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THE

AMERICAN AND ENGLISH

ENCYCLOPÆDIA OF LAW.

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1. **Definition.**—Damages are the indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights through the act or default of another.1

2. General Principles.—Whenever an injury is done to a right, actual perceptible damage is not indispensable as the foundation of an action, but it is sufficient to show the violation of the right, and the law will presume some damage.2

But no damages are recoverable for a mere inconvenience attending the existence of a public benefit; 3 or for any lawful act law-

1. I Bouvier L. Dict. 420. "The sums allowed by law and found by a jury for tortious injuries or losses from breach of contract. . . . The pecuniary redress

contract. . . . The pecuniary redress which a successful plaintiff obtains by legal action." I Suth. Dam. 3.

2. Violation of Right—Embrey v. Owen, 6 Exch. 353; Whipple v. Cumberland Manuf. Co., 2 Story (U. S.), 661; Webb v. Portland Manuf. Co., 3 Sumn. (U. S.) 189; Paul v. Slason, 22 Vt. 231; Fitch v. Fitch, 3 J. & Sp. (N. Y.) 302; Seat v. Moreland, 7 Humph. (Tenn.) 575; Brent v. Kimball, 60 Ill. 211. The law implies damage from every tort. Hood v. Palm, 8 Pa. St. 239. A legal presumption of damage arises on proof of a confederacy to publish, circulate, of a confederacy to publish, circulate, and give credit to injurious though not actionable words. Hood v. Palm, 8 Pa. St. 239.

3. Inconveniences.—Where a railway

passed near the entrance to a country residence, although the owner was subjected to frequent stoppages by the closing of the gates at the crossing, and although his visitors and horses were frightened by the passing trains, these annoyances were held to give him no claim for damages against the company. Caledonia R. Co. v. Ogilvy, 2 Macq. H. L. C. 229; Reading v. Keppleman, 61 Pa. St. 233; Mills v. Brooklyn, 32 N. Y.

A railroad company caused to be con-demned and paid for a right of way through B.'s plantation. In order to get dirt for use on other parts of its road, it caused excavations to be made, which formed pits in its right of way through B.'s premises. Held, that the railroad company had the right to use its right of way for such purpose, and B. cannot recover damages thereby occasioned on fully done, which if causing damage is damnum absque injuria;1 or for any act causing no legal injury, which is injuria sine damno;2 or for an injury caused wholly or in part by the plaintiff's own wrongful act, default, or negligence.3

account of the unsightliness of his plantation or its supposed unhealthiness from water standing in the field, or the inconvenience of crossing over such right of way. New Orleans, etc., R. Co. v. Brown.

64 Miss. 479.

Where a railroad is built, with proper care and skill, after the public rights and the private property, if any, in the highway, or the soil thereof, have been acquired, it is not a nuisance, and the owners of the railroad are not responsible for any damages to private property, adjacent or near to the road, necessarily resulting from its construction or operation. Fletcher ω . A. & S. R. Co., 25 Wend. 462, so far as it holds a contrary doctrine, stated to have been overruled. Uline v. N. Y., etc., R. Co., 101 N. Y. 98; s. c., 53 Am. Rep. 123, and note.

1. Damnum Absque Injuria. - See DAM-NUM ABSQUE INJURIA. I Suth. Dam. 3. Thus the owner of land through which flowed a subterranean stream carried on mining operations on his own land in the usual manner. This laid dry the well of a neighbor. Held, that he was not liable. a neighbor. Held, that he was not hable. Acton v. Blandell, 12 Mees. & Wel. 324; Chase v. Silverstone, 62 Me. 175; Thurston v. Hancock, 12 Mass. 220; Panton v. Holland, 17 Johns. (N. Y.) 92; Trustees v. Youmans, 50 Barb. (N. Y.) 316; Mosier v. Caldwell, 7 Nev. 363; Greenland, 18 Pick. (Mass.) 177 leaf v. Francis, 18 Pick. (Mass.) 117.

So where a landowner exercising proper care makes an excavation on his own land, and digs so near the foundation of a house on the adjacent lot as to cause its walls to settle, he will not be held liable if such excavation would not have injured the lot if it were not under the pressure of the weight of the building. McGuire v. Grant, 25 N. J. L. 356; Porter v. North Mo. R. Co., 33 Mo. 128; Hatch v. Vermont Cent. R. Co., 28 Vt. Hatch v. vermont Cent. R. Co., 20 vt. 142; N. Y., etc., R. Co. v. Young, 33 Pa. St. 180; Shafer v. Wilson, 44 Md. 268; Baltimore, etc., R. Co. v. Reaney, 42 Md. 119; Bonomi v. Backhouse, Ell. Bl. & Ell. 622; Smith v. Thackerah, L. R. 1 C. P. 564.

In general, if a voluntary act, lawful in itself, may naturally result in the injury of another, or the violation of his legal rights, the actor must at his peril see to it that such injury or such violation does not follow, or he must expect to respond in damages therefor; and this is true regardless of the motive or the degree of care with which the act is performed. Georgetown, etc., R. Co. v. Eagles, 9 Colo. 545.

No liability accrues where private property is destroyed to prevent the spread of a fire. Amer. Print Works Co. v. Laurence, 23 N. J. L. 9; Russell v. Mayor, etc., 2 Denio (N. Y.), 461; Field v. Des Moines, 39 Iowa, 575; Surocco v.

Geary, 3 Cal. 69.

2. Injuria Sine Damno. - 1 Suth. Dam. 3; Chichester v. Sethbridge, 2 Durn. 71, Alderton, 2 Bos. & Pul. 86.

3. Negligence.—The general rule is, that if the plaintiff's own wrong contributed to the infliction of the injury, there can be no recovery. This principle is held to apply to all cases of injury to the person or to property growing out of negligence. But if the plaintiff's wrong was merely coincident with the injury and contributed nothing toward it, he may The doctrine of contributory negligence is, perhaps, not to be applied to young infants. 2 Sedgwick's Meas. Dam. (7th Ed.) 359, and cases cited. See Contributory Negligence; Admir-ALTY; SHIPPING; RAILROADS; etc.

On the trial of a civil suit for damages for assault and battery, the court instructed the jury that "if the plaintiff voluntarily engaged in the fight in the first instance for the sake of fighting, and not as a means of self-defence, he could not recover unless the defendant beat him excessively or unreasonably." *Held*, that this was as favorable to the plaintiff as the law will permit; that the law does not put a premium on fighting, and one who voluntarily engages in it will not be afforded relief for his own wrong in damages if he come out second best. Held, further, that while such voluntary act on the part of the plaintiff would not preclude the State from punishing him or the defendant for a breach of the peace, it nevertheless prevents him from recovering compensation for injuries re-ceived by his own seeking, and in violation of law. Galbraith v. Fleming, 60 See Ashby v. White and Mich. 403. others, I Smith's Leading Cases (6th Am. Ed.), 448.

In an action for assault and battery, if the defendant was the aggressor, he can3. Nominal Damages.—Proof of the violation of any legal right entitles the injured party to some damages. If no actual damage appear, nominal damages are given for the technical injury.¹ This rule is applied in all actions, whether ex contractu or ex delicto.

not invoke the doctrine of self-defence; and if he was not the aggressor, but only repelled force by force, he must not have gone beyond the necessities of the case, nor inflicted excessive injuries on his assailant. Thomason v. Gray, 82 Ala.

"The rule is, not that any negligence on the plaintiff's part will preclude him from recovering; but that though there has been negligence on the plaintiff's part, still he may recover unless he could, by ordinary care, have avoided the consequences of the defendant's negligence." Davies v. Mann, 10 Mees. & Wels., the donkey case, is an example. See also the collection of cases appended to Ashby v. White, in 1 Smith's Leading Cases (6th Am. Ed.), 448; Wood's Mayne on Dam. (Ed. 1880) 04 to 103.

1. Invasion of Right.—"For any in-

1. Invasion of Right.—"For any invasion of property itself or of a substantial right of property, nominal damages are recoverable, whether any actual damage results therefrom or not." Wood's Mayne Dam. (Amer. Ed.) 7, n. "Every injury imports a damage, though it does not cost the party one farthing." Per Lord Holt, Ashley v. White, Ld. Raym. 938; Quin v. Moore, 15 N. Y. 432; Smith v. Whiting, 100 Mass. 122; Munroe v. Stickney, 48 Me. 462; Champion v. Vincent, 20 Tex. 811; Cowley v. Davidson, 10 Minn. 392. An action may be maintained against a corporation to recover damages for wrongfully, maliciously, and without just or probable cause, obtaining and levying an order of attachment upon personal property.

attachment upon personal property.

Injury Resulting in Benefit.—Even though the injury results in an actual benefit to the complainant, he is entitled to nominal damages. Stowell v. Lincoln, II Gray (Mass.), 434; Gile v. Stevens, 13 Gray (Mass.), 146; Bond v. Hilton, 2 Jones (N. Car.), 149; Mosotti v. Page, 12 C. B. 643. "When one encroaches on the inheritance of another, the law gives a right of action, and even if no damages are found the action will be sustained and nominal damages recovered; because, unless that could be done the encroachment acquiesced in might ripen into a legal right, and the trespasser, by a continuance of his encroachment, acquire a legal title." Per curiam, Hathorn v. Stinson, 12 Me. 183. See also Jewett v. Whitney, 43 Me. 242; White v.

Griffin, 4 Jones L. (N. Car.) 139; Murphy v. Fond du Lac, 23 Wis. 365; Hibbard v. W. U. Tel. Co., 33 Wis. 558.

Damages will not be reduced because it appears that the nuisance complained of resulted in the employment of great numbers of people, which increase in population led to an increased rental value of the property of the complainant. Francis v. Schoellkopf, 53 N. Y. 152.

Public Officers.—In this country, contrary to the rule in England, sheriffs and other public officers are made liable in nominal damages for breach of their duty to individuals, even though no actual damage results. Patterson v. Westervelt, 17 Wend. (N. Y.) 543; Palmer v. Gallup, 16 Conn. 555; Laflin v. Willard, 16 Pick. (Mass.) 64; Crawford v. Andrews, 6 Ga. 244; Moore v. Floyd, 4 Ore, 101; Hamilton v. Ward, 4 Tex. 356. Compare Stimson v. Farnham, L. R. 7 O. B. 175.

Q. B. 175.

Nominal Damages Establish Title.—
The title to lands is often tried by means of an action for damages for trespass. Nominal damages will establish the plaintiff's title, and these will be granted even if the "act occasions no other damage than putting at hazard rights which, if they were acquiesced in, would be lost by the lapse of time." Bassett v. Salisbury, 8 Fost. (N. H.) 438; Devendorf v. Wert, 42 Barb. (N. Y.) 227; Thomas v. Brackney, 17 Barb. (N. Y.) 654; Carhart v. Auburn Gas Light Co., 22 Barb. (N. Y.) 297; Honsee v. Hammond, 39 Barb. (N. Y.) 89; O'Riley v. Chesney, 3 Lans. (N. Y.) 278; Del. & Hud. Canal Co. v. Torrey, 33 Pa. St. 143.

Under section 610, 2 R. S. Ind. 1876, p. 254, proof of actual pecuniary damages is not necessary to entitle one to nominal damages for an invasion of his right topossession of real estate. Hill v. Forkner, 76 Ind. 117.

76 Ind. 117.

Nominal Damages and Costs.—Wherenominal damages carry costs, a verdict.
for the defendant, which should have been
given with nominal damages for the
plaintiff, will be reversed. Eaton v. Lyman, 30 Wis. 41; Watson v. Hamilton, 6.
Rich. (S. Car.) 75.

But otherwise such an erroneous verdict will stand. Hickey v. Baird, 9 Mich. 32; Robertson v. Gentry, 2 Bibb (Ky.), 542; Jennings v. Loring, 5 Ind. 250.

4. Substantial Damages.—Where actual injury and the violation of a right are proved, substantial damages may be awarded as compensation to the injured party, and in certain cases as punishment to the wrong-doer. In arriving at the proper amount of damages the courts follow defined rules.

5. Remoteness.—I. IMMEDIATE DAMAGES.—No one is held responsible for all the consequences of his acts or defaults, but only

for those which the law considers the natural consequences.

These are either the direct consequences, or they are indirect. For all direct consequences, whether they are such as inevitably ensue or such as have naturally ensued in the particular case, the person guilty of the cause is held absolutely liable. This rule is applied in cases arising ex contractu as well as ex delicto.2

claimed as an item of damages from personal injury occasioned by negligence, if plaintiff fails to prove the value of the time lost, or facts on which an estimate of such value can be founded, only nominal damages for that item can be given. Leeds v. Met. G. L. Co., 90 N. Y. 26; Staal v. Grand St. R. Co. (N. Y.), 9 Cent.

Rep. 452.

In a suit for damages for breach of a contract entered into in 1860, in which the party covenanted to buy a slave to be worth not less than \$900, and to be held in trust for another, and no proof was offered on the question of damages other than that contained in the covenant, held, no error to instruct the jury to give only nominal damages. The words "to be worth not less than \$900" are used as descriptive of the property, and not the sum to be laid out in its purchase. Anders v. Ellis, 87 N. Car. 207; Harrell v. Watson, 63 N. Car. 454.

Defendants purchased and agreed to carry certain shares of stock for plaintiff until instructed by him to sell, or for a period of six months. No money was paid by plaintiff on account of the pur-chase, but he gave defendants the guaranty of a third party against loss. fendants sold the stock without authority, and notified plaintiff thereof. action to recover damages, it appeared that for thirty days after such sale the stock could have been purchased in the market for the price at which it was sold, or for a less price. Held, that plaintiff, having had a reasonable time after notice of sale to replace the stock, was only entitled to recover nominal damages. Colt v. Owens, 90 N. Y. 368.

In an action de bonis asportatis, appellant's counsel submitted that inasmuch as

the constable who seized the goods offered to return the property to appellee uninjured, she was entitled to recover nominal damages only. "But this is not law. Where a trespass has been committed and goods carried away, the injured party is not obliged to accept an offer to compromise, or receive the goods upon restoration proposed, but may stand by his legal rights." Per curiam, in Kelly v.

McDonald, 39 Ark, 387.

1. Compensation.—"The law of damages is principally that which defines, measures, and enforces payment of compensation; other damages are nominal or exceptional. . . . The law defines the scope of responsibility with as much precision as the nature of the subject will permit, and lays down a universal measure of recompense for civil injury which the sufferer is entitled to receive or recover, and the person who is liable is bound to pay, where the injury has been done with no bad motive for which the law subjects him to punishment. This universal and cardinal principle is, that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs." I Suth. Dam. 17; Noble v. Ames Mfg. Co., 112 Mass. 492; Baker v. Drake, 53 N. Y. 216; Northrup v. McGill, 27 Mich. 234; Peltz v. Eichelle, 62 Mo. 171; Buckley v. Buckley v. New McGill. Ferrer Pools J. L. ley, 12 Nev. 423; Ferrer v. Beale, 1 Ld. Raym. 692; U. S. v. Smith, 4 Otto (U. S.), 214.

In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort. Brewster v. Van Liew, 110 Ill.

2. Remoteness—Immediate Damages.-I Suth. Dam. 17-21; Vicars v. Wilcox, 2 Smith's Lead. Cas. (6th Am. Ed.) 531, and the cases cited in the notes.

II. CONSEQUENTIAL DAMAGES.—Such damages as the cause produced naturally but indirectly are called consequential. In awarding damages of this character, the rules followed are different in cases of tort and in cases on contracts.

III. TORTS NOT MALICIOUS.—In cases of tort not involving malice, damages may be recovered not merely for the direct consequences, but for such indirect results as might reasonably be expected to ensue by a person of ordinary intelligence; or, in other words, for all the natural consequences of the wrongful act.¹

"The first, and in fact the only, inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act: it will assume this character if it can be shown to be such a consequence as, in the ordinary course of things, would flow from the act; or, in case of a contract, if it appear to have been contemplated by the parties. Where neither of these elements exists, the damage is said to be too re-The above rule has been frequently adopted by the courts, but it must be admitted, in the language of one of four judges, that it is a vague rule, and something like having to draw a line between night and day; there is a great duration of twilight, when it is neither night nor day. Every cause leads to an infinite sequence of effects. But the author of the initial cause cannot be · made responsible for all the effects of the series. In a case where a passenger, who had been set down with his wife at a wrong station, sought to recover from the railroad company damages for a cold which his wife had caught by walking in the rain at night, Cockburn, C. J., said: 'You must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of.' Wood's Mayne on Dam. (Ed. 1880), § 52, citing Hadley v. Baxendale, 9 Ex. 341; Hoey v. Felton, 11 C. B. N. S. 142; Williams v. Reynolds, 6 B. & S. 495; Piper v. Kingsbury, 48 Vt. 480; Survey v. Wells, 5 Cal. 124; Williams v. Vanderbilt, 28 N. Y. 217; Cooper v. Young, 22 Ga. 269.

1. Instances.—The cases cited here will illustrate these distinctions: Weston v. Grand Trunk R. Co., 54 Me. 376; Cooper v. Young, 22 Ga. 269; Priestley v. North Ind. R. Co., 26 Ill. 205; Survey v. Wells, 5 Cal. 124; Burrows v. March Gas Co., L. R. 5 Exch. 67.

"It is a fundamental principle of law,

applicable alike to breaches of contract and to torts, that in order to found a right of action there must be a wrongful act done, and a loss resulting from that wrongful act; the wrongful act must be the act of the defendant, and the injury suffered by the plaintiff must be the natural and not merely a remote consequence of the defendant's act. The wrong done and the injury sustained must bear to each other the relation of cause and effect; and the damages, whether they arise from withholding a legal right or the breach of a legal duty, to be recoverable, must be the natural and proximate consequence of the act complained of." Per curiam, in Warwick v. Hutchinson, 45 N. J. L. 61, citing 2 Greenl. Ev. §§ 254-256; Sedg. Dam. 31; Stevenson v. Newnham, 13 C. B. 285; Burton v. Pinkerton, L. R., 2 Exch. 340; Glover v. L. & S. W. R. Co., L. R. 3 Q. B. 25; Byard v. Holmes, 5 Vroom (N. J.), 296; Cuff v. N. & N. Y. R. Co., 6 Vroom (N. J.), 17; Kuhn v. Jewett, 5 Stew. Eq. (N. J.) 647; White v. McNett, 33 N. Y. 371; Adams Express Co. v. Egbert, 36 Pa. St. 360.

An injured passenger cannot recover damages for the loss of profits from his business during the time he was confined to the house by his injury. Physic v.

Manhattan R. Co., 30 Hun (N. Y.), 377.
The defendant's servant negligently drove his team against a sleigh hitched. at the side of the street. The horse attached to this sleigh became frightened, and dashed down the street and around. the corner, where he injured the plain-The defendant was held liable for this injury, which was the natural though indirect result of the negligence of his servant. McDonald v. Snelling, 14 Allen (Mass.), 292. The servant of a railroad company entered and left down the bars in the fence between the plaintiff's field and the track. The plaintiff's horsewent through the gap, got upon the track. and was killed by a train. The company was held liable for the value of the horse, Radway v. Briggs, 37 N. Y. 256; Hen-ley v. Neal, 2 Humph. (Tenn.) 551; Powell v. Salisbury, 2 Younge & J. (Exch.) 391; Lawrence v. Jenkin, L. R. 8 Q. B. 274; Greenland v. Chaplin, 5 Exch. 248; Daniels v. Ballantyne, 23 Ohio St. 532; Clement v. Railroad Co., 53 Mo. 366.

A gas company had contracted with the plaintiff to supply him with gas, and to make repairs. A leak occurred, and at his request the company sent a workman to search for it. The man negligently used a candle near the leak, and caused an explosion. The company was held liable for the damage thus brought about. Lannen v. Albany Gas Co., 44 N. Y. 459; Williams v. Vanderbilt, 28 N. Y. 217; Laurent v. Vaughn, 30 Vt. 90.

In the case of the building and operating of a railroad through the streets of a city under an ordinance granting permission therefor, the owner of lands abutting on such streets is not entitled to recover of the railroad company all the damages sustained by him by the location and operation of the road, including the loss by depreciation of the market value of his property, and which are common to other owners or the public, but his right to recover must be limited to such damages as are peculiar to his property, and which are of a physical nature. Chicago, etc., R. Co. v. Berg, to Ill. App. 607.

In an action by a married woman against a city for injuries received in consequence of a defect in a sidewalk, the damages must be confined to such as she herself sustained; and the fact that she had a dependent family will form no proper element in estimating her damages. Joliet v. Conway, 119 Ill. 489.

In an action against a railroad company as a common carrier, by a passenger who was carried beyond his destination, the plaintiff is entitled to recover damages for his trouble and inconvenience in getting back to his destination. The plaintiff, who was a young girl about eight years of age, being carried about one mile beyond her destination, and put off at a place with which she was not familiar, would naturally be frightened by her condition and surroundings, and attempt to walk rapidly along the track back to the station, and for damages resulting from these natural consequences of the defendant's wrongful act a recovery may be had. The fact that the plaintiff was sick when she left the train, though the conductor was ignorant of it, is competent and admissible evidence for her; not as an element of damages, but as tending, in connection with other circumstances, to show the relation between the subsequent aggravation of her sickness and the defendant's original wrongful act; and the rough condition of the track back to the station, over which she walked, is admissible as evidence for the same purpose. Whether the plaintiff's aggravated sickness was a proximate consequence of the defendant's wrongful act, is a question of fact for the determination of the jury; and if so found by them, it is an element of the damages she is entitled to recover. East Tenn., etc., R. Co. v. Lockhart, 79 Ala. 315.

In an action for personal injuries, reasonable expenses for medical attendance are a proper element of damages. Hulehan v. Green Bay, etc., R. Co., 68 Wis. 520.

The plaintiff bought a cow from the defendant, who fraudulently represented that she was free from infectious disease. His other cows caught the disease, and five of them died. *Held*, that he might recover their value. L. R. I. C. P. 559.

A woman was injured by reason of a defect in a bridge. Her fright and exertions brought on a miscarriage. It was held that this was not too remote from the original cause to be considered a natural consequence, and she recovered for it. Oliver v. La Valle, 36 Wis. 592.

For a false report of the financial standing of the plaintiff by a mercantile agency in a notification sent to subscribers, such damages as might reasonably have been foreseen as the probable consequences of the act may be recovered. King v. Patterson, 49 N. J. L. 417.

The owner of an animal committing injury to the person is not liable without proof of his previous knowledge of the vicious nature of the animal. State v. Donohue (N. J.), 8 Cent. Rep. 621. See also 12 Cent. L. Jour. 534, 583; 13 Cent. L. Jour. 570; 4 Am. L. Rev. 201; 1 Western L. Jour. 424; 2 Western L. Jour. 513; 14 Alb. L. Jour. 104; 2 Alb. L. Jour. 184.

Waters.-Where one deliberately and without compulsion selects a particular portion of a floatable stream for the storage of logs, and thereby prevents another from entering such common highway with a drive of logs from a tributary stream, he is liable to such other person for the damages occasioned thereby. Wages and board of men while waiting for a reasonable time would be an element of damage; so, too, would the expense of moving one crew out and another in, as well as the increased cost. if any, of making the drive the next season, and the interest on the contract price for making the drive during such

(b) Unforeseen Consequences.—Consequences are considered natural, although it may have been impossible to foresee the order in which they would occur, or who would suffer.1

time as the payment thereof was delayed. because of inability to complete the drive on account of such obstruction. The loss of supplies left in the woods for use when completing the drive, and destroyed by wild beasts, would not constitute an element of damage. McPheters v. Moose

River L. D. Co., 78 Me. 329.

Where a municipality, though under no obligation to build drains, does construct them, but in a negligent way, and the property of individuals is thus injured by accumulations of surface water. the municipality is held responsible for the damage thus caused. Seifert v. Brooklyn, 101 N. V. 136; Gilluly v. City of Madison, 63 Wis. 518; Henderson v. Minneapolis, 32 Minn. 319; Allen v. Chippewa Falls, 52 Wis. 430; Johnson v.

Dist. Columbia, 118 U. S. 10.

He who changes the drainage of the surface water on his own land must provide a sufficient outlet or culvert to carry off the ordinary flow, so that it may not accumulate upon the higher lands of his neighbors. Phila., etc., R. Co. v. Davis (Md.), 10 Cent. Rep. 551; Field v. West Orange, 36 N. J. Eq. 118; Crawford v. Rambo, 44 Ohio St. 279; Butler v. Peck, 16 Ohio St. 336; Martin v. Riddle, 26 Pa. 415; Porter v. Durham, 74 N. Car. 767; Ogburn v. Connor, 46 Cal. 346; Harrison v. Great North. R. Co., 3 Hurl. & C. [Ex.] 231.

Sickness in plaintiff's family, caused by overflow of water from defendant's negligently constructed dam, is a proper element of damages where the same is pleaded in the petition. Browcago, etc., R. Co., 80 Mo. 457 Brown v. Chi-

A municipal corporation built a tunnel to carry surface water and discharge it on the premises of a citizen, without exercising due care to prepare means for its safe discharge. The injury thus caused produced a stop in the plaintiff's business. Held, that a recovery of the reasonable profits of the business for the time it was necessarily at a standstill, because repairs could not sooner be made by plaintiff, could be recovered. Haute v. Hudnut (Ind.), 11 West. Rep. Compare Sowers v. Lowe (Pa.), 8 333. Compare Sowers v. Lowe (Pa.), 8 Cent. Rep. 245. Owners of land along the banks of a

logging stream may recover against the logging company the value of the pasturage lost in consequence of a negligent overflowing of the meadows by the company, Witherall v. Muskegon Booming

Co. (Mich.), 12 West. Rep. 470.
Where one person owns the coal beneath the surface, and another owns the surface land, the owner of the coal will be held responsible for the destruction of a spring issuing at the surface, if this be due to his failure to give a proper support to the surface. Contra, if the loss of the spring is not caused by a failure to support, but by mining operations properly carried on. Gumbert v. Kilgore (Pa.), 6 Cent. Rep. 406.

1. I Sutherl. Dam. 47.

A militia officer drilled his men in a public business resort. The noise of the drill frightened the horses of the plaintiff hitched at the usual place. The horses ran off and one was killed. The officer was held liable. It was not possible for the officer to foresee, when he gave the order, that the plaintiff would have his horses standing at that place when the troops passed, and still less that the horses would become frightened, take the particular course they pursued, and collide with the particular obstacle which caused the death of one of them; but the possibility of such occurrences was sufficiently great to have been considered before the order for the drill was given, and giving an order for a drill in such a place was a wrong, and for such natural consequences of the wrong the wrong-doer is held responsible. Childress v. Yourie, Meigs (Tenn.), 561; Topeka v. Tuttle, 5 Kan. 312.

In a case in Massachusetts, the defendant sold naphtha to a customer, knowing that he intended to sell it again in his trade, and also knowing it to be so easily inflammable as to be dangerous. The purchaser sold some of the fluid to the plaintiff, who knew nothing of its dangerous character. The latter used some of it in a lamp, it exploded, and he was iniured. It was held that he could recover for this injury. Wellington v. Downer Kerosene Oil Co., 104 Mass. 64

So of a druggist who negligently labels a poison as a harmless drug and puts it upon the market. He is liable to whoever innocently uses the poison, no mat-ter how many intervening sales of the article may have taken place. Langredge v. Levy, 2 Mees. & Wels. 519; Thomas v. Winchester, 6 N. Y. 397; Norton v. Sewall, 106 Mass. 143. But if the drug misnamed was in itself harmless, and was

(c) Efficient Cause.—Where other causes intervene between the act of the defendant and the injury, the efficient cause will be held responsible.1

bought by persons who used it in composition with other substances, which composition, because of the presence of the harmless, but misnamed, substance became hurtful, any damage done by the poisonous compound thus formed would be too remote from the act of the first vendor to be charged upon him. Davidson v. Nichols, II Allen (Mass.), 514; Loop v. Litchfield, 42 N. Y. 351; Long-mied v. Halliday, 6 Exch. 761.

1. Wood's Mayne on Dam. (Ed. 1880)

§ 53; I Suth. Dam. 48.
"The general rule we understand is that where two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether without the concurrence of both it would have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such occurrence, so that it cannot be attributed to that cause for which he is responsible." Shaw, C. J., in Marble v. Worcester. 4 Gray (Mass.), 395; Livie v. Jenson, 12 East, 648.

The injury must be the proximate consequence of the act complained of. And if there be no intermediate efficient cause. the act must be considered as reaching to the effect. Georgetown, etc., R. Co.

v. Eagles, 9 Colo. 545.

A case cited in Wood's Mayne on Dam. (Ed. 1880) well illustrates this principle. Contrary to a local statute, the defendant washed his wagon in the street. waste water he allowed to run down the gutter to a grating over a sewer, where, in the ordinary state of things, it would have gone through and under ground. But because of the cold then prevailing the grating was then frozen up, and the water did not run through it, but spread over the top, ran over the pavement, and froze there. The plaintiff coming along shortly after, slipped on this ice, fell, and broke his leg. There was no evidence that the defendant knew of the obstruction, and as the freezing of the water was considered an independent cause of the plaintiff's injury, he could not recover. Sharp v. Powell, L. R. 7 C. P. 253; s. c., 4i L. J. C. P. 95.

One who keeps gunpowder insufficiently protected near buildings belonging to others is held liable for an injury suffered by them in consequence of its

explosion through the negligence of a third person, or through an accident: because a natural result of leaving a highly explosive substance unguarded is its explosion by very frequent and ordinary occurrences, against which it is the duty of the owner to provide, and his neglect to do so is the efficient cause of the damage. Myers v. Malcolm. 6 Hill (N. Y.), 202; Sneesby v. L. & Y. R. Co., L. R. 9 Q. B. 267; Dudgeon v. Pembroke, L. R. 9 Q. B. 595.

The city of Topeka permitted a hole

to stand in one of its streets. The horses of the plaintiff, on being driven over the hole, took fright, and ran away. They did themselves no injury there, but be-fore they could be stopped, in another place, they broke the carriage and hurt themselves. The city was held responsible. Topeka v. Tuttle, 5 Kan. 312.

In the same way, a person who wrongfully made a hole in his neighbor's fence was held liable for all the damage that was done to the crops by cattle that strayed in at the gap. Gray v. Water-

man. 40 Ill, 522.

"Where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote, if the plaintiff sustains no other than a contract relation to such third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such third person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract, unless the wrongful act is done" for that express purpose. I Suth. Dam. 55.

Thus, one who had contracted to support all the paupers of a town brought an action against S, for beating one of the paupers, whereby the expense of his maintenance was increased. Held, that he had no cause of action. Anthony v. Slaid,

11 Met. (Mass.) 290.

Highway Accidents.-See, on this subject, titles Crossing; Highways. Also the following articles: Amer. Law Reg. N. S. No. 7, 777; 8, 81; 10, 559; 20, 796; Law Times, 49, 337; and also the following cases: Oliver v. La Valle, 36 Wis. 592; Jackson v. Bellevieu, 30 Wis, 250; Kelley v. Fond du Lac, 31 Wis, 179; Moulton v. Safford, 51 Me. 127; Cobb v. Inhabitants of Standish, 14 Me. 198; Marble v. Worcester, 4 Gray (Mass.), 395; Palmer v. Andover, 2 Cush. (Mass.) 600; Davis v. Dudley, 4 Allen (Mass.), 557; Smith v.

(d) Extraordinary Consequences.—" If one's fault happens to concur with something extraordinary, and therefore not likely to be foreseen, he will not be answerable for such unexpected result." 1 "That which never happened before, and which in its character is not such as naturally to occur to prudent men to guard against its happening at all, cannot, when in course of years it does happen, furnish good ground for a charge of negligence, in not foreseeing its possible happening, and guarding against that remote contingency." 2

(e) True Cause.—An efficient adequate cause of the injury being found must be taken to be the true cause, unless some other independent cause is shown to have intervened between it and the act

complained of.3

Smith, 2 Pick. (Mass.) 621; Horton v. Taunton, 97 Mass. 266; Hyatt v. Rondout, 44 Barb. (N. Y.) 385; Sykes v. Paulet, 43 Vt. 446; s. c., 5 Am. Rep. 295; Toms v. Whitby, 35 Up. Can. Q. B. 195.

The insufficiency of the highway must be the sole, operative cause of the injury.

If it is the joint product of the plaintiff's lack of prudence and the town's negligence, there can be no recovery. Bovee

v. Danville, 53 Vt. 183.

1. 7 Suth. Dam. 56.

Certain imported wool being negligently wetted, it was necessary to remove it from the original packages. Soon after an act of Congress was passed, under the provisions of which, but for the opening of the packages, the plaintiff could have obtained a rebate upon the duty collected. The loss of this duty was held not to have been recoverable as a consequence of the negligence in wetting the wool. Stone v. Codman, 15 Pick. (Mass.) 297; Vedder v. Hildreth, 2 Wis. 427.

A canal-boatman used a lame horse in drawing his boat. This caused a delay on his trip, and in consequence his boat reached a dam on the canal just as a flood occurred. Had he been on time. the dam, and also the danger from the flood, would have been safely passed. It was held that his fault in using a lame horse was too remote from the loss of the goods in the flood to hold him liable. Morrison v. Davis, 20 Pa. St. 171; Denny v. N. Y. Cent. R. Co., 13 Gray (Mass.) 481; Railroad v. Reeves, 10 Wall. (U. S.) 176; Hoadley v. Northern T. Co., 115 Mass. 304; Daniel v. Ballentene, 23 Ohio St. 523. Compare Read v. Spaulding, 30 N. Y. 630; Charleston Steamb. Co. v. Baron, 1 Harp. (S. Car.) 262; Bell v. Reed, 4 Binn. (Pa.) 127; Crosby v. Fitch, 12 Conn. 410.

In erecting an obstruction to the flow of surface water a sufficient outlet must be provided to prevent the accumulation of water from the ordinary and usual rainfall upon the upper and adjacent lands of other persons, but no responsibility will be incurred for damages caused by excessive and extraordinary rainfalls and floods, the occurrence of which cannot be foreseen. Phila., etc., R. Co. v. Davis (Md.),

10 Cent. Rep. 551.

But "if the overflow was of such an extraordinary character that railroad engineers of ordinary care and prudence in the construction of the embankment and culverts could not reasonably have been expected to have anticipated and provided against it, the railroad was not liable." Gulf, etc., R. Co. v. Pomeroy (Tex.), 3 S. W. Rep. 722.

2. Per curiam in Hubbell v. Yonkers, 104 N. Y. 434; Dougan v. Champlain Trans. Co., 56 N. Y. 1; Cleveland v. N. J. Steamb. Co., 58 N. Y. 306; Loftus v. Union Ferry Co., 84 N. Y. 455.

3. The defendant set fire to the stubble in his field on the 3d of October, after ploughing a furrow around it to prevent the spread of the fire. The flames jumped across the furrow and ran over the prairie. The defendant tried to extinguish the fire, but succeeded only partially, and it smouldered in the ground until the fifth, when, because of a change in the wind, it burned afresh, and running upon the plaintiff's land, two miles away, it destroyed his property. Held, that this damage was not too remote from the true cause in the negligence of the defendant. Krippner v. Biebl, 28 Minn. 139.

A common carrier contracted to take the plaintiff to her home, but set her down a mile from her residence, on a line of street-cars which passed within a block of her door. The day was cold but dry. She walked home, and in so doing caught a cold which permanently injured her This injury was held too remote and the plaintiff's negligence too direct for her to recover for her sufferings, loss

(f) Plaintiff's Own Act.—The immediate cause may be in the plaintiff's own act, but if this act result from the defendant's fault. without fault on the part of the plaintiff, the defendant will be liable.

(g) Act of Third Person.—The immediate cause of the injury may be the act of a third person, and yet an earlier act of the

defendant may be the efficient cause.2

IV. WILFUL, RECKLESS, OR MALICIOUS TORTS.—In estimating the iniury caused by reckless, wilful, illegal, fraudulent, or malicious acts, the courts go beyond the proximate consequences. In such cases the law regards as the consequences of the tort the losses of the defendant in property, his expenses in the assertion of his rights, and the injury to his feelings and reputation. further sum may be added by way of punitory damages.3

of employment, and permanent injury. Francis v. St. Louis Transfer Co., 5 Mo. App. 7.

1. 1 Suth. Dam. 62.

R, having a judgment against W., and knowing him to be insolvent, represented to the plaintiff that he was worthy of On this representation the plaintiff sold and delivered goods to W. R. then caused an attachment to issue on his judgment, and seized the goods before they came into the hands of W. Here it was the act of the plaintiff that put his goods in such a situation as to be exposed to seizure; but this act was induced by the fraudulent representations of R., and R. was held liable to plaintiff for the value of the goods. Bean v. Wells, 28 Barb. (N. Y.) 466.

The train in which the plaintiff was a passenger had been run on the switch at Bergen to await the train from the west. After waiting some fifteen minutes, the train was irregularly started, the conductor getting on the engine. The train had proceeded some forty rods when the westtern rain was seen approaching at the rate of twenty-five miles an hour. An effort was made, by breaking up and reversing the engine, to get the train back on the switch, but before this could be done a " But it collision of the trains occurred. is insisted that although the defendant's negligence caused the injury complained of, the plaintiff should have been nonsuited, because his careless conduct contributed to produce it. The misconduct alluded to is, that upon seeing the approaching train, and men jumping from other cars to avoid the impending danger, he left his seat and rushed to the forward door of the car, with the view of escaping himself, and had stepped one foot on the platform at the instant of the collision. This, it is said, was such negligence as to have required the court to nonsuit the plaintiff. That is, that as a matter of law a passenger in a railroad car, who sees that he is placed in peril by the culpable conduct of the managers of the road, and judges correctly that a collision is inevitable, is guilty of wrong if he does not control the instinct of self-preservation and sit still, and take the chances of Safety. This is not law." Buel v. N. Y. Cent. R. Co., 31 N. Y. 314; South W. R. Co. v. Paulk, 24 Ga. 356; Wilson v. North. Pac. R. Co., 26 Minn. 278; Oliver v. La Valle, 36 Wis. 592.

2. An illustration of this rule is the famous Squibb case, 2 W. Black. 892.

So, too, in Griggs v. Fleckenstein, 19 Ga. 81. The defendant negligently left his horses on the street unsecured, They ran off; people in the street hallooed, and raised their arms before them. and caused them to swerve from their course, and to collide with another team, properly tied. This team ran off, and injured the plaintiff's horse. The defendant was held liable. The immediate cause of the injury was the collision with the second team, but the earlier wrongful act of the defendant in leaving his team negligently unguarded is regarded as the primary and efficient cause, acting through these subsequent events. See also Snelling v. McDonald, 14 Allen (Mass.), 202,

The assessor of a town altered an assessment after his authority over it had ceased. The plaintiff was thus rated higher in property than before, and his taxes were increased. He refused to pay the additional sum, and the selectmen of the town, with full knowledge of the facts, directed a levy to be made upon the plaintiff's goods. After the levy was made he paid the full assessment. In a suit against the assessor for the injury, it was held that he was liable for this consequence of his wrong. Bristol Manuf.

Co. v. Gridley, 28 Conn. 201.
3. 1 Suth. Dam. 71. The defendant

heat a negress whom he had hired from The negress her mistress, the plaintiff. ran to her mistress for protection. defendant pursued her and continued the The woman caught her misbeating. tress around the waist and clung to her, and the defendant continuing to strike at her with a cowhide, unintentionally, but recklessly, inflicted several blows upon the mistress. It was held that the damages for this battery were not to be confined to the actual wrong to her person, but the jury might take into consideration the anguish and wounded feelings of West v. Forrest, 22 Mo. the plaintiff.

In an action for an assault and battery, committed in arresting the plaintiff illegally, he is entitled to recover compensation for the loss of his time, and for the indignity suffered by him. Morgan v.

Curley, 142 Mass. 107.

Where, in trespass, aggravating circumstances in both the act and intention existed, the jury would not be confined to actual damages, but might give an additional sum to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiffs. Smith v. Goodman, 75

Ga. 198. The defendant, who had dined and drunk freely after a shooting party, was driving past the plaintiff's field, where the plaintiff was shooting. The defendant left his carriage, went up to the plaintiff, and said he would join his party. The plaintiff positively declined his company, inquired his name, and gave him formal notice not to sport on his land. But the defendant declared with an oath that he would shoot, and several times fired his gun at birds on the land of the plaintiff. When his ammunition gave out he tried to borrow of the plaintiff, and on his being ordered off the grounds threatened that in his capacity of magistrate he would commit the plaintiff to jail. Gibbs, C. J., in refusing to set aside a verdict of £500, said: "I wish to know, in a case where a man disregards every principle that should actuate the conduct of a gentleman, what is to restrain him except large damages? Suppose a gentleman has a paved walk in his paddock before his window, and a man intrudes and walks up and down before the window and looks in while he is at dinner. Is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of the mischief I have done you'?" Merest v. Harvey, 5 Taunt. 442.

In an action of tort for a wilful injury to the person, the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages, for when the physical injury is the same, it may be more aggravated in its effects upon the mind, if it is done in wanton disregard of the rights and feelings of the plaintiff, than if it is the result of mere carelessness. Hawes v. Knowles. 114 Mass. 510.

Corporations.—A railroad corporation is liable for all acts of wantonness, rudeness, or force, done or caused to be done by its agents or servants, in or about the duties or business assigned to them, though in violation of the general rules or orders prescribed for their conduct; and the rule as to vindictive damages for such acts, in actions against the corporation, is the same as in actions against natural persons. Louisville, etc., R. Co. v. Whit-

man, 79 Ala. 328.

"It is a well-established principle of jurisprudence, that corporations may be held liable for torts involving a wrong intention, such as false imprisonment, and exemplary damages may be recovered against them for the wrongful acts of their servants and agents done in the course of their employment, in all cases and to the same extent that natural persons committing like wrongs would be held liable. In such cases the malice and fraud of the authorized agents are imputable to the corporations for which they acted." Wheeler & Wilson Mfg. they acted. Wheeler & Wilson Mig. Co. v. Boyce, 36 Kan. 350; L. & G. R. Co. v. Rice, 10 Kan. 437; M. K. & T. R. Co. v. Weaver, 16 Kan. 456; K. P. R. Co. v. Kessler, 18 Kan. 523; K. P. R. Co. v. Little, 19 Kan. 269; Western News Co. v. Wilmarth, 33 Kan. 510; Railroad Co. v. Slusser, 19 Ohio St. 157; A. & G. W. R. Co. v. Dunn, 19 Ohio St. 162; Goddard v. Grand Trunk R., 57 Me. 202; Railroad Co. v. Quigley, 21 How. (U. S) 213; Railroad Co. v. Arms, 91 U. S. 489; Railroad Co. v. Bailey, 40 Miss. 395; Railroad Co. v. Blocher, 27 Md. 277; Hopkins v. Railroad Co., 36 N. H. 9; Railroad v. Hammer, 72 Ill. 353; Reed v. Home Sav. Bank, 130 Mass. 443; Fenton v. Sewing Machine Co., 9 Phila. 189; Goodspeed v. East Haddam Bank, 22 Conn. 530; Boogher v. Life Ass'n, 75 Mo. 319; Wheless v. Second Nat. Bank, Mo. 316; Wheless v. Second Nat. Bank, I Bax. (Tenn.) 469; Jordan v. Railroad Co., 74 Ala. 85; Williams v. Insurance Co., 57 Miss. 759; Vance v. Railway Co., 32 N. J. L. 334; Cooley on Torts, 119; 3 Suth. Dam. 270, and cases cited.

- V. Breach of Contract.—The liability for a breach of contract is less extensive than that for a tort; involving only such consequences as were the direct result of the breach, and were within the contemplation of the parties at the time of the formation of the contract.¹
- (a) Hadley v. Baxendale, the leading English case on this subject, and one followed by the American courts, has been considered to lay down the following rules as to damages for the breach of contract: "First, that damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable." Among such are losses caused by the loss of a season, the fall of the market, any increased expense caused the plaintiff by the breach, or substantial inconvenience from that cause.
- 1. "Whatever foresight at the time of the breach the defaulting party may have of the probable consequences, he is not generally held, for that reason, to any greater responsibility; he is liable only for the direct consequences of the breach, such as usually from the breach of such a contract, and such as were within the contemplation of the parties when the contract was entered into, as likely to result from a breach." I Suth. Dam. 74; Wood's Mayne on Dam. (Ed. 1880) § 14; Burton v. Pinkerton, L. R. 2 Exch. 340 will illustrate. The plaintiff there made a contract to serve on board an English ship as one of its crew, for a voyage from London to Rio Janeiro and back to a final port of discharge. Rio the master engaged in an illegal business, and the plaintiff left the ship. While at Rio he was seized by the authorities and imprisoned as a Peruvian deserter. In an action for a breach of contract the plaintiff was allowed to recover damages for the loss of the wages he might have earned, but was denied damages for the imprisonment. Bramhall, B., in delivering the opinion of the court, said: "It is true that in one sense the defendant's conduct caused the imprisonment; but for that, no doubt, the plaintiff would not have been imprisoned. That, however, is not enough. According to the ordinary rule, damage, to be recoverable by the plaintiff, must inevitably flow from the tortious act of the defendant. It must be caused by him as the causa causans, and this imprisonment was not so caused.

There is a broad distinction between an act which gives occasion for damages arising from other causes, which were not in the contemplation of the parties when the contract was made, and an act proximately causing the injury, and it is only for the latter that an action will lie. Warwick v. Hutchinson, 16 Vroom (N. J.), 61.

Damages recoverable upon breach of a contract are only those damages which are the direct and proximate result of the wrong complained of. Damages which are remote and speculative cannot be recovered. Walrath v. Whittekind, 26 Kan, 482,

Damages which are the legal and natural result of the act done, though to some extent contingent, are not too remote to be recovered, especially where they are such as may be fairly and reasonably considered as arising either naturally from a breach of the contract itself, or as may reasonably be supposed to have been in contemplation of both the parties at the time they entered into the contract as the probable result of a breach of it. Stewart v. Lanier House Co., 75 Ga. 582.

Co., 75 Ga. 582.

2. Natural Consequences.—Hadley v.

Bayendale of Fr. 241.

Baxendale, 9 Ex. 341.

It is presumed that the parties contemplated the usual and natural consequences of a breach when the contract was made. Booth v. Spuyten Duy. R. M. Co., 60 N. Y. 492; Miller v. Mariners' Church, 7 Greenl. (Me.) 55; Frohreich v. Gammon, 28 Minn. 476.

If a person contracts to store fruit at a temperature not exceeding a certain height, and decay of the fruit, occasioned by the temperature being allowed to reach a greater height, causes a diminution of market value, such diminution, in an action for breach of the contract, may be considered as an element of damage. Hyde v. Mechanical R. Co., 144 Mass. 432; Candee v. West. Un. Tel. Co., 34 Wis. 479; Eten v. Luyster, 60 N. Y. 252; Houser v. Pearse, 13 Kan. 104; McHose v. Fulmer, 73 Pa. St. 365;

Second Rule: (c) Peculiar Circumstances.—Damages arising out of the usual course, but from peculiar circumstances, are too remote, unless the special circumstances were known to the defendant at the time of the breach.1

Bank of Mont. v. Reese, 2 Casey (Pa.), 143; 2 Greenl. Ev. § 256; 1 Sedgw. Dam. (7th Ed.) 66; Mather v. Amer. Ex. Co., 138 Mass. 55; Cline v. Myers, 64 Ind. 304; Prosser v. Jones, 41 Iowa, 674. In the case last cited, the defendant agreed to give the plaintiff \$100 for a threshingmachine and thresh his wheat at any time within four days after notice. he failed to do, and the plaintiff, whose wheat was unstacked, and who was unable to get another machine to thresh it, brought an action to recover for such injury as it afterwards sustained, and the expense of stacking it, but it was held that such damages were too remote to be recovered in an action for the breach of a contract.

In a suit to recover for the value of a table-rake to be attached to a reaper, a counter-claim, alleging that by the con-tract of sale the plaintiff agreed to adjust the same to the defendant's reaper so that he could properly harvest a crop of his wheat, known by the plaintiff to be then growing; that the plaintiff could not and did not do so, whereby the defendant, being unable to procure another machine, was compelled to use it to avoid greater loss, whereby he lost 80 bushels of his wheat, of the value, etc., -is bad on demurrer, the damages being too remote. Fuller v. Curtis, 100 Ind. 237; s. c., 50 Am. Rep. 786; Osborne v. Poket, 33 Minn. 10.

A railway company set down a passenger and his wife and children at the wrong station. Consequently they were obliged to take a long walk in the rain and darkness. It was held that damages were properly awarded for the inconvenience suffered, but that the illness of the wife, who caught cold during the walk, was too remote a consequence to be considered an element of damage. Hobbs v. L. & S. W. R. Co., L. R. 10 Q. B. 111; Walsh v. Chicago, etc., R. Co., 42 Wis. 23.

Where the owner of a hotel leased it for a term of years, and covenanted to keep it in tenantable condition during the term, and bound the lessee not to make changes or alterations in the building or premises without the lessor's consent, and the contract inhibited him from making repairs at the lessor's expense without first obtaining his consent, but he was bound to "keep the hotel open and in good, first-rate style," if the lessor

failed to keep the covenant to repair, and the building and premises fell into a ruinous condition, and a large portion of the building was suffered to become unfit for comfortable occupancy, the lessee could recover such damages as were traceable solely to a breach of the contract, such as profits which would be its immediate fruits and were independent of any collateral enterprise entered into in contemplation of the same; although remote or consequential, provided they were capable of exact computation. Stewart v. Lanier House Co., 75 Ga. 582.

Where premises have been conveyed absolutely to secure a loan, and, because of a refusal on the part of the lender to reconvey on tender of the amount due, the borrower brings an action to compel a reconveyance, he cannot, after judg-ment in his favor in such an action, maintain another action to recover, as damages, the amount of a depreciation in the value of the property pending the litigation, or his costs and expenses in the equity suit; these are not proper items of damages. Marvin v. Prentice. 94 N. Y. 295.

L. contracted with B. & J. to construct a stone flume, to be completed by a day certain, on the site of a mill which had been destroyed by fire. It was the intention of B. & J., when the contract was made, upon the completion of the flume, to erect thereon a corn-feed mill for temporary use, which intention was known to L. The flume was not completed until several months after the time provided in the contract. No cornfeed mill was ever built. In an action by L. for the contract price of the flume, B. & J. recouped their damages for the loss of the use of the corn-feed mill, which they were prevented from building by reason of plaintiff's failure to complete the flume as contracted. that such damages were too remote and uncertain, and an instruction to that effect by the trial court to the jury upheld. Bridges v. Lanham, 14 Neb. 369; s. c., 45 Am. Rep. 121.

1. Wood's Mayne on Dam. sec. 27:

Ashe v. Bassett, 5 Jones (N. Car.), 299. In Hayden v. Cabot, 17 Mass. 168, it was held that the surety in a bond could claim from the principal only the amount he paid on the bond and his reasonable expenses; not extraordinary expenses,

Third Rule: (d) Special Circumstances Known to Defendant. Where the special circumstances are known to the defendant, and where the damage is the natural result of his default, the special damage is held to have been in view of the parties to the contract, and is not too remote.1

which might have been avoided by payment of the money: for remote and unexpected consequences are never considered as coming within the contract. also Batchelder v. Sturgis, 3

(Mass.) 201.

Where the purchaser of a saw-mill and outfit sought to recover damages against the vendors thereof, resulting from the fact that the property received was inferior to that for which he bargained, losses sustained by the purchaser from abandoning planting operations in which he was engaged and going into the milling business, improvements made in order to carry on such business, alleged losses of profits by reason of having received an inferior outfit, additional purchases of timber, stock, vehicles, etc., to run a mill of the capacity of that bargained for, and personal services of himself and assistant while he was running the mill, or until its capacity had been fully tested, did not form elements of damage which could be recovered. Such damages were too remote and contingent, and evidence concerning them was properly rejected. Willingham v. Hooven, 74 Ga. 233.

Parties to contracts are not supposed to know more of one another's affairs than may be communicated to them, nor to consider existing or contemplated transactions with other persons, unless these are made known to them. the losses on collateral engagements depending on the fulfilment of the principal contract are too remote to be considered in estimating the damages for the breach of the principal contract. Lawrence v. Wardwell, 6 Barb. (N. Y.) 423, decides that a lessee in action against a lessor for a refusal to give possession could not give evidence of the loss of an advantageous bargain for the assignment of the Clare v. Maynard, 6 Ad. & Ell. 519; Walker v. Moore, 10 B. & C. 416; Cuddy v. Major, 12 Mich. 368; Barnard v. Poor, 21 Pick. (Mass.) 378; Fox v. Harding, 7 Cush. (Mass.) 516; Griffin v. Colver, 16 N. Y. 489.

A sleeping-car belonging to the Pullman company caught fire through the negligence of a servant of the company. A woman occupying one of the berths was obliged to leave the car in her night-dress. The night was very severe, and she caught cold. She was menstruating at the time, and the cold caused a suppression of her menses. It was held that her condition at the time was an independent cause of her illness, which was too remote from the negligence of the company to entitle her to recover damages for her attack of sickness. Pullman Čar

1. Hadley v. Baxendale, 9 Exch. 341.
This rule was followed in Hammer v. Schoenfelder, 47 Wis. 455. in that case was a butcher, and the defendant had agreed to furnish him with such a quantity of ice as he might need for his ice box to keep fresh meat during the summer. The defendant had supplied the plaintiff before, and understood the use of the ice. At the last of July the defendant ceased to furnish ice, and in consequence a quantity of meat was spoiled, as no ice could be procured elsewhere. The defendant was held liable for the value of the spoiled meat.

If a vendor knows that his vendee has a contract to resell the article, he will become liable for the loss of the profit on such resale if he fails to complete the delivery of the article. I Suth. Dam. 84; Booth v. Spuyten Duy. R. M. Co., 60 N. Y. 488; Borries v. Hutchinson, 18 C. B. N. S. 44; Sneed v. Foord, I E. & C. B. N. S. 44; Sneed v. Foord, I E. & E. 602; Smith v. Green, I C. P. D. 92; Simpson v. L. R. Co., I Q. B. D. 274; Alder v. Keighley, 15 Mees. & Wels. 117; Messmore v. New York S. & L. Co., 40 N. Y. 422; Rhodes v. Baird, 16 Ohio St. 573; Cobb v. I. C. R. Co., 38 Iowa, 601; Haven v. Wakefield, 39 Ill. 509. The circumstances made known at the making of the contract, and its intrinsic nature, of the contract, and its intrinsic nature, must be considered in estimating the damages. Winne v. Kelly, 34 Iowa, 339; Van Arsdale v. Randell, 82 III. 63; Rogers v. Bemas, 69 Pa. St. 432; Hexter v. Knox, 63 N. Y. 561; Squire v. West. Un. Tel. Co., 98 Mass. 232; Richardson v. Chinoweth, 26 Wis. 656; Walcott v. Mount, 36 N. J. 262; Grindle v. East. Exp. Co., 67 Me. 317.

Because of the hardships sometimes involved in the application of this third

volved in the application of this third rule, the courts have shown a disposition to break away from the rigorous assertion of it. The following substitutes for the rule are suggested in Wood's Mayne on

Damages (Ed. 1880), § 41:

6. Prospective Damages.—The rule heretofore given for estimating remote or consequential damages applies, with a single qualification, to prospective damages, namely: All damages, existing or prospective, may be considered, where they are natural and necessary consequences of the act complained of, provided they do not constitute a new cause of action.¹

The application of the second branch of this rule leads to many

difficulties in cases of trespass to realty and nuisance.

I. Trespass to Realty.—In cases of trespass, the cause of action is the wrongful act of the defendant, and the injury resulting is merely the measure of the damages. Therefore, applying the rule above, all damages for a trespass must be recovered in a

single action.2

II. Nuisances, Acts Wrongful only When Causing Damage.—In these cases the cause of action is, not the act of the defendant, but the injurious consequences of the act. Therefore, under the rule first stated, successive actions must be brought for any consequences accruing after the institution of the first suit. It is con-

I. Where there are special circumstances connected with a contract which may cause special damage to follow if it is broken, mere notice of such special circumstance given to one party will not render him liable for the special damage unless it can be inferred from the whole transaction that he consented to become liable for such special damage.

2. Where a person who has knowledge of such special circumstances might refuse to enter into the contract at all, or might demand a higher remuneration for entering into it, the fact that he accepts the contract without requiring any higher rate will be evidence, though not conclusive evidence, from which it may be inferred that he has accepted the additional risk in case of breach.

3. Where the defendant has no option of refusing the contract, and is not at liberty to require a higher rate of remuneration, the fact that he proceeded in the contract after knowledge or notice of such special circumstances, is not a fact from which an undertaking to incur a lia-

bility for special damages can be inferred.
4. Even if there were an express contract by the defendant to pay for special damages under the circumstances last supposed, it might be questioned whether such a contract would not be void for want of consideration.

1. Wood's Mayne on Dam. (Ed. 1880) s. 103. The case oftenest cited in support of this proposition is Fetter v. Beale, I Salk. II. The plaintiff in that case had recovered in a previous action for an assault and battery, which had caused a

fracture of his skull. Upon another piece of his skull coming out he brought a new action. Lord Holt, in holding that the former action was a bar to any subsequent recovery, said: "Every new dropping is a new nuisance; but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of action, but the measure of damages, which the jury must be supposed to have considered at the trial." Other cases on personal injuries are Birchard v. Booth. 4 Wis. 67; Morely v. Dunbar, 24 Wis. 183; Slater v. Rink, 18 Ill. 527; Howell v. Goodrich, 69 Ill. 556; McLaughlin v. Corry, 77 Pa. St. 109; Klein v. Jewett, 26 N. J. Eq. 474; Aaron v. Second Av. R. Co, 2 Daly (N. Y.), 127; Balt., etc. R. Co. v. Shipley, 31 Md. 368; Atchison v. King, 9 Kan. 550; Welch v. Ware, 32 Mich. 77; Collins v. Council Bluffs, 32 Iowa, 324.

2. A valuable article on this subject will be found in the Amer. Law Reg. v. 26, pp. 281, 345. It is apparently the first successful attempt at a classification of the cases on this difficult subject, and we are indebted to it for much useful material. Among the cases there cited are the following: Kansas R. Co. v. Mihlman, 17 Kan. 224; Oakley v. Kensington Canal Co., 5 Barn. & Ald. 138; Marshall v. Ulleswater Steam Nav. Co., L. R. 7 Q. B. 166; Clegg v. Dearden, 12 Q. B. 575; Vedder v. Vedder, I Den. (N. Y.) 257; Dickinson v. Boyle, 17 Pick. (Mass.) 78; Williams v. Pomeroy Coal Co., 37 Ohio St. 583; Dick v. Webster, 6. Wis. 481.

sidered unreasonable to assume that the defendant will continue the act after a judicial determination that he has no right to do so; and to quicken his steps in removing the wrongful state of things, punitive damages are usually allowed in the second and subsequent actions.¹

III. Trespasses Resulting in Continuing Nuisances.—The rule here is a combination of the two rules just given. The institution of the wrong is treated as a trespass, while the continuance of it is treated as a nuisance. The damages for the original act of trespass are all to be recovered in the first action, but successive actions must be brought to recover for damages for the continuation of the wrongful conditions, and in these the damages are estimated only to the date of the bringing of each suit.²

1. Robinson v. Bland, per Mansfield, Ld. C. J., 2 Burr. 1087; Whitehouse v. Fellowes, 10 C. B. N. S. 765; Nicklin v. Williams, 10 Ex. 259; Bonomi v. Backhouse, E. B. & E. 622; s. c., 9 H. L. C. 503; Rosewell v. Prior, 2 Salk. 460; Battishill v. Reed, 18 C. B. 696; Bankart v. Houghton, 28 L. J. Ch. 473; Lamb v. Walker, 3 Q. B. Div. 389 (dissenting opinion of Cockburn, C. J.); Mitchell v. Darley Main Colliery Co., 14 Q. B. Div. 125; s. c., 24 Am. L. Reg. (N. S.) 432, overruling Lamb v. Walker, supra, and adopting Cockburn's dissenting opinion; Del. & Raritan Canal Co. v. Wright, 21 N. J. L. 469; Waggoner v. Jermaine, 3 Denio (N. Y.), 306; Baldwin v. Calkins, 10 Wend. (N. Y.) 167, 179; Phillips v. Terry, 3 Keyes (N. Y.), 313; Whitemore v. Bischoff, 5 Hun (N. Y.), 176; Duryea v. Mayor, 26 Hun (N. Y.), 176; Duryea v. Mayor, 26 Hun (N. Y.), 120; Beckwith v. Griswold, 29 Barb. (N. Y.) 291; Thayer v. Brooks, 17 Ohio, 489; Polly v. McCall, 1 Ala. Sel. Cas. 246; s. c., 37 Ala. 20; Stein v. Burden, 24 Ala. 130; Savannah Canal Co. v. Bourquin, 51 Ga. 378; Shaw v. Etheridge, 3 Jones L. (N. Car.), 300; Burnett v. Nicholson, 86 N. Car. 99; Duncan v. Markley, 1 Harper (S. Car.), 276; Langford v. Owsley, 2 Bibb (Ky.), 215; Cobb v. Smith, 38 Wis. 21; Hazletine v. Case, 46 Wis. 391; Clark v. Nevada Mining Co., 6 Nev. 203; Hodges v. Hodges, 5 Metc. (Mass.) 205; McConnel v. Kibbe. 20 Ill. 483; 33 Ill. 175.

2. The opinion of Earl, J., in the case of Uline v. N. Y., etc., R. Co., 23 Am. & Eng. R. R. Cas. 3; s. c., 101 N. Y. 98, contains an elaborate and almost exhaustive discussion of this class of torts. There a railroad corporation, having acquired all private rights in a city street, and authority from the municipality, raised the grade of the street in front of the plaintiff's lots. The plaintiff sued the company for damages. After stating

the case, the learned judge continues: "The question, however, still remains, what damages? All her damages upon the assumption that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? . . . There never has been in this State, before this case, the least doubt expressed in any judicial decision, as far as I can discover, that the plaintiff in such a case is entitled to recover damages only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts, and it is the prevailing doctrine elsewhere. In Hambleton v. Veere, 2 Saund. 169, 170, the learned annotator in his note says: 'So in trespass and tort, new actions may be brought as often as new injuries and wrongs are repeated; and therefore damages shall be assessed only up to the time of the wrong complained of. In Rosewell v. Prior, 2 Salk. 459, the plaintiff being seized of an ancienthouse and lights, defendant erected a building whereby plaintiff's lights were estopped. There was a former recovery for the erection, and the second action was for the continuance of the erection; and it was held that the former recovery was no bar. In Bowyer v. Cook, 4 C. B. 236, there had been an action of trespass for placing stumps and stakes on plaintiff's land, and the defendant paid into court in that action forty shillings, which the plaintiff took in satisfaction of that trespass. The plaintiff afterward gave the defendant notice that unless he removed the stumps and stakes a farther action would be brought against him; and in the second action it was held that the leaving the stumps and stakes on the land was a new trespass, and that the plaintiff was entitled to recover. Holmes v. Wilson, 10 A. & E. 503, the action was trespass against a turnpike company for continuing buttresses on plaintiff's land to support its road. Plaintiff had recovered compensation for the erection of the buttresses in a former action, and the money had been paid into court and received by him; and it was held that after notice to defendant to remove the buttresses, and a refusal to do so, plain-tiff might bring another action of trespass against the company for keeping and continuing the buttresses on the land, and that the former recovery was not a bar to such an action. In that case it was argued for the defendant that the damages given in the first action were to be regarded as a full compensation for all injuries occasioned by the buttresses, and were to be considered as the full estimated value of the land permanently occupied by the buttresses; that the damages were in respect of prospective as well as past injury, and that the judgment operated as a purchase of the land. Patterson, J., said in reply to the argument: 'How can you convert a recovery and payment of damages for the trespass into a purchase? A recovery of damages for a nuisance to land will not prevent another action for continuing it;' and it was argued by learned counsel for the plaintiff, in reply to the argument that the former judgment operated as a purchase of the land: 'As to the supposed effect of the judgment in changing the property of the land, the consequence of that doctrine would be, that a person who wants his neighbor's land might always buy it against his will, paying only such purchase-money as a jury might assess for damages up to the time of the action.' . . .

"In Bare v. Hoffman, 79 Pa. St. 71, the plaintiff had a dam from which he conducted water to his tannery, and the defendant made a dam below into which the surplus water over plaintiff's dam flowed, and from his dam the defendant by a pipe conducted the water to his tannery, by which the plaintiff lost the use of the water required to carry the offal from his tannery; and it was held that evidence of permanent injury to the market value of plaintiff's tannery was inadmissible; that the injury was not of such a character as to assume that it would be permanent, and to assess damages accordingly; and that as a general rule, successive actions may be brought so long as the obstruction is continued. Mercur, J., writing the opinion, said: 'The general rule is, that successive actions may be brought as long as the obstruction is maintained. A recovery in

the first action establishes the plaintiff's right. Subsequent actions are to recover damages for a continuance of the obstruction.' In Thompson v. Morris Canal & Banking Co., 17 N. J. L. 480, it was held that the title to lands does not pass by a verdict for the plaintiff, in an action for trespass; that it remains in the plaintiff; and therefore a verdict for damages to the full value of the land is manifestly wrong. In Thayer v. Brooks, 17 Ohio, 489, the action was case, for nuisance in diverting water from the mill of the The injury complained of in plaintiff. the declaration was that the mill was rendered less useful by reason of a diversion of a portion of the water from the stream by means of a canal cut by defendant. The court instructed the jury that the owner of the mill was entitled to recover such damages as the jury believed he had sustained by the mill-site having been diminished in value in consequence of the diversion of the water. Birchard, C. J., writing the opinion, said: 'This was going too far. Suppose the party liable at all, he was only liable under any form of declaration for the damages actually sustained prior to the commencement of the suit.'

Trespass-Nuisance.

" 'There is no case to show that when land is vested in a party and fresh injuries are done upon it, fresh actions will not lie.' See also Thompson v. Gibson, 8 M. & W. 281; Mitchell v. Darley Main Colliery Co., L. R. 14 Q. B. D. 125; Whitehouse v. Fellowes, 10 C. B. (N. S.) 765. I find no case in England now regarded as authority in conflict with these cases. The case of Beckett v. Midland R. Co., L. R. 3 C. P. 82, does not lay down a different rule. That case arose under the Land Clauses Consolidation Act and the Railroad Clauses Consolidation Act, which require full compensation to be made by railroad companies, not only for lands taken, but also for damages to lands injuriously affected. Under those acts the plaintiff recovered, not only the value of his lands taken, but for permanent injury to his other lands. The case of Lamb v. Walker, L. R. 3 Q. B. D. 389, was overruled in Mitchell v. Darley Main Colliery Co., supra, and is no longer authority in England.

"The same rule of damages which I am trying to enforce prevails generally and with very rare exceptions in the other States of this Union. In Esty v. Baker, 48 Me. 495, Appleton, J., said: 'The mere continuance of a building upon another's land, even after the recovery of damages for its erection, is a trespass for which an action will lie. In Russell

v. Brown, 63 Me. 203, the action was trespass quare clausum for continuing upon the plaintiff's land the wall of a building nine inches wide and one hun-The defendant dred and six feet long. pleaded in bar a former judgment recovered for building the wall, and satisfaction: and it was held that the mere continuance of a structure tortiously erected upon another's land, even after recovery and satisfaction of a judgment for its wrongful erection, is a trespass for which another action of trespass quare clausum will lie, and that a recovery with satisfaction for erecting a structure does not operate as a purchase of the right to continue such erection.

"In harmony with these authorities are the views of approved text-writers. 3 Blackst. Com. 220; I Sedg. Dam. (7th Ed.) 278; Mayne on Dam. (Am. Ed.) §§ 110, 111; I Suth. on Dam. 199, 202; 3 Suth. on Dam. 369, 399. While the authorities in other States are not entirely harmonious, those which I have cited give the

general drift of the decisions.

"But whatever difference there may be in other States as to the rule of damages under consideration, in this State there is none whatever here. Here the authorities are entirely uniform that in such an action as this, damages can be recovered only up to the commencement of the action, and that the remedy of the plaintiff is by successive actions for his damages until the nuisance shall be abated. The law was so announced in Greene v. N. Y., etc., R. Co., 65 How. Pr. 154; Tay-Tor v. Metropolitan El. R. Co., 18 J. & Sp. (N. Y.) 311; Duryea v. Mayor, etc., 26 Hun (N. Y.), 120, all cases entirely analogous to this. . . . In Whitmore v. Bischoff, 5 Hun (N. Y.), 176, it was held that the damages which a party can recover for a private nuisance are those which he has sustained previous to the bringing of the action, and that it is error to allow a recovery for the diminution in value of the premises, based upon the assumption that the nuisance is to continue forever. In Duryea v. Mayor, etc., 26 Hun (N. Y.), 120, the action was brought to recover the damages occasioned by the wrongful act of one who had discharged water and sewage upon the land of another, and it was held that no recovery could be had for damages occasioned by discharge of water and sewage upon the land after the commencement of the action. In Blunt v. McCormick, 3 Denio (N. Y.), 283, the action was case for damages in consequence of the erection of a building adjoining plaintiff's, whereby plaintiff's light was obstructed. The plaintiff was defendant's tenant. The court at the trial charged the jury that if the plaintiff was entitled to recover, they should give damages for the injury which he would suffer during the whole of his term. It was held that his charge was erroneous, and that a recovery could be had only for such damages as had occurred at the time the suit was commenced, and not for the whole term. In Plate v. N. Y. Cent. R. Co., 37 N. Y. 472, 473, the action was brought to recover damages caused by keeping and maintaining the defendant's railroad track and ditches along the side thereof in such manner as to cause the water to flow back upon the plaintiff's land. There had been a former recovery of damages for the same cause, which was alleged as a bar to the second action; but it was held not to be a bar. judge writing the opinion said: 'If in-deed he could have recovered damages, not only for all injuries which had occurred previous to the commencement of the action, but also for all injuries which may possibly thereafter occur, the first recovery would be a bar to the second.' . . .

"The rule laid down in the cases which I have cited, and which I contend is the true one, gives any party who has suffered any legal damages by the construction or operation of a railroad ample remedy. He may sue and recover his damages as often as he chooses, once a year or once in six years, and have successive recoveries for damages. He may enjoin the operation of the railroad and compel the abatement of the nuisance by an action in equity; and where his premises have been exclusively appropriated, or where a highway, in the soil of which he has title, has been exclusively appropriated by a railroad, he may undoubtedly maintain an action of ejectment. Brown v. Galley, Hill & D.'s Supp. (N. Y.) 308; Etz v. Daily, 20 Barb. (N. Y.) 32; Redfield v. Utica, etc., R. Co., 25 Barb. (N. Y.) 54." See also Blunt v. McCormick, 3 Denio (N. Y.), 283; Whitemore v. Bischoff, 5 Hun (N. Y.), 176; McKeon v. Lee, 4 Robt. (N. Y.) 449; Duryea v. Mayor, etc., 26 Hun (N. Y.), 120; Carl v. S. & F. R. Co., 46 Wis. 625; A. & Gt. W. R. Co. v. Robbins, 35 Ohio St. 531; Battishill v. Reed, 18 C. B. 696; Mahon v. N. Y., etc., R. Co., 24 N. Y. priated by a railroad, he may undoubt-Mahon v. N. Y., etc., R. Co., 24 N. Y. 658; Brakken v. Railroad Co., 29 Minn. 41; Drucker v. Manhattan R. Co., 51 N. Y. Sup. Ct. 429; Cumberland Canal Co. v. Hitchins, 65 Me. 140; Savannah Canal Co. v. Bourquin, 51 Ga. 378; Gould v. McKenna, 86 Pa. St. 297; Kansas R. Co. v. Mihlman, 17 Kan. 224.

IV. Permanent Injuries, Not the Result of Trespass.—Where permanent structures are erected which result in injury to the realty adjacent, such as dams, dikes, roads, railways, and bridges, a new principle is applied. The rule under nuisances given above is not applicable, because, since the new condition is in its nature permanent, the fear of prospective punitive damages cannot operate. In these cases, therefore, all damages may be recovered in a single suit.¹

1. In cases of this sort punitive damages can have no effect, and the application of the former rule would lead to a multiplicity of suits. Besides, these injuries usually arise from the erection of public works which it is the policy of the law to encourage, and which are lawful in themselves. The rule and the distinction are laid down in Smith v. Railroad Co., 23 W. Va. 453. Green, J., said: Where the damage is of a permanent character and affects the value of the estate, a recovery may be had at law of the entire damages in one action; but where the extent of the wrong may be apportioned from time to time. separate actions should be brought to reseparate actions should be brought to recover the damages sustained." He cites Troy v. Cheshire R. Co., 23 N. H. 101; Cheshire Turnpike Co. v. Stevens, 13 N. H. 28; Parks v. Boston, 15 Pick. (Mass.) 108; Blunt v. McCormick, 3 Denio (N. Y.), 283; Thayer v. Brooks, 17 Ohio, 489; Anon., 4 Dall. (U. S.) 147; Tucker v. Newman, 11 Ad. & El.

The same doctrine is laid down in Hargreaves v. Kimberly, 26 W. Va. 789; s. c., 53 Am. Rep. 121, where the former case is approved. In Troy v. Cheshire R. Co., 23 N. H. 83, the leading case on this subject, there is a full discussion of the question. In the opinion of the court in that case it is said: "Wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change from any cause but human labor, there the damage is an original damage and may be at once fully compensated, since the injured person has no means to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means... Thus the individual who so manages the water he uses for his mills as to wash away the soil of his neighbor, is liable at once for all the injury occasioned by its removal, because it is in its nature a permanent injury; but

if the works are so constructed that upon the recurrence of a similar freshet the water will probably wash away more of the land, for this there can be no recovery until the damage has actually arisen. because it is yet contingent whether any such damage will ever arise. . . In one of the cases which arose from the building of the great canals in New York, the case was that a high dam was erected. upon the falls of the Hudson for the purpose of diverting the waters of the river into a feeder for the canal; the lands of an owner were buried under twenty feet of water, and their value to him, of course, entirely destroyed; the work was in its nature and design permanent. There it would be clear that the party injured would be entitled to the entire-damages he had sustained, and must sus-tain, in a single action; in truth, substantially the entire value of his propstantially the entire value of his property." See also Beckett v. Midland R. Co., 3 L. R. C. P. 82; Woods v. Nashua. Mfg. Co., 5 N. H. 467; Heard v. Middlesex Canal Co., 5 Metc. (Mass.) 81; Warner v. Bacon, 8 Gray (Mass.), 397; Fowler v. Bacon, 8 Gray (Mass.), 207; Fowler v. Bacon, 8 Gray (Mass.), 207; Fowler v. Bacon, 8 Gray (Mass.), 207; Fowler v. Marthagles Co., 107. v. New Haven & Northampton Co., 107 Mass. 352; s. c., 112 Mass. 334; Finley v. Hershey, 41 Iowa, 389; Cadle v. Muscatine W. R. Co., 44 Iowa, 11; Powers v. Council Bluffs, 45 Iowa. 654; Stodgbill v. C. B. & Q. R. Co., 53 Iowa, 341; Van Orsdol v. B. C. R. & N. R. Co., 56 Iowa, 470; Bizer v. Ottumwa, etc., Co., 70 Iowa, 145; Chicago, etc., R. Co. v. Maher, 91 Ill. 312; Van Schoick v. Del., etc., Canal Co., 20 N. J. L. 249; Seely v. Alden, 61 Pa. St. 302; Duncan v. Sylvester, 24 Me. 482; Adams v. Hastings, 18 Minn. 265; Ill. Cent. R. Co. v. v. New Haven & Northampton Co., 107 ings, 18 Minn. 265; Ill. Cent. R. Co. v. Grabill, 50 Ill. 241; Cooper v. Randall, Grabill, 50 Ill. 241; Cooper v. Randall, 59 Ill. 317; Elizabethtown, etc.. Co. v. Combs, 10 Bush (Ky.), 382; Jefferson-ville, etc., R. Co. v. Esterle, 13 Bush (Ky.), 667; Ortwine v. Baltimore, 16 Md. 387; Chase v. N. Y. Cent. R. Co., 24 Barb. (N. Y.) 273; Easterbrook v. Erie R. Co., 51 Barb. (N. Y.) 94; North Vernon v. Voegler, 103 Ind. 314; Fifth Nat. Bank v. N. Y. El. R. Co., 28 Fed. Rep. 221.

7. Compensatory and Punitive Damages.—In actions for breach of contract, with a single exception, the amount recovered is limited to the actual damage caused by the breach. The measure of damages is the same, whether the defendant fails to comply with his contract through inability, or wilfully disregards it.2

In tort actions the motive of the defendant becomes material. If a tort is committed through mistake, ignorance, or mere negligence, the damages are limited to the actual injury received, 3 but

1. Breach of Promise of Marriage.-In actions for breach of promise of marriage vindictive damages are allowed; but this action, although founded on contract, is regarded as being somewhat in the nature of a tort action. Johnson v. Johnson, 24 N. Y. 252; Thorn v. Knapp, 42 N. Y. 474; Coryell v. Colbaugh, I N. J. (Coxe) 77. Compare Harrison v. Swift, 13 Allen (Mass.), 144; Kurtz v. Frank, 76 Ind. 594; s. c., 40 Am. Rep. 275.
2. Contracts.—In all actions for breach

of contract the damages are confined to pecuniary loss; the law takes no notice of the motives of the party in default. I Sedgwick's Dam. (7th Ed.) 45; Grand Tower Co. v. Phillips, 23 Wall. (U. S.) 471; Toledo, etc., R. Co. v. Roberts, 71 Ill. 540; Walsh v. Chicago, etc., R. Co., 42 Wis. 23; Duche v. Wilson, 37 Hun

(N. Y.), 519.

As to the rule that a vendor of real estate is liable to higher damages if he fraudulently or knowingly represent himself as having title, see Sikes v. Wild, I B. & S. 594; Pumpelly v. Phelps, 40 N. Y. 59; Plummer v. Rigden, 78 Ill. 222; Martin v. Wright, 21 Ga. 504. Compare Parker v. Walker, 12 Rich. (S.

Car.) 138.
3. Torts not Malicious.—A tort committed by mistake, in the assertion of a supposed right, or without any actual wrong intention, and without such recklessness or negligence as evinces malice or conscious disregard of the rights of others, will not warrant the giving of punitive damages. I Suth. Dam. 724; Kolb v. O'Brien, 86 Ill. 210; Hamilton v. Third Ave. R. Co., 53 N. Y. 25; Kentucky, etc., R. Co. v. Dills, 4 Bush (Ky.), tucky, etc., R. Co. v. Dilis, 4 Busn (ky.), 593; Penna. R. Co. v. Kelly, 31 Pa. St. 372; Snow v. Grace, 25 Ark. 570; Wanamaker v. Bowes, 36 Md. 42; Phelps v. Owens, 11 Cal. 22; Chicago, etc., R. Co. v. McKean, 40 Ill. 218; Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388; Allison v. Chandler, 11 Mich. 542; Goetz v. Ambs, 27 Mo. 28. Punitive damages were not allowed for seizure under execution of the property of a stranger, not wantonly or wilfully taken. Phelps v. Owens, II Cal. 22. For malpractice by a physician. Long v. Morrison, 14 Ind. Where the process of a court is 595. 595. Where the places of a court is used improperly, but in good faith. Beveridge v. Welch, 7 Wis. 465. For injury to the person, not wilful. Heil v. Glanding, 42 Pa. St. 493; Louisville, etc., R. Co. v. Shanks, 94 Ind. 598; s. c., 19 Am. & Eng. R. R. Cas. 78. Nor for failure to stop a train, where the act was not done wilfully. Morse v. Duncan, Rec., 14 Fed. Rep. 396. And punitive damages were not allowed for injury to a brakeman by a projecting awning, although known to the company to be in a dangerous condition. Ill., etc., R. Co. v. Welch, 52 Ill. 184. Nor for mere neglect. Peoria Bridge Assn. v. Loomis, 20 Ill. 251.

In order to justify the assessing of exemplary damages, it must be made to appear that the act complained of was a wilful or malicious wrong; and an instruction to the effect that the defendants were liable for exemplary damages, if they, when they committed the acts, had good reason to believe they were wrongful, was held erroneous. Inman v. Ball,

65 Iowa, 543.

If a sheriff or other officer makes a wrongful seizure of goods under an order of attachment, but acts without fraud, malice, oppression, or other improper motive, he is not liable therefor in vindictive or exemplary damages on account of the malicious motives of the plaintiff in the writ. Dow v. Julien, 32 Kan.

To entitle a person to punitive damages for a wrongful act, there must be an element of fraud or malice, or evil intent, or oppression, entering into and forming part of the act. Phila., etc., R. Co. v. Hoeflich, 62 Md. 301; s. c., 50

Am. Rep. 223.

Something more must be shown than a "mere disregard of the rights of others, which is involved in every trespass, except those committed in honest mistake, or by accident, or, possibly, by misadventure. Wilkinson v. Searcy, 76 Ala.

Exemplary damages ought not to be given, unless in case of intentional viola-

if the defendant act maliciously, wilfully, or with such gross negligence as to indicate a wanton disregard of the rights of others, the jury are not confined in assessing damages to compensation, but may give damages as a punishment to the defendant, called exemplary, punitive, or vindictive damages.1

tion of another's right, or when a proper act is done with an excess of force or violence, or with malicious intent to in-

you another in his person or property.

Kelly v. McDonald, 39 Ark. 387.

1. Wilful and Malicious Torts.—In Day
v. Woodworth, 13 How. (U. S.) 363,

Mr. Justice Grier said: "It is a wellestablished principle of the common law. that in actions of trespass, and in all actions on the case for torts, a jury may inflict what are called exemplary, puniinflict what are called exemplary, puntive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff." Voltz v. Blackmar, 64 N. Y. 440; Hoadly v. Watson, 45 Vt. 289; Smalley v. Smalley, Walson, 45 VI. 203; Shanley & Shanley,
81 Ill. 70; Clevenger v. Dunaway, 84 Ill.
367; Robinson v. Burton, 5 Harr. (Del.)
335; Wilkinson v. Drew, 75 Me. 360.
It is not necessary that there should be

actual malice, if the act shows a wanton disregard of the rights of others. Drohn v. Brewer, 77 Ill. 280; Raynor v. Nims, 37 Mich. 34; s. c., 26 Am. Rep. 493; Baltimore, etc., R. Co. v. Boone, 45 Md.

Punitive damages have been allowed for malicious seizure of property. Morris v. Shew, 29 Kan. 661. For maliciously suing out process. McCullough v. Walton, 11 Ala. 492. For wanton inpury. Dean v. Blackwell, 18 Ill. 336; Baltimore, etc., R. Co. v. Blocher, 27 Md. 277; Wallace v. Mayor, etc., 2 Hilt. (N. Y.) 440; s. c., 9 Abb. Pr. (N. Y.) 40. For wilful trespass. Jennings v. Maddox, 8 B. Mon. (Ky.) 430; Best v. Allen, 30 Ill. 30. For malicious destruction of timber. Winter v. Peterson, 24 N. J. For taking property under execution, knowing it to be exempted. Lynd v. Picket, 7 Minn. 184. For malicious prosecution. Callahan v. Caffarata, 39 Mo. 136. Against public officers. Parker v. Shackleford, 61 Mo. 68.

In a few States the doctrine of exemplary damages as punishment is rejected, but a more liberal rule of damages is allowed in cases where other courts give punitive damages. "The true rule, as I understand it," said Cushing, J., in Bix-by v. Dunlop, 56 N. H. 456; s. c., 22 Am. Rep. 475, "is to instruct the jury that if they for the said they are the said to the said they are the said to the said they are the said to the said they for the said to the said they for the said to t that, if they find the defendant has been malicious, the rule of damages will be

more liberal." The same rule has been held in Massachusetts. Smith v. Holcomb, 99 Mass. 552. In Meagher v. Driscoll, 99 Mass. 281, the court said:
"Acts of gross carelessness often inflict serious wounds upon the feelings, when the injury to property is trifling, and in such cases the damages are enhanced, not because vindictive damages are allowed, but because the actual injury is made greater by its wantonness. Fillebrown v. Hoar, 124 Mass. 580. In several other States the courts have reseveral other States the courts have refused to give punitive damages eo nomine. Koerner v. Oberley, 56 Ind. 284; Stewart v. Maddox, 63 Ind. 57; Boyer v. Barr, 8 Neb. 68; s. c., 30 Am. Rep. 814; Welch v. Ware, 32 Mich. 84; Elliot v. Van Buren, 33 Mich. 49; Stilson v. Gibbs, 53 Mich. 280.

When Punishable as a Crime When

When Punishable as a Crime. - Where the tort is punishable as a crime, some courts have refused to allow punitive damages, on the ground that double punishment would be inflicted thereby. Meidel v. Anthis, 76 Ill. 241; Albrecht v. Walker, 73 Ill. 69; Lucas v. Flinn. 35 Iowa, 9; Stowe v. Heywood, 7 Allen (Mass.), 118; Storall v. Smith, 4 B. Mon.

(Ky.) 378. So in Murphy v. Hobbs, 7 Colo. 541; s. c., 49 Am. Rep. 366, it was said that in civil actions for injury resulting from torts, where the offence is punishable under the criminal laws, exemplary damages, as a punishment or example, cannot be awarded.

But the general rule is otherwise. Corwin v. Walter, 18 Mo. 71; Phillips v. Kelly, 29 Ala. 628; Roberts v. Mason. 10 Ohio St. 277. It was held in Kimball v. Holmes, 60 N. H. 163, in an action of trespass for injuring the plaintiff's horse, if the award of damages is enhanced beyond the actual material damages sustained because the act was accompanied with malice, it will not for that reason be open to the objection that it exposes the defendant to double punishment, if only full compensation is awarded. Boetcher v. Staples, 27 Minn. 308; s. c., 38 Am. Rep. 295; Brown v. Swineford, 44 Wis. 282.

Exemplary damages have been allowed even where the compensatory damages were but normal. Hefley v. Baker. 19 Kan. 9; Wilson v. Vaughn, 23 Fed.

Rep. 229. Compare Stacy v. Portland Pub. Co., 68 Me. 287; Maxwell v. Ken-nedy, 50 Wis. 647.

Punitive damages cannot be recovered against a municipal corporation. Chica-

go v. Kelly, 69 Ill. 475.

The object of exemplary, punitory, or vindictive damages is to punish the wrongdoer, and not to compensate the person injured; and therefore, where by statute the cause of action for a tort survives the death of a wrong-doer, since the civil law never inflicts vicarious punishment, nothing more than compensatory damages can be awarded against the personal representative of the wrong-doer. Sheik v. Hobson, 64 Iowa, 146.

Whether a particular case is one in which punitive damages should be given or not, is a question to be determined by the court in its instructions to the jury. Chicago v. Martin, 49 Ill. 241; Heil v. Glanding, 42 Pa. St. 493; Murphy v. N. Y., etc., R. Co., 29 Conn. 499; Chiles v. Drake, 3 Metc. (Ky.) 146.

Corporations.-There is a conflict of authority as to whether punitive damages may be allowed against a corporation for the grossly negligent or wanton act of its servant, when the corporation was in no wise responsible for the act. The New York rule on the subject is contained in the following extract from the case of Cleghorn v. N. Y., etc., R. Co., 56 N. Y. 44: "For the purpose of the case, the following rule may be laid down as fairly deducible from the authorities, viz.: For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages, unless he is also chargeable with Such misconduct gross misconduct. may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite: it must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such

habits, the company may and ought to be amenable to the severest rule of damages: but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the charant, unless such conduct is of the character before specified." Craker v. Chicago, etc., R. Co., 36 Wis. 657; The Amiable Nancy, 3 Wheat, 546; Hagan v. Providence, etc., R. Co., 3 R. I. 88; Wardrobe v. California Stage Co., 7 Cal. 118; Mendelsohn v. Anaheim Lighter 70., 40 Cal. 657; Keene v. Lizardi, 8 La. 32; Boulard v. Calhoun, 13 La. Ann. 445; Hill v. New Orleans, etc., R. Co., 11 La. Ann. 292; Nashville, etc., R. Co., v. Starnes, 9 Heisk. (Tenn.) 52; Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388; Turner v. Railroad Co., 34 Cal. 594; McKeon v. Citizens' R. Co., 42 Mo. 797; Ackerson v. Erie R. Co., 32 N. J. L. 254; Detroit Daily Post Co. v. McArthur, 16 Mich. 446; Great Western R. Co. v. Miller, 19 Mich. 205; Jones v. Burgett, 46 Tex. 272.

It is only in an extreme case that punitive damages are allowed against a corporation. Fisher v. Met. El. R. Co., 34 Hun (N. Y.), 433.

In a large number of cases, however, it is held, contrary to the principle of the cases above cited, that a corporation is liable in punitive damages for the wrongful act of a servant, in cases where puni-tive damages could be recovered against the servant. They are all cases where the corporation was punished with punitive damages for the act of its servant where no moral responsibility for the act rested on the corporation-where the act was unauthorized and unratified, and the company was in no wise negligent in its selection or retention of the servant. Atlantic & Great Western R. Co. v. Dunn, 19 Ohio St. 162; Quigley v. Central Pacific R. Co., 11 Nev. 350: Baltimore, etc., R. Co. v. Blocher, 27 Md. more, etc., R. Co. v. Blocher, 27 Md. 277; Jeffersonville R. Co. v. Rogers, 28 Ind. 1; 38-Ind. 116; Perkins v. Mo., K. & T. R. Co., 55 Mo. 201; Maleek v. Tower Grove, etc., R. Co., 57 Mo. 17, Doss v. Missouri, etc., R. Co., 59 Mo. 27; Chicago, etc., R. Co. v. Burke, 53 Miss. 200; Western Union Tel. Co. v. Eyser, 2 Colo. 142; New Orleans, etc., R. Co. v. Bailey 40 Miss. 200; Graban Eyser, 2 Colo. 142; New Orleans, etc., R. Co. v. Bailey, 40 Miss. 395; Graham v. Pacific R. Co., 66 Mo. 536; Evans v. St. Louis, etc., R. Co., 11 Mo. App. 463; Gasway v. Atlanta, etc., R. Co., 58 Ga. 216. See also Milwaukee, etc., R. Co. v. Arms, 91 U. S. 489; 8. Liquidated Damages or Penalty.—Where the parties to a contract have fixed upon a certain sum as damages for its breach, the question whether the amount recovered is to be the sum named, or whether the actual damage is to be considered, depends upon whether the court construes the stipulated sum to be liquidated damages or a penalty.

If the sum is regarded as liquidated damages, it forms the measure of damages, and the jury are confined to it; but if it is held to be a penalty, the actual damage, and not the amount named in

the instrument, is to be regarded.1

The courts are guided in determining this question by the language used, the subject-matter of the contract, and the intention of the parties. The use of the words penalty and liquidated damages are not conclusive, although the word penalty *prima facie* excludes the notion of stipulated damages.²

Chicago, etc., R. Co. v. Bryan, 90 Ill.

It is generally held that where the servants of a corporation have committed a tort punishable with punitive damages, the corporation may, by ratification of such act, make itself liable in punitive damages. Nashville, etc., R. Co. v. Starnes, 9 Heisk. (Tenn.) 52; Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388; Illinois Cent. R. Co. v. Hammer, 72 Ill. 347; Craker v. Chicago, etc., R. Co., 36 Wis. 657; Bass v. Chicago, etc., R. Co., 42 Wis. 654; s. c., 24 Am. Rep. 437.

Retention of the employee who was suilty of the wanton or grossly necligent

Retention of the employee who was guilty of the wanton or grossly negligent act, and especially his promotion by the company after it knew of such act, are evidence of such a ratification of his act as will make the company liable for punitive damages. Bass v. Chicago, etc., R. Co., 42 Wis. 654; Goddard v. Grand Trunk R. Co., 57 Me. 202; Perkins v. Missouri, etc., R. Co., 55 Mo. 201. But compare Edelman v. St. Louis Transfer

Co., 3 Mo. App. 503.

1. Lowe v. Peers, 4 Burr. 2229. "It may therefore be laid down as a settled rule, that no other sum can be recovered under a penalty than that which shall compensate the plaintiff for his actual loss." 2 Sedgwick's Dams. (7th Ed.) p. 207; Lord v. Gaddis, 9 Iowa, 265; Ricketson v. Richardson, 19 Cal. 330; Dehler v. Held, 50 Ill. 491. "Liquidated damages are damages agreed upon by the parties, as and for a compensation, for and in lieu of the actual damages arising from such breach. They may exceed or fall short of the actual damages, but the sum thus fixed and determined binds the parties to such agreement." Appleton, C. J., dissenting, in Dwinel v. Brown, 54 Me. 468; Spicer v. Hoop, 51 Ind. 365.

2. Construction. — The courts "pay more attention to the whole nature and object of the agreement, than to the precise words, in determining whether the intent was to create a penalty or provide for liquidated damages." Pierce v. Jung, 10 Wis. 30; Davis v. Gillette, 52 N. H. 126; Lampman v. Cochran, 16 N. Y. 275; Studbaker v. White, 31 Ind. 212; Henry v. Davis, 123 Mass. 345; Pennypacker v. Jones, 106 Pa. St. 237; Vetter v. Hudson, 57 Tex. 604.

In Mathews v. Sharp, 99 Pa. St. 560, it was held that "in order to determine whether the sum named in a contract as a forfeiture for non-compliance is intended as a penalty or as liquidated damages, it is necessary to look at the whole contract, its subject-matter, the ease or difficulty in measuring the breach in damages, and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequence of the breach." And in Streeper v. Williams, 12 Wright (Pa.), 454, the court said: "Upon the whole, the only general observation we can make is, that in each case we must look at the language of the contract, the inten tion of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience

and equity ought to take of the case."

"The real question in this class of cases will be found to be, not what the parties intended, but whether the sum is in fact in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not by the words or the

Where the subject-matter of the contract is such that the damages for its breach can be computed with certainty by definite rules, the courts will usually treat the sum agreed upon as a penalty; especially if there is great disparity between the agreed sum and the actual damage. Such contracts are those for the payment of money,2 and those in which the market price affords a certain standard for the measure of damages.

But if from the nature of the contract the damages cannot be calculated with any degree of certainty, as when that which is the subject-matter of the contract has no precise market value, or there are peculiar circumstances contemplated by the contract, the stipu-

lated sum will be held to be liquidated damages.3

understanding of the parties." Jaqueth v. Hudson, 5 Mich. 123. The subjectmatter of the contract, the situation of the parties, and trade usage, and all the watts v. Sheppard, 2 Ala. 425; Hosmer v. True. 19 Barb. (N. Y.) 106.

1. When Certain.—Watts v. Camars,

115 U. S. 353; Fisk v. Gray, II Allen (Mass.), 132; Kurtz v. Sponable, 6 Kan. 395; State v. Dodd, 45 N. J. L. 525. "The general result of the authorities has been correctly stated to be, that, when the injury is susceptible of definite admeasurement, as in all cases where the breach consists in the non-payment of money, the parties will not be allowed to make a stipulation for a greater amount, whether in the form of a penalty or of liquidated damages." Bispham's Eq. (3d

Ed.) p. 234. 2. Contracts for the Payment of Money. -For breach of contracts for the payment of money interest is the measure of damages. Loudon v. Taxing Dist., 104 U. S. 771. But the agreement of the parties for the rate of interest before maturity is always enforced, where it does not exceed the legal rate. where there is a much higher rate agreed to be paid after maturity, some courts have held such higher rate to be a penalty. Walter v. Long, 6 Munf. (Va.) 71; Watts v. Watts, 11 Mo. 547. It has been so held with regard to any rate above legal interest, in States where by statute any rate might be contracted for. Daniel v. Ward, 4 Minn. 168; Robinson v. Kenny, Ward, 4 Minn. 108; Robinson v. Kenny, 2 Kan. 184. But the general rule is that the parties may fix by agreement any rate after maturity which would not exceed the legal rate. Downey v. Beach, 78 Ill. 53; Brewster v. Wakefield, 22 How. (U. S.) 118; Wilkerson v. Daniels, I Greene (Iowa), 179. Reasonable expenses of collection and attorneys' fees, when contracted to be paid have been when contracted to be paid, have been allowed by some courts. Robinson v.

Loomis, 51 Pa. St. 78; Tallman v. Truesdale, 3 Wis. 443; Billingsley v. Dean, 11 Ind. 331; Kuhn v. Meyers, 37 Iowa, 351. See, contra, Foote v. Sprague, 13 Kan. 155; Shelton v. Gill, 11 Ohio, 417.

Where the stipulated sum is so great

that it is apparent that the provision was inserted in terrorem, it will be held to be a Bradstreet v. Baker, 14 R. I.

In Scoffeld v. Tompkins, 95 Ill. 190, the defendants agreed to buy land of the plaintiff and pay for it by a given day. and that if they made default the plaintiff should retain the land and recover the stipulated price as liquidated damages. The court held that the stipulation must be treated as a stipulation for a penalty. The purpose, doubtless, was to insure the timely fulfilment of the contract by the in terrorem forfeiture. The actual damages, if any, can be easily proved.

3. When Uncertain.—Dwinel v. Brown,

54 Me. 468; Kemble v. Farren, 2 Bing. 141; Linde v. Thompson, 2 Allen (Mass.), 456; Bagley v. Peddie, 16 N. Y. 469; Davis v. Freeman, 10 Mich. 188; Wolf, etc.. Co. v. Schultz, 71 Pa. St. 180; Jones v. Binford, 74 Me. 439; Easton v. Canal Co., 13 Ohio, 79; Geiger v. Railroad Co.,

41 Md. 4.

Such are damages for delay in completing work, for breach of agreements not to engage in trade at a particular place, and agreements not to disclose trade secrets. Hall v. Crowley, 5 Allen (Mass.), 304; Grasselli v. Lowden, 11 Ohio St. 349; Stewart v. Bedell, 79 Pa. St. 336; Hardee v. Howard, 33 Ga. 533; Berrinkott v. Traphagen, 39 Wis. 219.

An agreement by a contractor to pay \$1000 a week as damages for delay in building a railroad bridge was held to be liquidated damages. Texas, etc., R. Co. v. Rust, 19 Fed. Rep. 239. So in Wolf v. Des Moines, etc., R. Co., 64 Iowa, 380, where the court said: "But when, from the nature of the contract, the extent of

Where a large sum, which is not the actual debt, is agreed to be paid in case of a default in the payment of a lesser sum which is the actual debt, such larger sum is always a penalty. But the rule is otherwise where a less sum is to be taken for a greater, if paid at a certain time.¹

Where a deed contains several stipulations of various degrees of importance, as to some of which the damages might be considered liquidated, whilst for others they might be deemed unliquidated, and a sum of money is made payable in gross on a breach of any of them, the courts hold it to be a penalty only, and not liquidated damages.²

the damages which would result from a breach thereof is difficult or impossible of ascertainment, the fact that the parties have deliberately named a sum which should be treated as liquidated damages on the happening of a breach is of the highest importance in determining the question."

A stipulation in a bond that the obligor should not practise his profession in a particular place was held to be liquidated damages. Miller v. Elliot, I Ind. 484. See, contra, Burrill v. Daggett, 77 Mo. 545; Heatwole v. Gorrell, 35 Kan, 602.

545; Heatwole v. Gorrell, 35 Kan. 602. In Cushing v. Drew, 97 Mass. 445, where a business was sold with the goodwill of the seller, and a sum was named in the contract, as damages for breach of the good-will contract, the amount was held to be liquidated damages.

An agreement to pay an attorney \$15,000 in case a suit was taken from his control, was also held to be liquidated damages. Ryan v. Martin, 16 Wis. 57.

A railway company made application for the right of way through certain streets of a town, which was refused, and afterwards obtained permission to go through the same streets, by agreeing to extend the road a certain distance beyond the town, and executed a bond in the sum of \$50,000, as stipulated damages, conditioned for the faithful performance of their agreement. The railroad company failed to perform its part of the contract, and the city brought suit on the bond. Held, that the amount named in the bond was stipulated damages, recoverable assuch, and not a penalty; the damage from failure to perform the contract being incapable of accurate computation, and the amount having been agreed upon by both parties with a full knowledge of all the facts. Indianola v. G., W. T. & P. R., 56 Tex. 594.

1. Larger Sum Payable for Lesser.—I Suth. Dam. 497; Cairnes v. Knight, 17 Ohio St. 69; Fitzpatrick v. Cottingham, 14 Wis. 219; Mead v. Wheeler, 13 N. H.

353; Niver v. Rassman, 18 Barb, (N. Y.) 55; Kuhn v. Meyers, 37 Iowa, 351; Wallis v. Carpenter, 13 Allen (Mass.), 19; Corley v. Carter, 23 Ala, 612. In Waggoner v. Cox, 40 Ohio St. 539, the rule was laid down that where the larger sum mentioned in a note is the actual debt, and a smaller sum has been agreed upon as a release, if paid under stated conditions, the failure to comply with the easier terms gives the creditor the right to enforce the payment of the larger sum.

In Thompson v. Hudson, L. R. 4 H. L. I, it was held that if there was a larger sum due, and the creditor agreed to take a lesser sum, if paid upon a certain day, or in a particular manner, and the debtor failed to pay the lesser sum, the court would not relieve against the payment of the larger sum.

In Morris v. McCoy, 7 Nev. 399, it was said: "Although, as a general rule, it is acknowledged that the intention of the parties, as expressed in the contract, should be enforced, still it is clearly ignored in that class of cases where the parties stipulate for the payment of a large sum of money as damages for the non-payment of a smaller sum at a given day. In such cases, it is said, no matter what may be the language of the parties, the larger sum will be deemed a penalty, and not liquidated damages." Berrinkott. v. Traphagen, 39 Wis. 219.

v. Traphagen, 39 Wis. 219.

2. Various Stipulations. — Green v. Price, 13 M. & W. 695, affirmed in 16 M. & W. 346; Carpenter v. Lockhart, I Ind. 434; Cotheal v. Talmage, 9 N. Y. 551; Tayloe v. Sandiford, 7 Wheat. (U. S.) 13; Dailey v. Litchfield, 10 Mich. 29; Hammer v. Breedenbush, 31 Mo. 49; Charleston Fruit Co. v. Bond, 26 Fed. Rep. 18.

The rule was laid down in Green v. Price, 13 M. & W. 695, supra, in addition to the rule quoted in the text, that "when the damages are altogether uncertain, and yet a definite sum of money is expressly made payable in respect to it by way of

In doubtful cases the courts are inclined to construe the stipu-

lated sum as a penalty.¹
9. Measure of Damages.—I. CONTRACTS.—(A) Contracts for Payment of Money.—The measure of damages for the breach of contracts for the payment of money is the principal, and legal interest

liquidated damages, those words must be read in the ordinary sense, and cannot be construed to import a penalty." part of the rule, as applied in that case to an instrument containing several stipulations, has not been generally followed. As to it, the court said in Lyman v. Babcock, 40 Wis. 503: "Such a rule would not only put the same value on a small part as on a large part, but would put the same value on any part as on the whole.

Where the contract is to do several things, and one sum is to be paid for breach, that sum is intended and regarded as adequate compensation for a breach of the whole contract, for it is all the promisor is to pay if he breaks the whole. It would be most unjust and oppressive to require him to pay the whole sum for violating any one of the least important items of the contract. 2 Parsons on

Cont. (4th Ed.) 438. If a contract contains stipulations for performance of divers things, and the damages resulting from non-performance of some of them are capable of being measured by a precise sum, and one sum is stipulated to be paid in respect to the non-performance of the contract generally, that sum is a penalty, although the parties choose to call it liquidated damages and not penalty, and so express it in the contract. I Addison on Cont., §

496; Astley v. Wilson, 2 B. & P. 346, 353.

Statutory Penalty.—Where a penalty is imposed by statute for the doing or omission of a certain act, the courts will not mitigate the penalty, for it would be in contravention of the direct expression of the legislative will. Story's Eq. (12th Ed.) § 1326; Powell v. Redfield, 4 Blatchf. (U. S.) 47; U. S. v. Montell, Taney (U.

S.), 47. In Clarke v. Barnard, 108 U. S. 436, on required by statute to be given to the State of Rhode Island by the B., H. & E. R. Co., conditioned to complete the road within a given time, it was held that such a bond was in the nature of a statutory penalty, and that it was not necessary for the State to show any actual damage in order to be able to recover the full penalty of the bond; and accordingly, judgment was entered up for \$100,000, the amount named in the bond.

1. Construction in Doubtful Cases -Wallis v. Carpenter, 13 Allen (Mass.), 19; Cheddicke v. Marsh, 21 N. J. L. 463. In Shreve v. Brereton, 51 Pa. St. 175, Read, J., quotes as follows: "The general leaning," says Judge Coulter, "how-ever, is, that such agreements shall be considered as penalties, so that a party shall recover such damages only as he shows that in justice and fairness he ought to recover. The general rule of law is that the remedy shall be commen surate with the injury sustained.'

Courts generally are inclined to treat a fixed sum designated as damages in a contract as a penalty, and to hold that the real damages are to be inquired into. Farrar v. Beeman. 63 Tex. 175.

The tendency and preference of the law is to consider a sum payable for breach of contract as a penalty, over which it has control, rather than as liquidated damages. Lansing v. Dodd, 45 N. J. L. 525.
2. Fletcher v. Tayleur, 17 C. B. 29.

"... All damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages." Loudon v. Tax-

ing Dist., 104 U. S. 771.
"Interest is allowable as damages in such a case-contract to pay moneyfrom the time the payments were due, or from demand made, when the defendant. refuses to account or make payment; but the plaintiff cannot recover special damages for the detention of money due tohim beyond what the law allows as interest." Insurance Co. v. Piaggio, 16. Wall. (U. S.) 378; Kendall v. Stokes, 3. How. (U. S.) 102.

Where money was to be paid for a special object, which was known to the defendant, such as the maintenance of credit, payment of taxes, and the discharge of liens, damages have been given in addition to interest. Prehn v. Royal Bank of Liverpool, L. R. 5 Ex. 92; Boyd v. Fitt, 14 Ir. C. L. 43; Ilsley v. Jones, 12 Gray (Mass.), 260; Riggs v. Lindeau 7 Granch (C. C.), 500. In Mar. Lindsay, 7 Cranch (C. C.), 500. In Marzetti v. Williams, 1 B. & Ad. 415, a banker was held liable to damages for refusing to pay a check.

(B) Contracts for the Sale of Real Estate.—When the purchaser refuses to comply with his contract, the measure of damages is the difference between the contract price and the value of the land at the time the contract was broken.1

If the vendor has title and refuses to convey, he will be liable

to substantial damages.2

When the vendor is unable to make a good title, some courts allow substantial damages, whether the default is caused by unforeseen circumstances, or whether the vendor has acted in bad faith. In other courts only nominal damages are allowed, except where the defendant has entered into the contract knowing that he could not fulfil it, or where he has been guilty of fraud.3

In Tuers v. Tuers, 100 N. Y. 196, the plaintiffs, being possessed of an undivided interest in certain real estate in the city of New York, appointed defendant as their agent to collect the rents thereof, he agreeing to pay all taxes and water rents charged on the premises out of the rents collected; he collected the rents, retained the amount of certain taxes and water rents, but did not pay the same, and wrongfully appropriated to his own use the sums so retained. It -appeared that high rates of interest were chargeable upon taxes unpaid. that, in consequence of the non-payment, the holder of a mortgage upon the premises had begun a foreclosure. Held, that plaintiffs' right to recover was not limited to their share of the rents, etc., so misappropriated, with interest, but they were entitled to recover all such damages as flowed naturally and proximately from the breach. See Bank v. Peck, 127 Mass. 298; Saylor v. Bushong, 100 Pa.

1. Breach of Contract for the Sale of Real Estate.—The measure of damages for the breach of contracts for the sale of real estate when the vendee is in default is the difference between the contract price and the value of the land at the time the contract was broken. In Old Colony R. Co. v. Evans, 6 Gray (Mass.), 25, the court said: "Upon more full consideration of the measure of damages in an action at law, where the defendant has refused to receive the deed tendered him, the court are of opinion that the proper rule of damages in such a case is the difference between the price agreed to be paid for the land and the salable value of the land at the time Sabin, 51 N. H. 167; s. c., 12 Am. Rep. 76; Porter v. Travis, 40 Ind. 556; Meason v. Kaine, 67 Pa. St. 126.

2. When the vendor voluntarily conveys away his title, or refuses to make conveyance to the purchaser, he will be liable to substantial damages. Strutt v. Farlar, 16 M. & W. 249; Lewis v. Lee, 15 Ind. 499; Pumpelly v. Phelps, 40 N. 75 Ind. 499, Fulliperry 2. Inches, 40 K. Y. 60; Graham v. Hackwith, I A. K. Marsh. (Ky.) 429; Wilson v. Spencer, II Leigh (Va.), 261; Skaaraas v. Finnegan, 31 Minn. 48; Hammond v. Hannin, 21

Mich. 374; s. c., 4 Am. Rep. 490.

3. Where Vendor is Unable to Make Title.-Where the vendor is unable to make a good title, the rule laid down in Flureau v. Thornhill, 2 W. Bl. 1078, is that if the title proves bad, and the vendor is, without fraud, incapable of making a good one, the purchaser is not entitled to any damage for the fancied goodness of the bargain, which he supposes he has lost. An exception to this rule was introduced in Hopkins v. Grazebrook, 6 B. & C. 31, allowing more than nominal damages in case of fraud. But the correctness of this exception has been doubted; and in Sikes v. Wild, \mathbf{I} B. & S. 587, the judge said, "I do not see how the existence of misconduct can alter the rule by which damages for breach of contract are to be assessed." Bain v. Fothergill, L. R. 7 Eng. & Ir. App. 158.

In this country many courts make no distinction, but allow substantial damages in all cases, as in contracts for the sale of goods, whether the breach results sale of goods, whether the breach results from inability to perform the contract, or from bad faith. Hopkins v. Lee, 6 Wheat. (U. S.) 109; Lawrence v. Chase, 54 Me. 196; Case v. Wolcott, 33 Ind. 5; Brigham v. Evans, 113 Mass. 538; Harrison v. Charlton, 37 Iowa, 134; Cannel v. McLean, 6 Har. & G. (Md.) 297; Barbour v. Wicheles a P. 1887 Galox in Calculation. v. Nichols, 3 R. I. 187; Gale v. Dean, 20

Ill. 320.

In Pennsylvania it seems that only expenses and nominal damages can be recovered in any case. McNair v. Compton, 35 Pa. St. 23; Burk v. Serrill, 80 Pa. St. 413.

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When the damages are nominal, he recovers the amount he has

paid and his expenses; when substantial, the value of his bargain.¹
(C) Contracts for the Sale of Personal Property.—(I) Seller Against Buyer.—For breach of an executed contract of sale, the seller may recover the contract price of the goods; and if no price has been agreed upon, the value of the goods at the time of executing the order.2

In other courts the rule is that the vendor is liable only for nominal damages, when he is unable to make a good title from no fault of his own; but if at the time of making the contract he knew that he had no title, he is liable for substantial damages. Pumpelly v. Phelps, 40 N. Y. 60; Cockcroft v. N. Y., etc., R. Co., 69 N. Y. 201; Drake v. Baker, 34 N. J. 358.

In many States, where the vendor acts in good faith he will be liable only to nominal damages, but if there is fraud he will be held to substantial damages. Sawyer v. Warner, 36 Iowa, 333; Thompson v. Guthrie, 9 Leigh (Va.), 100; Bush v. Cole, 28 N. Y. 261; Tracy v. Gunn,

29 Kan. 509.

1. When nominal damages only are recoverable, the vendee recovers any payments he has made, and his expenses in searching the title. Walker v. Moore, 10 B. & C. 416; Thompson v. Guthrie, 9 Leigh (Va.), 100; McNair v. Compton, 35

Pa. St. 23.

When substantial damages are allowed, the vendee recovers the difference between the contract price and the market value of the land at the time when the conveyance should have been made. Allen v. Atkinson, 21 Mich. 351; Dustin v. Newcomer, 8 Ohio, 49; Pumpelly v. Phelps, 40 N. Y. 59; Drake v. Baker, 34

N. J. L. 358.
2. For Breach of Executed Contract. Konitzky v. Meyer, 49 N. Y. 571; Althouse v. Alvord, 28 Wis. 517; Hill v. Hill, 1 N. J. L. 261; Bailey v. Smith, 43 N. H. 111; Morse v. Sherman, 106 Mass. 430; Scotten v. Sutter, 37 Mich. 526. To entitle the seller to recover the contract price the title must have passed to the

In Pittsburgh, etc., R. Co. v. Heck, 50 Ind. 303; s. c., 19 Am. Rep. 713, it was

"It is conceived that in all cases of contracts for the sale of personal property, where it has any market value, the vendor, before he can recover of the vendee the contract price, must have delivered the property to the vendee, or have done such acts as vested the title in the vendee, or would have vested the title in

him, if he had consented to accept it: forthe law will not tolerate the palpable injustice of permitting the vendor to hold the property, and also to recover the. price of it."

In Indianapolis, etc., R. Co.v. Maguire, 62 Ind. 140, it was held that there could be no recovery by the seller of personal property as upon a sale and delivery. where there was no proof of anything done on the part of the plaintiff which divested him of his title or which restricted him in his control over the property. In Fell v. Muller, 78 Ind. 507, the same distinction was recognized.

But in Pearson v. Mason, 120 Mass. 53, where the defendant agreed to purchase certain stocks from the plaintiff, it was held that upon tender before action brought, and also at trial, of the stock, the plaintiff could recover the whole contract price. Bridgeford v. Crocker, 60 N. Y. 627; Bagley v. Findlay, 82 Ill. 524; Chicago v. Greer, 9 Wall. (U. S.)

726.

It was said in Dustan v. McAndrew, 44 N. Y. 72: "The vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three methods to indemnify himself: 1. He may store or retain the property for the vendee, and sue him for the entire purchase price; 2. He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or, 3. He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price.

Where the goods have been manufactured for a special purpose, on the buyer's order, the seller may tender the goods, and sue for the entire contract price. Gordon v. Norris, 49 N. H. 383; Ballentine v. Robinson, 46 Pa. St. 177; Goddard v.

Binney, 115 Mass. 450.

In Shawhan v. Van Nest, 25 Ohio St. 490; s. c., 18 Am. Rep. 313, the plaintiff had agreed with the defendant that for a certain sum the former would furnish the materials and make for the latter a car-

For breach of an executory contract of sale, the seller may recover his actual damage, which is usually the difference between the contract price and the market value of the goods at the time and place of delivery, with interest.1

(2) Buyer Against Seller.—If the seller fails to deliver the goods. the buyer may recover the difference between the contract price and the market value of them at the time and place of delivery.2

riage in accordance with the defendant's directions, and have it completed and ready for delivery at a certain place on a certain day. The plaintiff alleged that he had complied with the contract on his part, and at the time stipulated had tendered the carriage to the defendant at the place appointed, and had requested him to accept and pay for it, which he refused On the trial the evidence established the contract and the other averments of the petition, and showed that the plaintiff was still keeping the carriage subject to the defendant's order. It was held that the plaintiff was entitled to recover, as prayed in the petition, the contract price and interest thereon.

Where lumber was sawed in special sizes to fill a bill of lumber ordered by the defendant, it was held that the seller might hold the lumber subject to the buyer's order, and sue for the whole contract price, upon his refusal to accept it. And that as the place of delivery was St. Louis, 200 miles distant from the mill, the seller was not required to go through the expensive and meaningless form of tendering the lumber at the place of de-livery. Black River Lumber Co. v. Warner (Mo. Sup. Ct.), Alb. L. J., March 24, 1888; Canada v. Wick, 100 N. Y.

If the goods have been procured for the buyer, and are of a kind not salable in market, the seller may tender them, and sue for the price. Allen v. Jarvis, 20 Conn. 38; Thorndike v. Locke, 98 Mass. 340; Bookwalter v. Clark, 11 Biss. (U. S.) 126.

1. For Breach of Executory Contract .-Clement, etc., Co. v. Meserole, 107 Mass. 362; Danforth v. Walker, 37 Vt. 239; Young v. Merton, 27 Md. 114; Nixon v. Nixon, 21 Ohio St. 114; Gibbons v. on v. Nixon, 21 Ohio St. 114; Gibbons v. U. S., 8 Wall. (U. S.) 269; Hayden v. Demets, 53 N. Y. 426; Rand v. White Mountains R. Co., 40 N. H. 79; Laubach v. Laubach, 73 Pa. St. 392; Harris Manf. Co. v. Marsh, 49 Iowa, 11; Whelan v. Lynch, 65 Barb. (N. Y.) 329; 60 N. Y. 469; Northup v. Cook, 39 Mo. 208.

The time when the contract is to be considered as hypolen is not the time.

considered as broken is not the time when the buyer gives notice that he in-

tends to break the contract, but the time when the goods were to be delivered. Philipots v. Evans, 5 M. & W. 475; Follansbee v. Adams, 86 Ill. 13. In Kadish v. Young, 108 Ill. 170; s.c., 48 Am. Rep. 548, it was held that in ordinary cases of contracts for the sale of personal propertv for future delivery, where the purchaser fails to receive and pay for it at the stipulated time, the measure of damages the difference between the contract price and the market or current value of the property at the time and place of delivery; and this rule is not affected by notice to the seller by the buyer before the day of delivery that he will not receive the property, unless the seller, upon receiving such notice, shall elect to then terminate the contract. The price paid by the seller for an article by him sold and contracted to be delivered in the future, is not a circumstance to be taken into consideration.

The market price will usually fix the value of the goods; and the seller may resell as agent for the buyer, after having given him notice of his intention to sell, according to trade usage. Whitney v. Boardman, 118 Mass. 242; Saladin v. Mitchell, 45 Ill. 79; Pollen v. Le Roy. 30 N. Y. 549; Hickock v. Hoyt, 33 Conn. 553; Rickey v. Tenbroeck, 63 Mo. 563.

2. It is the general rule, that on the vendor's failure to deliver the goods according to the contract, the measure of damages is the difference between the contract price and the market price, at the place where and the time when they should have been delivered. 2 Benj. on Sales, § 1335; Sleuter v. Wallbaum, 45 Ill. 44; Worthen v. Wilmot, 30 Vt. 555; Grand Tower Co. v. Phillips, 23 Wall. (U. S.) 471; Rose v. Bozeman, 41 Ala. 678; Miles v. Miller, 12 Bush (Ky.), 134; Gordon v. Norris, 49 N. H. 376; Somers v. Wright, 115 Mass. 292; Kountz v. Kirkpatrick, 72 Pa. St. 376; s. c., 13 Am. Rep. 687, note; Burnham v. Roberts, 70 Ill. 19; Parsons v. Sutton, 66 N. Y. 92; Bush v. Mol. 396; Chadwick v. Butler, 28 Mich. 349; Gray v. Hall. 29 Kan. 704; Marsh v. McPherson, 105 U. S. 709; Guice v. Crenshaw, 60 Tex. 344.

When there is no market at the place of delivery, the price of the goods in the nearest market, with the cost of transportation added, determines their value.¹

1. Nearest Market.—If there is no market at the place of delivery, the value of the goods is estimated by the price in the nearest and most suitable market, with the cost of transportation added or deducted. Washington Ice Co. v. Webster, 68 Me. 463; Griffin v. Colver, 16 N. Y. 489; Rice v. Manley, 66 N. Y. 82; McHose v. Fulmer, 73 Pa. St. 365; East Tenn. etc. R. Co. v. Hale, 85 Tenn. 69.

If there is no such market price at the place of delivery, and the goods are costly and difficult of transportation from a distance, and are intended to be used for manufacturing purposes, then the market price may be arrived at by deducting the cost of manufacturing and the price of the raw material from the market price of the manufactured article. Equitable Gas Light Co. v. Balto. Coal Tar & Manuf. Co., 65 Md. 73.

In Wood's Mayne on Damages, § 22, the rule is thus laid down: "But if they [the goods] cannot be purchased for want of a market, their value must be estimated in some other way. If there has been a contract to resell them, the price at which such contract was made will be

evidence of their value."

Upon the breach of a contract to furnish goods, when similar goods cannot be purchased in the market, the measure of damages is the actual loss sustained by the purchaser by reason of the non delivery. Culin v. Woodbury Glass Works,

108 Pa. St. 220.

The true measure of damages for a breach of a contract to sell and deliver five hundred gross of fruit jars, a part of which only were delivered, is the difference between the contract price and the market value of such articles at the time and place fixed by the contract for delivery. If such articles cannot be had in the market where by the contract they were to have been delivered, they may be bought in the nearest market, and the additional cost of getting them there will be the cost in the market where they were to be delivered. Capen v. De Steiger Glass Co., 105 Ill. 185.

But in Wire v. Foster, 62 Iowa, 114, where defendant sold and agreed to deliver to plaintiff at his farm a few miles from S. certain corn, to be paid for when delivered, at the market price, held, that, since the law presumes that plaintiff could have gone into the market and bought the corn at the market price, he was not

damaged by defendant's failure to deliver, and the fact that the quantity of corn contracted for was not in the market at S. at the time fixed for delivering is not material.

Market Value.—The market value and not the market price is the proper criterion. Usually the market price is the best evidence of the market value, but not always. Where there is an inflated speculative market price, not the result of natural causes, but of combinations to affect the market, the actual market value is the proper standard; and this may be ascertained by the market price either before or after the day of delivery. Kountze v. Kirkpatrick, 72 Pa. St. 376; s. c., 13 Am. Rep. 687; Durst v. Burton, 47 N. Y. 167; Cahen v. Platt, 69 N. Y. 343; Trout v. Kennedy, 47 Pa. St. 393; Stark v. Alford, 49 Tex. 260.

Resale.—If the buyer has a contract for resale at a higher price, his damages will not be increased thereby. Williams v. Reynolds, 6 B. & S. 495; Cole v. Swanston, I Cal. 51; Cockburn v. Ash-

land L. Co., 54 Wis. 619.

The measure of damages for failure to fulfil a contract to furnish saw-logs cannot be fixed by the loss occasioned to the other party from his own consequent failure to supply lumber therefrom under a contract subsequently made with other persons, the first contract not having been made on the strength of the second. Wetmore v. Pattison, 45 Mich. 439.

This rule, however, is changed when the vendor knows that the purchaser has an existing contract for a resale at an advanced price, and that the purchase is made to fulfil such contract, and the vendor agrees to supply the article to enable him to fulfil the same. In such case the profits which would accrue to the buyer upon fulfilling his contract or resale may justly be said to have entered into the contemplation of the parties in making the contract. Carpenter v. First Nat. Bank, 119 Ill. 354.

In Friend, etc., Co. v. Miller, 67 Cal.

In Friend, etc., Co. v. Miller, 67 Cal. 464, it was held that although the seller knew of the contract for resale, the buyer could not recover the loss resulting from his failure to fulfil the second contract. As to price-current lists and newspaper reports of markets as evidence of prices, see Harrison v. Glover, 72 N. Y. 451; Whelan v. Lynch, 60 N. Y. 469; Whitney v. Thacher, 117 Mass, 523.

Where the goods are to be delivered in instalments, the measure of damages is the sum of the differences between the contract price and the market price at the several times of delivery.1

Profits which are the direct and immediate fruits of the contract are recoverable; but not mere speculative profits, which are en-

tirely conjectural.2

Where Purchase-money is Paid in Advance.-In some States it has been held that where the purchase-money has been , paid, the buyer can recover the difference between the contract price and the highest market price, between the time of breach and the time of bringing suit, if suit is brought in a reasonable time. Cartwright v. McCook, 33 Tex. 612; West v. Pritchard, 19 Conn. 212; Kent v. Ginter, 23 Ind. 1; Maher v. Riley, 17 Cal. 445. It has been so held in New York. Commercial Bank v. Kortwright. 22 Wend. (N. Y.) 348; but see Baker v. Drake, 53 N. Y. 211. So in Gilman v. Andrews, 66 Iowa, 116, it was held that where payment is made in advance for goods to be delivered, the measure of damages for a failure to deliver is the difference between the contract price and the highest market price between the time of delivery named in the contract and the commencement of the action to Myer v. Wheeler, 65 Iowa, recover. 390.

And this was held to be the rule with regard to stock contracts in Bank, etc., v. Haines, 63 Me. 74; Musgrave v. Beckendorf, 53 Pa. St. 310. In Pinkerton v. Manchester, etc., R. Co., 42 N. H. 424, this rule was disapproved of with regard to stock contracts; and the courts generally disapprove of the rule with regard to stock contracts, as well as contracts for sale of other property. Balto., etc., Co. v. Sewell. 35 Md. 238; White v. Salisbury, 33 Mo. 150; Noonan v. Ilsley, 17 Wis, 314; Smith v. Dunlap, 12 Ill. 184; Hill v. Smith, 32 Vt. 433.

The time of delivery, and not the time when the seller gives notice that he intends to break the contract, is the rule. Thus, where the defendants renounced a contract for the delivery of iron rails, it was held that the time when the contract was to be considered as broken was at the time of delivery. Windmuller v. Pope (N. Y.), Alb. L. J. Feb. 11, 1888,

1. Delivery in Instalments.—The rule is stated by Sedgwick, in his work on the Measure of Damages, as follows: "Where delivery is required to be made by instalments, the measure of damages will be estimated by the value at the time

each delivery should be made. where a contract is for the delivery of goods in equal proportions, in a given number of months, and the action for non-delivery is brought after the period stipulated for the last delivery, the proper measure of damages is the sum of the differences between the contract and the market prices on the last day of each month respectively." I Sedgw. on Dam. (7th Ed.), 558, n.; Brown v. Muller, L. (7th Ed.), 558, n.; Brown v. Muller, L. R. 7 Exch. 319; Missouri Furnace Co. v. Cochran, 8 Fed. Rep. 463; Roper v. Johnson, L. R. 8 C. P. 167; Ex parte Llansamlet Tin Plate Co. (In re Voss), L. R. 16 Eq. 155; Tyers v. Rosedale & F. I. Co., L. R. 8 Exch. 305; Boorman v. Nash o Barn & C. 145, 152; Frost v. v. Nash, 9 Barn. & C. 145, 152; Frost v. Knight, L. R. 7 Exch. 111; Hill v. Chip-Mingnt, L. R. / Each. 11, Johnson v. Allen, 78
Ala. 387; s. c., 56 Am. Rep. 34.
In Roper v. Johnson, L. R. 8 C. P. 197,

the defendant agreed to sell to plaintiffs a fixed quantity of coal, at an agreed price, to be delivered during the months of May, June, July, and August. The defendant requested the plaintiffs, on the last of May, to consider the contract cancelled, to which the plaintiffs did not assent; and the defendant having refused, in June, to deliver any coal, the plaintiffs brought the action for the breach, on the 3d of The evidence showed that the price of coal had risen during the whole of the month of May, and was still rising at the time of trial, which was in August. It was held, "that, in the absence of evidence on the part of the defendant that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss; the true measure of damages was the sum of the differences be-

not elapsed when the action was brought or when the cause was tried." Wood's. Mayne on Dam. § 206; 2 Benj. on Sales, §§ 1331, 1332, 1333; Shreve v. Brereton, 51 Pa. St. 176.

tween the contract price and the market.

price at the several periods of delivery,

notwithstanding that the last period had

which the profit to be made by the bargain is the only thing purchased, and in such cases the amount of such profit is strictly the measure of damages. Wood's Mayne on Damages, p. 82. It

2. Profits. - There are many cases in

has been held that when the defendants refused to allow the contract to be executed, that the jury should allow the plaintiffs as much as the performance of the contract would have benefited them. Profits or advantages, which are the direct and immediate fruits of the contract entered into between the parties, are part and parcel of the contract itself, entering into and constituting a portion of its very elements-something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration, and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement. Masterton v. Mayor of Brooklyn, 7 Hill Morrison v. Lovejov, 6 (N. Y.), 62: Minn, 224 (310); Fox v. Harding, 7 Cush. (Mass.) 516; Devlin v. Mayor, etc., 63 N. Y. 8; Royalton v. Royalton & W. T. Co., 14 Vt. 311; McAndrews v. Tippett, 30 N. J. 105; Richmond v. Dubuque, etc., R. Co., 40 Iowa, 264; s. c., 33 Iowa, 422, 501, 502; Hoy v. Gronoble, 34 Pa. St. 9; Burrell v. N.Y. & S. Salt Co., 14 Mich. 34; U. S. v. Speed, 8 Wall. (U. S.) 77; Cook v. Com'rs Hamilton Co., 6 McLean (U. S.), 612; McHose v. Fulmer, 73 Pa. St. 365; Hubbard v. Rowell, 51 Conn. 423; Jones v. Foster, 67 Wis. 296; Kendall, etc., Co. v. Com'rs, etc., 79 Va. 563; Nat. Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535; Bell v. Reynolds, 78 Ala. 511; s. c., 56 Am. Rep. 52; Fairchild v. Rogers, 32 Minn. 269; U. S. v. Behan, 110 U. S. 338.

In Passenger v. Thorburn, 34 N. Y. 634, where the defendant had sold cabbage-seed to the plaintiff, and warranted them to produce "Bristol cabbages," which was untrue, it was held that the damages recoverable for the breach of warranty would be the value of a crop of "Bristol cabbages," such as would have been ordinarily produced that year, less the expense of raising the crop and of the value of that actually raised from the seed.

The case of White v. Miller, 7 Hun (N. Y.), 427, was one precisely of the same kind, and was decided on the authority of the foregoing decisions. Its correctness was reaffirmed on appeal in 71 N. Y. 118; s. c., 27 Am. Rep. 13; and again in 78 N. Y. 393; s. c., 34 Am. Rep. 544. So was Flick v. Weatherbee, 20 Wis. 392, where a like ruling was made.

Another well-considered case is that of Jones v. George, 61 Tex. 345; s. c., 48 Am. Rep. 280, in which is cited a strong array of relevant authorities. In

that case a druggist was applied to for "Paris green," knowing that it was intended to be used in destroying cottonworms. He, in good faith, delivered "chrome green," a different and inferior article, which was neither "Paris green" nor possessed its properties, though resembling it in appearance. The vendor was held liable for the loss of the purchaser's erop of cotton caused thereby, and the measure of the plaintiff's damages was held to be the value of the crop just before its destruction, with the cost of the compound and its preparation and application, and interest on the moneys thus expended.

But it has been held otherwise. Thus plaintiff purchased potatoes from defendant which were represented as "Early Rose" potatoes, when in fact they were a later and different kind. Plaintiff was a gardener, and wanted potatoes for early market. He sued defendant for damages. Held, he could only recover the difference in value. He could not recover speculative damages. Hurley v. Buchi, 10 Lea (Tenn.), 346.

Grover, J., in Taylor v. Bradley, 4 Abb. App. Dec. (N. Y.), 363, said: "An examination of the cases will show that the courts have been endeavoring to establish rules by the application of which a party will be compensated for the loss sustained by the breach of the contract; in other words, for the benefits and gains he would have realized from its performance, and nothing more. It is sometimes said that the profits that would have been derived from performance cannot be recovered; but this is only true of such as are contingent upon some other operation. Profits which would certainly have been realized but for the defendant's default are recoverable. . . . It is not an uncertainty as to the value of the benefit or gain to be derived from performance, but an uncertainty or contingency whether such gain or benefit would be derived at all. . . . It is sometimes said that speculative damages cannot be recovered because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of. The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent The latter description and uncertain.

embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount:" that "the plaintiff will be fully compensated by recovering the value of his bargain. ought not to have more, and I think he is not precluded from recovering this by any infirmity in the law in ascertaining its amount." Cited with approval in Wakeman v. Wheeler, etc., Co., 101 N.Y. 205; s. c., 54 Am. Rep. 676. And in Bell v. Reynolds, 78 Ala. 511; s.c., 56 Am. Rep. 52, it was held, on a sale of guano, which the seller knew was intended for use by the purchaser in raising a cotton crop on his plantation, only one half of the stipulated quantity being delivered, and it being then too late to procure it elsewhere, the measure of damages to the purchaser is the difference in value between the cotton raised on the land on which the guano was used, and that raised on the adjoining land, of the same quality and cultivated in the same manner, on which no guano was used.

On the other hand, "mere speculative profits, such as might be conjectured would be the probable result of an adventure, defeated by the breach of a contract, the gains from which are entirely conjectural, and with respect to which no means exist of ascertaining even approximately the probable results, cannot, under any circumstances, be brought within the range of recoverable damages." I Suth. on Dam. 141; Ferris v. Comstock, 33 Conn. 513; Wolcott v. Mount, 36 N. J. L. 262; s. c., 38 N. J. 496; s. c., 20 Am. Rep. 425; Bergen v. New Orleans, 35 La. Ann. 523; Jones v. Nathrop, 7 Colo. 1; Howe Machine Co. v. Bryson, 44 Iowa, 159; s. c., 24 Am. Rep. 735; White v. Miller, 71 N. Y. 118; s. c., 27 Am. Rep. 13.

In Pennypacker v. Jones, 106 Pa. St. 237, the court said: "It was no part of this contract that the plaintiffs should make profits, or even have the opportunity of doing so, by carrying on a business with the machinery which the defendants agreed to erect. It is not like the sale of chattels or of land, where the difference between the contract value and the actual or market value of the property sold represents directly and immediately the measure of the party's loss or gain in the There the possible profit is transaction. the very object of the contract, and is necessarily in the contemplation of the parties. But when a machinist furnishes machinery to a mill-owner it is no part of his engagement that a profitable business shall be carried on with the machinery furnished. Of course if it is defective he is responsible for the damage resulting directly from such defect; but that is a very different thing from the uncertain, remote, and speculative profits which may or may not be made in the business to be done."

Loss of profits cannot be made the measure of damages for breach of contract where the profits are conjectural. speculative, dependent on chances, or have no reference to the nature of the contract and the breach; nor where the damages largely exceed the contract price, unless such a result is contemplated by the parties. The measure of damages for failure to furnish machinery at the date specified in the contract of purchase cannot be fixed at the loss of profits which might have been made from the use of the machinery, where the contract does not specify for what it is to be used, and there is no showing that all the other conditions to the realization McKinnon v. of the profits existed. McEwan, 48 Mich. 106; s. c., 42 Am. Rep. 458.

The plaintiff being employed as a travelling salesman for the defendants, to sell goods of different characters and qualities, at a compensation to be determined by a specified commission on the amount of sales of the different kinds of goods, the profits which he might have earned under the contract are purely speculative and conjectural; and his testimony as to the probable amount of sales, not stating any facts, is inadmissible as evidence for him in an action for a breach of the contract. Brigham v. Carlisle, 78 Ala. 243; s. c., 56 Am. Rep.

Where a railroad company contracted with the plaintiff to carry excursionists to a certain place, upon breach of the contract it was held that conjectural profits not based on actual agreements with those desiring to make the excursion, and with no definite knowledge of how many tickets could have been sold under the original contract, or for what profit, can form no legal basis for a recovery. Houston, etc., R. Co. v. Hill, 63 Tex. 381; s. c., 51 Am. Rep. 642.

The measure of damages to which a showman is entitled for breach of a contract for printing bills, etc., is the difference between what he was to have paid for the printing under the contract, and what he had to pay to effect, as far as possible, the same amount of advertising otherwise; and not the loss of the possible profits he might have made, had the show been advertised according to the contract.

(D) Contracts for Services.—The measure of damages for the breach of contract for services is the amount of compensation agreed upon, or if there has been no contract, the value of the services 1

Where the employer breaks the contract before performance, the measure of damages is the difference between the cost of doing the work and the amount the employee was to receive for it.2

Great West., etc., Co. v. Tucker (Iowa).

34 N. W. Rep. 205.

1. Where there is no contract the regen v. Wemple, 30 N. Y. 319; Weston v. Davis, 24 Me. 374; Stowe v. Buttrick, 125 Mass. 449; McEwen v. Kerfoot, 37 Ill. 530. covery is on the quantum meruit. Ber-

The value of the services generally, and not their value to the employer in the particular case, is the amount the employee is entitled to recover. Walker v. Rogers, 24 Md. 237; Brackett v. Sears,

15 Mich. 244.

Where there is no price fixed, the usual price at the time and place of performance is the rule. Bagley v. Bates,

Wright (Ohio), 705.
Where work is performed there is an implied promise to give reasonable compensation. Lewis v. Frickey, 20 Barb. (N. Y.) 387; Hay v. Walker, 65 Mo. 17. But where a person is employed upon the agreement that he will be paid whatever he sees fit to charge, he cannot make an unreasonable charge. Van Arman v. Byington, 38 Ill. 433.

After the expiration of the contract, there is a presumption that the employee continues to work upon the same terms. Huntingdon v. Claffin, 38 N. Y. 182; Ranck v. Albright, 36 Pa. St. 367. If the employee quits work before the

expiration of his contract without his employer's consent, he can recover nothing. Holmes v. Stummal, 24 Ill. 370; Larkin v. Buck, 11 Ohio St. 561; Ewing v. Ingram, 24 N. J. L. 520; Wolfe v. Howes, 20 N. Y. 197; Preston v. Am. Linen Co., 119 Mass. 400. But when the employee is prevented by sickness he recovers proportionately for the services rendered. Harrington v. Fall River, etc., Co., 119 Mass. 82; Callahan v. Shotwell, 60 Mo. 398; Hubbard v. Belden, 27 Vt. 645.

2. For wrongful dismissal the employee may sue on the contract, after its expiration, and recover the whole amount agreed to be paid, less what he has or might have earned in the mean while. Howard v. Daly, 61 N. Y. 362; Barber v. Knickerbocker, etc., Co., 24

Wis. 630.

In Everson v. Powers, 80 N. Y. 527: s. c., 42 Am. Rep. 319, it was held that where, upon breach of a contract of employment, by a wrongful discharge of the employee, an action is brought by him before the expiration of the term of service, but is not brought to trial until after the expiration thereof, plaintiff is entitled to recover the same damages as he would have been entitled to had the action been commenced after the expiration of the term, i.e., the difference between the compensation fixed by the contract for the service and what plaintiff has received, together with what he was able to earn after his discharge. But he must not remain idle. Jones v. Jones, 4 Md. 600; Chamberlain v. Morgan, 68 Pa. St. 168.

A person, who has been employed for a year and wrongfully discharged, is bound only to seek like employment, to prevent his damages from being reduced by his remaining idle; he cannot be required to seek employment in some other trade or calling. Fuchs v. Koerner (N. Y.), The Reporter, Feb. 1, 1888.
In Speed v. U. S., 8 Wall. (U. S.) 77.

in an action for a partial breach of contract, the court said the rule for estimating damages for breach of contract by the employer was "the difference between the cost of doing the work and what claimants were to receive for it, making reasonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the conmasterton v. Brooklyn, 7 Hill (N. Y.), 62; Goodrich v. Hubbard, 51 Mich. 63; Nash v. Hoxie, 59 Wis. 384; Singleton v. Wilson, 85 Tenn. 344; Rice v. Caudle, 71 Ga. 605.

In case of a contract for doing specific work at a specified price, the measure of damages for a refusal to allow the work to be done is the profit which would have been realized by the contractor if he had been permitted to perform it, and not the difference between the contract price and the sum which the contractor actually received from other employments during the time which would have been required

II. TORTS.—(A) Injuries to Property.—(1) Real Property.— (a) Trespass.—(See also PROSPECTIVE DAMAGES, ante, § 6.)—In actions for injury to real property, where the injury is done to the realty itself, the measure of damages is the difference in the value of the land before and after the trespass, or in some cases the amount necessary to restore the property to the condition in which it was before the trespass was committed.1

Where the injury consists in removing fixtures, cutting timber; etc., the measure of damages is the value of the property taken,

and the injury done to the land by its removal.2

for completing the work. Nilson v. Morse, 52 Wis. 240.

In U. S. v. Behan, 110 U. S. 338, it is said: "When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a quantum meruit. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claim for the loss of anticipated profits, he may do so subject to the rules of law as to the character of profits which may be thus claimed."

1. Injury to the Realty.—Where the

cost of putting the premises in the same condition in which they were before the trespass exceeds the increased value thereby added to the land, the depreciation in value of the land will usually be held to be the measure of damages. Thus for wrongfully causing a gravel bar to be formed upon the plaintiff's land, the difference in value of the land with and without the bar, and not the cost of removing it, was held to be the rule. Easterbrook v. Erie R. Co., 51 Barb. (N. Y.) 94; Hanover Water Co. v. Ashland Iron Co., 84 Pa. St. 279. So in an action for removing lateral support, the decrease in the value of the land, and not the cost of restoring it to its former condition, is the measure of damages. McGuire v. Grant, 25 N. J. L. 356; Gilmore v. Driscoll, 122 Mass. 199.
In an action for a violation of the

plaintiff's right to lateral support, by so digging upon the defendant's adjoining land as to cause a portion of the plaintiff's land and a stone wall upon it to fall, and to endanger trees which have been set out upon the land, designed for a burialplace, which design is not known to the defendant, although the defendant is: guilty of gross carelessness, the measure of damages will not include injury to the plaintiff's feelings. White v. Dresser, 135 Mass. 150; s. c., 46 Am. Rep. 454.

Where the evidence tended to show that plaintiff's meadow was so injured by a fire negligently set out by defendant that the roots of the grass were destroyed, so that the meadow would not produce grass for mowing, it was held that the court properly instructed the jury that plaintiff's measure of damages was the cost of restoring the meadow to as good a condition as it was in before the fire. Vermilya v. Chicago, etc., R. Co., 66 Iowa, 606,

So in Sabine, etc., R. Co. v. Joachimi, 58 Tex. 456, it was held, in an action for negligently causing an overflow of the plaintiff's land, that the measure of damages for injury to the ground would be the cost and expense of restoring the land to its former condition, and the loss occasioned by being deprived of the use of the same, with interest.

The decrease in the rental value of the: premises forms the most certain rule by which to estimate the damages. Willey v. Hunter, 57 Vt. 479; Carli v. Union, etc., R. Co., 32 Minn. 101.

Possession gives a right of recovery; and the plaintiff's recovery depends upon the nature of his estate; a tenant is entitled to such an amount as will render his possession as beneficial during his term as it would have been but for the trespass; the reversioner recovers for permanent injury to the land. Gilbert v. Kennedy, 22 Mich. 117. The plaintiff recovers in the proportion which his estate bears to that of other owners. Jackson v. Todd, 25 N. J. L. 121. So a tenant cannot recover for the cutting of trees which it would have been waste for him to cut. McKeen v. Gammon, 33 Me. 187.

2. Removing Fixtures. - For removing fixtures, cutting timber, etc., the measure of damages is the value of the property taken away, and the injury done to the

Where the defendant has been guilty of no intentional wrong, according to the best authorities the value of the property in situ is the measure of damages.1

land. Karsy v. St. Paul, etc., R. Co., 22 Minn. 118; Sturgis v. Warren, 11 Vt. 433; Kolb v. Bankhead, 18 Tex. 229.

The damages may exceed very far the value of the trees after severance, as in the case of fruit and shade trees. Van Deusen v. Young, 29 Barb. (N. Y.) 9; Whitbeck v. N. Y. Cent. R. Co., 36 Barb. (N. Y.) 644.

Some courts confine the damages to the value of the property before the trespass was committed, on the principle that the plaintiff is entitled to compensation only for the injury. Foote v. Merrill, 54 N. H. 490; Longfellow v. Quimby, 33 Me. 457; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass 80; U. S. v. Magoon,

3 McLean (U. S.), 171. In Blaen Avon Coal Co. v. McCulloh, 59 Md. 403; s. c., 43 Am. Rep. 560, the court said: "The general rule in actions of trespass for mining and carrying away coal, as laid down by this court in the case of The Barton Coal Co. v. Cox, 39 Md. I, and reannounced in Franklin Coal Co. v. McMillan, 49 Md. 549, is that the plaintiff is entitled, independently of circumstances of aggravation, to recover the value of the coal immediately upon its conversion into a chattel by a severance from the freehold, without abatement of the cost of severance. In the former case the prayer of the plaintiff on this point, which was excepted to below and sustained on the appeal, applied the substance of the rule in these words: "Such sum per ton as the jury may find the said coal so mined was worth when first severed from its native bed, and before it was put upon the mine cars, without deducting the expense of severing said coal from its native bed.

The rule was adopted by the court of appeals after a full consideration of the leading English cases on this subject. Martin v. Porter, 5 M. & W. 351; Morgan v. Powell, 3 Ad. & El. N. S. 281; Wood v. Morewood, 3 Ad. & El. 440; and Wild v. Holt, 9 M. & W. 672.

Among the cases that may be cited in which other courts of this country have reviewed these English authorities, and applied the same rule of compensation, are Bennett v. Thompson, 13 Ired. (N. Car.) 146; Moodey v. Whitney, 38 Me. 174; Maye v. Tappan, 23 Cal. 306; and McLean Co. Coal Co. v. Long, 81 Ill. 359, followed in McLean Co. Coal Co. v. Lennox, 91 Ill. 561.

1. In Herdic v. Young, 55 Pa. St. 176, it was said: "Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real iniury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of action so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value in place, and with such other damage to the land as his mining may have caused." Coxe v. England, 65 Pa. St. caused. Coxe v. England, 05 1 a. C. 212; Webster v. Moe, 35 Wis. 75; Railway Co. v. Hutchins, 32 Ohio St. 571; Winchester v. Craig, 33 Mich. 205; Chamberlain v. Collinson, 45 Iowa, 429; In Ross v. Scott, 15 Lea (Tenn.), 479, a defendant, who by mistake mined coal, cut timber, and built houses on another's land, was held liable for the value of the coal in situ, and entitled to allowance for permanent improvement to the land. The court said: "The weight of authority, both of English and American, now is, that where there is an honest dispute as to title, or where the trespass has been from ignorance and not wilful, the damages will be confined to the value of the property before the trespass was committed, or, to use the language of the English courts, 'at the same rate as if the property taken had been purchased in situ by the defendant at the fair market value of the district," and cited Wood v. Morewood, 3 Q. B. 440; Jegon v. Vivian, L. R. 6 Ch. 742; Hilton v. Woods, L. R. 4 Eq. 432; In re United Merthyr Collieries Co., L. R. 15 Eq. 46; Living-Colleries Co., L. R. 15 Ed. 46; Livingston v. Raward's Coal Co., 42 L. T. (N. S.) 334; Goller v. Felt, 30 Cal. 481; Forsyth v. Wells, 41 Pa. St. 291; Ward v. Carson River Wood Co., 13 Nev. 44; Weymouth v. Chicago, etc., R. Co., 17 Wis., 550; Foote v. Merrill, 54 N. H. 490; Longfellow v. Quimby, 33 Me. 457; Stockbridge Iron Co. v. Cove Iron Works, 102 Mass. 80; Railway Co. v. Hutchins. 32 Ohio St. 571. Hutchins, 32 Ohio St. 571.

This latter is the most general rule. See Tilden v. Johnson, 52 Vt. 628; s. c.,

36 Am. Rep. 769, n.

For destroying growing crops, the value at the time of the trespass is the measure of damages. Richardson v. Northup, 66 Barb. (N. Y.) 85; Gresham v. Taylor, 51

(b) Nuisance.—(See also Prospective Damages, ante. § VI.) -In actions for nuisance, as in other actions for torts, the measure of damages is compensation to the plaintiff for the actual injury inflicted. Where the injury is discomfort and injury to health, no precise rule can be laid down, and the amount of damages must be left to the jury in view of all the facts. For a permanent nuisance, the decrease in the rental value, or the difference in the value of the premises with and without the nuisance, is the measure of damages.1

(2) Personal Property.—(a) Trespass.—For asportation or destruction of his personal property, so that the owner is wholly deprived

The value at maturity, and Ala. 505. the labor necessary to put the crop in condition for market, are the data from which to estimate its value. Van Wych z. Allen, 69 N. Y. 61; Jenkins z. McCoy, 50 Mo. 348; Chicago z. Huenerbein, 85 Ill. 594; Smith z. Chicago, etc., R. Co.,

38 Iowa, 518.

In Sabine, etc., R. Co. v. Joachimi, 58 Tex. 456, it was held that the measure of damage to the growing crops was the difference between the value of such crops immediately after the injury and their value immediately before. The inquiry as to value should be confined to the very time of the destroying flood and the very place where it occurred, and should not extend to the date of the maturity of the crops, nor to the place where it would usually find a market.

1. McKnight v. Ratcliffe, 44 Pa. St. 156; Thayer v. Brooks, 17 Ohio St. 489; v. Railroad Co., 38 N. Y. 445; Frank v. Railroad Co., 20 La. Ann. 25.
Where the nuisance causes the loss of

a tenant, the rental value while unoccupied will serve as a guide to the proper amount of damages. Francis v. Schoell-kopf, 53 N. Y. 152; Wesson v. Washburn Iron Co., 13 Allen (Mass.), 95; Seeley v. Alden, 61 Pa. St. 312; Chase v. N. Y. Cent. R. Co. 24 Barb. (N. Y.) 273.

N. Y. Cent. R. Co. 24 Date. Co. The fact that the premises are occupied by the plaintiff, and are not rented, will not alter the rule. Michel v. Monroe, 39 Hun (N. Y.), 47. The owner may recover for loss in value to building lots, although no buildings have been erected. Peck v. Elder, 3 Sandf. (N. Y.) 126.
For injury to land by excavation, the

damage is not what it would cost to put it in its previous condition, but the actual damage done. McGuire v. Grant, I

Dutch. (N. J.) 356.

For raising a dam, by which the plaintiff's mill was interfered with, the diminution of profits was held to be the proper basis upon which to estimate the dam-

age. Simmons v. Brown, 5 R. I. 200. Benefits to the plaintiff's estate from the nuisance cannot be considered in mitigation of damages. Francis v, Schoellkopf, 53 N. Y. 152; Vinnel v. Vinnel, 4 Jones (N. Car.), 121.

In Sherman v. Fall River, etc., Co., 2 Allen (Mass.), 524, it was held that the plaintiff could recover not only for the inconvenience from gas escaping from the defective pipes of the defendant, but also for reasonable expenses in attempting to exclude it from his well. Jutte v. Hughes, 67 N. Y. 267.

Where the damage consists in injury to the plaintiff's business, it is proper to show the extent and profits of the business before the nuisance. Pollit v. Long, 58 Barb. (N. Y.) 20; Shafer v. Wilson, 44 Md. 268; St. Louis, etc., R. Co. v. Capps, 67 Ill. 607; Crawford v. Parsons, 63 N.

H. 438,

Damages for a nuisance cannot be awarded on the assumption that the nuisance is to be continued permanently. Uline v. N. Y. Cent. R. Co., 101 N. Y. 98; s. c., 53 Am. Rep. 123, note.
Thus, where the plaintiff alleges special

injury to property used for renting, from noise and bad odors, lessening its rental value, he cannot, besides having the nuisance abated, recover as for a permanent diminution of such rental value, but only for his loss prior to the commencement of the action. Stadler v. Griehen, 61 Wis. 500.

Sickness in plaintiff's family, caused by overflow of water from defendant's negligently constructed dam, is a proper element of damages where the same is pleaded in the petition. Brown v. Chicago,

etc., R. Co., 80 Mo. 457.
"It [the nuisance] must be something which produces real discomfort or annoyance through the medium of the senses; not from delicacy of taste or a refined (Case of undertaker's shop) Westcott v. Middleton (N. J.); Alb. L. J., Feb. 4, 1888.

of it, he is entitled to recover its value at the time of the trespass. and interest from that time. This is the measure of damages for an entire loss of the property. For any injury to it there is a right to a proportional recovery.1

1. 3 Suth. on Dam. 472; State v. Smith, 31 Mo. 566; Clapp v. Thomas, 7 Allen (Mass.), 188; Garretson v. Brown, 26 N. J. L. 425; Scott v. Bryson, 74 Ill. 420; Brannin v. Johnson, 19 Me. 361; Baker v. Drake, 53 N. Y. 211; Briscoe v. McElween, 43 Miss. 556; Stirling v. Garritee, 18 Md. 468; Ripley v. Davis, 15 Mich. 75; Fernwood, etc., Asso. v. Jones, 102

Pa. St. 307.

The value of the property in the nearest market is usually the measure of the plaintiff's damage. Brown v. Allen, 35 Iowa, 306; Coolidge v. Choate, 11 Met. (Mass.) 79; Starkey v. Kelley, 50 N. Y. 677. Where the thing taken has special value to the owner, such as family portraits, etc., the special value to the owner is to be considered. Spicer v. Waters, 65 Barb. (N. Y.) 227; Green v. Boston, etc., R. Co., 128 Mass. 221. In Houston, etc., R. Co. v. Burke, 55 Tex. 323; s. c., 40 Am. Rep. 808, it was said that in estimating the value of family portraits, the jury might look to their original cost, and to the probable cost of replacing them.

In Greenfield Bank v. Leavit, 17 Pick. (Mass.) I, the court said: "It is well settled, that if the property for which an action is brought should be returned to and received by the plaintiff, it shall go in mitigation of damages." Barrelett v. Bengard, 71 Ill. 280; Bates v. Clark, 95

U. S. 204.

The measure of the plaintiff's damages, in an action against a railroad company on account of cattle killed, is not necessarily the value of the animal when alive, but the difference in value between the living animal and the dead carcass; and though he may abandon the carcass, when comparatively worthless, and recover the full value of the living animal, yet if he converts it to his own use, or otherwise disposes of it, or if he might realize appreciable value for it by the exercise of reasonable diligence, the net amount of such value must be deducted. Georgia Pac. R. Co. v. Fullerton, 79 Ala. 298; Boing v. Raleigh, etc., R. Co., 91 N.

Where the property is sold by the trespasser, the plaintiff is not limited in his recovery to the amount for which it was sold. Smith v. Zent, 83 Ind. 86; s. c., 43 Am. Rep. 61. But if the plaintiff purchase at a sale made by the defendant, for

less than its value, the property taken, the amount paid will be the plaintiff's damage, and not the value of the property. Sprague v. Brown, 40 Wis. 612; Baker v. Freeman, 9 Wend. (N. Y.) 236; Hurl-

burt v. Green, 41 Vt. 490.

The plaintiff is entitled to the value of the use of his property from the time it was taken to the time of restoration. Farrel v. Colwell, 30 N. J. L. 123; Beadle v. Whitlock, 64 Barb. (N. Y.) 287.

In replevin for a boat wrongfully taken by the defendant, the measure of damages is a fair and reasonable compensation for its use, with such special damages as are known and necessarily accompanied the detention, and any actual injury occurring to the property. Such compensation cannot be determined by the prospective profits which the owner would have derived from the use of the boat, contingent upon his chance of business. Aber v. Bratton, 60 Mich. 357.

The defendant as constable attached the plaintiff's ox, which was exempt; and after the executions were paid the ox was returned. Held, that the measure of damages was the use of the ox; that if the defendant was to the expense of keeping the ox, it was the value of the use less such expense; that a failure to raise crops by reason of being deprived of the use of the ox was not the natural and proximate result of the attachment; that the plaintiff could not allow his land to go uncultivated and then ask the jury to speculate as to his loss; and that evidence was inadmissible to show it. Luce v. Hoisington, 56 Vt. 436.

The fact that the property was applied to the owner's benefit without his consent, cannot be shown in mitigation of damages, unless it was done by process of law. Bates v. Courtwright, 36 Ill. 518; Perham v. Coney, 117 Mass. 102; Sprague v. Brown, 40 Wis. 612. See Wehle v. Butler, 61 N. Y. 245.

Where goods were properly seized by a collector for non-payment of taxes, and the distress became void for an irregularity afterwards occuring in the officer's proceedings, the measure of damages, in an action of trespass for the goods by the owner against the officer, is the value of the property less the amount applied to the payment of the tax. Cressey v. Parks, 76 Me. 532.

(b) Conversion.—The measure of damages for the conversion of property is the value of the property at the time and place of con-

Where the property is taken by a mistaken trespasser, the value at the time of conversion is the rule; but against a wilful trespasser

the value at the time of demand or suit brought is given.2

(B) Injury to the Person.—I. When Death Does Not Ensue.— Where the facts do not warrant the giving of punitive damages, the measure of damages is the actual loss the plaintiff has sustained from his injury. The elements of damage to be considered are, the plaintiff's loss of time from his business or employment. his loss of

1. Spencer v. Vance, 57 Mo. 427; Spicer v. Waters, 65 Barb. (N. Y.) 227; Agnew v. Johnson, 22 Pa. St. 471; Vater v. Mullen, 24 Ind. 277; Hurd v. Hubbell, 26 Conn. 389; Lyon v. Gormly, 53 Pa. St. 261; Stirling v. Garritee, 18 Md. 468; Grant v. King, 14 Vt. 367; Robinson v. Barrows, 48 Me. 186; Homer v. Hathaway, 33 Cal. 117; Dixon v. Caldwell, 15 Ohio St. 412. 1. Spencer v. Vance, 57 Mo. 427; Spi-Ohio St. 412.

Where the articles converted are of great value to the owner, but of little value to others, as plates for printing, the measure of damages is their value to their Stickney v. Allen, 10 Gray owner.

(Mass.), 352.

Some courts make no difference in allowing damages, whether the thing converted is property having a fixed value, or property having a fluctuating value, as stocks, and give the value at the time of conversion, in either case. Third Nat. Bank v. Boyd, 44 Md. 47; Sturges v. Keith, 57 Ill. 451; s. c., 11 Am. Rep. 28, note; McKenney v. Haines, 63 Me. 74; Fisher v. Brown, 104 Mass. 259; Bates v. Stansell, 19 Mich. 91.

But in other courts, in the case of stocks, the highest market price between the time of conversion and the time of bringing suit is allowed. Stapleton v. King, 40 Iowa, 278; Ewing v. Blount, 20 Ala. 694; Kent v. Ginter, 23 Ind. 1;

Stephenson v. Price, 30 Tex. 715.

As to the rule in New York. see Mathews v. Coe, 49 N. Y. 57; Gruman v. Smith, 81 N. Y. 27; Harris v. Tunbridge 83 N. Y. 99. See also Work v. Bennett, 70 Pa. St. 484; North v. Phillips, 89 Pa.

St. 250.

2. Where the Property has been Improved.—Where the property has been improved by the defendant, the plaintiff has been allowed by some courts to recover its improved value. Rice v. Hollenbeck, 19 Barb. (N. Y.) 664; Nesbitt v. St. Paul Lumber Co., 21 Minn. 491; Ellis v. Wire, 33 Ind. 127; s. c., 5 Am. Rep. 189; Final v. Backus, 18 Mich. 218; Davis v. Easley, 13 Ill. 192.

The measure of damages in an action of trover for logs taken from land in the plaintiff's possession is the value of the logs at the time and place of conversion, with interest. The conversion is complete when the logs are taken away from the premises, Skinner v. Pinney,

19 Fla. 43; s. c., 45 Am. Rep. 1.

But in a recent case it was held that the measure of damages for an honest mistake in cutting timber is the value of v. Merriman (Minn.), Alb. L. J., March 3, 1888; Arpin v. Burch, 68 Wis. 619.

In Wooden Ware Co. v. U. S., 106 U. S. 432, it was held, in an action of trover for cutting and carrying away timber, that the rule was: 1. Where the defendant is a wilful trespasser, the full value of the property at the time and place of demand, or of suit brought, with no deduction for his labor and expense. Where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion; or if the conversion sued for was after value had been added to it by the work of the defendant, the value, less the cost, of such improvement. 3. Where he is a purchaser without notice of wrong from a wilful trespasser, the value at the time of such purchase. And the court cited with approval Winchester v. Craig, 33 Mich. 205; Heard v. James, 49 Miss. 236; Baker v. Wheeler, 8 Wend. (N. Y.) 505; Baldwin v. Porter, 12 Conn. 484; Nesbitt v. St. Paul Lumber Co., 21 Minn.

3. Loss of Time. - Where the plaintiff is unable by reason of his injuries to attend to his regular business, he is entitled to compensation for his loss of time. Rockwell v. Third Ave. R. Co., 53 N. Y. 625; Indianapolis v. Gaston, 58 Ind. 225; Penna., etc., R. Co. v. Graham, 63 Pa. St. 290; Chicago v. O'Brennan, 65 Ill. 160; Ripon v. Bittel, 30 Wis. 614; Hill v. Winsor, 118 Mass. 251; Tefft v. Wilcox, 6 Kan. 46; Tomlinson v. Derby, 43 Conn. 562; Nones v. Northouse, 46 capacity to perform the kind of labor for which he is fitted.1 the

Vt. 587; Morris v. Chicago, etc., R. Co., 45 Iowa, 29; Huizega v. Cutler, etc., Co., 51 Mich. 272; Houston, etc., R. Co. v. Boehm, 57 Tex. 152; s. c., 9 Am. & Eng. R. R. Cas. 366.

The amount of damages depends upon the amount of money the plaintiff earned, whether he worked regularly at his trade or profession, and all the facts showing how much he realized from his labor before the injury. Masterton v. Mt. Vernon, 58 N. Y. 391; Hanover R. Co. v. Coyle, 55 Pa. St. 396; Ballou v. Far-

num, 11 Allen (Mass.), 73.

In an action to recover damages for injuries sustained by reason of a defect in a street, it appeared that plaintiff was a canvasser for a book-publishing house, receiving for his services a certain percentage on the sales made by him, and that he was disabled by his injuries from pursuing his business. He was allowed to testify, under objection, to the amount of his annual earnings, for six or seven years prior to the accident. Held. Ehrgott v. Mayor, etc., 96 N. no error. Y. 264.

In an action for a personal injury caused by an obstruction in defendant's street, the court instructed the jury that, if the plaintiff was entitled to recover in any sum, "he may receive all the damages proceeding continuously from the injury sustained up to the present time, and also such as it is reasonably certain he will continue to suffer in the future;" and that they "should consider plaintiff's occupation, business or profession, and the extent and value of his business at the time of his injury, and the effect of such injury, if any is shown. upon his ability to pursue his calling and business, and all the proximate consequences of the injury received by the plaintiff, if you find any from the preponderance of the evidence, through the negligent act of the defendant, and without prejudice or feeling, in your sound discretion as jurors, simply endeavor to compensate him for the loss." Held not objectionable as a statement of the rule for the measure of damages. Stafford v. Oskaloosa, 64 Iowa, 251.

The plaintiff cannot recover for his. own loss of time, and in addition what he has paid another to labor in his place. Blackman v. Gardiner Bridge,

75 Me. 214.

Nor can he recover for his loss of time. if his employer continues to pay his wages. Drinkwater v. Dinsmore, 80 N. Y. 390; s. c., 36 Am. Rep. 624,

The plaintiff cannot recover the possible profits he would have made by superintending the sales of property, which he was unwilling to intrust to others. Phyfe v. Manhattan R. Co., 30 Hun (N. Y.).

Evidence that the plaintiff's time was not spent in useful occupation has been held to be admissible in mitigation of damages. Balto., etc., R. Co. v. Bote-

ler, 38 Md. 568.

A minor son whose father is entitled to his services, cannot recover for time lost, or inability to work during minority. Stewart v. Ripon, 38 Wis. 584; Jordan v. Bowen, 46 N. Y. Sup. Ct. 355.

1. Loss of Capacity for Labor.-In estimating the amount of the damages to be given for permanent injury, the elements to be considered are, the former occupation of the plaintiff, and the amount of money he received from it, and the extent to which the act of the defendant has impaired his capacity to perform the duties of that or any other calling for which he is fitted. George v. Haverhill, Nichols, 33 N. J. L. 435; McLaughlin v. Corry, 77 Pa. St. 100; Hall v. Fond du Lac, 42 Wis. 274; Morris v. Chicago, etc., R. Co., 45 Iowa, 29; Chicago v. Jones, 66 Ill. 349.

On the question of damages, it is not only proper, but important, for the plaintiff to show, by the evidence, his previous physical condition and ability to labor, or follow his usual avocation, as well as his condition since the injury, to enable the jury to properly find the pecuniary damage. City of Joliet v.

Conway, 119 Ill. 489.

Some cases hold that where it is desired to prove a special employment at the time of the injury, it should be specially alleged. Bristol Manf. Co. v. Gridley, 28 Conn. 201; Squier v. Gould, 14 Wend. (N. Y.) 159; Taylor v. Monroe,

43 Conn. 36.
But in Wade v. Leroy, 20 How. (U. S.) 34, it was held that the plaintiff might prove that he was engaged in a particular business for which he was incapacitated by the injury, without a special allega-

tion.

So in Luck v. Ripon, 52 Wis. 196, it was held that where a complaint for injuries to the person alleges generally that plaintiff was unable, by reason of such injuries, to pursue his lawful business, that is sufficient to admit evidence of the particular business and the damages resulting from its interruption; and if deexpense he has incurred for medical services, nursing, etc., the mental and physical pain he has suffered, and the insult and indignity that has been put upon him. 2

fendant wishes to be more fully informed by the complaint as to what plaintiff's business is, the remedy is by a motion to make more definite and certain.

It is proper to introduce as evidence of the probable duration of the life of the deceased the standard mortuary tables. Rowley v. London, etc., R. Co., L. R. 8 Ex. 221; Sauter v. New York, etc., R. Co., 66 N. Y. 50; Donaldson v. Miss., etc., R. Co., 18 Iowa, 280; David v. Southwestern, etc., R. Co., 41 Ga. 223.

1. Expenses, Medical Services, etc.—
The cost of medical attention, nursing, and all reasonable expenses, which the plaintiff has incurred by reason of his sickness, are recoverable under a general allegation of damage. Chicago, etc., R. Co. v. Wilson, 63 Ill. 167; Sheehan v. Edgar, 58 N. Y. 631; Folsom v. Underhill, 36 Vt. 581; Goodno v. Oshkosh. 28 Wis. 300; Klein v. Thompson, 19 Ohio St. 569.

In *Indiana*, it is held that the plaintiff can recover the value of medical services, although rendered gratuitously, upon the ground that they were rendered for his benefit, and not for the benefit of the defendant. Indianapolis v. Gaston, 58 Ind. 277; Pa. Co. v. Marion, 104 Ind.

230.

It is no defence to a claim for money paid to a nurse, that the plaintiff had a family capable of taking care of him. Kendall v. Albia (Iowa), Alb. L. J., Jan.

7, 1888, 17

2. Physical Pain.—The plaintiff may recover for the physical pain and suffering, which is the result of the defendant's act, such reasonable compensation as the jury may allow. This question must always be left largely to the jury. Chicago v. Elzeman, 71 Ill. 131; Mason v. Ellsworth, 32 Me. 271; McLaughlin v. Corry, 77 Pa. St. 109; Hammond v. Mukwa, 40 Wis. 35; Rockwell v. Third Ave. R. Co., 64 Barb. (N. Y.) 438; Pierce v. Millay, 44 Ill. 189; Sheridan v. Hibbard, 119 Ill. 307.

In an action to recover damages from a township for injuries received by reason of the unsafe condition of one of its roads, the court instructed the jury "that if, in view of all the evidence, they find for the plaintiff, they should allow in estimating the damages not only for the direct expenses incurred by the plaintiff by reason of the injury, but also for the privation and inconvenience he is sub-

jected to, and for the pain and suffering he has already endured bodily and mentally, and which he is likely to experience, as well as the pecuniary loss he has sustained and is likely to sustain during the remainder of his life, from his disabled condition." Held, that the measure of damages was correctly stated. Scott v. Montgomery, 05 Pa. St. 444.

There is no legal measure of damages for the pain and suffering resulting from a personal injury, and the amount of the damages must be left, to some extent, to the fair discretion and judgment of the jury. Wade v. Blackwood, 48 Ark. 396.

Where the injury is permanent, compensation is allowed for the pain which it is reasonably certain the plaintiff will suffer in the future. Filer v. N. Y. Cent. R. Co., 49 N. Y. 42; Frink v. Schroyer, 18 Ill. 416; Memphis, etc., R. Co. v. Whitfield, 44 Miss. 466; Holyoke v. Grand Trunk R. Co., 48 N. H. 541; Fry v. Dubuque, etc., R. Co., 45 Iowa, 416; Spicer v. Chicago, etc., R. Co., 28 Wis. 580.

Mental Pain, Insult.—The mental pain produced by the injury, on account of the apprehension felt for its result, as the disfigurement of the person, etc., may be considered by the jury. The mental suffering, for which recovery can be had, must be that which accompanies actual injury. Fenelon v. Butts, 53 Wis. 344; Ferguson v. Davis Co., 57 Iowa, 607; Smith v. Holcomb, 99 Mass. 552; Ford v. Jones, 62 Barb. (N. Y.) 484; Smith v. Pittsburg, etc., R. Co., 23 Ohio St. 10; McMahon v. N. C. R. Co., 39 Md. 438; Porter v. Hannibal, etc., R. Co., 71 Mo. 66; Pa., etc., Co. v. Graham, 63 Pa. St. 290; s. c., 3 Am. Rep. 549.

But no recovery can be had for mental suffering alone where there is no other injury. Indianapolis, etc., R. Co. v. Stables, 62 Ill. 313; Canning v. Williamstown, I Cush. (Mass.) 451; Wyman v. Leavitt, 71 Me. 227; s. c., 36 Am. Rep. 303; Johnson v. Wells, 6 Nev. 224. Compare Cooper v. Mullins, 30 Ga. 152; Masters v. Warren, 27 Conn. 294; Oliver v. La Valle, 36 Wis. 598.

In Bovee v. Danville, 53 Vt. 190, in which a woman was caused by the injury to give premature birth to twins, it was held that any injured "feelings" following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of

The fact that the injury was aggravated by disease, and that the effects produced would not ordinarily have resulted from the injury, cannot affect the measure of damages.1

damage; and the court said: "If, like Rachel, she wept for her children, and would not be comforted, a question of continuing damage is presented too delicate to be weighed by any scales which

the law has yet invented.

Measure of-Torts

In Kennedy v. Sugar Refining Co., 125 Mass, 90, in a case under the statute allowing the survival of a right of action for injuries to the person, where the deceased fell from a platform twenty feet high, and became unconscious on striking the ground, and so remained until his death, the judge at nisi prius allowed a verdict to stand for a considerable sum for the mental suffering of the deceased during the fall: and a new trial was awarded, on appeal, only on the ground that there was, and could be, no evidence of any such suffering.

In Nourse v. Packard, 138 Mass. 307, the body of the deceased was found under a heap of grain, and expert testimony showed that he would probably have lived from three to five minutes before suffocation; substantial damages were

allowed for mental suffering,

But in Mulchey v. Washburn, etc., Co. (Mass.), Alb. L. J., Feb. 11, 1888, 121, where the deceased was found some minutes after the accident in an unconscious condition, it was held that there being no evidence that he suffered consciously, there could be no recovery.

And it has been held that there can be recovery for the mental suffering which it is reasonably certain the plaintiff will suffer in the future. Kendall v. Albia (Iowa), 34 N. W. Rep. 883.

The plaintiff may recover damages for insult and indignity put upon him. Thus in Craker v. Chicago, etc., R. Co., 36 Wis. 657; s. c., 9 Am. Ry. Rep. 118, a verdict of \$1000 was sustained as damages for the insult to a female passenger by being kissed by the conductor.

So substantial damages have been allowed for excluding persons from certain cars on account of color, or other reasons. Westchester, etc., R. Co. v. Miles, 55 Pa. 209; Chicago, etc., R. Co. v. Williams, 55 Ill. 185; Pleasants v. M. B.

& M. R. Co., 34 Cal. 586.

A passenger on a railroad train who is carried beyond her station, by the negligence of the company, but without any circumstances of aggravation, and without receiving any personal injury, may recover compensation for the inconvenience, loss of time, labor and expense of travelling back, but not for anxiety and suspense of mind suffered in consequence of the delay, nor the effects upon her health, nor the danger to which she was exposed in consequence of the train being stopped at her station an insufficient length of time to enable her to get off. Trigg v. St. Louis, etc., R. Co., 74 Mo.

147; s. c., 41 Am. Rep. 305.

1. Injury Aggravated by Disease—Treatment.—In Baltimore City R. Co. v. Kemp, 61 Md. 74; s. c., 18 Am. & Eng. R. R. Cas. 220, it was held that recovery could be had against a railroad company for a cancer caused by a blow received in a railroad accident, although cancer would probably not have set in had not the plaintiff a natural tendency to the disease. Alvey, C. J., in delivering the opinion of the court in this case, said: It is the common observation of all, that the effects of personal physical iniuries depend much upon the peculiar conditions and tendencies of the person injured; and what may produce but slight and uninjurious consequences in one case, may produce consequences of the most serious and distressing character in another; and this being so, a wrong-doer is not permitted to relieve himself from responsibility for the consequences of his act, by showing that the injury would have been of less severity if it had been inflicted upon any one else of a large majority of the human family.

In Stewart v. Ripon, 38 Wis. 364, it was held that the fact that the injuries to plaintiff resulting from a fall upon a sidewalk were largely increased by reason of his organic tendency to scrofula did not affect the measure of the city's

liability in damages.

In Jeffersonville, etc., R. Co. v. Riley, 39 Ind. 568, it was held that a charge to the jury that "if Riley came to his death, not from the act of the defendant's servant, but from disease with which the act of the defendant had nothing to do, then your verdict should be without further inquiry for the defendant. But if the deceased, from other causes, was in such physical condition that the act of the defendant's servant, which in the case of a healthy person would not have produced or caused the same effect, yet in this special case did cause the death, then you should find that the death resulted from defendant's act," was correct.

In joint actions by husband and wife for injuries to the latter the husband is a nominal party, and the recovery is limited to the injury done to the wife; but the husband may bring a separate action for the loss occasioned him by his wife's injuries.1

Jeffersonville, etc., R. Co. v. Riley, 39 Ind. 568.

In Allison v. Chicago, etc., R. Co., 42 Iowa, 274, it was held that the fact that the accident would not have caused plaintiff's arm to be broken had it not been broken shortly before and had not perfectly healed, did not affect the question of the liability of the railroad for the injuries suffered, nor the question of the measure of damages to be assessed.

In Fitzpatrick et ux v. Great Western R. Co., 12 Up. Can. Q. B. 645, it was held that a declaration in tort against a railroad company to recover damages for a miscarriage caused to a pregnant woman by fright ensuing upon a railroad collision was good on demurrer. Accord, see Barber v. Reese, 60 Miss. 906.

In Oliver v. La Valle, 36 Wis. 592, the plaintiff, a pregnant woman, was frightened owing to the negligence of de-fendant. It was held that she was entitled to recover damages for a miscar-

riage resulting from her fright.

In an action of tort against a railroad company for negligently causing a pregnant woman to leave the train before arriving at her destination, so that she had to walk three miles to arrive there, it was held that the fact that her physical injuries would not have resulted from the walk had she not been pregnant, and the fact that her condition was unknown to the company at the time, were imma-Brown v. Chicago, etc., R. Co. terial. 54 Wis. 342. When it is claimed that the fall pro-

duced or excited disease, it should appear, in order to recover damages for the results of the disease, not only that the fall was a possible cause of the disease, but other causes should be so excluded and the circumstances should be such as to leave a reasonable inference that the fall was the actual cause. Houston v.

Traphagen, 47 N. J. 23.

In Houston, etc., R. Co. v. Leslie, 57 Tex. 83, it was held that if a disease causing suffering or permanent injury results proximately from personal injuries inflicted by the negligence of a railway company, the suffering caused by that disease constitutes an element in estimating damages; nor is this rule affected by the fact that such a disease would not ordinarily result from the original personal injury inflicted.

It is incumbent upon a person injured to use such reasonable efforts as are in. his power to mitigate the consequences of the injury. Chandler v. Allison, 10 Mich. 460.

If the plaintiff, by the exercise of ordinary care and the use of reasonable means, could have prevented the injury from becoming permanent, he cannot recover for the suffering and loss of capacity to labor, caused by his neglect to use such means. Field on Damages, 130; Railroad Co. v. Pennell, 94 Ill. 448; Railroad Co. v. Pindar, 53 Ill. 447.

But if the plaintiff exercise reasonable care in employing a physician, the damages will not be mitigated, although his condition might have been improved by more skilful treatment. Collins v. Council Bluffs, 32 Iowa, 329; s. c,, 7 Am. Rep. 200; Rice v. Des Moines, 40 Iowa, 638;

Stover v. Bluehill, 51 Me. 439.

1. Joint Actions by Husband and Wife for Personal Injury to Wife. - When a married woman sustains injuries and a suit is brought to recover damages in which both husband and wife join, the husband is a nominal party merely. such case the only damages recoverable are the actual damages done the wife. The husband is entitled to nothing for the expense caused him and the loss of his wife's society and services. Fuller v. Naugatuck R. Co., 21 Conn. 557; v. Naugatuck R. Co., 21 Conn. 557; Barnes v. Hurd, 11 Mass. 59; Heirn v. McCaughan, 32 Miss. 17; Barnes v. Martin, 15 Wis. 240; Lewis v. Babcock, 18 Johns. (N. Y.) 443; Brooks v. Schwerin, 54 N. Y. 343; Smith v. St. Joseph, 55 Mo. 456; East Tenn., etc., R. Co. v. Cox, 57 Ga. 252; Baltimore City Pass R. Co. v. Kenp. 61 Md. 74: 5. Pass. R. Co. v. Kemp, 61 Md. 74; s. c., 18 Am. & Eng. R. R. Cas. 220. In Iowa, however, the husband may in such case recover for the loss of his wife's services. McDonald v. Chicago, etc., R. Co., 26 Iowa, 124. In a suit in which the wife is the real plaintiff, she cannot recover for expenses incurred about her Her husband alone can recover Klein v. Jewett, 26 N. J. Eq. 474; Tuttle v. Chicago, etc., R. Co., 42 Iowa, 518; Northern Central R. Co. v. Mills, 61 Md. 355.

The husband may institute suit alone to recover the damages caused him by the injury to his wife. McKinney v.

(2) Statutory Actions for Injuries Causing Death.—The measure of damages in statutory actions for injuries causing death is compensation for the pecuniary loss to the survivors from the death of the deceased. The circumstances to be considered are, the age of the deceased, the amount of his earnings, his habits, health, and probable duration of life.1

comb v. Barre, 38 Vt. 148; Kavanaugh v, Janesville, 24 Wis. 618; Rogers v. Smith, 17 Ind. 323; Long v. Morrison, 14 Indiana, 595; Laughlin v. Eaton, 54

Me. 156.

When both husband and wife have been injured by the same accident, the husband may in the same action recover for the injury done to himself and for that which he has sustained by the injury to his wife. Cincinnati, etc., R. Co. v. Chester, 57 Ind. 297; Hopkins v. Atlantic, etc., R. Co., 36 N. H. 9.

An action brought by the husband on account of injuries to his wife is no bar to a subsequent action by him for his own injuries occurring at the same time. Newbury v. Connecticut, etc., R.

Co., 25 Vt. 377.

A husband may in a suit instituted by him to recover damages for injuries inflicted upon his wife recover for the loss of the services and society of his wife, and also the costs incurred by him for medical attendance, nursing, and the ide. Mowrey v. Chaney, 43 Iowa, 609; Smith v. St. Joseph, 55 Mo. 456; Matteson v. New York, etc., R. Co., 35 N. Y. 487; Tuttle v. Chicago, etc., R. Co., 42 Iowa, 518; Neier v. Missouri Pac. R. Co., 12 Mo. App. 35.

The services of a married woman in

performing the ordinary duties of the household belong to her husband, and he only can recover for the loss of such services. Wyandotte v. Agan, Alb. L.

J., Jan. 14, 1888, 38.

1. The loss for which compensation is to be given under these statutes is the pecuniary loss to the plaintiff from the decedent's In estimating the amount of damage, nothing is to be added as a solatium for injury to the feelings of the survivors, or for loss of the society of the deceased. Blake v. Midland R. Co., 18 Q. B. 93; Chicago, etc., R. Co., v. Harwood, 8, 93; Chicago, etc., R. Co., v. Harwood, 80 Ill. 88; Huntingdon, etc., R. Co. v. Decker, 84 Pa. St. 419; Lehman v. Brooklyn, 29 Barb. (N. Y.) 234; Telfer v. Northern R. Co., 30 N. J. L. 188; Donaldson v. Miss. R. Co., 18 Iowa, 280; March v. Walker, 48 Tex. 372; Castello v. Landwehr, 28 Wis. 522; Mynning v. Detroit, etc., R. Co., 59 Mich. 257. See, contra, Reseson v. Green Mourtain etc. Beeson v. Green Mountain, etc., Co., 57 Cal. 20.

In State, etc., v. B. & O. R. Co., 24 Md. 106, the court said: "According to the appellant's theory, the mother and son are supposed to live on together to an indefinite age: the one craving sympathy and support, the other rendering reverence, obedience, and protection. Such pictures of filial piety are inestimable moral examples, beautiful to contemplate, but the law has no standard by which to measure their loss."

The pain and suffering of the deceased cannot be considered in estimating the amount of damages. Whitford v. Panama R. Co., 23 N. Y. 465; Cleveland, etc., R. Co. v. Rowan, 66 Pa. St. 393; Donaldson v. Miss. R. Co., 18 Iowa, 281.

In estimating the prospective pecuniary damages, the jury should consider the deceased's age, the amount of his earnings, his health, habits, capacity for labor, and the probable duration of his life. Chicago v. Major, 18 Ill. 340; Atlanta, etc., R. Co. v. Ayres, 53 Ga. 12; Balto., etc., R. Co. v. Kelly, 24 Md. 271.

There must be evidence of pecuniary loss to the survivors to enable them to recover. Chicago, etc., R. Co. v. Morris, 26 Ill. 400; Kessler v. Smith, 66 N. Car. 154. The services must be such as can be estimated on a money basis. Demarest v. Little, 47 N. J. L. 28.

Loss of intellectual and moral training and proper nurture by a child, and loss of her husband's care and protection by a widow, are held to be within the meana witow, are field to be within the meaning of the term "pecuniary loss." Tilly v. N. Y., etc., R. Co., 24 N. Y. 471; Mc-Intyre v. N. Y., etc., R. Co., 37 N. Y. 287; Atchison v. Twine, 9 Kan. 350.

The loss by a child of a parent's care

in its education, maintenance, and pecuniary support has a pecuniary as well as a moral value, and the verdict cannot therefore be limited to nominal damages, because the evidence fails to show the amount of the earnings of the parent. Stoher v. St. Louis, etc., R. Co., 91 Mo. 511. But where there is no evidence that the deceased was fitted to give such training, the jury cannot take it into consideration. Chicago, etc., R. Co. v. Austin, 69 Ill. 426.

It is not competent to show that the deceased was in the line of promotion. and would have received greater wages.

For the death of a minor child the parent recovers the value of the child's services during his minority, less the expense of his

support.1

(C) Injuries to the Reputation, etc.—(1) Slander and Libel.—No definite rule can be laid down as to the measure of damages in actions for slander and libel. The amount of damages must always be left largely to the discretion of the jury, in view of all the circumstances, the character and standing of the parties, the nature

Brown v. Chicago, etc., R. Co., 64 Iowa,

Evidence may be given that the parents are poor, in bad health, and obliged to work for a living, that the jury may consider the probability of pecuniary benefit to the parents continuing beyond the child's minority. Johnson v. Chicago, etc., R. Co., 64 Wis. 425.

The fact that a widow has a policy of insurance on her husband's life does not affect her claim for damages. Althorf v. Wolfe, 22 N. Y. 355; Kellogg v. N. Y. Cent. R. Co., 79 N. Y. 72; North Pa. R. Co. v. Kirk, 90 Pa. St. 15; Harding v. Townshend, 43 Vt. 536; s. c., 5 Am. Rep. 304. See Clark v. Wilson, 103 Mass. 219; s. c., 4 Am. Rep. 532.

In an action to recover damages on account of the death of her husband, a widow may show that she had no means of support except what her husband furnished her. Annas v. Milwaukee, etc.,

R. Co., 67 Wis. 46.

It is not necessary that the survivors should have a legal claim on the deceased; it is enough that they have a right to expect and have been receiving aid from him. Railroad Co. v. Barron, 5 Wall. (U. S.) 90; Paulmier v. Erie R. Co., 34 N. J. L. 151; Penna, R. Co. v. Keller, 67 Pa. St. 300.

If the jury find that the next of kin are not dependent on the deceased in whole or in part for support, they can only give nominal damages. Chicago, etc., R. Co. v. Swett, 45 Ill. 197; Chicago, etc., R. Co.

v. Shannon, 43 Ill. 338.

In an action for killing her husband, the subsequent marriage of the widow cannot affect the measure of damages. Georgia R. Co. v. Garr, 57 Ga. 277; s. c.,

24 Am. Rep. 492.
1. For Death of Minor Child.—In an action by a parent for the death of his minor child the measure of damages is the value of the child's services until he becomes of age, less the expense of his support. Rockford, etc., R. Co. v. Delancy, 82 Ill. 198; Pa., etc., R. Co. v. Bantom, 54 Pa. St. 495; Quinn v. Moore, 15 N. Y. 432; Chicago v. Hesing, 83 Ill. 205; Ewen v. Chicago, etc., R. Co., 38 Wis. 13; Penna. R. Co. v. Kelley, 31 Pa. St. 372; Penna. R. Co. v. Zebe, 33 Pa. St. 318.

In Houston, etc., R. Co. v. Cowser, 57 Tex. 293, it was said: "The measure of damages to which a parent is entitled for the negligent killing of his son by a railway company, suggested as being such a sum as would purchase an annuity equal to the value of the pecuniary aid which the parent would have derived from the deceased, calculated on the basis of all the facts and circumstances of the particular case, reasonably accessible in evidence, and including the probable duration of life. In such a case the plaintiff should give evidence of such facts as would furnish the basis for a verdict; such as the circumstances of the deceased, his occupation, age, health, habits of industry, his sobriety and economy, his skill and capacity for business, his annual earnings, and the probable duration of his life. In the absence of such evidence, there is no standard by which to test the correctness of a verdict in such a case,"

In Lehman v. Brooklyn, 29 Barb. (N.Y.) 234, in an action for killing a boy four years of age, the court set aside a verdict for \$1500, on the ground that his services up to the time of his majority could have no pecuniary value, and only nominal

damages could be recovered.
In Chicago, etc., R. Co. v. Becker, 84 Ill. 483, a verdict for \$2000 for the death of a boy six years old was sustained. And in Louisville, etc., R. Co. v. Connor, 9 Heisk. (Tenn.) 20, the court refused to set aside a verdict for \$3000 for the death of a child eighteen months old.

When a child is so young that there can be no evidence that she would probably make voluntary contributions to the support of her parents after reaching majority, it is error to instruct the jury that they may consider the benefits which might come to the parents after the child reached majority. Cooper v. Lake Shore, etc., R. Co. (Mich.), The Reporter, Sept. 21, 1887.

of the charge, the extent to which it has been given publicity, and the motives of the defendant.1

1. "There is no legal measure of damages in actions for such a wrong. The amount which the injured party ought to recover is referred to the sound discretion of the jury. The damages are intended to repair the injury done; and all that the law can determine in a given case is what facts proved may be taken into account, and what are fair considerations to influence their judgments. They are to consider the plaintiff's injured feelings and tarnished reputation, taking into consideration the natation, taking into consideration the nature of the imputation, the extent of its publicity, the character, condition, and influence of the parties." 3 Suth. Dam; 643. True v. Plumley, 36 Me. 466; Markham v. Russell, 12 Allen (Mass.), 573; Flint v. Clark, 13 Conn. 361; Pool v. Devers, 30 Ala. 672.

When words which are actionable in the resulting a specific the law implies

themselves are spoken, the law implies malice. But the plaintiff may show, in aggravation of the injury, that the words were spoken from motives of actual malice. Welch v. Ware, 32 Mich. 84; Fry v. Bennett, 28 N. Y. 324; Schilling v. Carson, 27 Md. 175; Symonds v. Carter, 32 N. H. 467.

The plaintiff may prove repetitions of the slander in aggravation of damages. the stander in aggravation of damages.

Barlow v. Brands, 15 N. J. L. 248;
Johnson v. Brown, 57 Barb. (N. V.) 118;
Stearns v. Cox, 17 Ohio, 590; Elliott v.
Boyles, 31 Pa. St. 65; Perry v. Breed,
117 Mass. 155; Meyer v. Bohlfing, 44
Ind. 238; Leonard v. Pope, 27 Mich. 148. And in some States it has been held that evidence is admissible of repetition of the slander after action brought. Williams v. Harrison, 3 Mo. 411; Hatch v. Potter, 7 Ill. 725; Schenck v. Schenck, 20 N. J. L. 208. See, contra, Frazier v. McCloskey, 60 N. Y. 337.

In Prime v. Eastwood, 45 Iowa, 640, it was held that the damage by repetition of the slander by others was too remote to be considered. Olmsted v. Brown, 12 Barb. (N. Y.) 662; King v. Patterson,

49 N. J. 417.

The defendant's social position may be shown, upon the theory that the injury is increased when the words are spoken by one of influence in the community. Hosley v. Brooks, 20 Ill. 115; Humphries v. Parker, 52 Me. 502; Lewis v. Chapman, 19 Barb. (N. Y.) 252; Fowler v. Chichester, 26 Ohio St. 9; Barber v. Barber, 33 Conn. 335. So, too, the wealth of the defendant may be shown. Brown v. Barnes, 39 Mich.

211; Karney v. Paisley, 13 Iowa, 89; Kniffen v. McConnell, 30 N. Y. 289; Trimble v. Foster, 87 Mo. 49; s. c., 56 Am. Rep. 440. But it is error to show the plaintiff's social position in aggrava-tion of damages. Prescott v. Tousey, 59 N. Y. Super. Ct. 12.

In some States it is held that an unsuccessful plea in justification will increase the damages, as a repetition of the offence. Gorman v. Sutton, 32 Pa. St. 247; Pool v. Devers, 30 Ala. 672; Cavanaugh v. Austin, 42 Vt. 576; Fero v. Roscoe, 4 N.Y. 165; Jackson v. Slitson, 15 Mass. 48. But in other States it is held to be no aggravation of damages when the plea is put in in good faith. v. Sargent, 36 N. H. 496; Raynor v. Kinney, 14 Ohio St. 283; Hudson v. Dale, 19 Mich. 17; s. c., 2 Am. Rep. 66. And in New York under statute. Klinck v. Colby, 46 N. Y. 427.

Evidence is admissible to show that

the defendant knew the charge to be rate deficient and while charge to be false, as proving malice. Stow v. Converse, 3 Conn. 325; Harwood v. Keech, 4 Hun (N. Y.), 389; Sexton v. Brock, 15 Ark. 345. See, contra, Hartranft v. Hesser, 34 Pa. St. 117.

The plaintiff's mental sufferings may be shown, though not specially alleged. Chesley v. Thompson, 137 Mass. 136.

Where the libel contains charges injurious to the plaintiff's business, he may show the amount of his daily sales up to and after the publication of the libel, to show the extent of his injury, although others have published the same libel. Bergmann v. Jones, 94 N. Y. 51.

The defendant may show facts tending to prove the truth of the words, although not amounting to justification, to disprove malice. Hudson v. Dale, 19 Mich. 17; s. c., 2 Am. Rep. 66; Bisby v. Shaw, 12 N. Y. 67. He may show that he believed the words to be true, and give the grounds of his belief. Cook v. O'Brien, 2 Cranch (C. C.), 17; Wozelka v. Hettrick, 93 N. Car. 10.

Some courts allow the defendant to prove that common reports existed that the plaintiff bore the character or committed the acts charged. Bridgman v. Hopkins, 34 Vt. 532; Wetherbee v. Marsh, 20 N. H. 561; Sheehan v. Collins, 20 Ill. 325; Shilling v. Carson, 27 Md. 175; Fuller v. Dean, 31 Ala. 654; Hinkle v. Davenport, 38 Iowa, 355. But the general rule is that such evidence cannot be given. Peterson v. Morgan,

(2) Malicious Prosecution.—No certain rule can be laid down for estimating damages in such actions. The jury are to consider all the facts, and give compensation to the defendant for the injury done to his reputation, for his mental and physical suffering, and the indignity he has suffered, and the costs he has incurred in defending the previous action.¹

116 Mass. 350; Dame v. Kenney, 25 N.
 H. 323; Inman v. Foster, 8 Wend. (N.
 Y.) 602.

Perhaps the best rule is that laid down in Bowen v. Hall, 20 Vt. 232, that such reports are inadmissible, unless they have become so general as to affect the general reputation of the plaintiff. Evidence of the general bad character of the plaintiff may be given, as a person of such character will not be injured to the same extent as a person of good repute. Clark v. Brown, 116 Mass. 504; Fisher v. Patterson, 14 Ohio, 418; McLaughlin v. Cowley, 131 Mass. 70; Sayre v. Sayre, 25 N. J. L. 235; Campbell v. Campbell, 54 Wis. 97; Bennett v. Matthews, 64 Barb. (N. Y.) 410; Warner v. Lockerly, 31 Minn. 421.

The defendant may always show all the circumstances under which the words were spoken, and the occasion and motive of the act. Haines v. Welling, 7 Ohio, 253; Haynes v. Leland, 29 Me.

Ohio, 253; Haynes v. Leland, 29 Me. 233; Root v. King, 7 Cow. (N. Y.) 613. In Doe v. Roe, 32 Hun (N. Y.), 628, the defendant was allowed to show that the plaintiff, charged with unchastity, had the appearance of pregnancy, and other suspicious circumstances.

It is no justification that the defendant repeated the words as a rumor. Ensor v. Bolgiano (Md.). 8 Cent. Rep. 206.

v. Bolgiano (Md.), 8 Cent. Rep. 296.
In an action for damages for making slanderous charges against the plaintiff, evidence is competent, in mitigation of damages, to show the mental distress of the defendant at the time the words were spoken, caused, as he believed, by the act of the defendant. McDougald v. Coward, 95 N. Car. 368.

1. In Saville v. Roberts, I. Ld. Raym.

1. In Saville v. Roberts, I Ld. Raym. 374, the elements of damage for malicious prosecution are said to be: I. Damages to a man's fame, as if the matter whereof he be accused be scandalous. 2. Where a man is put in danger to lose his life or limb. 3. Damages to a man's property, as where he is forced to spend money in necessary charges to acquit himself of the crime. 4. Any special damage.

The bodily and mental sufferings of the plaintiff are to be considered. Parkhurst v. Mastellar, 57 Iowa, 474.

Compensation is to be given to him for the indignity which has been put upon him. McWilliams v. Hoban, 42 Md. 56. This may be merely the indignity of being arraigned in court as a criminal. Faynan v. Knox, 40 N. Y. Super. Ct. 41.

For injury to the reputation, the same elements are to be considered as are proper in the case of slander and libel. Sheldon v. Carpenter, 4 N. Y. 478.

The plaintiff recovers the costs and the expense to which he has been put in defending the suit, and the costs are not limited to taxable costs. Smith v. Smith, 20 Hun (N. Y.), 559; Closson v. Staples, 42 Vt. 209; Krug v. Ward, 77 Ill. 603.

But the plaintiff's expenses in prosecuting the suit for malicious prosecution are too remote to be considered; they are not what the defendant ought to have fore seen. Stewart v. Sonneborn, 98 U. S. 197, and cases therein cited.

The law implies malice from want of probable cause; but the plaintiff may show express malice in aggravation of damages. Chapman v. Dodd, 10 Minn. 350; Ives v. Bartholomew, 9 Conn. 309.

The plaintiff may show any special damage that has resulted. Thus, where a woman prosecuted for perjury was rendered insane thereby, this fact was admitted in aggravation of damages. Plath v. Braunsdorff, 40 Wis. 107.

The defendant may show in mitigation of damages that he had reason to believe the accused was guilty, although the facts are not sufficient to amount to probable cause. Heyne v. Blair, 62 N. Y. 19; Galloway v. Burr, 32 Mich. 332; Pullen v. Glidden, 68 Me. 562; Lamb v. Gulland, 44 Cal. 609.

He may show that he acted on the advice of a magistrate, to disprove malice White v. Tucker, 16 Ohio St. 468. See, contra, Gee v. Culver, 12 Oregon, 228. See also Teal v. Fissel, 28 Fed. Rep.

The defendant may give evidence of the general bad reputation of the plaintiff, as bearing on the question of malice. Fitzgibbon v. Brown, 43 Me. 169; Blizzard v. Hays, 46 Ind. 166; Israel v. Brooks, 23 Ill. 575; O'Brien v. Frazier, 47 N. J. L. 349; s. c., 54 Am. Rep. 170;

10. Pleading, Procedure, and Evidence. - I. PLEADING. - In suing for damages the plaintiff must state such a case in the declaration

or petition as will entitle him to damages.1

(a) Recovery under General Allegation. General damages, or such as the law holds to be the necessary result of the act complained of, may be recovered under a general allegation of damages. Thus in an action for the conversion of property, its value may always be obtained under the general allegation of damage.2

Rosenkrans v. Barker, 115 Ill. 331. And the plaintiff may put in evidence of his good character, as tending to prove actual Woodworth v. Mills, 61 Wis. 44; malice.

s. c., 50 Am. Rep. 135.
The fact that the plaintiff waived preliminary examination, upon which he might have been released, is not admissible in mitigation of damages, unless it can be shown that his motive was to continue the imprisonment, and thus increase his damages. King v. Colvin, 11

R. I. 582.

1. Facts must be set forth in the complaint from which the court can infer that the plaintiff has sustained damage. Thompson v. Gould, 16 Abb. Prac. N. S. (N. Y.) 424; Stephen's Plead. *428. "If the averment is merely one of a legal liability, it is well established that such an averment, being one of matter of law, will not supply the want of those allegations of fact from which alone the court could infer the law to be as stated.

2 Sedg.'s Dam. (7th Ed.) 606.

The petition of plaintiff alleged that the city council of a town by resolution employed an attorney to obtain from the State patents for its lands, agreeing to pay him a portion of the land for his services; that before the patents were obtained the business was taken from the attorney by the city authorities. for specific performance, alleging the doing of various acts in fulfilment of his part of the contract, and there was an alternative prayer for the money value of the consideration promised him, but a failure to allege, either generally or specifically, damage to himself. Judgment by default was rendered and a writ of inquiry executed, on which there was a verdict for \$1250 as the value of the land. Held, the allegations of the petition form no legal basis for the judgment. error was fundamental, and fatal even to a judgment by default. Laredo v. Russell, 56 Tex. 398.

The plaintiff having agreed and undertaken, for a specified price, to unload for defendant certain cars laden with lime rock "at such times and places as may be ordered by defendant," an action does not lie to recover the stipulated compensation, unless the service was ordered or directed by defendant, or was performed by his authority, express or implied; and the fact that it was so done must be alleged in the complaint. Flouss v. Eureka Co., 80 Ala. 30; Maier v. Randolph, 33 Kan. 340.

In an action to recover damages on account of injuries sustained by employee; it is not necessary to aver in the com-plaint that the employer had had reasonable time to remedy the defect after the notice was given. Woodward Iron Co.

v. Jones, 80 Ala. 123.

Demand for Damages under the Reformed Procedure.-Under the code system, in cases where there has been no answer made, the omission of the amount of damages from the complaint, of a praver for damages, and of any statement of damages in the summons, is sufficient to cause a reversal of a judgment awarding damages to the plaintiff. Pitts. Coal M. Co. v. Greenwood, 39 Cal. 71; Simonson v. Blake, 12 Abb. Prac. (N. Y.) 331; Andrews v. Mainlaws, 8 Hun (N. Y.), 65.

2. The general allegation of damages will suffice to let in proof, and to warrant recovery of all such damages as naturally and necessarily result from the wrongful act complained of; the law implies such damages. But where damages do not necessarily result from the act complained of, and consequently are not implied by law, the plaintiff must state in his petition the particular damage sustained, in order to introduce testimony in regard to it; this rule is to avoid surprise. But when severe injuries to the person are shown to have existed, the law infers that physical pain resulted therefrom, since the adverse party is presumed to know the ordinary operation of natural laws. The same is true as to mental suffering, for it is contrary to ex-perience and the laws of nature that an ordinary person should sustain great bodily injury without mental pain resulting therefrom. Texas, etc., R. Co. v. Curry, 64 Tex. 85.

(b) What Must be Specially Alleged.—Special damages, which are for the natural, but not the necessary results of the act complained of, must be specially alleged. For example, a woman suing for an injury to her person cannot show, without a special allegation, that her personal appearance was so impaired as to lessen her prospects for making an advantageous marriage. The object of this rule is to prevent any surprise upon the defendant.

1. Illustrations.—The distinction between special and general damages is well set out in the opinion of Swayne, J., in the case of Roberts v. Graham, 6 Wall. (U. S.) 578. "Graham was the plaintiff in the court below. The complaint sets forth a contract whereby Roberts agreed to transport him and his wife and child, as first cabin passengers, from New York to San Francisco by the Panama route, and to furnish them with suitable accommodations, provisions, and supplies on

the way.

"Among other breaches it is alleged that the defendant did not furnish them with first-cabin fare, but that the child was furnished with second-cabin fare of the poorest quality; that he did not furnish them with proper accommodations, provisions, and supplies; but that, on the contrary, he overloaded the steamer Moses Taylor, on which they were conveyed from Panama to San Francisco, 'with a number of passengers wholly out of proportion to her size, and much greater than she could suitably accommodate; and that by reason thereof the plaintiff and his wife and child were subjected to great inconvenience and injury.

"In the course of the plaintiff's testimony he gave evidence tending to prove his illness, and that it was caused by exposure in his not having sufficient bed or berth clothing on the Moses Taylor; 'that bed-clothing had been furnished him, but that he was compelled to deprive himself of it in order to supply his child, which child had not been furnished with a berth

or bed-clothing.

"The evidence being closed the defendant's counsel asked the court to instruct the jury that in assessing the damages by reason of the sickness of the plaintiff himself during the voyage, they must exclude from consideration sickness arising from want of sufficient bed-clothing on the Moses Taylor. 'Because there is no allegation in the complaint on which to base a complaint for such injuries, and because the allegation is that the plaintiff's sickness was caused by exposure and sickness at Panama, before the arrival there of the Moses Taylor.'

"This instruction the court refused to

give, and the said judge thereupon charged the jury that 'if they found from the evidence that the plaintiff's sickness and consequent injuries were caused by exposure by reason of not being furnished with a sufficient quantity of bed-clothing on the steamer Moses Taylor, then they must estimate the damages caused to the plaintiff by such exposure and want of sufficient clothing or covering for his berth, and by his illness consequent thereon, and include such damages in their verdict.'

"To this refusal to instruct, and to the instruction given, the defendant excepted,

"It is objected that the plaintiff was allowed to recover for a special damage not alleged in the complaint. As a general proposition that cannot be done. Special damage, whether resulting from a tort or breach of contract, must be specially averred, in order that the defendant may be notified of the charge and

come prepared to meet it.

"Special, as contradistinguished from general damage, is that which is the natural but not the necessary result of the act complained of. In this connection, in the case before us, two questions are presented for our consideration: was the sickness of the plaintiff, alleged to have been induced by his exposure on the Moses Taylor, special damage within the rule of pleading on that subject? And, if so, was the right of the defendant to object to a recovery on that ground waived by his conduct during the trial?

"The complaint avers that the complainant by this breach of the contract was subjected to great inconvenience

and injury.'...

"In Ward v. Smith, II Price, 19, the suit was upon a lease. The declaration averred that the defendant refused on request to permit the plaintiff to take possession and have the use of the premises whereby the plaintiff had sustained loss and had been obliged to hire other premises at great cost for rent and other charges. The plaintiff proved on the trial that the premises had been taken for his wife's business, who was a milliner, were advantageously situated for that trade; and that by not being suffered to

occupy them he has sustained considerable loss by the passing by of a profitable part of the year for that business. The plaintiff recovered. It was urged by the defendant upon a motion for a new trial, that there was no special damage averred in the declaration, for that there were no particular customers averred therein as having withdrawn their custom, and further that there was no averment of the business of the wife, or that the plaintiff had sustained any loss in her business.

"Richards, Chief Baron. said: 'As to the objection of special damage having been admitted, there was in fact no special damage as such proved. The object of the plaintiff's testimony was to show that the plaintiff had sustained inconvenience. Baron Graham said that no special damage had been proved. He added: 'Loss of customers and general damage occasioned thereby, however, may have been given in evidence under this declaration; for it charges general loss without specifying any particular individuals whose custom had been lost, and it was competent for the plaintiff to show certain damages sustained by the breach of the agreement in this action, without stating his loss more specially in the declaration

"It would not be easy to distinguish that case as to the point under consideration from the one before us. It is of undoubted authority, and is conclusive."

I Suth. Dam. 763, 5; I Chitty Pl. *396. A valuable note on this subject will be found in 2 Sedg. Dam. (7th Ed.) 606.

In an action for breach of contract to convey land, special damages not laid in the declaration cannot be recovered. Warner v. Bacon, 8 Gray (Mass.), 397.

In a suit against a tenant holding over under the statute, special damages not alleged cannot be shown in evidence. Rothschild v. Williamson, 83 Ind., 387.

Loss of Business, Rent, etc.—In an action for obstructing a right of way, damages for consequent diminution of rental value and loss of rent cannot be recovered unless specially alleged. Adams v. Barry, 10 Gray (Mass.), 361; Vanderslice v. Newton, 4 N. Y. 130; Stevenson v. Smith, 28 Cal. 102; Potter v. Fromont, 47 Cal. 165; Spencer v. St. Paul R. Co., 21 Minn. 364; Birchard v. Booth, 4 Wis. 67; Lusk v. Briscoe, 65 Mo. 555; Chicago West Div. R. Co. v. Klauber, 9 Ill. App. 613; Ins. Co. v. Perrine, 23 N. J. L. 402.

Profits as Distinguished from Rents.—

Profits as Distinguished from Rents.—A declaration alleged loss of profits in plaintiff's mill in consequence of the

building of a dam by the defendants. Held, that under this allegation proof was inadmissible of the loss of rent of the mill, which the lessor, on the building of the dam, was obliged by the lessees to reduce. Plimpton v. Gardiner. 64 Me. 360; Parker v. Lowell, 11 Gray (Mass.), 353; 2 Sedg. Dam. (7th Ed.) 607, etc. In trespass against a railroad company for operating its line in front of the plaintiff's premises, unless there is a special allegation, loss of rent, loss of business, etc. cannot be proven. Wampach v. St. Paul, etc., R. Co., 21 Minn. 364.

An allegation that the plaintiff was put to the loss of a business engagement will not support evidence that he had a business engagement whereby he would have earned \$3000 a year, and lost it through the defendant's wrong. Chicago West Div. R. v. Klauber, 9 Ill. App. 613. And generally to recover for the loss of rent, or of business, the causes of the loss must be specially set out, and the particular loss alleged. Myer & Sons Co. v. Davies, 17 Ill. App. 228; Frohreich v. Genmon 28 Minn 476

Gammon, 28 Minn. 476.

Special Damages Must be Specially
Alleged.—Lewis v. Paull, 42 Ala. 136:
Marshall v. Wood, 16 Ala. 807; Worthy
v. Patterson, 16 Ala. 172; Gundy v.
Humphries, 35 Ala. 626; Tucker v. Parks,
7 Colo. 62; Bristol Manuf. Co. v. Gridley,
28 Conn. 201; Olmstead v. Burke, 25 Ill.
86; Roberts v. Hyde, 15 La. Ann. 51;
Nunan v. San Francisco, 38 Cal. 689;
Andrews v. Stone, 10 Minn. 72; Spencer
v. St. Paul, etc., R. Co., 21 Minn. 362;
Squier v. Gould, 14 Wend. (N. Y.) 159;
Strang v. Whitehead, 12 Wend. (N. Y.)
64; Vanderslice v. Newton, 4 N. Y. 130;
Burrill v. N. Y., etc., Co., 14 Mich. 34;
Byerson v. Marseillis, 16 N. J. L. 450;
Trenton Mut. Life Ins. Co. v. Perrine, 23
N. J. L. 402; Jenkins v. Steanka, 19 Wis. 126.

If a contract and a breach are set out in the complaint, a demurrer, on the ground that no cause of action is stated, will be overruled, and at least nominal damages may be recovered. Cowley v. Davidson, 13 Minn. 92; Wilson v. Clarke, 20·Minn. 367; Rider v. Pond, 10 N. Y. 262; reversing Rider v. Pond, 28 Barb. (N. Y.) 447.

In an action for breach of an agreement to convey real estate, the plaintiff cannot prove, under the general allegation, a refusal of the defendant to allow him to remove a barn from the property, nor the taking out of stone by the defendant, nor receipt of rents. Warner v. Bacon, 8 Gray (Mass.), 399; Baldwin v. Western R. Co., 4 Gray (Mass.), 336;

(d) Matter of Aggravation.—Matters of aggravation, under the common-law system, need not be specially alleged, and are not traversable. But where Code pleading prevails they must be specially alleged.

(e) Itemizing Damages.—In most actions, where the damages are not liquidated, and the cause of action is single, the separate items

need not be stated, but a gross sum may be claimed.3

Adams v. Barry, 10 Gray (Mass.), 361;

Battley v. Faulkner, 3 Barn. & Ald. 294. In an action for injury to realty, by allowing a privy to overflow, where the complaint contained no special allegation of damage, evidence that the plaintiff's well-water was tainted, and that, in consequence, a brewing became unmerchantable, was held inadmissible. Solms v. Lias, 16 Abb. Prac. (N. Y.) 311.
Where the holders of a satisfied judg-

ment were sued for combining to set it up as unsatisfied, and to sell the plaintiff's land on it, though the execution was void. held, that there need be no allegation of special damage. Swan v. Saddlemire, 8

Wend. (N. Y.) 676.

In an action to recover a mare unjustly detained, and damages for her detention, held, that if the plaintiff desires to recover for her loss of flesh, and her absence during the breeding season, he must specially allege the facts. Stevenson v. Smith, 28 Cal. 103; Shaw v. Hoffman, 21 Mich. 151; Patten v. Libbey, 32 Me. 378.

Where the plaintiff, in an action for personal injury, averred that thereby he was prevented from attending to his ordinary business," held, that he could not show under this averment that he was sawing and carting timber. Tomlinson v. Town of Derby, 43 Conn. 562; Baldwin v. Western R. Co., 4 Gray (Mass.), 333; Dickinson v. Boyle, 17 Pick. (Mass.) 78; Boyden v. Burke, 14 How. (U. S.)

575. In an action to recover damages sustained from a personal injury, resulting from the negligence of the defendant, one count alleged that plaintiff was hindered from transacting her business and affairs, and deprived of large gains and profits which she otherwise would have earned, and another count that the injuries received had a permanent effect upon her personal bodily strength and ability to make a living, and that she had been rendered unable to earn or make for herself a living, and had been deprived of large gains and profits which she otherwise would have earned, held, that under these averments it was admissiblefor the plaintiff to show what was her business, and that she had been disabled from pursuing it by reason of her ininries. Bloomington v. Chamberlaine, 104 Ill. 268.

In an action for a personal injury, and averment that the plaintiff had "become wholly crippled and maimed, and pre-vented from actively pursuing his busi-ness for life," authorizes the admission of evidence that the injury would be deleterious to the plaintiff's nervous, aswell as to his general, system, and that it would diminish his strength and power of physical endurance. Wabash R. Co., v. Savage, 110 Ind. 157.

An indictable conspiracy to injure is actionable without proof of special damage. Archbold Nisi Prius, 450. No allegation of special damage is required in an action for conspiracy to injure. Seenarr. in Skinner v. Gunton, et al., I. Saunders, 228. Damage may be recovered under the general allegation in an action on the case for conspiracy to defame, though the words may not be actionable. Hood v. Palm., 8 Pa. St.

Claims for compensatory and for exemplary damages should be severed in the pleading, and in their submission to the jury. Zeliff v. Jones, 61 Tex. 458.

1. I Suth. Dam. 767; 2 Sedg. Dam. (7th Ed.) 612; Stanfield v. Phillips, 78 Pa. St. 73; Schofield v. Ferrers, 46 Pa. St. 438; Plumb v. Ives, 39 Conn. 120; Thayer v. Sherlock, 4 Mich. 173; Clark v. Boardman, 42 Vt. 667; McConnell v. Kibbe, 33 Ill. 175; Allen v. Hitch, 2 Curtis (U. S.), 147; Ogden v. Gibbons, 5

N. J. L. 518. 2. 1 Suth. Dam. 769; Howard v. Black, 42 Vt. 258; Bishop v. Baker, 19 Pick. (Mass.) 517; Thayer v. Sherlock, 4 Mich. 173; Snively v. Fahnestock, 18 Md. 391; McAfee v. Crofford, 13 How.

(U. S.) 447; Allis v. Nanson, 41 Ind. 154-3. 1 Suth. Dam. 770; Shepard v. Prath. 16 Kan. 209; Wodoruff v. Cook, 25 Barba (N. Y.) 505.

(f) Effect of the Ad Damnum.—The amount claimed in the ad damnum is the upward limit of the plaintiff's recovery, and if a verdict is rendered for a greater sum it will be error unless the

plaintiff enters a remittitur for the excess.1

(g) Statutory Damages.—(See also EMINENT DOMAIN.)—To recover a statutory penalty the statute under which it is claimed should be referred to, and the facts making out a case of its violation should be averred.² If an act be prohibited by statute, the commission of the act affords no ground of action by a private party against the doer of the act, unless it has caused the party some special damage.3

Injuries by Domestic Animals.—At common law, the owner of an animal was responsible for any injuries it might do, provided he knew of its vicious disposition.4 This liability has been extended by statute in some States, notably Massachusetts. New

York, Michigan, and Nebraska. (See ANIMALS.)

Damages from the Sale of Intoxicants.—In New Hampshire, New York, Ohio, Illinois, Michigan, Iowa, and Wisconsin, damages may be recovered against liquor-dealers for injuries arising from the sale of intoxicants. (See CIVIL DAMAGE ACTS.)

1. 2 Sedg. Dam. (7th Ed.) 614; Annis v. Upton, 66 Barb. (N. Y.) 370; Flournoy v. Childress, 1 Minor (Ala.) 93; Hall v. Hall, 42 Ind. 585; White v. Cannadee, 25 Ark. 41; Kelley v. Bank, 64 Ill. 541; Palmer v. Reynolds, 3 Cal. 396; Lentz v. Frey, 19 Pa. St. 366; Cameron v. Boyle, 2 Greene (Iowa), 154; Crews v. Locklend, 67 Mp. 610. Lackland, 67 Mo. 619.

Under no circumstances is a plaintiff entitled to recover a sum in excess of that alleged in his bill and the interest thereon. The averment of his demand is as essential as the proof of it, and both must concur to entitle him to relief. Enoch v. Mining & P. Co., 23 W. Va. 314; Attrill v. Patterson, 58 Md. 227. Where, in an action for personal in-

juries, the court instructed the jury that their verdict might be for a sum much larger than the amount actually claimed, the instruction was erroneous; and to authorize the appeal court to disregard the error, it should clearly appear that no prejudice resulted therefrom. Strafford v. Oskaloosa, 57 Iowa, 748.

In an attachment the plaintiff made affidavit to a claim of \$2500, but in the ad damnum he claimed \$30,000. The latter was held to be merely formal, and ad damnum he claimed \$30,000. he was bound by the statement in the affidavit to narr. Snow v. Grace, 25 Ark. 570.

The amount laid in the declaration determines the jurisdiction of the court and not the amount recovered. Hamden v. Merwin (Conn.), 3 N. E. Rep. 534; Aulick v. Adams, 12 B. Mon. (Ky.) 104; 2 Sedg. Dam. (7th Ed.) 616.

In Maryland, in actions ex contractu, the amount recovered must be within the jurisdiction of the court. Rohr v. Anderson, 51 Md. 218.
2. 1 Suth. Dam. 770; 2 Sedg. Dam.

(7th Ed.) 588.

If no form of action is provided by the statute for the recovery of the penalty, debt is the proper form. Strange v.

Powell, 15 Ala. 452.

3. 2 Sedg. Dam. (7th Ed.) 565, 573;
Chamberlaine v. Chester & B. R. Co., 1

Exch. 870.

4. Cox v. Burbidge, 13 C. B. (N. S.)
440; 2 Sedg. Dam. (7th Ed.) 581.
5. Steele v. Smith, 3 E. D. Smith
(N. Y.), 3216; Wheeler v. Brant, 23 Barb. (N. Y.) 3246; Campbell v. Brown, 19 Pa. St. 359; Johnson v. Wing, 3 Mich. 163; Smith v. Cawsey, 22 Ala. 568; 11 Pittsb.

Leg. J. (Pa.) 180.
6. Under these statutes damages may be recovered for the death of a parent, or husband while intoxicated. Jackson v. Brookins, 5 Hun (N. Y.), 530; Quain v. Russell, 8 Hun (N. Y.), 319; Volens v. Owen, 74 N. Y. 526; Emory v. Addis, 71 Ill. 273. Compare Davis v. Justice, 31 Ohio St. 359.

Recovery may also be had for the loss of means of support. Dunlavey v. Watson, 38 Iowa, 398; Wightman v. Devere, 33 Wis. 570; 2 Sedg. Dam. (7th Ed.) 581, n.; I West Jur. 305; 2 Mo. Jur. 513.

- II. VERDICT AND JUDGMENT.—The jury after considering the evidence should give such an amount of damages as seems to them reasonable.
- (a) Court and Jury—Excessive Damages.—Where there is a legal measure of damages, and the jury disregard this, the court may grant a new trial. Where there is no legal measure of damages, the court will ordinarily leave the question of amount to the discretion of the jury. But if the amount is so great or so small as to indicate that the jury were influenced by passion or prejudice, the verdict may be set aside.²

1. 2 Sedg. Dam. (7th Ed.) 663; I Suth. Dam. 810. "The power of the court to grant a new trial, on account of the excessiveness of damages, seems to be comparatively modern, and to have sprung up when attaints fell into disuse. Accordingly, the court held in several cases that they had no right to interfere where there had been no misbehavior on the part of the jury, and there was no measure of damages by which they could correct the mistake. It is now, however, well acknowledged, that whether in actions for malicious prosecution, words, or any other matter, if the damages are clearly too large, the court will send the inquiry to another jury. But it must appear from the amount of damages as compared with the facts of the case laid before the jury, that the jury must have acted under some undue motives, or of some gross error or misconception of the And in a case of uncertain damage, where matters have been properly left for all the parties to the sound discretion of the jury, in a subject of which they are competent and proper judges, a new trial will not be granted, because if the court had been to fix the damages they might have given less."" Wood's Mayne on Dam. (Ed. 1880) s. 798.

Though a verdict for damages for a wrong done may appear to the court to be for a large amount, it will not be disturbed when there is nothing in the record showing it to be clearly excessive. I. & G. N. R. Co. v. Brett, 61 Tex. 483.

When the injury is the result of unavoidable accident, not of wilful negligence or gross carelessness, damages will be regarded as excessive if awarded to the full extent allowed by law where death ensues, where the evidence shows that the loss of a foot, as in this case, would not necessarily shorten life nor wholly incapacitate one for business. Kennon v. Gilmer, 5 Mont. 257.

2. "It is very dangerous for the judges to intermeddle in damages for torts: it must

be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages." Lord Camden in Huckle v. Money, 2 Wils. (C. P.) 207. The case must be very gross and the damages enormous for the court to interpose. Wood's Mayne on Dam. (Ed. 1880) 708; I Suth. Dam. 810; 2 Sedg. Dam. (7th Ed.) 652. This power is never exerted but in the clearest cases. Gilbert v. Burtenshaw, Cowper, 230. "A court will not set aside a verdict upon the ground of excessive damages, unless in a clear case where the jury have acted upon a gross mistake of facts, or have been governed by some improper bias, or have disregarded the law." Story, J., in Wiggin v. Coffin, 3 Story (U. S.), I.

A new trial will be granted where the damages are so excessive as to show passion, prejudice, or incorrect appreciation of the law applicable to the case. Kelly v. McDonald, 39 Ark. 387; B., P. & C. R. Co. v. Pixley, 51 Ind. 22; Delphi v Lowery, 74 Ind. 520; Gale v. N. Y. Cent., etc., R. Co., 76 N. Y. 594; Berry v. C. R. Co., 40 Iowa, 564; P., C. & St. L. R. Co. v. Sponier, 85 Ind. 165; s. c., 8 Am. & Eng. R. R. Cas. 453; Graham v. Pacific R. Co., 66 Mo. 536; Boyers v. Pratt, 1 Humph. (Tenn.) 93; Goodall v. Thurman, 1 Head (Tenn.), 217; 12 Johns. (N. Y.) 236; I Burrow, 609; 6 East, 244; England v. Burt, 4 Humph. (Tenn.) 399; Jones v. Jennings, 10 Humph. (Tenn.), 428; Nailing v. Nailing, 2 Sneed (Tenn.), 631; Yaulx v. Herman, 8 Lea (Tenn.), 687; Tennessee C. & R. Co. v. Roddy, 85 Tenn. 400. This power is said never to have been exercised in cases of crim. con. Smith v. Masten, 15 Wend. (N. Y.) 270.

In New York, the court of appeals will not now consider the question of excessive damages in cases of negligence. Gale v. N.Y. Cent. R. Co., 76 N.Y. 594; Paulitsch v. N. Y. etc., R. Co., 102 N. Y. 280.

also be set aside because the damages are insufficient, provided the jury appear to have been influenced by passion or partiality. The same principles are applicable to these cases as to cases of excessive damages. I Suth. Dam. 815; Armytage v. Haley, 4 A. & E. (Q. B.) 917; Porteous v. Hazel, I Hopk. Ch. (N. V.) 332; McDonald v. Walker, 40 N. Y. 551; Nicholson v. N. Y., etc., R. Co., 22 Conn. 74; Chesapeake, etc., R. Co. v. Higgins, 85 Tenn. 621; Phillips v. Southwest R. Co., 5 Q. B. D. 78. But see Pritchard v. Hewitt, 91 Mo. 547; "A new trial will not be granted solely on the ground of the smallness of the damages recovered."

Examples of Proper and Excessive Damages.—The following tabulated resume of the authorities will serve to show what sums are considered proper damages for

various injuries.

Railroads—Carrying Passengers Beyond Destination.—A verdict for five hundred dollars damages is not excessive against a railroad company for carrying a passenger three fourths of a mile beyond where he had a right to be stopped and then harshly refusing to back the train to the usual stopping-place, so that he was compelled to get off in the dark and rain at a muddy place, and walk back to the proper stopping-place, or else to remain on the train. Higgins v. Louisville, etc., R. Co., 64 Miss. 80.

In New Orleans, etc., R. Co. v. Hurst, 36 Miss. 660, plaintiff was carried four hundred yards beyond his station, and as the conductor refused to back the cars to the station, he was obliged to get off. He obtained a verdict for \$4500, which the supreme court declined to disturb. This case was afterward criticised in New Orleans, etc., R. Co. v. Statham, 42 Miss. 607, where the court set aside a verdict for \$3275, for carrying plaintiff, a person in ill-health, about sixty feet beyond the platform of the station.

In an action against a railroad company for carrying a female passenger beyond her station the evidence showed that she lost two or three hours' time and paid \$1.50 for a returning conveyance. There were no aggravating circumstances. There was a verdict for \$1000, reduced by remittiur to \$750, and judgment accordingly. Held excessive, and judgment reversed. Marshall v. St. Louis, etc., R. Co., 78 Mo. 610.

For Wrongfully Ejecting a Passenger— Excessive.—\$3000 was held to be excessive damages for wrongfully expelling from a car a passenger who had lost his ticket for a sleeping-car berth, but gave satisfactory assurance that he had purchased the ticket. He was held entitled to recover only the price of the ticket and a reasonable compensation for the inconvenience of being deprived of his berth. Pullman, etc., Co. v. Reed, 75 Ill. 125. In Quigley v. Cent. Pac. R. Co., 11 Nev. 350, the plaintiff presented his ticket to the conductor, who took it up and refused to allow him to ride without paying his fare again, as the ticket-agent had informed him that plaintiff had obtained the ticket without paving for it. Plaintiff was accordingly put off the train over a quarter of a mile from the station where he had started, no more force being used than was necessary. He was delayed one day, and had to purchase another ticket at an expense of \$40.50. Held. that a verdict of \$5000 was so excessive as to indicate passion and prejudice on the part of the jury. So a verdict for £50 was held to be excessive for ejecting a passenger from a train because the conductor thought he had not given him his ticket. He was ejected three miles from the station at which he started, and after waiting four hours took the next train to his destination. Huntsman v. Great Western R. Co., 20 Upp. Can. Q. B. 24. Plaintiff bought and put in his pocket his destination.

a proper railroad ticket, took a seat on the proper train, and, on the conductor's demand for his ticket, searched for and failed to find it, but informed the conductor in good faith that he had one, and asked the latter to wait for him to find The conductor instantly stopped the train, and ordered him to get off, between two stations 121 miles apart, threatening to use force to carry out the order. Plaintiff obeyed, and was left after midnight in a forest on a dark night, in an uninhabited, swampy locality, and, not knowing the distance to either station, walked back in about an hour and a half to the one whence he started, crossing on the way a long railroad bridge over a river, and, in consequence of these facts, became sick, lost two weeks' work, and had medical attendance. Held, that a verdict for \$500 damages was not excessive. International & G.N.R.Co.v. Wilkes, 68 Tex. 617.

Not Excessive.—Where the conductor took up the passenger's ticket, and when within a few miles of his destination accused him of riding beyond the point for which he had paid, treated him insolently, and put him off the train where there was no station, at nine o'clock on a dark night, held, that a verdict for \$700 was not excessive. Indianapolis, etc., R. Co. v. Milligan, 50 Ind. 392.

In Du Laurans v. St. Paul, etc., R. Co., 15 Minn. 40, the conductor demanded ten cents more than the regular fare, which was fifty cents, from the plaintiff for not procuring a ticket before entering the car. which amount plaintiff refused to pay. The conductor, while retaining the regular fare, ejected plaintiff at the next station, which was not his place of destination, The supreme court, while considering a verdict of \$500 large, would not disturb it.

The conductor of a railway train, after a short conversation with a female passenger, seized and kissed her several times without encountering much resistance. Held, that \$1000 was not excessive damages. Ryan, C. J., said: "She was entitled to liberal damages for her terror and anxiety, her outraged feelings and insulted virtue, for all her mental humiliation and suffering." Craker v. Chic. & N. W. R. Co., 36 Wis. 657; s. c., 9 Am. Rep. 118. In Illinois, etc., R. Co. v. Johnson, 67 Ill. 312, the passenger was put off the train in the night time at some distance from a station, because he had no ticket. The passenger informed the conductor that the station was closed. and offered him the regular fare, which Held, that the sum of was refused. \$200 was not excessive damages. In a similar case, a verdict for \$500 was held to be excessive. Illinois, etc., R. Co. v. Cunningham, 67 Ill. 316. See also Toledo, etc., R. Co. v. McDonough, 53 Ind. 289; Graham v. Pacific R. Co., 66 Mo. 536.

The ticket-office of the defendant not having been opened before the train started, the plaintiff got on board the train without In accordance with a rule of the company the conductor ejected him from the train, but in a rude and insulting manner, using profane language. \$562.50 held not excessive. St. Louis, etc., R. Co. v. Myrtle, 56 Ind. 566. In similar circumstances a verdict for \$500 held excessive. Ill. Cent. R. Co. v. Cunningham, 67 Ill. 316.

Through a misunderstanding a lady was ejected from one train, but was permitted to travel on the next. A verdict of \$1000 held excessive. Goins v. West. R. Co., 59 Ga. 426. In similar circumstances, \$50 held not excessive Hughes v. West.

R. Co., 61 Ga. 131.

A passenger was wrongfully expelled and beaten, but not disfigured or permanently injured, and not put to any expense. Verdict for \$5000 held excessive. Missouri, etc., R. Co. v. Weaver, 16 Kan.

Partly through the fault of the conductor, a woman with her sister and two small children boarded the wrong train. After she had travelled some distance she was rudely and insultingly ejected. The night was cold, the place a swamp, and she could get no shelter but among negroes. walked back to her starting-point. A verdict of \$6500 held not excessive. International, etc., R. Co. v. Gilbert, 64 Tex. 536.

A passenger presented a proper ticket. The conductor said it had been tarapered with, and harshly threatened to eject the The latter got off to avoid passenger. being put off, but changed his mind, got on again, paid his fare, and continued his iourney. \$500 held not excessive. Mc-Ginnis v. Missouri Pac. R. Co., 21 Mo.

App. 399.

There being no vacant seat except in the smoking-car and the ladies' car, plaintiff entered the latter. A brakeman seized him, and without requesting him to leave the car, forcibly ejected him in a rude and violent way. \$2500 compensatory damages held not excessive. Bass v. Chicago, etc., R. Co., 42 Wis. 654.

A passenger lost his ticket, and on being called upon failed to produce it, but offered to pay his fare. He was then ejected. A verdict for \$300 held not excessive. Curtis v. Grand Trunk R. Co., 12 Up. Can. C. P. 89.

The plaintiff had bought a round-trip A brakeman asked him for his ticket. ticket, tore it in two, and returned to him the wrong half of it. On his return trip the passenger handed to the conductor the remaining piece of the ticket. conductor refused it, and notwithstanding his explanation, forcibly ejected him. Held, that \$600 was not excessive. Lake Erie, etc., R. Co. v. Fixe, 88 Ind. 381; s. c., 11 Am. & Eng. R. R. Cases, 109.

A woman was expelled from the ladies' car because the conductor held that her reputation for chastity was bad. \$3000 held not excessive. Brown v. Memphis

& Charleston R. Co., 5 Fed, Rep. 500. In an action for wrongful death, the evidence tended to show that the deceased was a laboring man, sober and industrious; that he provided for his family as best he could under the circumstances; that he was 36 years old, and left a widow and six young children. Held, that a verdict of \$5000 was not excessive. County of Howard v. Legg, 110 Ind. 479.

\$1500 are not excessive damages for the death of a strong, healthy girl 11 years old, under I How. Ann. St. Mich. § 3392, allowing the jury, in actions for damages from wrongful act, to "give such damages as they shall deem fair and just to the person" entitled thereto. Cooper v. Lake Shore & M. S. R. Co.

(Mich.), 33 N. W. Rep. 306.

A judgment for \$3000 for the wrongful death of a minor, who was II years and 8 months old, intelligent, healthy, and promising, and left surviving him a father, a poor man, working as an engineer, and having a wife and three children, held not grossly excessive. Union Pac. R. Co. v. Dunden, 37 Kan. 1.

A locomotive engineer, earning four dollars per day, of industrious and sober habits, and with an expectation of life of 31 years, was killed by his engine being thrown from the track by reason of a de-The evidence showed fect in the road. that the company had been notified that the road was defective, had failed to repair it, and had sent deceased out on an engine that was out of repair, and liable to jump the track; and did not show contributory negligence. The jury rendered a verdict against the company for \$8000. which the trial judge refused to set aside, although he considered it excessive. Held, on appeal, that the verdict should not be set aside. Tennessee, etc., R. Co.

v. Roddy, 85 Tenn. 400.

Permanent Slight Injuries.—In an action brought by a brakeman for personal injuries received in attempting to couple two cars together, entailing the loss of the thumb and first finger of the right hand, and where the party from such injury was laid up a little over a month and could not do anything for three or four months, a verdict of \$6500 is so excessive as to show that it was given under the influence of passion or prejudice, and ought to be submitted to the judgment of another jury. Kansas Pac. R. Co. v. Peavey, 29 jury. Ka Kan. 160.

A second verdict of \$8000 in the same case set aside, though remittitur for \$1500 Kan. Pac. R. Co. v. Peawas entered. vey, 34 Kan. 473; s. c., 11 Am. & Eng.

R. R. Cas. 260.

In Sawver v. Hannibal, etc., R. Co., 37 Mo. 240, the injuries to a passenger in a railroad accident consisted of bruises about the shoulders and head, a scalp wound which quickly healed, and a shock to the nervous system. The plaintiff admitted that her injuries were not serious, shortly after the accident, and was able to resume work two or three months after-Held, that \$6900 was excessive ward. damages.

For the fracture of a child's arm, resulting in a permanent disfigurement, \$6600 held excessive, and reduced to \$3000.

Ryder v. New York, 50 N. Y. Sup. Ct.

A woman received temporary injuries, depriving her for a time only of the opportunity to earn \$0.00 per week. held excessive. Langley v. Sixth Av. R. Co., 48 N. Y. Sup. Ct. (J. & Sp.) 542.

Through the negligence of the defendant, the plaintiff, a man aged seventy, was knocked down by horses. His injuries were so great that he was confined to his house for several months, and one of his legs was shortened two inches. \$10,000 excessive. Chicago West Div. R. Co. v. Haviland, 12 Ill. App. 561.

Permanent Injuries, Disabling. — The

court refused to disturb a verdict for \$3500 against a railway company for iniuries sustained by a child ten years old Houston, etc., R. Co. at its turn-table.

v. Simpson, 60 Tex. 103.

When a bodily injury was sustained in consequence of the negligence of a railway company, which injury was of a permanent character, inflicting great bodily pain when it was received, and for a long time afterwards, it was held that a verdict for \$2000 was not so excessive as to require a reversal. Texas, etc., R. Co. v. Lowry, 61 Tex. 149.

The evidence tended to show that the accident resulted in an incurable affection of the spinal cord, which would always seriously impair the plaintiff's physical powers, and cause permanent suffering. \$2000 held not excessive. Waldron z.

St. Paul, 33 Minn. 87.

A verdict of \$15,000 damages for a broken thigh, fractured pelvis, and other permanent injuries, awarded a passenger injured by the negligence of a railroad company, held not excessive. Louisville, N. O. & T. Co. v. Thompson, 64 Miss. 584; s. c., 39 Am. & Eng. R. R. Cas. 541.

A verdict of \$5000 damages to a lady 57 years old, who has lost the free use of one of her arms, has had her shoulder and spine injured so as to produce great pain, and whose general health has been rendered bad, will not be set aside as excessive. Texas P. R. Co. v. Davidson,

68 Tex. 370.

Plaintiff had been injured in a railway collision. It was shown that she had suffered severe pain for months, and had not recovered from the injury at the time of the trial, which took place more than three years after the accident. One physician testified that, if plaintiff was at that time still disabled, she would not fully recover from it. Other physicians could not discover any evidence of permanent anatomical injury or lesion, and thought that she would recover entirely. Held, that a verdict of \$4000 is not excessive. Heucke v. Milwaukee City R. Co. (Wis.), 34 N. W. Rep. 243.

Where the plaintiff suffered a complete paralysis of the right side, owing to a fall on a sidewalk, held, that a verdict of \$10,000 would not be set aside as excessive. Osborne v. City of Detroit, 32

Fed. Rep. 36.

Where an accident occurred through the negligence of defendant, resulting in the loss of libellant's hand, held, that a judgment for \$4000 was not excessive. Withcofsky v. Wier, 32 Fed. Rep. 301.

The injuries which plaintiff received by being run into by defendant's train were the loss of his truck, the amputation of two toes, and a permanent injury to his leg, which made it necessary for him to have an assistant in his business. Held, that a verdict of \$2000 damages was not excessive. Norfolk & W. R. Co. 27 Burge (Va) 4 S. F. Ren. 21

v. Burge (Va.), 4 S. E. Rep. 21.

Broken Arm — Where, through defendant's negligence, plaintiff suffered a compound fracture of the left arm, and a partial dislocation of the elbow, impairing the use of the arm for life, and rendering it quite painful at certain seasons, held, that a verdict for \$4000 was not excessive. Van Winter v. Henry Co., 61

Iowa, 684.

Where the plaintiff lost one month's work, and his injuries consisted of a straining of the ligaments of a finger of his right hand, which weakened it, and a weakening of one lung, a verdict of \$5000 damages was held excessive. Union Pacific R. Co. v. Hand, 7 Kans. 380. In Clapp v. Hudson, etc., R. Co., 19 Barb. (N. Y.) 461, plaintiff's leg was broken and his head somewhat injured in a collision. As was obliged to go on crutches for three or four months, and though the injured leg, when healed, was somewhat shorter than the other, yet he recovered his usual health. The court reduced a verdict for \$6000 damages to \$4000. See also Chicago, etc., R. Co. v. Poudrom, 51 Ill. 393; Chicago, etc., R. Co. v. Hughes, 69 Ill. 170.

\$\$000 for an injury which rendered a healthy, vigorous, and strong man diseased, feeble, and helpless for life, are held not excessive. Cummings v. Nat.

Furnace Co., 61 Wis, 603.

\$5000 for personal injuries to a healthy, active woman, seventy years old, which permanently destroyed the use of one of her limbs, held not excessive. Hinton v. Cream City R. Co., 65 Wis. 323.

In an action brought by a brakeman twenty-seven years of age, and receiving wages of \$60 per month, against a railroad company for damages caused by the negligence of the company, where the permanent disability is the loss of a leg below the knee, and where the plaintiff after his injury had his leg sawed off three times before the surgeon got it right: then was confined to his room over fifty days, and during the time had lockiaw for twelve or fifteen days so severely as to be unconscious at times, and suffered everything that a man could suffer and not die; and upon the first trial a verdict for \$8000 was rendered, and upon the second trial a verdict for \$10,000,held not excessive. Atchison, etc., R. Co. v. Moore, 31 Kan. 197.

\$4700 for loss of hand held not excessive. Central R. Co. v. De Bray, 71

Ga. 406.

\$4500 for loss of leg held not excessive. W. & A. R. v. Wilson, 71 Ga. 22. \$6040 for crushing a leg held not excessive. Central R. Co. v. Crosby, 74

Ga. 737.

For breaking leg and causing permanent injury, \$14.833 was excessive damages, plaintiff being twenty-one years of age, realizing \$200 to \$300 for four months, and then being deprived of employment. Southwestern R. Co. v. Singleton, 66 Ga. 252.

A person aged fifty-two was so injured as to be confined to bed for nine weeks, and suffered a permanent shortening of one leg about two inches and a half. Held, \$8000 damages not excessive. Funston v. Chicago, Rock Island, etc.,

R. Co., 61 Iowa, 452.

Cars of the defendant ran off the track. The accident caused a shock to the plaintiff, a passenger, which aggravated a condition of hernia already existing. \$1500 held not excessive. Houst. & Texas Cent. R. v. Shafer, 54 Tex. 641; s. c., 6. Am. & Eng. R. R. Cas. 421.

A healthy man was so injured as to be almost a physical and mental wreck. \$25,000 held not to be excessive. Chicago, etc., R. Co. v. Holland, 18 Ill, 418.

A passenger on a train suffered through negligence of the company a fracture of one leg, one arm, and a collar bone. \$3500 held not excessive. Klutts v. St. Louis, etc., R. Co., 75 Mo. 642; s. c., 11 Am. & Eng. R. R. Cas. 637. For a broken thigh and pelvic bone \$15,000 held not excessive. Louisville, etc., R. Co. v. Thompson, 64 Miss. 584.

In a collision the plaintiff's right foot and ankle were so crushed that the leg had to be amputated below the knee. His left leg was badly bruised, the bones separated, and the ligaments ruptured. He was fastened among the timbers of the wreck, and as one of the cars took fire, in addition to the physical pain he suffered greatly in the apprehension of being burned to death. For weeks afterward he lay in a critical condition, and spent about \$5000 on his cure. Held, that a verdict of \$35,000 was excessive. Louisville, etc., R. Co. v. Fox. 11 Bus. (Ky.), 500,

A man aged fifty-four was negligently hurt so that he was confined to the house for six weeks, had three ribs broken, and was lamed possibly for life. \$5000 held not excessive. Quinn v. Long Island R. Co., 34 Hun (N. Y.), 331.

For crushing the leg of a twelve-yearold child, causing permanent injury, \$3500 held not excessive. Houston, etc.,

R. Co. v. Simpson, 60 Tex. 103.

A brakeman adjusting a defective brake was caught between freight cars, and in consequence was wholly disabled for nine months and partially for life, while one of his legs was shortened, and he was subjected to permanent pain. *Held*, \$5000 not clearly excessive. Texas, etc., R. Co. v. McAtee, 61 Tex. 695.

For the loss of a leg, entailing severe pain, \$10,000 held not excessive. Atchison, etc., R. Co. v. Moore, 31 Kan. 197.

The plaintiff while lawfully passing along the street was injured by a splinter on the track of the defendant. He was confined to bed six weeks, suffered great pain, was disabled for several months, left permanently lame, and was obliged to spend about \$1350 for physicians' services. A verdict for \$12,000 held not excessive. Rockwell v. Third Ave. R. Co., 64 Barb. (N. Y.) 439.

Through gross negligence of the defendant a passenger broke his leg and A verdict for otherwise injured himself. \$10,000 held not excessive. Montgomery, etc., R. Co., 51 Ga. 582; Berg v. Chicago, etc., R. Co., 2 Am. & Eng. R. R. Cas. 70; Delie v. Chicago, etc., R. Co., 5 Am. & Eng. R. R. Cas. 264: Ohio, etc., R. Co. v. Collarn, 5 Am. & Eng. R. R. Cas. 554; Indianapolis, etc., R. Co. v. McLin, 8 Am. & Eng. R. R. Cas. 237; Pittsburgh, etc., R. Co. v. Spania, 8 Am. & Eng. R. R. Cas. 453; Houston, etc., R. Co. v. Boehm, 9 Am. & Eng. R. R. Cas. 366; Wabash R. Co. v. McDaniels, 11 Am. &

Eng. R. R. Cas. 158

Loss of Livelihood. — Ten thousand dollars will not be held excessive damages by the supreme court for per-

sonal injury to a physician whose professional earnings were \$2000 per annum, and who suffered greatly, was rendered permanently unable to practise after-wards, and must sooner or later die from the injury. Carthage T. P. Co. v. Andrews, 102 Ind. 138; Funston v. Chicago, etc., R. Co., 61 Iowa, 452.

Death.—Where the deceased had been

guilty of very gross negligence, and the jury assessed the damages for his death at \$10,000, held excessive. Nashville, etc.. R. Co. v. Smith, 6 Heisk. (Tenn.) 174.

Deceased was aged twenty-four, without family, temperate and industrious. His annual net earnings were found to be \$263. A verdict for \$10,000 was held to be excessive, but was allowed to stand on the entering of a remittitur for \$5000. Rose v. Des Moines Val. R. Co., 39. Iowa, 246; s. c., 20 Amer. R. Rep. 326.

Deceased was aged sixty, industrious, and reasonably healthy. A verdict for \$4500 was held not excessive. Walter v. Chicago, etc., R. Co., 39 Iowa, 33.

£3000 for the death of a farmer held not excessive. Secord v. Great West. R.

Cc., 15 Up. Can. Q. B. 631. £5000 for the death of a blacksmith aged thirty-five held not excessive. Morley v. Great West. R. Co., 16 Up. Can. Q.

A father who had abandoned his family recovered \$3000 for the negligent killing of his daughter aged thirteen. Held not excessive, Pines v. N. Y. Cent. R. Co.,

34 Hun (N. Y.), 80.

The only child of the plaintiff was a girl aged six years, a healthy, bright child. Without fault on her part she was killed in driving across the track. \$5000 held not excessive. Hooghkirk v. Del. & Hud. Canal Co., 63 Barb. (N. Y.) 328.

A married woman aged twenty-seven, the mother of two young children, was negligently killed by the defendant company. \$5000 held not excessive. Dimmey

v. Wheeling, etc., R. Co., 27 W. Va. 32.

A verdict for \$2500 for the killing of a boy about seven years old is held not soexcessive as to warrant the interference of this court. Johnson v. Chicago, etc.,

R. Co., 64 Wis. 425.

A verdict for \$2000 damages on account of the death of a married man, an unskilled laborer, fifty-five years old, held not excessive. Mulcairns v. Janesville, 67 Wis. 24.

A verdict for \$2500 damages for the death of a workman fifty-five years old, in fair health, who could earn \$2.25 per day of ten hours, and whose family was to a large extent dependent upon his labor for support, is held not excessive.

67 Wis. 46.

Municipalities—Defective Sidewalks.—
The defendant negligently left unguarded a hole in the street. The plaintiff, a married woman aged twenty-eight, fell in, and suffered severe injury so that her final recovery appeared doubtful, and her life would probably be shortened. \$19,000 held not excessive. Groves v. Rochester, 39 Hun (N. Y.), 5. In similar circumstances \$2000 held not excessive. Murrill v. St. Louis, 12 Mo. App. 466.

An injury caused by a defect in a sidewalk caused a miscarriage. \$2000 held not excessive. Joliet v. Conway, 17 Ill.

App. 577.

Defective sidewalk caused a fall resulting in an incurable spinal disease. \$2000 beld not excessive. Waldron v. St. Paul,

33 Min. 87.

A laboring woman whose leg was broken and permanently injured by a fall on a defective sidewalk recovered \$966.66. Held not excessive. Schroth v. Prescott, 68 Wis. 678.

For a dislocation of the elbow and compound fracture of the arm, impairing use of the arm for life, \$4000 held not excessive. Van Winter v. Henry County, 61 lowa, 684.

For fracture of a child's arm, causing permanent disfigurement, \$6600 held excessive, and reduced to \$3000. Ryder v. New York, 50 N. Y. Sup. Ct. 220.

A physician earning \$2500 a year so injured that he had to abandon his practice. \$15,000 held not excessive. Wod-

bury v. Dist. Col., 3 Cent. Rep. 788.

Miscellaneous Cases—Enticing Away.— In an action for enticing away the servants of another, the evidence showed that the circumstances attending the wrong were of a very aggravated character; that the plaintiffs, at considerable expense and much trouble, had procured the laborers enticed and persuaded away from them, and afterwards retained by the defendant during their term of service. One who had been in the employment of the plaintiffs was used by the defendant as his agent to decoy these persons and bring them to him. The plaintiffs were put to expense and loss of time in endeavoring to induce them to return. They were compelled to employ counsel. When they applied to the defendant for a settlement of their claim they were met with contumely, insult, and abuse. Plaintiffs proved their loss by showing what would have been the net profits of each of these laborers, and what they had lost by the failure to improve their property in con-

sequence of the decoying and retaining of their servants. The verdict was for less than the amounts so proved. *Held*, that the verdict was not excessive. Smith v. Goodman, 75 Ga. 198.

Assault.—A verdict of \$1200 damages for an assault and battery upon the plaintiff by spitting in her face is held not so large as to induce this court to believe that the jury were actuated by passion,

prejudice, or other improper motive. Draper v. Baker, 61 Wis. 450.

\$1000 for assault held not excessive. Atlantic, etc., R. Co. v. Condor, 75 Ga.

A verdict for \$7000 in favor of one injured in being brutally and cruelly removed from a train held not excessive. Marion v. Chicago, etc., R. Co., 64 Iowa,

\$1700 held to be excessive for assault and battery with a hatchet by striking the plaintiff on the head, there being evidence of considerable provocation and no great injury. Hewries v. Vogel, 87 Ill. 242.

For lying in wait for the plaintiff and shooting a rifle-ball through his lung and buckshot into his leg, \$1950 held not excessive. Cummins v. Crawford, 88

Ill. 312.

Abuse of Process .- The plaintiff was the owner of a restaurant, which, because of the levy of an oppressive attachment, was closed from Friday evening until the forenoon of the following Monday. property attached consisted of cakes, bread, pies, and other contents of the establishment. The cakes, pies, and bread were greatly injured or entirely spoiled. The plaintiff had in her employ clerks, cooks, and possibly other employes, to whom she paid wages during the time the restaurant was closed. The foregoing matters embrace all the actual damages which the evidence tends to prove. actual damages sustained could not possibly have exceeded \$50. The amount allowed as exemplary damages was \$650. Held to be so excessive as to evince passion and prejudice on the part of the jury, and to justify the interference of the appellate court. Saunders v. Mullen, 66 Iowa. 728.

False Imprisonment.—The plaintiff recovered \$60,000 against the Sergeant-at-Arms of the House of Representatives of the U. S., for a false imprisonment done under the orders of the House, and lasting thirty-five days. There were no circumstances calling for punitive damages, and the health and business of the plaintiff suffered but slightly. Held, excessive.

(b) Nominal Damages.—If no other legal right than that to nominal damages is infringed by the verdict, a new trial will not be granted, unless necessary to carry costs or to vindicate a contested right.¹

Kilbourne v. Thompson, 4 McArthur (D. C.), 401.

In an action for false imprisonment, where it appeared that defendant was illegally arrested and kept in jail for ten days on a charge of refusing to deliver possession of a sewing-machine, which was sought to be replevied in an action against his wife by the company from whom she had bought it, although the machine had in fact been fully paid for, and was legally her property, a verdict for \$1000 held not excessive. Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350.

Libel.—In an action of libel for charging plaintiff, a man, with adultery, a verdict of \$3875 against a newspaper held not excessive. Gibson v. Cincinnati

Enquirer, 2 Flip. (C. C.) 12.

\$800 held not excessive for a libel charging the plaintiff with being a released convict from the penitentiary. Indianapolis Sun Co. v. Howell, 53 Ind. 527.

Breach of Promise.—Where the manner of breaking off an engagement to marry was abrupt and wanton, and most humiliating to the young girl with whom it was made, and the defendant is shown to be worth from fifteen to twenty thousand dollars, engaged in a profitable business and of good social standing, an award by the jury of \$4500 damages can hardly be called excessive. McPherson v. Ryan, 57 Mich. 33.

\$4000 held not excessive. Richmond

v. Roberts, 98 Ill. 472.

Seduction—Criminal Conversation.—It is said that no verdict for the latter wrong has ever been set aside.

A case in which a verdict of a jury rendered in favor of the father for three thousand dollars damages, for the seduction of his infant daughter while living out at service with the defendant, was upheld by the court. Riddle v. McGinnis,

22 W. Va. 253.

For the seduction of the wife of the plaintiff, where proof showed plaintiff to be of low character, and a visitor to houses of ill-fame, \$1500 held not to be so excessive as to be set aside. "The amount of the damages in such cases is very much a matter of feeling, to be controlled by no rigid rule." From the opinion of the court, Cross v. Rutledge, 81 Ill. 266. See also, on the general question of excessive damages in these cases.

Wilford v. Berkeley, I Burr. 609; Smith v. Masten, 15 Wend. (N. Y.) 270; Nortin v. Warner, 6 Conn. 172; Shattuck v. Hammond, 46 Vt. 466; s. c., 14 Am. Rep. 631; Rea v. Tucker, 51 Ill. 110; Conway v. Nichol, 34 Iowa, 533; Harrison v. Price, 22 Ind. 16.

Trespass to Property.—For a wanton, aggravated trespass, causing a loss of \$25, a verdict of \$100 held not excessive.

Clark v. Bales, 15 Ark. 452.

The agents of the seller of a sewing-machine entered the buyer's house in his absence, and against the remonstrances of his wife, violently removed the machine, but returned it the next day with an explanation that they had taken it under the belief that full payment had not been made. Singer Sewing Machine Manuf. Co. v. Holdfodt, 86 Ill, 455.

Landlord and Tenant — For an unlawful

Landlord and Tenant — For an unlawful ejectment of tenant, and turning his wife and children in the street and injuring his goods, held, \$500 not excessive. Moyer v. Gordon (Ind.), 12 West. Rep.

1.45

Nuisance.—For maintaining a nuisance injurious to the health of the plaintiff and his family, \$800 held not excessive. Price

v. Wagner, 20 Minn. 355.

Innkeeper.—A guest in a hotel opened a door in all respects like his own, and next to that. It was the door of the elevator, and on stepping in he fell down the shaft and was injured. Held, \$2000 not excessive. Hayward v. Murrill, 94 Ill. 340.

Injuries Done by Dogs, etc.—Where the defendant's dog had so bitten the plaintiff that she contracted hip disease, \$1450, to be doubled by the court under the statute, held not excessive. Fitzgerald

v. Dobson, 78 Me. 559.

1. "But if no other right is infringed by the verdict than that to nominal damages, a new trial will not be granted. But it is otherwise if nominal damages are necessary to vindicate a contested right or to carry costs." Eaton v. Lyman, 30 Wis. 41; Hibbard v. Western Un. Tel. Co., 33 Wis. 558; Smith v. Weed Sew. Mach. Co., 26 Ohio St. 562; Mahony v. Robbins, 49 Ind. 146; Watson v. Moeller, 63 Iowa, 161; I Sedg. Dam. (7th Ed.) 85, n.

If judgment be rendered for less than the pleadings admit to be due, it will be

(c) Remittitur.—An excessive verdict may be allowed to stand if the plaintiff will enter a remittitur for the excess. And where the damages are not sustained by the evidence, the court may require the plaintiff to choose between a remittitur and a new trial.

(d) Admission of Part of Claim.—By statute in some States, where the defendant admits part of the plaintiff's claim to be due. an order may be entered for the payment of that part, or the defendant may of his own motion pay the amount into court, in order to save costs.2

(e) Double and Treble Damages.—Where double or treble damages are allowed by statute, and the jury find single damages in terms, the court will direct judgment to be entered for the increased amount.3

Nunan v. San Francisco, 38 Cal.

A verdict fixing the value of plain-tiff's grass, burned by negligence of defendant, at \$750, held not to be set aside, it appearing that, although plaintiff's witnesses did not give very satisfactory reasons for their opinion as to its value, yet the railroad did not call any witnesses to fix the value at any less. Gulf, etc., R. Co. v. Withe, 68 Tex. 295.

Increase of Damages on Appeal .-- See Ohio River R. Co. v. Harness, 20 Am. & Eng. R. R. Cas. 405; Washburn v. Mil-waukee, etc., R. Co., 20 Am & Eng. R. R. Cas. 225; Selma, etc., R. Co. v. Gammage, I Am. & Eng. R. R. Cas. 41.

1. I Suth. Dam. 812. The remission may be made either in the trial court or in the appellate court. Bank of Kentucky v. Ashley, 2 Pet. (U. S.) 327; Treschett v. Hamilton M. Insur. Co., 14 Gray (Mass.), 456; Crum v. Hadley, 48 N. H. 191; Bigelow v. Doolittle, 36 Me. 115; Pendleton St. R. Co. v. Rohmann, 22 Obio St. 446. Tolodo etc. B. 20 Ohio St. 446; Toledo, etc., R. Co. v. Beals, 50 Ill, 150; Strong v. Hooe, 41 Wis. 659.

It must be made apparent to the court that the remission will give justice, otherwise it cannot be permitted. Smith v. Dakes, 5 Minn. 373; Orange, etc., R. Co. v. Fulney, 17 Gratt. (Va.) 366.

In Indiana a remittitur cannot be entered after a motion for a new trial on the ground of excessive damages has been granted. Hill v. Newman, 47 Ind. 187.

In Kentucky it cannot be entered after the close of the term at which the judgment was entered. Holeman v. Coleman.

I A. K. Marsh. (Ky.) 297.
Where one who has recovered judg-

ment in justice's court for more than \$100 remits the excess to save a reversal, and the case is nevertheless appealed, it can-not thereafter be claimed that plaintiff had released so much of the demand in

suit as had been remitted. School Dist. v. Cook, 47 Mich. 112.

See also, as to remittitur, 2 Sedg. Dam. (7th Ed.) 655, 660; Kinsey v. Wallace, 36 Cal. 462; Ill. Cent. R. Co. v. Ebert, 74 Ill. 399; Collins v. Council Bluffs, 35 Iowa, 432; Lombard v. Chic., Rock 35 Iowa, 432; Lombard v. Chic., Rock Island, etc., R. Co., 47 Iowa, 494; Doyle v. Dixon, 97 Mass. 208; Belknap v. Railroad Co., 49 N. H. 373; Union v. Durkes, 38 N. J. L. 21; Pendleton R. Co. v. Rahmann, 22 Ohio St. 446.

An excessive verdict is cured by remittitur of the excess. Ferguson et al. v. Fargason, 38 Ark, 238; Dodds v. Roane, 36 Ark. 511; Duffy v. Dubuque, 63 Iowa, 171; Attrill v. Patterson, 58 Md. 226; Higgs v. Hunt, 75 Mo. 106.

A verdict for excessive damages may

A verdict for excessive damages may be cured by release of the excess, in actions for torts, as well as in actions on contracts. Little Rock, etc., R. Co. v. Barker, 39 Ark. 491; C. & M. R. Co. v. Himrod Furnace Co., 37 Ohio St. 434; Corcoran v. Hannan, 55 Wis. 120. Compare Savannah, etc., R. Co. v. Harper, 70 Ga. 119.

2. Buffalo Barb. Wire Co. v. Phillips,

64 Wis. 338.
In all actions except for assault and battery, false imprisonment, libel, slander, malicious arrest and prosecution, criminal conversation, or debauching the plaintiff's daughter or servant, the defendant or any one of several defendants may pay into court a sum of money by way of compensation or amends. plaintiff does not see fit to accept this tender, he goes on with the case at the risk of being compelled to pay the costs accrued after such payment, if the amount paid in is found large enough to cover the real claim; and on the other hand, the defendant is thus protected. Md.

Rev. Code 1888, art. 75, ss. 21, 22.
3. Double and Treble Damages.—Sedg. Dam. (7th Ed.) 588; 1 Suth. Dam. 826;

III. ASSESSMENT OF DAMAGES.—(a) Writ of Inquiry.—Where the plaintiff recovers a judgment by default, the damages are assessed under the common-law system by a writ of inquiry. jury being summoned and impanelled, an inquisition is had, evidence is heard, a verdict rendered, and final judgment entered that the plaintiff recover the amount of the damages assessed by the jury.1

(b) Assessment by the Court.—With the assent of the plaintiff. the court may assess damages without the aid of a jury where

they are mere matter of calculation as in a protested note.2

(c) Effect of a Default.—A judgment by default in favor of the plaintiff admits the defendant's liability to some damages, but the amount is matter of proof. The defendant is therefore not entitled to deny the plaintiff's cause of action, but he may offer evidence in mitigation of damages. (See also MITIGATION OF Damages.) 3

Royse v. May, 93 Pa. St. 454; Chipman v. Emrick, 5 Cal. 239; Palmer v. York Bank, 18 Me. 166; Shrewsbury v. Bawtlitz, 57 Mo. 414; Osborn v. Lovell, 36

Mich. 24.

Recovery of Double Damages for Killing Stock.-See Spealman v. Mo. Pac. R. Co., 2 Am. & Eng. R. R. Cas. 636; Scott v. St. Louis, etc., R. Co., 13 Am. & Eng. R. R. Cas. 651; Memphis, etc., R. Co. v. Cooley, 20 Am. & Eng. R. R. Cas. 553; Henderson v. Wabash, etc., R. Co., 22 Am. & Eng. R. R. Cas. 595.

Double Damage Act of Missouri—Pleading Under What Must Amount

ing Under-What Must Appear.-Under the Double Damage Act of Missouri, the statement filed with the justice of the peace, in an action for killing stock, must show by direct averment or necessary implication that the killing did not occur within the limits of some incorporated Rowland v. St. Louis, etc., R. Co.,73 Mo. 619; Schulte v. St. Louis, etc., R. Co., 76 Mo. 324.

The statute in question is a penal one, and it requires greater strictness of construction, both as to allegata and probaia, than is requisite in ordinary cases. Fusz v. Squaunhorst, 67 Mo. 256; Sedg. Stat. & Const. L. 281; Manz v. St. Louis, etc., R. Co., 2 West. Rep. 472.
But in another case, in which the peti-

tion avers that the point of entry and that where the injury occurred are where the road "passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands," and that the action is brought under the act in question, it is held to be sufficient. Farrell v. Union Trust Co., 77 Mo. 475; Jackson v. St. Louis, etc., R. Co., 80 Mo. 147. See also Williams v. Hannibal, etc., R. Co. %0 Mo. 598.

1. 1 Suth. Dam. 771; 2 Sedg. Dam. (7th Ed.) 648.

According to some authorities, the court may assess damages without writ.
Price v. Dearborn, 34 N. H. 481; Begg v. Whittier, 48 Me. 314; Arden v. Cornell, 5 Barn. & Ald. 885.

A statutory writ of inquiry differs from a common-law writ in that any defence may be made to the subject of a new assignment that could have been made originally if it had been part of the Reeb v. Bosch, 17 Ill. declaration.

App. 426. 2. 1 Suth. Dam. 772: 2 Sedg. Dam. (7th Ed.) 648; McCoy v. Lemon, 11 Rich. (S. Car.) 165; Andrews v. Blake, I Hy. Bl. 529; Brandt v. Foster, 5 Iowa, 287; Grigsby v. Ford, 3 How. (Miss.) 184. By statute in some States damages

may be recovered after a default before the court without a jury. By virtue of a recent act the courts of Baltimore may assess damages without a jury after a default, even in cases of tort. 1886, ch. 184 (Md.)

3. Effect of a Default.—After a default the jury are bound to find for the plaintiff. Ellis v. State, 2 Ind. 262; Frazier υ. Lomax, 1 Cranch. (C. C.) 328. No evidence in bar of the action may be received after a default, but the amount of damages may be contested.

Gilbert, 19 Fla. 54.

Upon an inquiry of damages, in a suit for goods sold and delivered, where judgment was taken by default for want of an answer, evidence in bar of the action is not competent. The judgment by default admits the cause of action, and the plaintiff is only required, upon the inquiry, to make proof of the delivery of the goods and their value. Lee v. Knapp,

IV. EVIDENCE.—Admissibility of Facts Affecting the Measure of Damages.—(See SLANDER; LIBEL; MALICIOUS PROSECUTION. supra.)—When certain facts are offered in evidence to increase or diminish the damages, whether they are admitted or rejected will usually be found to depend not upon particular rules of evidence, but upon the question whether they are, or are not, proper elements of damage. No general rules, therefore, can be laid down as affecting this branch of the subject; but it may be said that the courts admit all facts tending to show the extent of the plaintiff's injury, and reject all evidence speculative in its nature, which is introduced rather for its effect upon the jury, than for the purpose of showing the actual injury to the plaintiff.1

90 N. Car. 171; Chicago, etc., R. Co. v. Ward, 16 Ill. 522; Mizell v. McDonald,

25 Ark. 38.

1. Contracts. - In an action for breach of promise of marriage, evidence of seduction is admissible in aggravation of damages. Kelley v. Riley, 106 Mass. 339; Sauer v. Schulenberg, 33 Md. 288.

So the length of the engagement may be shown to increase the damages.

Grant v. Willey, 101 Mass. 355.

But a declaration by the plaintiff, after the commencement of the action, that she would not think of marrying the defendant but for his money, is not admissible in mitigation of damages. Miller v. Hays, 34 Iowa, 496.

Evidence of the previous unchastity of the plaintiff is admissible, although known to the defendant at the time of the engagement. Denslow v. Van Horn, 16 Iowa, 476; Burnett v. Simpkins, 24

On the trial of an action for damages for breach of an alleged promise to marry, defendant's wealth is a proper subject of inquiry. McPherson v. Rvan. 50

Mich. 33.

For breach of contract for the sale of goods, their value for a specific purpose cannot be shown, but only their general market value. Bouton v. Reed, 13 Gray

(Mass.), 530.

The value of goods may be proved by price-lists and by offers to sell, as well as by actual sales. Cliquot's Champagne, 3 Wall. (U. S.) 143; Harrison v. Glover, 72 N. Y. 451. Compare Norton v. Willis.

73 Me. 580.

In Whitney v. Thacher, 117 Mass. 523, the court said: "We see no reason why merchandise brokers in Boston, members of firms doing business and having houses established both in Boston and New York, might not properly be admitted to testify as to the market value, at a particular date, of an article of merchan-

dise with which they are familiar, even though their knowledge was obtained from daily price-current lists and returns of sales daily furnished them in Boston from their New York houses. It is not necessary to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of af-fairs, and from means of information such as are usually relied on by men engaged in business, for the conduct of that business, that qualifies him to testify. An unaccepted offer, as an isolated transaction, is not competent evidence upon the question of value. But in a market regularly attended by buyers and sellers an offer as well as a sale of an article of recognized uniform character, constantly bought and sold in that market, so as to have a place upon the daily price-current lists, may serve to show that the market value of that article did not then exceed the price at which it was offered. It is admissible because of its publicity, and the presumption of the presence of dealers ready to purchase, and who would have done so if the offer had been below the market value." Harrison v. Glover. 72 N. Y. 451.

In Peter v. Thickstun, 51 Mich. 589. it was held that local newspaper quotations were admissible as evidence of the market value of goods upon a particular

See, contra, Cook Co. v. Harms, 10 Ill.

App. 24.

The value of property may be proved by the value of similar property at the same time and place. Benham v Dunbar, 103 Mass. 365; Cross v. Wilkins, 43 N. H. 332.
Where there is no market at the place

of delivery, proof of the value of the articles in other markets may be given,

with the cost of transportation added. Harris v. Panama R. Co., 58 N. Y. 660; Young v. Lloyd, 65 Pa. St. 199; Grand Tower v. Philipps, 23; Wall. (U. S.) 471; The Scotland, 105 U. S. 24.

The market price of goods is to be proved by persons conversant with the markets for such goods. Lynch, 60 N. Y. 469. Whelan v.

But every man is presumed to have some knowledge of the value of articles in ordinary use, and one may testify as to value, although not engaged in buying and selling the kind of goods in question. Browne v. Moore, 32 Mich. 254; White v. Hermann, 51 Ill. 243; Pa. R. Co. v. Bunnell, 81 Pa. St. 414.

Evidence may be given of the value of the article in market within a reasonable time, both before and after the day of delivery. Boyd v. Gunnison, 14 W. Va.

What one "thinks" or "calculates" he would have made, but for a breach of contract, is not admissible. Birney v. Wabash, etc., R. Co., 20 Mo. App. 470.

Nor can witnesses be allowed to give their opinions as to the value of prospective profits. Wakeman v. Wheeler, etc., Co., 101 N. Y. 205; s. c., 54 Am. Rep.

Tort Actions .- Evidence of the plaintiff's occupation, and the effect of the injury upon his ability to perform the duties of it, is to be admitted. Rapids, etc., R. Co. v. Martin, 41 Mich. 667; Elkhart v. Ritter, 66 Ind. 136. evidence of the loss of a position to which the plaintiff was about to be appointed is not admissible. Brown v. Cummings, 7 Allen (Mass.), 507. Where the plaintiff was disqualified from attending to his business by the injury, it is error to admit proof of the average profits of his business, it being too uncertain a basis upon which to estimate damages. Bierbach v. Goodyear Rubber Co., 54 Wis. 208; s. c., 41 Am. Rep. 19. But a professional man may testify as to his past earnings to show the amount of his damage. Nash v. Sharp, 19 Hun (N. Y.), 365.

In actions for personal injuries occasioned by the negligence of the defendant, on the question of damages, it is not only proper, but important, for the plaintiff to show, by the evidence, his previous physical condition and ability to labor, or follow his usual avocation, as well as his condition since the injury, to enable the jury to properly find the pecuniary dam-Joliet v. Conway, 119 Ill. 489; Conner v. Pioneer, 29 Fed. Rep. 629.

In a damage suit for bodily injury,

petitioner can allege the resulting necessity for a dissolution of a partnership of which he was a member, for the purpose of showing how far the injury disabled him from pursuing his ordinary occupation. If a plaintiff sought damages based upon such a disolution, a question would arise as to the admissibility of evidence. and it would become necessary to decide whether the dissolution was the proximate result of the injury; but when he alleged the dissolution merely to show the extent to which he was disabled, no such question could arise. International, etc., R. Co. v. Irvine, 64 Tex. 529.

In an action by a physician against a city, to recover damages for a personal injury received on account of a defective bridge, proof of his professional earnings before and after the injury is admissible in evidence under a special allegation of damages on account of loss of business. not as a basis or measure of damages, but as aiding the jury in estimating the compensation to be awarded. Logansport v. Justice, 74 Ind. 378.

Evidence of contributions made to assist the plaintiff while suffering from the injury cannot be admitted in mitigation of damages. Norristown v. Moyer, 67

Pa. St. 355.

The plaintiff cannot prove under a general allegation that others are dependent upon him for support, and that he has become embarrassed pecuniarily by reason of the injury. Laing v. Colder, 8 Pa. St. 479, s. c., 2 Am. Ry. Rep. 379: Tomlinson v. Derby, 43 Conn. 562. Although there are some authorities to the contrary, the weight of authority is that neither the pecuniary circumstances of the plaintiff nor of the defendant are admissible on the question of the amount Hunt v. Chicago, etc., R. of damages. Co.. 26 Iowa, 363; Penna. Co. v. Roy, 102 U. S. 451; s. c., 1 Am.& Eng. R. R. Cas. 225; Belknap v. Boston, etc., R. Co., 41 N. H. 358; Chicago, etc., R. Co. v. Henry, 62 Ill. 142; Chicago, etc., R. Co. v. Johnson, 103 Ill. 512; s. c., 8 Am. & Eng. R. R. Cas. 225; Mo. Pac. R. Co. v. Lyde, 57 Tex. 505; s. c., 11 Am. & Eng. R. R. Cas. 188.

So it was held in Mo., etc., R. Co. v. Lyde, 57 Tex. 505, that whatever may be the rule in cases of slander and of breach of promise of marriage, yet in a suit for damages for personal injury against a railroad company, brought by the party himself, although the plaintiff may show the nature of his business and the value of his services in conducting it as grounds for estimating damages, yet his wealth or poverty is an immaterial issue. And

in Joliet v. Conway, 119 Ill. 489, the court held, in an action by a married woman against a city for personal injuries sustained by her through a defective sidewalk, the damages must be confined to such as she has herself sustained: and the fact that she had a family, or had the care of or maintained the same. will form no proper element in the assessment of her damages. She cannot recover for damages resulting to her Louisville, etc., R. Co. v. Gower, 85 Tenn, 465.

But in Barnes v. Campbell, 60 N. H. 27, it was held in an action on the case, for a libel charging that the plaintiff is a thief, evidence that the plaintiff had a wife and child is competent on the question of damages. And in Hunt v. Chicago, etc., R. Co., 26 Iowa, 363, the plaintiff was allowed to prove that he had no means of support but his earn-

On the trial of an action of trespass for an assault and battery, the plaintiff may give in evidence the pecuniary circumstances of the defendant to enhance his damages, and in such case the defendant may give counter evidence on the subject; but unless such evidence is given by the plaintiff, the defendant has no right to introduce proof on that subject, even in mitigation of damages. Mullin v. Spangenberg, 112 Ill. 140.

Evidence of the pecuniary circumstances of the defendant is admissible only in cases where punitive damages Morgan v. Durfee, 60 are allowable.

Mo. 469; s. c.. 33 Am. Rep. 508.

The effect of the injury on the plaintiff's mental condition, and on his health in the future, may be shown. T. W. & W. R. Co. v. Baddeley, 54 Ill. 19; s. c., T. W. &

5 Am. Rep. 71. Such mental anguish as is caused by the injuries received is proper to be considered by the jury in determining the amount of compensatory damages. It is not error to instruct the jury that they may allow the plaintiff for mental anguish, which, by reason of the accident, he will suffer in the future, such sum as they think proper, without proof of any special sum, where, with reference to such future sufferings, they have been instructed that they should be satisfied from the evidence that such sufferings will probably be sustained by plaintiff. Ker v. Albia (Iowa), 34 N. W. Rep. 833. Kendall

In an action for personal injuries, the mental anguish or suffering which can be proven is only such as is endured by the plaintiff as the direct consequence of the personal injury to himself. Anxiety of mind about the safety of others who may be in danger of injury from the same cause cannot be considered. Keves 7

Minneapolis, etc., R. Co., 33 Minn. 290. At the time of the trial of an action for damages received in alighting from defendant's railway train, the pla a liff had not fully recovered from the effects of the injury, and still suffered from it. The physicians attending her were unable to determine whether she would recover or whether the injury would be permanent. The court gave the following instruction: "If you find from the testimony that her injuries are permanent, consider such inconvenience of getting about, and pain, if any, as you find are reasonably certain to result therefrom in the future." Held, that as there was some evidence tending to show that plaintiff would in the future suffer pain and inconvenience from the injury, the instruction was not erroneous. Am. & Eng. R. R. Cas. 45.

In an action against an incorporated village to recover for a personal injury caused by a defective sidewalk, the court, in substance, instructed the jury, that if they found the defendant guilty, the plaintiff would be entitled to recover for any pain and anguish which he had suffered, or would thereafter suffer, in consequence of the injury; for any and all damages to his person, permanent or otherwise, occasioned by such injury; for loss of time, if any, caused by the injury; for expenses incurred in a reasonable effort to effect the cure of such injury; and, generally, to recover all damages alleged in the declaration which they believed, from the evidence, he had sustained by the injury. Held, that as an instruction in regard to the measure of damages it was substantially correct, and that it was not open to the objection that it allowed the jury to give damages although the plaintiff had failed to exercise due care. Village of Sheridan v. Hibbard, 119 111. 307.

A railroad company is liable to a passenger on its train for the aggravation of an existing disease, if that aggravation is the result of its negligence and the injury the passenger thereby received. The argument causa proxima et non remota spectatur is not applicable. Louisville, etc., R. Co. v. Jones, 108 Ind. 556; s. c., 28 Am. & Erg. R. R. Cas. 170.

Counsel for the railroad asked the court to instruct the jury: " If the jury believe from the evidence that the seat of the injury caused by the defendant to the plaintiff was the right hip, and that before and at the time of the said injury

the said hip was in a diseased condition. and liable to injuries that in a sounder condition of health would not have been inflicted by the collision proven in the cause, they are at liberty to consider these facts in their estimate of compensation for damages inflicted by the defendant upon the plaintiff in the manner set out in the pleadings." Held, that such instruction was properly refused. Shenandoah Valley R. Co. v. Moore (Va.), 3 S. East, Rep 796.

In an action for injury to the arm of the plaintiff, when he has proved the injury and the condition of the arm, the jury may consider the pain suffered without further evidence of it. Chicago, etc., R. Co. v. Warner, 108 Ill. 538; s. c., 18

Am. & Eng. R. R. Cas. 100.

Standard life-tables may be introduced to show the probable duration of the plaintiff's life on the question of compensation for permanent injury; or in case of death, the deceased's expectation of life at the time of the accident. Scheff-B. C., etc., R. Co. v. Coates, 62 Iowa, 487; s. c., 15 Am. & Eng. R. R. Cas. 265; Sauter v. N. Y., etc., R. Co., 66 N. Y. 50.

The plaintiff may exhibit his injuries to the jury. Mulhade v. B. C. R. Co., 30 N. Y. 370.

In an action by a married woman against a city, for personal injuries sustained by her through a defective sidewalk, the damages must be confined to such as she has herself sustained; and the fact that she had a family, or had the care of or maintained the same, will form no proper element in the assessment of her damages. She cannot recover for damages resulting to her family. of Joliet v. Conway, 119 Ill. 489.

So the court may direct the person influred to perform such acts in the presence of the jury as will test the extent of his injury. Hatfield v. St. Paul, etc., R. Co., 33 Minn. 130; s. c., 18 Am. & Eng.

R. R. Cas. 292.

Or the court may require him to submit to the examination of medical experts. Atchison, etc., R. Co. v. Thul, 29 Kan. 466; s. c., 10 Am. & Eng. R. R. Cas. 378; White v. M. C. R. Co., 61 Wis 536; s. c., 18 Am. & Eng. R. R. Cas. 213; Schroeder v. Chicago, etc., R. Co., 47 Iowa, 375.

Where a passenger was wrongfully carried beyond her destination, the fact that she had to walk over a dusty road, got wet crossing a creek, and was chased by dogs, was held admissible. Cincinnati, etc., R. Co. v. Eaton, 04 Ind. 474:

s. c., 48 Am. Rep. 170.

It is not admissible to show that the deceased held policies of insurance on his life for the benefit of the persons who sue. B. & O. R. Co. v. Wightman. 29 Gratt. (Va.) 431; s. c., 17 Am. Ry. Rep. 351; Kellogg v. N. Y., etc., R. Co., 79 N. Y. 72; North Pa. R. Co. v. Kirk, 00 Pa. St. 15.

According to the best authorities, the pecuniary circumstances of the survivors cannot be shown to increase or diminish Bayfield, 37 Mich. 205; Ill. Cent. R. Co. v. Bayfield, 37 Mich. 205; Ill. Cent. R. Co. v. Baches, 55 Ill. 379; Penna. R. Co. v. Butler, 57 Pa. St. 335; Beard v. Skeldon, 13 Ill. App. 54; Chicago, etc., R. Co. v. Moranda, 93 Ill. 302. Compare Cent. R. Co. v Moore, 61 Ga. 151. And in Mul-cairnes v. Janesville, 67 Wis. 24, it was held that in an action for damages on account of the death of her husband, evidence as to the number of children dependent on the widow for support is admissible. And in Johnson v. Chicago, etc., R. Co., 64 Wis. 425, it was held that upon the question of damages for the negligent killing of a child, evidence that the parents are poor, in bad health, and obliged to work for a living is admissible to raise a presumption that its services would continue after majority.

For injury to the plaintiff's land by pollution of a stream, it is not competent to show the bad condition of lands situated on the same stream. Lincoln v. Taunton, 9 Allen (Mass.), 181. Compare Hawks v. Charlemont, 110 Mass 110.

Where damages claimed result through the frightening away of guests from plaintiff's hotel by the blasting of defendant, evidence of injuries to adjacent buildings, caused by rocks cast upon them through such blasting, is competent as bearing upon the reasonableness of the fears of injury entertained by such guests. G., B. & L. R. Co. v. Doyle, 9

Colo. 549.

On the trial of an action on the case, brought by the owner of a brewery, against the defendant, the owner of a starch factory located near the brewery, to recover damages for polluting the waters of a stream that ran through a part of the plaintiff's premises, by the flow of slops into the same, and for befouling the air with unhealthy and unsavory odors, arising from the using and operating the starch factory, the court allowed the plain iff to be asked, when testifying as a witness, the difference in the sales of his beer before and after the construction of the starch factory. Held,

DAMNUM ABSQUE INJURIA.—The literal translation of this term is damage without injury. But this is contradictory, and does not convey a proper understanding of the term. Its proper rendering is *injury without wrong*, and in law is used to designate a loss which does not give rise to an action of damage against the person causing it.

It is a well-known rule of law, that the exercise of ordinary rights for a lawful purpose and in a lawful manner is no wrong, even if it causes damage. It is chiefly in this class of cases that we meet with the phrase or formula damnum absque injuria.

that the question was properly allowed; the other proof showing that the flow of the slops from the sewer affected the atmosphere at the brewery, and the plaintiff's theory being that the atmosphere so polluted affected the beer, and rendered it unsalable. Cunningham v. Stein, 109 III. 375.

For conversion of books, the measure of damages is the price for which the books sold, and evidence of the cost of their manufacture and of their small scientific value is not admissible. Gunn v. Burghart, 47 N. Y. Super. Ct. 370.

Medical Expenses.—In an action for personal injuries, reasonable expenses for medical attendance are a proper element of damages. Hulehan v. Green Bay, etc., R. Co., 68 Wis. 520; s. c., 31 Am. & Eng. R. R. Cas. 322.

In an action for damages for personal injuries, where there is no evidence of the amount of medicine or medical treatment employed by the injured person on account of such injuries, it is error to instruct the jury that they may allow for medicines and medical treatment reasonably and necessarily employed. Eckerd v. Chicago, etc., R. Co., 70 Iowa, 353; s. c., 27 Am. & Eng. R. R. Cas. 114.

Where plaintiff claims as a ground of damage the reasonable expense of future medical attendance, it is for the jury to determine whether such attendance will be required, and evidence tending to show the probable value of such services is competent. Kendall v. Albia (Iowa), 34 N. W. Rep. 833.

In an action for personal injuries, it is no defence to a claim for moneys paid a nurse that the plaintiff had a family capable of taking care of him; and evidence of that fact is inadmissible. Kendall v. Albia (Iowa), 34 N. W. Rep. 833.

List of Authorities.—Sedgwick Measure of Damages (7th Ed.); Sedgwick Leading Cases on Damages (1878); Wood's Mayne on Damages (1880); Sutherland on Damages (1882); Field on Damages (1881); Weeks Damnum Absque Injuria (1879); Addison on Torts (1887); Addison on

Contracts (1888); Parsons on Contracts (1883); Redfield on Railways (1888); Rorer on Railways (1884); Thompson on Negligence (1880); Benjamin on Sales (1883); Schouler's Personal Property (1884); Townshend on Slander and Libel (1877); Liquidated Damages, 18 Cent. L. Jour. 143; 19 Cent. L. Jour. 282, 302; Remoteness of Damage, 12 Cent. L. Jour. 534, 583; 13 Cent. L. Jour. 86, 124; Exemplary Damages, 12 Cent. L. Jour. 529, 554, 557; 20 Amer. Law Reg. 570; Injury to Parental Feelings, 14 Cent. L. Jour. 61; Meas. of Damages, 14 Albany L. Jour. 152; Proximate and Remote Cause, 4 Amer. Law Rev. 201; 2 West. Law Jour. 513; 14 Alb. L. Jour. 104; Prospective Damages to Realty, 26 Amer. Law Reg. 281, 345.

1. The cases considering what loss or damage is damnum absque injuria, are scattered over almost the whole field of the law, especially that relating to torts. It would be impracticable under this title to consider the entire doctrine in its relation to all the many subjects wherein it arises. It is largely a matter of exceptions to general rules, and in addition to the notes infra, will be treated under the following titles, in connection with the subjects there under consideration: Accident; Act of God; Adultery; ADULTERY; ARREST; ASSAULT; CONTRIBUTORY NEG-LIGENCE; CONTRACTS; CONVERSION; DEATH; DECEIT; DE MINIMIS NON CURAT LEX; DRAINS AND SEWERS; EASEMENT; ELECTIONS; EMINENT DO-MAIN; FALSE IMPRISONMENT; FELLOW-SERVANTS; FELONY (cannot be made a ground of civil action); Fire Caused by THE OPERATION OF RAILROADS; FRANCHISE (injury by grantee of); FRAUD; FRAUDULENT REPRESENTATIONS; IN-FANTS; INSANE PERSONS; JUDGES; MA-LICIOUS PROSECUTION; MASTER AND LICIOUS PROSECUTION; MASTER AND SERVANT; MINES AND MINING; MUNI-CIPAL CORPORATIONS (non-exercise of powers by); NEGLIGENCE; NUISANCES; OFFICERS OF MUNICIPALITIES; PATENTS; PERJURY; PHYSICIANS AND SURGEONS; PRIVILEGED COMMUNICATIONS; -RAIL-ROADS; SEDUCTION; SLANDER AND LIBEL; SHERIFFS: STOCK AND STOCKHOLDERS: STREETS AND HIGHWAYS: TELEGRAPHS AND TELEPHONES: TRADE-MARKS: TRES-WATER AND WATER-WAR: COURSES.

Competition in Trade. - A classical illustration of the rule is given by a case in the Year Book of Henry IV., which has often been cited in modern books, and which is still perfectly good authority. The action was trespass by two masters of the grammar school of Gloucester against one who had set up a school in the same town, whereby the plaintiffs. having been wont to take forty pence a only twelve pence. It was held that such an action could not be maintained. "Damnum," said Hankford, J., "may be absque injuria; as, if I have a mill, and my neighbor build another mill, whereby the profit of my mill is diminished. I shall have no action against him, though it is damage to me; . . . but if a miller disturbs the water flowing from my mill, or doth any nuisance of the like sort. I shall have such action as the law gives." And it is well settled that interference with another's trade by fair competition is never actionable. Rogers v. Dutt, 13 Moore P. C. 241; Young v. Hichens, 6 Q. B. 606. See title DE MINIMIS NON CURAT LEX. URAT LEX.

Use of One's Own Property. - Baron Comyns lays down the rule generally, that an action on the case does not lie for a reasonable use of one's right, though it be to the annoyance of another and he puts the case: "If a man build a house, and make cellars upon his soil, whereby a house newly built in an adjoining soil falls down." He refers to 2 Roll. Abr. He refers to 2 Roll. Abr. 565, and I Sid, 167, which fully support

the doctrine.

In the case of Thurston v. Hancock, 12 Mass. 220, the plaintiff built a house on his own land, within two feet of the boundary-line, and ten years after the owner of the adjoining land dug so deep into his own land as to endanger the house; and the owner of the house on that account left it and took it down. Ιt washolden that no action lay for the owner of the house, because the defendants, having the entire dominion not only of the soil but of the space above and below the surface, could not be restrained in the exercise of their right, unless by covenant or by custom; that the house in question had not the qualities of an ancient building, so that the plaintiff could prescribe for the privilege of which he had been deprived; and that a man

who builds a house adjoining his neighbor's land ought to foresee the probable use by his neighbor of the adjoining land. The same principle was followed in Panton v. Holland, 18 Johns. (N. Y.) 92. And see Palmer v. Mulligan, 3 Cai, (N. Y.) 308; People v. Canal Board, 2 N. Y. Sup. Ct. (T. & C.) 275. In Howland v. Vincent, 10 Metc. (Mass.)

371, an owner of land made an excavation therein, within a foot or two of a public street, and used no precaution against the danger of falling into it. A person passing in the night-time went over the line of the street, fell into the excavation. and was injured. Held, that the owner of the land was not liable to an action for

the injury thus caused:

"So it is laid down in Com. Dig. (Action upon the Case for a Nuisance, that the action does not lie if a man make a ditch in his waste, which lies near the highway, within thirty-six feet of the highway, into which the horse of another falls; for the ditch in his own soil was no wrong to the other, but it was his fault that his horse escaped into the waste. Weeks Damnum Absque Injuria, § 9.

Injuries Committed through Necessity. -" Compulsory and involuntary acts, as a general rule, exempt a person from liability, and the sufferer has no redress. There may be a necessity to do an injury, resulting from the instinct of self-preservation; from the actual necessity of obeying a higher and controlling power, or necessity resulting from the act of God or a stranger. Young v. Hischens, 6 O. B. The illustration of the first case usually given is, where two persons being shipwrecked, have got on the same plank, but finding it not able to save them both, one of them thrusts the other from it, and the latter is drowned. survivor cannot be held liable to the relatives of the victim for the great injury inflicted, nor is the act considered any other than a justifiable homicide. The act is regarded as done through unavoidable necessity, and excused upon the right of self-preservation. If a ferryman overload his boat with merchandise, a passenger may, in case of necessity, and to save his own life and that of his fellow-passengers, throw the goods overboard, or at all events sufficient of them to lighten the boat and afford safety. Mause's Case, 12 Rep. 63. Obedience to existing laws will, as a general proposition, render an injury inflicted in obeving them damnum absque injuria—as when a proper officer executes a criminal in strict conformity with his warrant for so doing, issued upon a legal sentence, and where he properly executes legal process.

He is the servant of the law, and acting in obedience to it." Weeks Damnum Absque

Injuria, § 13.

Newspapers Entitled by Law to Certain Public Printing. -No action will lie by the publishers of a newspaper against a postmaster for refusing to receive the proofs in regard to the circulation of their paper. and to give them the publishing of the list of letters remaining in the post-office, according to the act of Congress, Strong v. Campbell, 11 Barb, (N. Y.) 135. in Iowa, where the statute provided that the boards of supervisors of the several counties should select two newspapers, having the largest circulation, in which to publish the proceedings of the board, and the laws of the general assembly of the State, it was held that the proprietor of a newspaper had no such private or personal interest in the publication of such laws and proceedings as that he could in his own name maintain an action to compel the board by mandamus to order the publication in his paper. Welch v. Board, 23 Iowa, 199; Smith v. Yoram, 37 Iowa,

Effect of Prohibitory Laws upon Brewery and Distillery Property.—The local option legislation of the State of Georgia' being constitutional, as a valid exercise of the police power, it follows that the incidental'effects upon the value of property, such as a brewery and its fixtures, resulting from the inability of the owners to adjust their old business to the new law, is damnum absque injuria. The law does not take or damage their property for the use of the public, but only prevents them from taking or damaging the public for their use. Menken v. City of Atlanta (Ga.), 2 South E. Rep. 559.

Fires.—A party who sets fire to logs and brush on his own lands is not liable to an action though it be blown on the lands of his neighbor and burn his barn; unless the party setting the fire is also guilty of negligence or carelessness in setting it at that place and time. Fahn v. Reichart, 8 Wis. 255; Hay's Admr. v. Miller, 6 Hun (N. Y.), 320. See Fires Caused by the Operation of Railways.

Where property is destroyed to prevent the spreading of a conflagration it is damnum absque injuria, and no action lies for the damage thereby occasioned. Russell v. Mayor, etc., 2 Denio (N. Y.), 461; Rex v. Pagham, 3 B. & C. 355; Surocco v. Geary, 3 Cal. 72; American, etc., Print Works v. Lawrence, 1 Zab. (N. J.) 257.

Riparian Rights—Pollution of Stream by Water from Coal-mine.—The case of Pennsylvania Coal Co. v. Sanderson.

113 Pa. St. 126; s. c., 14 Am. & Eng. Corp. Cas. 656, is a late and leading case upon this subject. It appeared that the Pennsylvania Coal Co. owned a large tract of coal land and operated a number of mines in the basin of a small stream known as Meadow Brook. Into this stream, owing to the natural conformation of the surface, the water from the surrounding lands was drained. mine water flowed from a tunnel, driven by the company, by the natural course of gravity into Meadow Brook. water which percolated into the shafts was pumped therefrom, and passed with the flow from the tunnel by an artificial watercourse into said stream. The large amount of mine water which the coal company poured into the stream so corrupted the water of the stream as to render it totally unfit for domestic use. The fish in the brook were entirely destroyed, and water-pipes leading therefrom corroded. The plaintiff, who was the owner of a tract of land on Meadow Brook, and previous to its pollution had been accustomed to use the water for domestic and other purposes, brings suit to recover damages alleged to have been sustained in consequence of the pollution of the stream. *Held*, that the right to mine coal is not a nuisance in itself, but is a right incident to the ownership of coal property; and when exercised in the ordinary manner, and with due care, the owner cannot be held liable in damages for permitting the natural flow of mine water over his own land into a watercourse, by means of which the natural drainage of the country is affected. The removal of water from the workings being essential to the business of mining, its discharge into the natural watercourse and consequent pollution of that stream is damnum absque injuria to lower riparian owners; and where the water flowing naturally from the tunnels is sufficient to cause the pollution independently of the water pumped from the lower level of the mines, no damages can be recovered for polluting the stream by the latter method.

The opinion of the court by Clark, J., is valuable as well for its elaborate review of authorities as for its logical reasoning. He said: "It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property; he may cut down the forest trees, clear and cultivate his land, although in so doing he may dry up the sources of his neighbor's springs, or remove the natural barriers against wind and storm. If, in the excavation of his land, he should uncover a spring of water, salt or fresh, acidulated or

sweet, he will certainly not be obliged to cover it again, or to conduct it out of its course lest the stream in its natural flow may reach his neighbor's land. It has always been considered that land on a lower level owes a natural servitude to that on a higher level in respect of receiving, without claim for compensation by the owner, the water naturally flowing down to it. In sinking his well, he may intercept and appropriate the water which supplies his neighbor's well. Acton v. Blundell, 12 M. & W. 324; Wheatley v. Baugh, I Casey, 528; Haldeman v. Bruckhart, 9 Wr. 514. Or if his own well is so close to the soil of his neighbor as to require the support of a rib of clay or of stone on his neighbor's land to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water. Wh. on Neg. 939. He may, to a reasonable extent, jure naturæ, divert water from a stream for domestic purposes, and for the irrigation of his land. Messinger's Appeal, decided October 5, 1885.

"So, also, each of two owners of adjoining mines has a natural right to work his own mine in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will occur to the owner of the adjoining mine. Smith v. Kendrick, 7 C. B. 505. One mine-owner may thus permit water, naturally flowing in his own mine, to pass off by gravitation into an adjoining or lower mine so long as his operations are carried on properly and in the usual manner. Bainbridge on Mines, 237. To the same effect are Wilson v. Waddell, L. R. 2 Appl. Cas. 95; Crompton v. Lea, L. R. 19 Eq. 115.

"The defendants, being the owners of the land, had a right to mine the coal. It may be stated as a general proposition that every man has the right to the natural use and enjoyment of his own property; and if whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is damnum absque injuria, for the rightful use of one's own land may cause damage to another without any legal wrong.

"Mining in the ordinary and usual form is the natural user of coal lands; they are, for the most part, unfit for any other use. 'It is established,' says Cotton, L. J., in West Cumberland Iron Co. v. Kenyon, L. R. 6 Ch. Div. 773, 'that taking out minerals is a natural use of mining property, and that no adjoining proprietor can complain of the result of

careful, proper mining operations.' In the same case, Brett, L. J., says: 'The cases have decided that where that maxim (Sic utere two ut alienum non lædas) is applied to landed property, it is subject to a certain modification; it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary, in order to enable him to have the natural use of his own land.' L. R. II Ch. Div. 787.

"The right to mine coal is not a nuisance in itself; it is, as we have said, a right incident to the ownership of coal property, and when exercised in the ordinary manner, and with due care, the owner cannot be held for permitting the natural flow of mine water over his own land into the watercourse by means of which the natural drainage of the country

is effected.

'There are, it is well known, percolations of mine water into all mines: whether the mine be operated by tunnel, slope, or shaft, water will accumulate. and, unless it can be discharged, mining The discharge of this acidmust cease. ulated water is, practically, a condition upon which the ordinary use and enjoy-ment of coal lands depends; the discharge of the water is practically part and parcel of the process of mining, and as it can only be effected through natural channels, the denial of this right must inevitably produce results of a most serious character to this the leading in-dustrial interest of the State. The defendants were engaged in a perfectly lawful business, in which they had made large expenditures, and in which the interests of the entire community were concerned; they were at liberty to carry on that business in the ordinary way, and were not, while so doing, accountable for consequences which they could not control. As the mining operations went on, the water, by the mere force of gravity, ran out on the drifts and found its way over the defendants' own land to the Meadow Brook; its is clear that for the consequences of this flow, which by the mere force of gravity naturally, and without any fault of the defendants, carried the water into the brook, and thence to the plaintiff's pond, there could be no responsibility as damages on part of the

"A person in the lawful use of his own land may cause to flow over the land of another a greater quantity of water than it is naturally subjected to. 'I am aware,' says Woodward, J., in Kauffman v. Griesemer, 2 Casey, 414, 'that in Merrit v. Parker (I Coxe, N. J. R.),

Chief Justice Kinsey denied these principles, and held that by no contrivance and under no pretence can one man cause to flow over the land of another a greater quantity of water than it is naturally subjected to; but, on the other hand, there is a Maryland case of equal authority (Williams v. Gale, 3 H. & John. R. 231) which in its facts bears a striking resemblance to the case at bar; and the case of Martin v. Riddle, decided by my brother Lowrie in the District Court of Allegheny County, and affirmed in the Supreme Court at September Term, 1848. These cases recognize the principle that the superior owner may improve his lands by throwing increased waters upon his inferior, through the natural and customary channels, which is a most important principle in respect not only to agricultural but to mining operations also.

"It may be said that, under the doctrine of Baird v. Williamson, 15 C. B. N. S. 376, when the flow of water is increased artificially, or is greater than would result from gravitation alone, the mineowner who causes it is liable for the increased injury; that this may be termed a non-natural use of the land, and the mine-owner would be held for any injury which would be sustained in consequence of this artificial increase in the amount. We understand the rule of Baird v. Williamson to be this: Where coal may be successfully mined by tunnel or drift, the owner of the land may be deemed to have the natural use and enjoyment of it in that form of mining, and he will in such a case not be allowed to add merely to the efficiency of his enterprise to the injury of his neighbor's land, by the artificial accumulation of water in large quantities, through the use of powerful engines and pumps.

But it does not appear from any evidence in this cause that the mine was conducted by the defendants in any but the ordinary and usual mode of mining The deeper strata can in this country. only be reached by shaft, and no shaft can be worked until the water is withdrawn. A drift is in some sense an artificial opening in the land, and accumulates and discharges water in a greater volume and extent than would otherwise result from purely natural causes, yet mining by drift has, as we have seen, been held to be a natural user of the land. So, too, we think, according to the present practice of mining, the working of the lower strata by shaft, in the usual and ordinary way, must be considered the natural user of the land, for the taking out of the coal which can be reached by shaft only; and, as the water cannot be discharged by gravity alone, it must necessarily, as part of the process of mining, be lifted to the surface by artificial means, and thence be discharged through the ordinary natural channels for the drainage of the country.

"But if we should be wrong as to the water which was pumped out of the mine, how can we discriminate as to the effect of the water which flowed from the mine by mere gravity and that which was pumped out? The witnesses did not discriminate in their testimony, and the learned court did not instruct the jury to The injury make any discrimination. done to the plaintiff was estimated without any effort to distinguish between the effects of the water from one or other of these sources. If the stream was already corrupted by the water which flowed from the tunnels, or if that water was sufficient of itself to corrupt it, so as to render it useless for domestic purposes, the water which was pumped, as an independent cause of action, would occasion an injury without damage. The pollution of a clear stream might inflict an injury for which damages would be recoverable, but we cannot see how damages could be estimated for the pollution of a stream which had already become foul from other causes for which the law gave no remedv."

"In the previous disposition of this case in this court, as reported in 5 Norris, 401, the principle of law mainly relied upon was stated as follows: 'If a man brings or uses a thing of a dangerous nature on his own land, he must keep it at his own peril, and is liable for the consequences if it escapes and does injury to another (Jones v. Festiniog, L. R. 3 Q. B. 736). The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir (Harrison v. Great Northwestern R. Co., 3 H. & C. 238), or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works (St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642), is damnified without any fault of his own, and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others, so long as it was confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does property (Fletcher ω , Rylands, L. R. I Ex. 280). "The parenthetic references to authorities are not found in the opinion in Fletcher v. Rylands, but were inserted in the body of the quotation by Mr. Justice Woodward, who delivered the opinion of this court.

"The doctrine declared in Fletcher v. Rylands, regarded as a general statement of the law, is perhaps not open to criticism in England, but it is subject to many and obvious exceptions there, and has not been generally received in this country. A rule which casts upon an innocent person the responsibility of an insurer is a hard one at the best, and will not be generally applied unless required by some public policy, or the contract of the parties. The later decisions in the the parties. English courts seem to encourage rather than to discourage exceptions to it. we regard the rule in Fletcher v. Rylands as wholly inapplicable to the case under consideration; referring to the judgment, we find the facts of that case to have been as follows: The plaintiff was damaged by his property being flooded with water, which, without any fault on his part, broke out of a reservoir, constructed and maintained on the defendant's land, by the defendant's orders. The coal under the defendant's land had, at some remote period, been worked out, but this was unknown at the time the defendant gave directions to erect the reservoir. though the persons employed did not in fact use proper care and skill to provide for the sufficiency of the reservoir, with reference to these old shafts, the defendants were personally free from all blame. The consequence was that the reservoir, when filled with water, burst into the shafts; the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief. 'We think that the true rule of law is,' says Blackburn, J., 'that the person who for his own purposes brings on his lands and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.
The general rule, as above stated, seems on principle just.

"Then follows the clause which we find quoted in the opinion of Mr. Justice

Woodward.

"But the defendants, in the case at bar, brought nothing upon the land; they accumulated nothing there; the water was there without any act of theirs, and it was the accumulation, of it which they sought to prevent. They were in the natural user of their lands for a lawful purpose, and the discharge of the mine water was an absolute necessity in order to that use of the land. The distinction is obvious, and we cannot see how Fletcher v. Rylands can be supposed to have any application in the consideration of this case.

"The case was taken to the House of Lords on a proceeding in error against the judgment of the Exchequer Chamber, which had reversed the judgment of the Court of Exchequer; the judgment was there affirmed (Rylands v. Fletcher, L. R. 3 H. L. 330), and the general legal proposition involved in the case thus stated by Lord Cranworth: 'If a person bring or accumulate on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent damage.'

"But the very distinction we have endeavored to point out between that case and this was suggested in the judgment of the House of Lords in the case referred to. Lord Cairns says: 'The defendants might lawfully have used that close for any purpose for which it might in the ordinary course of the employment of land be used; and if in what I may term the natural user of that land there had been any accumulation of water, either on the surface or underground and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that the result had taken place.' A line was thus drawn between the rule recognized in the case adjudged. and the general immunity which the law extends to landowners for acts done in the natural and lawful user of their land. In the first head-note of the case, as reported in L. R. 3 H. L. 330, the general legal proposition, embodied in the judgment of the House of Lords, is thus stated: 'Where the owner of land, without wilfulness or negligence, uses his land, in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbor, he will not be liable for damages.' Thus it seems that the liability, even under the ruling of Rylands v. Fletcher, is rested on the manifestly hazardous state of things artificially maintained on the land, and not on the natural user of it.

"As we have said, even in England the later decisions favor exceptions to the rule of Rylands v. Fletcher; thus, in Nichols v. Marsland, L. R. 10 Exch. 255, the defendant was an owner of artificial pools, formed by damming a natural stream, into which the water was finally let off by a system of weirs. The rainfall accompanying an extremely violent thunderstorm broke the embankments. and the rush of water down the stream carried away four county bridges, in respect of which the action was brought. It was held that the rule referred to did not apply in the operation of natural forces so violent and unexpected that human foresight could not have been reasonably expected to anticipate it. So it has been held not to apply where the immediate cause of the damage is the act of a stranger (Box v. Jubb, 4 Exch. Div. 76); nor when the artificial construction is maintained for the common benefit, and the immediate cause of the injury of such a trivial character as to have been wholly unexpected (Carstairs v. Taylor, L. R. 6 Exch. 217); or in the exercise of powers specially conferred by law. Madras R. Co. v. Zemindar, etc., L. R. 1 Ind. App. 364. "The principle of Rylands v. Fletcher

was again enforced by the Court of Exchequer in Smith v. Fletcher, L. R. 7 Ex. 305, a case referred to in the argument of counsel, growing out of injury from the same premises; the case was carried up, however, to the Exchequer Chamber, where the judges thought that, under the circumstances of the case, evidence might have been received to show that every reasonable precaution had been taken to guard against ordinary emergencies; and that it was desirable the opinion of the jury should be taken as to whether the acts of the defendants were done in the ordinary, reasonable, and proper mode of working the mine. It is not altogether clear, therefore, since the decision of this case in the Exchequer Chamber, what the English doctrine is as to cases which are not strictly like Ry-

lands v. Fletcher.

"Nor has the doctrine of Rylands v. Fletcher been generally received in this country. It has been cited with approval in Massachusetts (Shipley v. Fifty Associates, 106 Mass. 194; Gorham v. Gross, 125 Mass. 232; Mears v. Dole, 135 Mass. 508); but it has been expressly denied in New York (Losee v. Buchanan, 51 N. Y. 477), in New Jersey (Marshall v. Wel-wood, 38 N. J. Law, 339), and in New Hampshire (Sweet v. Cutts, 50 N. H. 439; Garland v. Towne, 55 N. H. 57). In Losee v. Buchanan, Earl, C., says: 'It is sufficient, however, to say that the law as laid down in these cases (Rylandsv. Fletcher and Smith v. Fletcher) is in direct conflict with the law as settled in this country

"Here, if one builds a dam upon his own premises, and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way, and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part. Angell on Watercourses, sec. 336; Taphan Curtis, 5 Vt. 371; Todd v. Cochell, 17 Cal, 97; Everett v. Hydraulic, etc., Co., 23 Id. 225; Shrewsbury v. Smith, 12 Cushing, 177; Livingston v. Adams, 8 Cowen, 175; Bailey v. Mayor, etc., of New York, 3 Hill, 531; s. c., 2 Denio, 433; Pixley v. Clark, 35 N. Y. 520, 524; Sheldon v. Sherman, 42 Id. 484.

"The true rule is laid down in the case of Livingston v. Adams, 8 Cow. (N. Y.)-175, as follows: 'Where one builds a mill-dam upon a proper model, and the work is well and substantially done, he is not liable to an action though it break. away, in consequence of which his neighbor's dam and mill below are destroyed. Negligence should be shown in order to-

make him liable.'

"In Marshall v. Welwood, 38 N. J. L. 339. Beasley, C. J., says: 'The fallacy in the process of argument by which judgment is reached in the case of Fletcher v. Rylands appears to me to consist in this: that the rule, mainly applicable to a class of cases which I think. should be regarded as in a great degree exceptional, is amplified and extended. into a general if not universal principle.

"In Garland v. Towne, 55 N. H. 57, Ladd, J., referring to the case of Rylands v. Fletcher, says: 'I am not aware that any court, this side of the Atlantic, has gone so far as this, and I apprehend it would be a surprise not only to that large class of our people engaged in various manufacturing operations who use water power to propel their machinery, and for that purpose maintain reservoirs, but to the legal profession, to hold that in case of the breaking-away of such reservoirs there is no question of care or negligence to be tried, but that he who has thus accumulated water in a non-natural state. on his own premises, is liable, at all events, as matter of law, in case it escapes, for the damage caused by it. As a general proposition, it is safe to say that the owner of land has a right to make reasonable use of his property, and that right extends as well to an unlimited distance above the earth's surface as to an unlimited distance below.' See also Wh. Neg. 934; Angell on Watercourses, sec. 336; Washburne on Easements, ch. 3, sec. 7; Iones v. Railroad Co., 27 Vt. 300. If a man erect a mill upon a stream of water, and build a dam wholly upon his own land in order to apply the weight and power of the water to the propelling of his mill, or if he erect tanks or basins to retain water for the irrigation of his land, it seems a severe rule to put upon him the strict and unbending obligation of an insurer to hold him liable for any injury whatever which may result from the escape of the water, whether in the construction and maintenance of the works he was negligent or not.

"As a general rule, those who engage in an undertaking attended with risks to their neighbors are answerable for the conduct of that undertaking with diligence proportioned to the apparent risk, and this would seem to be the better rule. Where one places a steam boiler upon his premises, and operates the same with care and skill, so that it is no nuisance, in the absence of proof of fault or negligence upon his part, he is not liable for damages to his neighbor occasioned by the explosion of his boiler. Losee v. Buchanan, 51 N. Y. 477. A railway company may bring upon its lands locomotive engines, and if, notwithstanding the best practicable care and caution, and the use of the best approved appliances, sparks escape and fire the property of the adjacent landowners, the company will So not be held for the consequences. with fires necessarily employed in the clearing of land, and for domestic purposes, in the accumulation of materials for building of dwelling-houses or other necessary structures on the land for the enjoyment thereof.

'In the first place, then, we do not regard the rule in Rylands v. Fletcher as having any application to a case of this kind; and if it had, we are unwilling to recognize the arbitrary and absolute rule of responsibility it declares, to the full extent, at least, to which its general state-

ment would necessarily lead.

"The case of Mason v. Hill, 5 B. & A. II, is in no respect inconsistent with the view we have expressed, and we cannot see how it can be supposed to have any important bearing on the case.

"The only case cited by the defendants in error which would seem to sustain their view of this case is the rather recent case of Pennington v. Brinsop Coal Co.,

L. R. 5 Ch. Div. 769, where an injunction was granted to restrain the coal company from pumping water from their colliery into Borsdane Brook, by means whereof the water used in the plaintiff's cotton mill was corrupted. The claim in that case, however, included the distinct assertion by the plaintiff of a prescriptive right to the use of the water for the supply of his boilers and for other purposes of the mill in its natural purity. the plaintiff had all the rights of a riparian owner, and also a right by prescription, was conceded; upon this the court granted an injunction. What the plaintiff's rights as a riparian owner were was not separately discussed in the judgment of the court: indeed, that question was not discussed at all, and cannot be said to have been decided, because, as we have said, the defendant conceded the prescriptive The opinion of the court (Frve. Judge) is wholly occupied with the discussion of a question which is irrelevant here, whether, where the right is con-ceded, damages might or should be awarded in lieu of the injunction. the question now under consideration was neither discussed nor decided, we cannot see how the case can be supposed to have any importance here. If it be assumed, however, that it was decided' upon the plaintiff's rights as a riparian owner alone, we think the case was not well considered: the authorities cited by the learned judge in that view certainly do not sustain him.

'There is a well-known line of cases in Pennsylvania and elsewhere which decide that a stream of water may not be fouled by the introduction into it of any foreign substance to the damage and injury of the lower riparian owners. Howell McCoy, 3 Rawle, 256; Barclay v. v. Hecoty, 3 Rawle, 250, Batclay v. Commonwealth, 1 Casey, 503; McCullum v. Germantown Water Co., 4 P. F. S. 40; Wood v. Sutcliffe, 16 Jur. 75; Wood v. Waud, 3 Ex. 748; St. Helen Smelting Co. v. Tipping, 4 B. & S. 608; 11 H. L. 642, are cases of this kind. But we do not understand the principle of these cases to be denied, and we think they are not pertinent to the question now under con-The defendants introduced sideration. nothing into the water to corrupt it; the water flowed into Meadow Brook just as it was found in the mine; its impurities were from natural and not from artificial

causes.

"It may be said that if the mines had not been opened the water which flowed into the stream would have been pure; but, as Chief Justice Lewis said in Wheatley v. Baugh, 1 Casey, 532, 'the law never has gone so far as to recognize in one man

DANCING-DANGER-DANSEUSE-DASH.

DANCING.—See note 1.

DANGER—DANGEROUS—(See also Accident Insurance: CONTRIBUTORY NEGLIGENCE.)—Peril; risk; hazard; exposure to injury, loss, pain, or other evil.2

DANSEUSE—A leading dancer in a ballet.3

DASH.—To throw mortar on the joints of a wall, and with the flat surface of the trowel smooth it even with the surface 4

the right to convert another's farm to his own use for the purpose of a filter.'

"In the case of the New Boston Coal Co. v. Pottsville Water Co., 54 Penn. St. 164, a question of somewhat similar nature was sought to be raised in this court; but the cause was determined on other grounds, and the question referred to was not decided."

1. Dancing upon the tight-rope, and keeping time to music with the feet on the back of a horse going around a circus ring, do not amount to dancing within an act which provides that "no house, room, or other place . . . shall be kept or used for public dancing, music, or other public entertainment of the like kind, without a license." If the dancing or music were essential parts of the entertainment, and not merely subsidiary to the general performance, the above acts would be included in the meaning of the term "dancing." The defendant having been convicted in the court below, the case was remitted, as it could not be seen from the case stated whether the justices before whom the case was tried thought that music and dancing were an essential part of the circus performance, or convicted the defendant on the ground that any music or dancing brought the case within the statute. Quaglieni v. Matthews, 6 B. & S. 482.

A statute forbidding the carrying of concealed deadly weapons made an exception of those cases "when the person has reasonable grounds to believe his person, or the person of some of his family or his property, is in immediate danger from violence or crime." In interpreting this act, the exception was held not to be confined to cases where the danger was then and there present, and the injury feared about to be inflicted; but it was said: "When a person has reasonable grounds to believe that his person will be in immediate danger of violence or crime at the hands of another, whenever that person is present,

then he may lawfully carry concealed

2. Webster's Dict.

arms, whenever and wherever he has reasonable grounds to apprehend that he will encounter such person and be exposed to the apprehended da. ger." Bailey v. Com.. 11 Bush (Ky.), 688.

Dangers of the Sea, of Navigation, and similar expressions. See BILL OF LAD-

ING and CHARTER-PARTY. Dangerous Business.—The manufacture of paraffine or lubricating oil, which is obtained from the residuum of petroleum by distillation, is a breach of a covenant in a deed not to erect on the lots conveved "any manufactory of gunpowder, glue, varnish, vitriol, turpentine, or any brewery, distillery, slaughter-house, or other dangerous or noxious business." It is a distillery, as well as a dangerous and noxious business. Atlantic Dock Co_v. Libby, 45 N. Y. 550. So of resin oil. Atlantic Dock Co. v. Leavitt, 50 Barb. (N. Y.) 135; s. c., 54 N. Y. 35.

Dangerous Weapons. See Affray and

3. Under an employment as seconde première danseuse, one can only be required to appear in the dances which, according to the usages of the theatre. enter into that employment; and a refusal by one so employed to dance a parlor dance, the polka, in parlor dress, with the figurantes of the theatre, in a play, is not ground for dismissal. Baron v. Placide, 7 La. Ann. 229.

Where theatrical managers engage a woman as première danseuse, and then assign her a place in the ballet which by the usages of the stage is filled by those of inferior rank, she cannot be compelled to fill the lower position, and may consider the contract broken and recover damages. Roserie v. Kiralfy, 12 Phila.

(Pa.) 209.
4. This is distinguished from "pointing." which is "to fill the joints of the wall with mortar and then smooth them with the point of the trowel." The words have not the same meaning, and an engagement to point mason-work is not satisfied by dashing. In re Bridge over Gulf Creek (Pa.), 3 Del. Co. Rep. 172.

DATE.—(See also ACKNOWLEDGMENT: ALTERATION OF IN-STRUMENTS; AMENDMENT; BAIL; BILLS AND NOTES; CON-TRACTS: DAY: DEEDS: EVIDENCE: INDICTMENT: PRACTICE AND PLEADING.)

1. Definition, 77. 2. When Necessary, 77.

3. Alteration of Date, 78.

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(a) Presumptions, 78.

(b) When Date in Instrument may be Contradicted by Parol, 79.

(c) How Proven, 80. 5. Impossible and Inconsistent Dates.

1. **Definition.**—The primary signification of the word date is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time given or specified, time in some manner ascertained and fixed; this is the sense in which the word is commonly used.1

2. When Necessary.—A date has been said to be necessary to the free and uninterrupted negotiability of a bill or a note,2 but no

date at all is necessary by common law.3

A date is necessary to the validity of a policy of insurance; but where there are separate underwriters, each sets down the date of his own signing, as this constitutes a separate contract.⁴ A deed is good without a date,5 and the fact that a deed bears date ante-

1. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date of an item or charge in a book account is not necessarily the time when the article charged was, in fact, furnished, but rather the time given or set down in the account in connection with such charge. Bement v. Trenton L. & M. Co., 32 N. J. L. 515.

The word is derived from the Latin

datum (given); because when the instruments were in the Latin the form ran datum, etc. (given the -- day of, etc.) Bouv. Dict. The word is not only used to designate the time when an event occurred, and particularly when an instrument was made or delivered, but also to signify that clause or memorandum in or affixed to a written instrument which specifies the time when it was given, or from which its operation is to be reckoned. Burrill explains that this clause in its old and full form ran, datum apud, etc., specifying the place and then the time; and that it was called the datum clause; this name being soon after shortened to date, which was adopted for more

general application, Abbott's Dict.

"Date of the Last Work done or Materials furnished."—This expression in a mechanics' lien law may be taken, in the absence of anything in the act indicating a different intention, to mean the time

when such work was done or materials furnished, as specified in the plaintiff's

written claim. Bement v. Trenton L. & M. Co., 32 N. J. L. 515.

"After Date of Appointment"—"From Such Date."—In section 1556 of the U. S. Rev. St. the phrases, "after date of appointment" and "from such date," touch ing a passed assistant surgeon, do not refer to the date of his original appointment, when he entered the service as assistant surgeon, but to the time of the notification by the secretary of the navy that he would thereafter be regarded as a passed assistant surgeon. United States. v. Moore, 95 U. S. 760.

2. Mitchell v. Culver, 7 Cow. (N. Y.)

3. Giles v. Bourne, 6 M. & S. 73; Vandervere v. Ogburn, Penn. (N. J.) 67; Seldonridge v. Connoble, 32 Ind. 375; Pierce v. Richardson, 37 N. H. 306; Dean v. De Lezardi, 24 Miss. 424.

A date in a bill or note is required only for the purpose of fixing the time of payment. If the time of payment is otherwise indicated, no date is necessary. I Ames' Bills and Notes, 145; Brewster v. McCardel, 8 Wend. (N. Y.) 478.

4. Marshall Ins. 336; 2 Parsons Marit.

Law, 27.

5. Thompson v. Thompson, 9 Ind. 323; Goddard's Case, 2 Rep. 4b; Jackson v. Schoonmaker, 2 Johns. (N. Y.) 234; Genter v. Morrison, 31 Barb. (N. Y.) 1555

rior to a patent on the same land will not vitiate it. 1 Nor will the omission of the date in an acknowledgment invalidate a deed.2

3. Alteration of Date.—An alteration in the date of a negotiable instrument avoids it as against prior parties and sureties even in the hands of an innocent holder for value.3

4. Evidence.—(a) Presumptions.—It may be stated as a general rule, that, prima facie, documents should be taken to have been made or written on the day they bear date:4 and if more documents

Lee v. Mass. Ins., Co., 6 Mass. 208; Geiss v. Odenheimer, 4 Yeates (Pa.), 278; Mc-Kinney v. Rhoades, 5 Watts (Pa.), 343; Colquhoun v. Atkinson, 6 Munf. (Va.) 550; Swan v. Hodges, 3 Head (Tenn.), 251; Banning v. Eades, 6 Minn. 402.

1. Bledsoe v. Doe, 5 Miss. 13. See

title DEEDS.

2. Lea v. Polk, etc., Co., 21 How. (U. S) 493; Webb v. Huff, 61 Tex. 677; Wickes v. Caulk, 5 H. & J. (Md.) 36; Kelly v. Rosenstock, 45 Md. 389; Brooks v. Chaplin, 3 Vt. 281; s. c., 23 Am. Dec. 209; Rackleff v. Norton, 19 Me. 274;

Huxley v. Harrold, 62 Mo. 516.

3. Britton v. Dierker, 46 Mo. 591;
Brown v. Straw, 6 Neb. 536; Overton v. Mathews, 35 Ark. 147; s.c., 37 Am. Rep. 9; Le May v. Williams, 32 Ark. 166; Wood v. Steele, 6 Wall. (U. S.) 80; Aubuchon v. McKnight, I Mo. 312; s. c., 13 Am. Dec. 502; Lisle v. Rogers, 18 B. Mon. (Ky.) 528; Bank of Commonwealth v. McChord, 4 Dana (Ky.), 191; Stephen v. Graham, 7 S. & R. (Pa.) 505; s. c., 10 Am. Dec. 485: Heffner v. Wenrich, 32 Pa. St. Dec. 485: Heffner v. Wenrich, 32 Pa. St. 423; Inglish v. Breneman, 5 Ark. 377; s. c., 41 Am. Dec. 96; Crawford v. West Side Bank, 100 N. Y. 50; Outhwaite v. Luntley, 4 Camp. 170; Walton v. Hastings, 4 Camp. 223; 1 Stark R. 215; Cardwell v. Martin, 9 East. 180; Master v. Miller, 4 T. R. 320; 2 H. Bl. 140; Vance v. Lowther, 45 L. J. Ex. 200; L. R. 1 Ex. 200; Hemilton v. Wood, 70 Ltd. 206 D. 176; Hamilton v. Wood, 70 Ind. 306. See titles ALTERATION OF INSTRU-

4. Best's Prin. of Ev., § 402; Stephens' Dig. Ev. 138; Smith v. Battens, 1 Moo. & Rob. 341; Anderson v. Weston, 6 Bing. (N. Car.) 296; Sinclair v. Baggaley, 4 M. & W. 312; Potez v. Glossop, 2 Exch. 191; Malpas v. Clements, 19 L. J. Q. B. 435; Yorke v. Brown, 10 M. & W. 78; Morgan v. Whitmore, 6 Exch. 716; Fowler v. Merrill, 11 How. (N. Y.) 375; Smith v. Porter, 10 Gray (Mass.), 66; Gardner v. Webber, 17 Pick. (Mass.) 407; Livingston v. Arnoux, 56 N. Y. 507; Ellsworth v. Railroad., 34 N. J. L. 93; Meadows v. Cozart, 76 N. Car. 450; Savery v. Browning.

18 Iowa, 246; Dodge v. Hopkins, 14 Wis

MENTS and BILLS AND NOTES.

630; Kniseley v. Sampson, 100 Ill. 573; Abrams v. Pomeroy, 13 Ill. 133; New Haven v. Mitchell, 15 Conn. 206; Williams v. Wood, 16 Md. 220; Cranson v.

Goss, 107 Mass. 439.

This has been held to apply to letters. Hunt v. Massey, 5 B. & Ad. 902; Goodtitle v. Milburn, 2 M. & W. 853; Potez v. Title v. Milburn, 2 M. & W. 853; Potez v. Glossop, 2 Exch. 191; Butler v. Lord Mountgarret, 7 H. L. Cas. 633; Sinclair v. Baggaley, 4 M. & W. 312; Malpas v. Clement, 19 L. J. Q. B. 435; Morgan v. Whitmore, 6 Ex. 713; Pullen v. Hutchinson, 25 Me. 249; Meldrum v. Clark, Morris (Morris Very) inson, 25 Me. 249; Meidrum v. Clark, Morris (Iowa), 130; Abrams v. Pomeroy, 13 Ill. 133; Williams v. Woods, 16 Md. 220; Breck v. Cole, 4 Sandf. (N. Y.) 80. Bills of exchange and promissory notes. Anderson v. Weston, 6 Bing. (N. Car.) 296; Laws v. Rand, 3 C. B. N. S. 445; Claridge v. Kleet, 15 Pa. St. 255; Kniseley v. Sampson, 100 Ill. 573. And the indorsements upon them. Smith v. Battens, I Moo. & R. 341; Hutchins v. Flintge, 2 Tex. 473; Caldwell v. Gamble, 4 Watts, (Pa.), 292. And assignments. Byrd v. Tucker, 3 Ark. 451. And also to bankers' checks. Laws v. Rand, 3 C. B. N. S. 442. So, a deed is presumed to have been executed and delivered on the day on which it is dated. Anderson v. Wesbin which it is dated. Anderson v. Weston, 6 Bing. (N. Car.) 296; Stone v. Grubbam, I Rol. 3, pl. 5; Oshey v. Hicks, Cro. Jac. 263; Costigan v. Gould, 5 Denio (N. Y.), 290; Wood on Conv., 195; Martindale on Cons., 173; Shep. Touch. 52, 78; Billings v. Stark, 15 Fla. 297; Ellsworth v. Central R., 34 N. J. L., 93; Harrison v. Phillips Academy, 12 Mass. 456; Smith v. Porter, to Gray (Mass.), 66; Cutts v. York, etc., Co., 18 Me. 190; Meech v. Fowler, 14 Ark. 29. Some of the courts hold that a deed is presumed to have been delivered on the day of its date, notwithstanding it was not acknowledged until afterwards. Martindale on Conv. 173; McConnell v. Brown, Litt. (Ky.) Sel. Cas. 459; Jayne v. Gregg. 42 Ill. 413; Robinson v. Gould, 26 Iowa. 89; Breckenridge v. Todd, 3 T. B. Mon. (Ky.) 52: Ford v. Gregory, 10 B. Mon. (Ky.) 75; Sweester v. Lowell, 33 Me. 446; Harthan one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed.¹

This presumption is, however, easily displaced, at least so far as it relates to the precise date; and the rule itself is subject to ex-

ceptions.2

(b) When Date in Instrument may be Contradicted by Parol.—The rule that parol evidence is admissible to contradict a written agreement will not be infringed by adducing extrinsic evidence even to contradict a deed or other writing, provided the contradiction be confined to the recitals of formal matter, which may well be presumed not to have been stated with careful precision. For instance, parol evidence has, on several occasions, been admitted to contradict the recited date of a deed, order, or other instrument.³

ris v. Norton, 16 Barb. 264; Darst. v. Bates, 51 Ill. 439. But others hold that the deed will not be presumed to have been delivered until it was acknowledged. Blanchard v. Taylor, 12 Mich. 339; Loo-mis v. Pingree, 43 Me. 299: Henderson v. Mayor, etc., 8 Md. 352; Clark v. Akers, 16 Kan. 166; Fountain v. Boatman's Savings Inst., 57 Mo. 553. And where a grantee died between the date of the deed and its acknowledgment, it was presumed that the deed had been delivered in his lifetime. Eaton v. Trowbridge, 38 Mich. 454. The doctrine, however, must not be pushed too far; and in applying it to bills of exchange, it must be borne in mind that the date of the bill, though prima facie evidence of the day when it was drawn, is no proof that it was accepted at the same time. The most that the law will presume is that a bill was accepted before its maturity, and within a reasonable time after it was drawn; and it recognizes that presumption, because in all ordinary transactions such a course of business would be pursued. Roberts v. Bethell, 12 Com. B. 778, questioning Israel v. Argent, and Blyth v. Archbold, cited in Pears. Chit. Pl. 330, n. b.

1. Stephens Dig. Ev. chap. 11, art. 85.
2. Anderson v. Weston, 6 Bing. (N. Car.) 296; Sinclair v. Baggaley, 4 M. & W. 312; Gibson v. King, Car. & M. 458; Wright v. Lainson, 2 M. & W. 739; Edwords v. Crock 4. Esp.

wards v. Crook, 4 Esp. 39.

Taylor in his work on Evidence, § 137, states two exceptions. The first is, where, in order to prove a petitioning creditor's debt, an instrument put in is signed by the bankrupt, which bears date before the act of bankruptcy. The second exception is, where, in petitions for damages on the ground of adultery, letters are put in evidence to show the terms on

which the husband and wife were living before the seduction; and here, in order to avoid the obvious danger of collusion; thas been deemed necessary that some independent proof should be given that the letters were written at the time they bear date. Trelawney v. Coleman, 2 Stark. R. 193; Houliston v. Smith. 2 C. & P. 24. It may be questionable whether the courts would not now recognize a third exception to the rule in those cases where indorsements made by a deceased obligee on a bond, acknowledging the receipt of interest, are tendered in evidence by his assignee, with the view of defeating a plea of the Statute of Limitations set up by the obligor. Taylor on Ev., § 137. And see Stephens Dig. Ev., chap. 11, art. 85.

85.
The presumption that a deed was delivered the day of its date is not conclusive, and the true date of delivery may be proved aliunde. Barry v. Hoffman, 6 Md. 78; Fairbanks v. Metcalf, 8 Mass. 230; Harrison v. Phillips Academy, 12 Mass. 456; Treadwell v. Reýnolds, 47

Cal. 171.

3. Taylor on Evidence, § 1052; as by proving that a charter party, dated February 6th, conditioned to sail on or before February 12th, was not executed till after the latter day, and that therefore the condition was dispensed with, Hall v. Cazenove, 4 East. 477. See Steele v. Mart, 4 B. & C. 273; Cooper v. Robinson, 10 M. & W. 694; Jayne v. Hughes, 10 Ex. 430; Or by showing, in answer to an objection that a notice of appeal was given too late, that the order, though bearing date the 24th of June, was in fact not signed by the justices till three days afterward. Rex v. Flintshire, 3 Dowl. & L. 537. In the case of Reffell v. Reffell, I Law. Rep. P. & D. 139, the Court of Probate

(c) How Proven.—It has been held that if the point at issue be a date, the judge will refer to an almanac. And the opinions of antiquaries have been received relative to the date of ancient handwriting.2

If it is desired to prove the date of a judgment, the production of the record, or the proof of an examined copy, is conclusive

evidence against all the world.3

5. Impossible and Inconsistent Dates.—If the written date in an instrument is an impossible one, the time of delivery must be shown:4 and where a date is given both as a day of the week and a day of the month, and the two are inconsistent, the day of the month governs.5

DAUGHTER.—A female child; a legitimate female descendant in the first degree.6

admitted parol evidence to prove that a will bearing date the 27th of February, 1855, was in fact executed in 1865, and had consequently revoked another will that was made in 1858. See also Quincey v. Quincey, 11 Jur. 111: Ex parte Flight, 35 Leg. Obs. 240; Haigh v. Brooks, 10 Ad. & El. 309; Butcher v. Stewart, 11 M. & W. 857. It is also admissible to show when a written promise, without a date, was in fact made. Lobb v. Stanley. 5 Q. B. 574.

Parol evidence is admissible to show the true date of delivery of a deed. Cook v. Knowles, 38 Mich. 316. And it has been held that, when any written instrument has no date, parol evidence may be given to show from what time it was intended to operate. Davis v. Jones, 17 C. B. 625; 25 L. J. C. P. 91.

1. Best's Prim. of Ev. (Cham.) 255;

Taylor on Ev. § 20; Page v. Faucet, Cro. El. 227; Tutton v. Darke, 5 H. & N. 649.

2. Tracy's Peerage Case, 10 Cl. & F. 154.

3. Taylor on Ev. § 1480.

4. Shepp. Touchst. 72; Cruise Dig. C.

2 S. 61.

5. Ingersoll v. Kirby, Walk. (Mich.)
Where a promissory note, bearing date July 20th, was expressed to be payable "one year, August 15th, after date," held, that the note should be read as if written "on the 15th of August, one year after date," or "one year from the 15th of August, after date," either of which is equivalent to "one year from the 15th of August next," and that the note did not mature one year from its date. Washington County Bank v. Jerome, 8 Mich.

6. Daughter is usually defined by the lexicographers as "an immediate female descendant." Bouv. L.D.; R. & L.L.D.; but the definition is believed to be more The word is subject to the same rules of interpretation as Child (q.v.).

Where there is a bequest to "all and every my daughters" by one who has no legitimate daughters, parol evidence is admissible to show that three female bastards, offspring of the testator and his wife before their marriage, were called daughters, and recognized as such by the testator, and these bastards were allowed to take under the will. "The word 'daughter," said the court, "taken by itself, means nothing more than 'female child.' But as this testator left no female 'children' in the ordinary sense, there are no persons to whom this word, in its literal construction, can apply; and consequently there is good ground for the admission of parol evidence as to the surrounding circumstances." Lake v. Hordern, L.R. 1 Ch. D. 644.

Under a bequest to the "sons and daughters" of A., who had had eight children, all but one of whom were dead at the time of the making of the will, and all but three of whom were known to the testator to be dead, descendants of the deceased sons and daughters were allowed to take their deceased parents' shares, Bell v. Hay, 46 Mo. 546. The expression "sons and daughters" was also held to include grandchildren in Smith's will.
2 Desau. (S. Car.) 123 n.

DAY.

1. Definition, 81.

2. How Days are Reckoned, 82.

3. Dies Non Juridicus, 85.

4. Fractions of a Day, 89. 5. Other Matters, or.

1. Definition.—A day is the space of time which elapses while the earth makes a complete revolution on its axis.

1. The term is sometimes used in jurisprudence, in its astronomical sense of the space of time in which the earth makes one revolution upon its axis; or of the time between one midnight and the next; sometimes in the popular sense, of the time between sunrise and sunset; and sometimes in a conventional sense, of those hours or that recurring time which is by usage or law allotted to and deemed sufficient for the discharge of some duty or performance of some business; as where one speaks of a day's work, the whole of a business day, etc. Abbott's Dict.

According to Coke, days are either natural or artificial. The natural day consists of twenty-four hours; and includes the solar day and the lunar day. which are artificial days. The solar day is from the rising to the setting of the sun; the lunar day or night is from the setting to the rising of the sun. Co. Litt. 135a; quoted in Pulling v. People, 8 Barb. (N. Y.) 385. According to Blackstone, generally, in legal signification the term includes the time elapsing from one midnight to the succeeding one. 2 Black Com. 141; Haines v. State, 7 Tex. App. 33. In People v. Hatch, 33 III. 137, a day is said to be a division of time. It is natural when it consists of twenty-four hours, or the space of time which elapses while the earth makes a complete revolution on its axis; artificial, when it contains the time from the rising to the setting of the sun, and a short time before rising and after setting. In Helphenstine v. Vincennes Nat. Bank. 65 Ind. 589, a day is said to mean a period of time consisting of twenty-four hours, and including the solar day and the night. A day is sometimes used to denote that portion of time during which the sun is above the horizon (called sometimes a solar day), and, in addition, that part of the morning or evening during which sufficient of his light is above for the features of a man to be reasonably discerned. Co. 3d Inst. 63; Trull v. Wilson, 9 Mass. 154. The Lord's day, on which service of process is prohibited by the Connecticut statute, comprises the solar day only. Fox v. Abel, 2 Conn. 541.

By custom, the word day may be understood to include a certain number of hours less than the number during which a certain work actually continued each day. Thus, in an action to recover compensation for causing certain repairs to be made upon the defendant's house. it appeared that he had promised to pay the plaintiff, who was a carpenter, twelve shillings per day for every man employed by him about the work. The plaintiff insisted at the trial that ten hours' labor constituted a day's work, and that he was entitled to 'charge one day and a quarter for each natural day during which the men worked twelve hours and a half; and he offered evidence of a custom among carpenters to that effect. Held, a valid custom, and that the evidence was admissible. Hinton v. Locke, 5 Hill (N. Y.), 437.

The time for completing commercial contracts is not limited to banking hours. A party has the whole business day to deliver or to pay. Price v. Tucker, 5 La. Ann. 514.

In an act prohibiting liquor selling on election day, the word "day" includes the whole twenty-four hours from midnight to midnight. Kane v. Commonwealth, 89 Pa. St. 522. And where a person is required to take action within a given number of days in order to secure or assert a right, the "day" is to consist of twenty-four hours,—that is the popular, and the legal, sense of the term,—so that if the act be done on the last day limited, if it be done at any time before twelve o'clock at midnight, that will be sufficient. Zimmerman v. Cowan, 107 Ill. 631. See also People v. Hatch. 33 Ill. 136.

Between Sundown and Sunrise of any Day.—"An act to prohibit the sale of seed cotton between the time of the setting and rising of the sun," prohibited such sale "between the hours of sundown and sunrise of any day." Held, that the time within which the sale was forbidden by this act was between sunset and the next succeeding sunrise, and that the offence was sufficiently charged in an indictment alleging a sale "at nine o'clock in the night of the same day." The court said: "The object of the legislature manifestly

2. How Reckoned.—The rule of computation adopted in any case depends not so much upon the signification of the word "day" as upon that of the words used in the particular instrument or statute to express the mode of computation, or upon the nature of the subject-matter and the reason of the thing. In computing time in some of the adjudged cases a distinction has been taken between the date and the day of the date of a written instrument; also between mercantile contracts and others; and again it has been said that a different rule of computation prevails under contracts and under statutes. These distinctions can be of no practical use. but are well calculated to mislead. The true rule is, that not only mercantile contracts, such as bills of exchange, promissory notes, policies of insurance, etc., but also wills and other intruments, are so to be understood as that the day of the date, or the day of the act from which a future time is to be ascertained, is to be excluded from the calculation; and the modern cases, in this country, have adopted the same rule in the construction of statutes, and as governing all proceedings under them.2

was to make criminal the sale of such cotton in the night time. . . law-makers, taking as a standpoint sundown, evidently intended to count forward and not backward, to include the period of time succeeding and not preceding the setting of the sun; the period of darkness until the next, and not the period of light back to the last, 'rising of the sun.' But it is argued that the super-added words of the act 'of any day' negatives this construction; that the use of these words, which have lately been repealed, makes it necessary to inquire whether the night can be said to be 'of' the day-that is belonging to or proceeding from the day. The division of time which most strikes us is that into day and night. One rotation of the earth in twenty-four hours produces a period of light and a period of darkness of about equal length, and it is entirely conventional at what point of the circle we begin to make the count; but of the two periods, that of light, the artificial day, is the most important to us, and from this or some other cause we habitually, in common parlance, speak of the night which succeeds a day as the night 'of' that day that is to say, the night that follows, that belongs to that day. 'A day is usually intended of a natural day, as in an indictment of burglary we say in the night of the same day.' Co. Litt. 135. The framers of the act doubtless used the words 'of any day in this sense, and meant the whole period of darkness between sundown of one day and sunrise of the next.

"If, notwithstanding the manifest intent, we must be limited to the scientific meaning of the words, then we agree that the division of time adopted by Pope Gregory XIII. is a part of our law. According to that calendar the civil, as distinguished from the artificial, 'day' is defined to be 'the whole time or period of one revolution of the earth on its axis, or twenty-four hours,' called the 'natural day.' 'And the evening and the morning were the first day.' Genesis, ch. 1. In this sense the day may commence at any period of the revolution. The Babylonians began the day at sunrising, the Jews at sunsetting, the Egyptians at midnight, as do several nations in modern times, the British, Spanish, American, etc. This day, in reference to civil transactions, is called the civil day. Thus, with us, the day on which a legal instrument is dated begins and ends at midnight. Webster's Dictionary, Unabridged."

1. Abbott's Dic.

In Pugh v. Duke of Leeds, 2 Cowper, 714, Lord Mansfield gave expression to the sentiment that, so far from there being any uniform rule on the subject, each case must stand on its own particular merits, and a rigid adherence to any rule would necessarily work injustice. "This is the conclusion he comes to after a most careful examination of all the authorities, with a view to elicit some general rule; and if unsatisfactory as far as certainty is concerned, is probably the most likely to effectuate the intention of parties." Note to Soldiers' Voting Bill of New Hampshire, 4 Am. L. Reg. (N. S.) 222

2. Weeks v. Hull, 19 Conn. 376.
From the Date or from the Day of

the Date.—In Pierpont v. Graham, 4 Wash. (U. S. C. C.) 232, Judge Washington says: "I understand the rule to be where reference is made to the date of an instrument, that if a present interest passes, the day is included in computing time: but if it is used merely to fix a terminus à quo, it is in all cases excluded: and with regard to the day an act is done, the weight of authorities is in favor of inclusion." See also Arnold v. United States, 9 Cranch (U S.), 104; Chilles v. Smith's Heirs, 13 B. Mon. (Ky.) 461. In Wilcox v. Wood, 9 Wend. (N. Y.) 346, the court says: "Where reference is had to the day of date for computing time, I know of no decision in this State settling the point." In Lisle v. Williams, 15 S. & R. (Pa.) 135, the day a bond was dated was included in computing time. See also Brown v. Buzan, 24 Ind. 194. the weight of modern authority is clearly to the effect that from the date and from the day of the date mean the same, and are to be construed accordingly as they may best effectuate the presumed intention of the parties who employed them, but in the absence of particular circumstances they are to be taken to exclude the day of date. See note to Soldiers' Voting Bill, 4 Am. L. Reg. (N. S.) 224; Weeks v. Hull, 19 Conn. 376; Sands v. Lyon, 16 Conn. 18; Page v. Weymouth, 47 Me. 238; Windsor v. China. 4 Greenleaf (Me.), 298; Windsor v. China. 4 Greenlear (Me.), 296; Homes v. Smith, 16 Me. 181; Cornell v. Moulton, 3 Denio (N. V.), 12; Taylor v. Jacoby, 2 Barr (Pa.), 497; Bemis v. Leon-ard, 118 Mass. 502; Blanchard v. Hill-iard, 11 Mass. 85; Woodbridge v. Brigham, 12 Mass. 403; Henry v. Jones, 8 Mass. 453; Wiggins v. Peters, I Metc. (Mass.) 127; Ewing v. Bailey, 4 Scam. (Ill.) 420; Waterman v. Jones, 28 Ill. 54; People v. Hatch 33 Ill. 9; Vairin v. Edmundson, 5 Gilm. (Ill.) 270; Bowman v. Wood, 41 Ill. 203; Roan v. Rohrer, 72 Ill. 582; Protection Life Ins. Co. v. Palmer, 81 Ill. 88. Carothers v. Wheeler, I Oreg. 194; Goode v. Webb, 52 Ala. 452; Wood v. Commonwealth, II Bush (Ky.), 220.

In Colorado it is held that where time is to be computed either prior or subsequent to a day named, the usual rule is to exclude one day of the designated period and include the other. Stebbins v. An-

thony, 5 Colo. 348.

But it is also held that in the computation of time, the day from which the reckoning commences and that on which it terminates may both be included or excluded, as will best preserve a right or prevent a forfeiture. State v. Schnierle, 5 Rich. (S. Car.) 299; O'Conner v. Towns, I Tex. 107.

From an Act done. - In many of the cases it is held to be the rule that where computation is to be made from an act done, the day on which the act was done should be included. Glassington v. Rawlins, 3 East, 407; The King v. Adderly, 2 Douglass, 463; Castle v. Burditt, 3 2 Douglass, 403; Castle v. Burditt, 3 Term. R. 623; Scoville v. Simes, 3 N H. 16; Priest v. Tarleton, 3 N. H. 93; Rand v. Rand, 4 N. H. 267; Blake v. Crownin-shield, 9 N. H. 204 (changed by statute in New Hampshire, Soldiers' Voting Bill (N. H.), 4 Am. L. Reg. 212); Pierpont v. Graham, 4 Wash. (U. S. C. C.) 232; Jacobs Graham, 4 Wash. (U. S. C. C.) 232; Jacobs v. Graham, 1 Blackf. (Ind.) 392; Arnold v. United States, 9 Cranch (U. S.). 104; Chilles v. Smith's Heirs, 13 B. Mon. (Ky.) 461; Hampton v. Erenyeller, 2 Browne (Pa.), 18; Wayne v. Duffy, 1 Phila. (Pa.) 367; Handley v. Cunningham, 12 Bush (Kv.), 402. But like the cases in which the computation is from the date, where it is from an act done, the weight of later authority, it is believed, is to the effect that the day should be excluded. in Bigelow v. Wilson, I Pick. (Mass.) 485, the court, adverting to the practice of including the day an act is done, says: "It is against reason, and opposed to the principle that fractions of a day are disregarded in law; besides, in some cases it would induce an absurdity; for suppose one day allowed a debtor to redeem after an act is done, and the act done on the last moment of the day, the right of redemption would be defeated on construction." See Lester v. Garland, 15 Vesey, 248; Weeks v. Hull, 19 Conn. 376; Sands v. Lyon, 16 Conn. 18; Windsor v. China, 4 Greenleaf (Me.). 298; Cornell v. Moulton. 3 Denio (N. Y.), 12; Long v. Phillips, 27 Ala. 311; Kimm v. Osgood, 10 Mo. 60; State v. Gasconade, 33 Mo. 102; Gorham v. Wing, 10 Mich. 486; Burr v. Lewis, 6 Tex. 76.

Under Statutes and Rules of Court. - In cases of this kind the decisions are more unanimous, and the first day has generally been excluded. Thus under a statute requiring that certain penalties incurred by railroad companies shall be sued for "within ten days," the day on which the penalty is incurred is to be excluded. People v. New York, etc., R. Co., 28 Barb. (N.Y.) 284. And a notice on the 15th of a month of a mechanic's lien filed on the 25th is sufficient under a statute requiring that ten days' notice shall be given. Hahn v. Dierkes, 37 Mo. 574. appeal from a judgment rendered March 15th, which is taken April 14th, is taken within thirty days after the rendition of the judgment. Faure v. United States Express Co., 23 Ind. 48. See also State

v. McLendon, I Stew. (Ala) 195; Ex parte v. McLendon, I Stew. (Ala) 195; Exparte Dean, 2 Cow. (N.Y.) 605; Homan v. Liswell, 6 Cow. (N.Y.) 659; Phelan v. Douglass, 11 How. Pr. (N.Y.) 393; Turnpike Co. v. Haywood, 10 Wend. (N.Y.) 422; Vandenburg v. Van Rensselaer, 6 Paige (N.Y.), 147; Irving v. Humphreys, Hopk. (N.Y.) 364; Bissell v. Bissell, 11 Barb. (N.Y.) 96; Judd v. Fulton, 10 Barb. (N.Y.) 117; Presbury v. Williams, 15 Mass. 193; Ewing v. Bailey, 4 Scam. (III.) 420: Prior v. People, 107 (III.) 628. Mass. 193; Ewing v. Bailey, 4.5 Cain. (II.) 420; Prior v. People, 107 (III.) 628; Sanders v. Norton, 4 B. Mon. (Ky.) 464; Flint v. Sawyer; 30 Me. 226; Cresey v. Parks, 75 Me. 387; Rand v. Rand, 4 N. H. 267; Sims v. Hampton, 1 S. & R. (Pa.) 411; Browne v. Browne, 3 S. & R. (Pa.) 496; Green's Appeal, 6 Watts & S. (Pa.) 327; Goswiler's Estate, 3 Pa. 200; Marys v. Anderson, 2 Grant (Pa.), 446; Cromelieu v. Brink, 5 Casey (Pa.), 522; Marks' Ex'rs v. Russell, 4 Wright (Pa.), 372; Brown v. Chicago, 117 Ill. 21; Conr. v. Warren, I Houst. (Del.) 188; Anderson v. Boughman, 6 Mich. 298; Hall v. Cassidy, 25 Miss. 48; Robinson v. Foster, 12 Iowa, 186; Peables v. Hanniford, 18 Me. 100; Featies v. Hammon, 1 Ac. 100; Bigelow v. Wilson, 1 Pick. (Mass.) 485; Portland Bank v. Maine Bank, 11 Mass. 204; Presby v. Williams, 15 Mass. 193; Hollis v. Francois, 1 Tex. 118; Walsh v. Boyle, 30 Md. 262; Thorne v. Mosher, 20 N. J. Eq. 257: Northrop v. Cooper, 23 Kan. 432; Beckwith v. Douglass, 25 Kan. 220; English v. McGavock v. Pollock, 13 Neb. 585; Catterlin v. Frankfort, 87 Ind. 45; Reigelsberger v. Stapp, 91 Ind. 311; Hill v. Pressley, 96 Ind. 447; Kerr v. Haverstick, 94 Ind. 178; White v. German Ins., 15 Neb. 660; Conklin v. Marshalltown, 66 Iowa, 122; White v. Haworth, 21 Mo. App. 439. See, however, Thomas v. Aflick, 4 Harris (Pa.), 14, where it was held, that the common-law rule of computation of time is to include the first day and exclude the last; and under that rule notice given on the 10th of May of a suit brought on the 18th of June is given thirty days before suit. But this decision in iv be considered as overruled by later decisions from the same court. In Indiana the day the act was done is included in the computation. Evans v. Darlington, 5 Blackf. (Ind.) 267; and in this State it is held that a statutory requirement of publication "for three weeks successively" means a publication for twenty-one days. excluding either the date of the first publication or the day of sale. Meredith v. Chancey, 59 Ind. 466. In Garner v. Johnson, 22 Ala. 494, it was held to be the general rule that where a statute requires service for a fixed number of days, the mode of computation is to include the day of service, and to exclude the other; but when it requires a number of entire days, both must be excluded.

The Delaware act of 1832, directing the discharge of imprisoned debtors, after five days, was held to require both the first and the last days to be included. Fortner's Case, 2 Harr. (Del.) 461. And the provision of an Iowa statute which provided for a notice to the defendant which shall "leave at least ten days between the day of service and the first day of the next term" was held to exclude both of those days in the computation of the time. Robinson v. Foster, 12 Iowa, 186. The rule that where the statute requires service of process a certain number of days. before the return day, both the day of service and the return day must be exscluded, was recognized and applied in Snell v. Scott, 2 Mich. N. P. 108. And where a statute provided for "thirty days" notice" of a tax sale, and that "said day of sale shall be after the expiration of thirty days' notice," held, that both the day of giving the notice, or making its first publication, and the day of sale should be excluded from the computation. Steuart v. Meyer, 54 Md. 454. So, under an act requiring "three days' actual notice," the day of the act and of the notice are both to be excluded. Jones v. State, 42 Ark. 93. In computing the time of a sheriff's advertisement, it has been held that the day it was published and the day of sale may both be counted. Manning v. Dove, 10 Rich. (S. Car.) 395. But in other cases it is held that in computing time given by a statute, both the first and the last days are never reckoned Jackson v. Van Valkenburg, inclusive. 8 Cow. (N. Y.) 260; Sanders v. Norton, B. Mon. (Ky.) 464. In Griffith v. Bogart, 18 How. (U. S.) 158, it was held that under the statute of *Missouri*, which allows land to be sold on any judgment against a party deceased, provided no such sale shall take place until after the expiration of 18 months from his death. the day from which the 18 months are to be calculated is not to be included.

The charter of a corporation was limited to continue "until the first day of January." Held that the word "until" was exclusive, and the charter expired with December 31st. People v. Walker, 17 N. Y. 502. So a rule extending time to plead "to" a specified day means until the meeting of the court on that day, and does not include the day. Clark v. Ewing, 87 Ill. 344.

In a statute providing that notices of town meetings shall be given "by a warning set on a sign-post at least five 3. Dies Non.—This is an abbreviation of the phrase dies non juridicus, universally used to denote non-judicial days; days during which the courts do not transact any business, as Sunday or the legal holidays.¹

days inclusive before the meeting is to be held," the term "five days inclusive" has been held to mean five days inclusive of the day on which the notice was posted, but exclusive of the day on which the meeting is to be held. Brooklyn Trust Co. v. Town of Hebron, 51 Conn. 22. And under a statute requiring the filing of a bond "before" a certain day each year, the filing the bond on that day is not a sufficient compliance. Alston v. Falconer, 42 Ark. 114; Elsey v. Falconer, 42 Ark. 117.

1. Bouv. Dic. When a day is declared by statute to become a legal holiday, it becomes a dies non juridicus. Lampe v. Manning, 38 Wis. 673. Dies non means only that process cannot ordinarily issue or be executed or returned, and that courts do not usually sit on that day. It does not mean that no judicial action can be had on that day. State v. Rick-

etts. 74 N. Car. 193.

What Acts may be Performed on a Dies Non—Judicial and Ministerial Acts.—Coke drew a distinction between judicial and ministerial acts performed on a dies non. 9 Co. 66. And see Sayles v. Smith, 12 Weekly Rep. 57; Butler v. Kelsey, 15 Johns. (N. Y.) 177; Field v. Park, 20 Johns. (N. Y.) 140; Lindenmuller v. People, 33 Barb. (N. Y.) 548; Cory v. Silcox, 5 Ind. 370; Kiger v. Coates, 18 Ind. 153; Hadley v. Musselman (Ind.), 3 N. East. Rep. 122. This it seems was afterwards overruled, but the distinction now obtains. Re Worthington, 7 Biss. (U. S.) 455.

Judgments.—In Re Worthington, supra, held, a judgment docketed on Christmas day is valid. The district court decided that the docketing of a judgment was a judicial act. The circuit judge, however, decided that it was a ministerial act.

Writs issued or served in civil cases on Sunday have been held invalid. Butlet v. Kelsey, 15 Johns. (N. Y.) 177; Story v. Elliott, 8 Cow. (N. Y.) 27; Shaw v. Dodge, 5. N. H. 462; Sterns' Appeal. 64 Pa. St. 447; Van Vetchen v. Paddock, 12 Johns. (N. Y.) 177; 7 Am. Dec. 103; Hauswirth v. Sullivan, 6 Mont. 203; Selectmen v. Turnpike Co., 2 Vt. 531; Rob v. Moffat, 3 Johns. (N. Y.) 257; Field v. Park, 20 Johns. (N. Y.) 120; Vanderpoel v. Wright, I Cow. (N. Y.) 209; Moore v. Hogan, 2 Duv. (Ky.) 437; Smith v. Noe, 30 Ind. 117; Taylor v. Phillips, 3 East, 155; Roberts v. Monkhouse, 8

East, 547; Anderson v. Birce, 3 Mich. 280. Nor can the original writ be issued. Havnes v. Sledge, 2 Porter (Ala.), 530; 27 Am. Dec. 665. But in Clough v. Shepherd. 31 N. H. 490, it is held that a plea that an original writ was issued on Sunday is defective if it does not allege it to be done to the disturbance of others; as at common law the issuing of original process on Sunday was not illegal. the levy of an execution on Sunday is void. Bland v. Whitfield, I Jones L. (N. Car.) 122; Pierce v. Hill, 9 Port. (Ala.) 151. And in the case of Bryant v. State (Neb.), 21 N. W. Rep. 406, the supreme court of Nebraska held that a writ of replevin conveys no authority to a sheriff or his deputy to seize property on the first day of the week, commonly called Sunday; and that where such officer seizes upon property on such day, the recapture on the same day of the property so seized is not a resistance of an officer in the execution of his office. A return made on Sunday is void. Peck v. Covell, 16 Mich. 9; Arctic Ins. Co. v. Hicks, 7 Abb. Pr. (N. Y.) 104; Gould v. Spencer, 5 Paige (N. Y.), 541. But such return may be amended. Boyd v. Vanderkemp, I Barb. Ch. (N. Y.) 173. And where a capias ad respondendum was returnable on Sunday, putting in special bail, though without knowledge of the defect, is a waiver of it. Wright v. Jeffry, 5 Cow. (N. Y.) 15. The fact that a subpœna ad respondendum is returnable on a legal holiday has been held not to be a ground for setting it aside. Kinney v. Stewart, 37 N. J. Eq. 339. And in Hauswirth v. Sullivan, 6 Mont. 203, it was held that where a sheriff serves a summons on Sunday and falsifies the return by making it appear that such service was made on Saturday, the fact may be proven to show that the court never had jurisdiction.

Notice or Demand.—Nor can a notice or demand be served on Sunday. Chesapeake & O. Canal Co. v. Bradley, 4 Cranch (U. S. C. C.), 193; Field v. Park, 20 Johns. (N. Y.) 140; Roberts v. Monkhouse, 8 East, 547; Sterns' Appeal, 64 Pa. St. 447; Rheem v. Bank, 76 Pa. St. 132; Brackett v. Edgerton, 14 Minn. 174; Delamater v. Miller, 1 Cow. (N. Y.) 75. But in Vermont it is held that a notice received on Sunday, and afterwards retained, is equivalent to a notice on Monday. Crozier v. Shants, 43 Vt. 478; and see Rawlins v.

Overseers, 2 C. B.72. But an appeal bond executed on Sunday is valid, its execution not being "judicial business." State v. California Mining Co., 13 Nev. 203.

Summons.—The issue of a justice's summons is a mere ministerial act, and valid though done on a legal holi-Smith v. Ibling, 47 Mich. 614.

Arrest on Civil Process.—In Johnson v. Day, 17 Pick. (Mass.) 106, it was declared that an arrest on civil process on Sunday was legal at common law, and that is the opinion of the judge who decided the case of Pearce v. Atwood, 13 Compare Moore v. Hogan, 2 Mass. 324. Duvall (Ky.), 437. An action for false imprisonment will lie for an arrest on Sunday. See Rob v. Moffat, 3 Johns. (N. Y.) 257; Fox v. Abel, 2 Conn. 541.

Verdict. - A verdict rendered on Sunday is a ministerial act, and valid. Reid v. State, 53 Ala. 402; State v. Ricketts. 74 N. Car. 187; Houghtaling v. Osborn, 15 Johns. (N. Y.) 118; Webber v. Merrill, 34 N. H. 202; Baxter v. People, 8 Ill. 368; Huidekoper v. Cotton, 3 Watts (Pa.), 56; Commonwealth v. Marrow, 3 Brews. (Pa.) 402; Rosser v. McColly, 9 Ind. 589; Cory v. Silcox, 5 Ind. 370; McCorkle v. State, 14 Ind. 39; Butler v. Kelsey, 15 Johns. (N. Y.) 177; Joy v. State, 14 Ind. ry, Johns, (N. 17) 17/7, Joy 2. State, 14 Add. 139; True v. Plumley, 36 Me. 468; Powers, v. State (Tex.), 5 S. W. Rep. 153. And in Van Ripper v. Van Ripper, 1 Southard (N. J.), 156; 7 Am. Dec. 576, it was held that where a jury were unable to agree until Sunday morning, it was a work of necessity to receive their verdict on that day. In State v. Fenlason (Me.), 7 Atlantic Rep. 385, it was held not to be error for the presiding judge, on Sunday, to send blank forms to a jury which commenced its deliberations on Saturday, with instructions to write out and seal up their verdict when agreed upon. In State v.Green, 37 Mo. 466, under a statute which provided that "no court shall be open or transact business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury," the reading of the instructions to the jury by the court had not been concluded, nor the cause finally submitted to them, until the clock in the court room showed ten minutes after twelve, midnight, on Saturday. The court took a recess without adjournment until two clock on Sunday morning; and then received the verdict and dis-The judgment was charged the jury. reversed for error. In Pulling v. People, 8 Barb. (N. Y.) 384, the cause was submitted to the jury on Sunday morning; about three o'clock the same morning they rendered their verdict, when the court adjourned until Monday, and judgment

was then pronounced. This was held to be error. But in Shaw v. McCombs. 2 Bay (S. Car.), 232, it was held that no verdict whatever could be received on Sunday. See also Davis v. Fish. I Greene (Iowa), 406; s.c., 48 Am. Dec. 387. These decisions are not now, however, considered as authority. And in True v. Plumley, 36 Me. 466, it was held that in a civil suit tried on Saturday, the verdict of the jury, though finally agreed on and sealed up on Sunday, may be affirmed and recorded on the next day. And where the statute provided that the term of a court of a certain district should begin on a day certain and continue two weeks, and a jury had gone out on Saturday of the first week and agreed upon a verdict after midnight, and the verdict was received and entered as of Saturday, held, that the verdict was not void for having been entered on Sunday. Hiller v. English, 4 Strobh. (S. Car.) 486. The authority given by a statute "to receive a verdict or discharge a jury" on Sunday imports the power to make orders inci-dental thereto; as, for instance, to have the verdict recorded, and to designate a day when the court will pronounce judgment thereon. State v. Rover, 13 Nev. And it has been held that in criminal cases the court may upon Sunday adjudicate the fact that the jury cannot agree. People v. Lightner, 49 Col. 226; State v. McGimsey, 80 N. Car. 377.

Writ of Inquiry.-In Butler v. Kelsey, 15 Johns (N. Y.) 179, it was held that a writ of inquiry could not be executed on-

Sunday.

Arbitration and Award.—In Story v. Elliot, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423, it is held that an award, being a judicial act, is void if made and published on Sunday. But in Sargeant. v. Butts, 21 Vt. 99, an award was sustained which had been determined after Saturday night had faded into Sunday morning. And in Isaacs v. Beth Hamedrash Society, I Hilt. (N. Y.) 469, it was held that where all the arbitrators, parties, and witnesses in a cause were of the Jewish persuasion, and the trial before the arbitrators was held on Sunday, and their award was drawn up and signed on that day, but was dated and delivered to the parties on the following day, such award was valid, and that the doctrine of Story v. Elliott extended only to the prohibition of the publication of the award on Sunday. See also Kiger v. Coates, 18 Ind. 153.

Attachment. - A writ of attachment filed and delivered to the officer after sunset,. Sunday, is not for that reason void. Johnson v. Day, 17 Pick. (Mass.) 106.

Referee's Announcement.—A referee's announcement on Sunday of a decision made and finally communicated on a secular day, held not to visite the con-

made and finally communicated on a secular day, held, not to vitiate the contract. Crosby v. Blanchard, 50 Vt. 696.

Trial of a case on Sunday, being a purely judicial act, is void. Chapman v. State, 5 Blackf. (Ind.) III. But continuing a cause over from Saturday to Monday is not keeping a court open on the Sabbath. Vanderwerker v. People, 5 Wend. (N. Y.) 530. And where a statute declares that justices of the peace may hold court on any day except Sunday, a judgment rendered on Thanksgiving day is valid. Bear v. Youngman, 19 Mo. App. 41. So an order made by a judge in vacation, bearing date on Sunday, is for that reason void. Coleman v. Henderson, 12 Am. Dec. 200.

Pronouncing judgment upon a verdict is clearly a judicial act, and if done on Sunday will be null and void. Blood v. Bates, 31 Vt. 147; Arthur v. Mosby, 2 Bibb (Ky.); 580; Chapman v. State, 5 Blackf. (Ind.) 111; Allen v. Godfrey, 44 Blackf. (Ind.) 111; Allen v. Godfrey, 44 N. Y. 433; Swann v. Broome, 3 Burr. 1595; Coleman v. Henderson, Litt. Sel. Cas. 171; Houghtaling v. Osborn, 15 Johns. (N. Y.) 115; Baxter v. People, 3 Gilm. (Ill.) 385; Davis v. Fish, 1 Greene (Iowa), 406. Or on a legal holiday. Lampe v. Manning, 38 Wis. 673. But it has been held by the supreme court of Nebraska that under one statute providing that "no court can be opened, nor any judicial business transacted, on Sunday or any legal holiday, except (1) to give instructions to a jury then deliberating on this verdict; (2) to receive a verdict or discharge a jury; (3) to exercise the powers of a single magistrate in a criminal pro-ceeding "-section 38 of an act to amend chap. 13, Rev. St. 1866 (Comp. St. 202)and another providing that "upon a verdict the justice must immediately render judgment accordingly" (Code, § 1002), it is a justice's duty to render a judgment immediately upon a verdict rendered upon Sunday; that he has no discretion in the matter. See also Hurford v. City of Omaha, 4 Neb. 336; Perkins v. Jones, 28 Wis. 243; Wearne v. Smith, 32 Wis. 412. But a court is not bound to accept as true a docket entry that a judgment was rendered on Sunday, when there is extraneous evidence that it in fact was not. Ecker v. First Nat. Bank, 1 Atlantic Rep. 849.

Recognizance.—In criminal cases, however, a recognizance entered into on Sunday has been held binding. Watts v. Commonwealth, 5 Bush (Ky.), 309; Johnston v. People, 31 Ill. 469; Salter v. Smith, 55 Ga. 244; Hammons v.

State, 59 Ala. 164; State v. Wyatt, 6 La. Ann. 701. But a recognizance taken on Sunday to prosecute an appeal in a criminal case is void. State v. Suhur, 33

Me. 539.

Criminal Process.—Under a statute permitting the execution on Sunday of writs of habeas corpus, or process on a charge of treason, felony, riot, etc., or upon an escape from custody, the court says, in Rice v. Commonwealth, 3 Bush (Ky.); 15, that those writs may be sued out on Sunday, as the right to execute embraces the right to have them issued. And in Wright v. Dressel, 140 Mass. 147, it was held that a search warrant was not a civil process within the meaning of the statute, and may be executed on Sunday. In North Carolina a sheriff may proceed on Sunday by distress to enforce the penalty for peddling without a license. Cowles v. Brittain, 2 Hawks (N. Car.) 204

Hawks (N. Car.), 204.

Injunction.—It has been held that although Sunday is a dies non juridicus at the common law, and although the statute of Illinois prohibits all secular employments on that day, yet in special cases where public policy or the prevention of irremediable wrong requires it, the courts may sit on that day and issue process. An injunction issued on Sunday, to prevent a railroad company from taking possession of a public street of a town without having made compensation, who would be injured thereby, was sustained. Longaber v. Fairbury, etc., R. Co., 64 Ill. 243.

A citation on a petition of selectmen of a town, for the removal by a turnpike company of a gate, was held to be a "process" within the Vermont Act of 1801, and, as such, cannot be served after sunset of Saturday evening. But though the citation abates, the court may retain the petition, and order notice. Cavendish v. Wethersfield Turnpike Co., 2 Vt. 531.

The proceedings in a statute foreclosure are not void, if the day of sale advertised happens on Sunday. The sale may be made on Sunday or postponed. Sayles v. Smith, 12 Wend. (N. Y.) 57; and in Indiana it is held that a sale of property for taxes on Christmas day is valid. Hadley v. Musselman, 104 Ind. 459. But as a general rule a civil officer cannot exercise his office on Sunday. Frost v. Hull, 4 N. H. 173; Shaw v. Dodge, 5 N. H. 462.

Receiving a notice of protest on Sunday, in silence, held, not to be a waiver of the irregularity of a personal service on Sunday. Rheem v. Carlisle Deposit Bank, 76 Pa. St. 132.

When a statute limits a specified number of days for doing an act or taking a legal proceeding, intervening Sundays and public holidays are frequently omitted from the computation, on the ground that these days are non-judicial days, and should not, therefore, be counted against one who is entitled to a prescribed number of days for doing a judicial act.¹

The privy examination of a married woman to her deed, taken on Sunday, is valid. Lucas v. Larkin, I Pick. (Tenn.)

1. See Louisville, etc., R. Co. v. Turner, 81 Ky. 599; Lewis v. Schwenn, 15 Mo. App. 342 Sunday is not to be Mo. App. 342. Sunday is not to be counted as one of the days of a term of court. Read's Case, 22 Gratt. (Va.) 17. Thus, in determining the "tenth day" of the term, under a notice of a step to be taken on the tenth day, Sunday is excluded. Michie v. Michie, 17 Gratt. (Va.) And where a statute gives a certain number of hours to perform an act, without mention of Sunday, the hours of an intervening Sunday are to be excluded from the computation. So held in respect to a statute which permits a justice of the peace to continue for seventy-two hours, for consideration, a cause submitted to him. before rendering judgment. Meng v. Winkleman, 43 Wis. 41. See also Hodgson v. Banking House, 9 Mo. App. 24. And under a statute providing that an appeal may be entered "within four days after the adjournment" of the court, Sunday should not be counted as one of the four days. Neal v. Crew, 12 Ga. 93: Bouligny v. White, 5 La. Ann. 31; Pierce v. Cushing, 33 La. Ann. 401. But in Anderson v. Boughman, 6 Mich. 208, it was held that where by the rule four days are required in reckoning time on a notice of hearing, an intervening Sunday is to be included in the computa-So held, also, where four days are given for the payment of taxes after property is seized. Cressey v. Parks, 75 Me. 387.

Where provision is made by statute for the publication of a notice for a certain number of consecutive days, and no exception is made of Sundays, they are to be counted. Taylor v. Palmer, 31 Cal. 240; Miles v. McDermott, 31 Cal. 271. Or where the time limited by statute for a particular purpose is such as must necessarily include one or more Sundays, they are to be included in the enumeration, unless they are expressly excluded or the intention of the legislature to exclude them is manifest. Goswiler's Est., 3 Pa. 200; Thayer v. Pelt, 4 Pick. (Mass.) 354. But the six days' publication

of notice of the filing of the assessment roll in the city clerk's office, required by the provision of the charter of the city of Chicago as to condemnation of land for a street, must be exclusive of Sunday, this being dies non juridicus. Chicago v. Vulcan Iron Works, 93 Ill. 222.

Publication of notice of a judicial sale, from March 12th to April 15th inclusive, satisfies the requirements of a deed calling for thirty days' notice of sale. The Sunday omissions do not vitiate the notice. Kellogg v. Carrico, 47 Mo. 157.

sunday offissions do not vitiate the notice. Kellogg v. Carrico, 47 Mo. 157. In New York, previous to Code of Procedure, where the period fixed by a statute for doing any act expires on Sunday, the act must be done on the preceding day; and intermediate Sundays are included in the computation of time. Broome v. Wellington, I. Sandf. (N. Y.) 664; Exp. Dodge, 7 Cow. (N. Y.) 147; Sundays are also to be reckoned in the computation of time under a Rhode Island statute which provides that a motion for a new trial shall be filed within 48 hours after the rendition of the verdict. Franklin v. Holden, 7 R. I. 215. And under a Virginia statute, providing that the day to be appointed, in the warrant for holding the court of examination, shall be not less than five nor more than ten days after the date thereof," held. that the court might be held on the fifth day after the date of the warrant, though one of the five days was Sunday. Abraham's Case, I. Rob. (Va.) 676. But in Michigan it is held that Sunday is not included in the two days in which a short summons from a justice's court may be made returnable. Simonson v. Durfee, 50 Mich, 80.

v. Durfee, 50 Mich. 80.

The word "days," as used in a statute regulating proceedings in court, which requires notice to be given or an act to be done in a specified number of "days," does not include Sundays. The prescribed number of secular days is to be given. Query, whether the rule extends to periods exceeding a week? National Bank v. Williams, 46 Mo. 17; and see Burton v. Chicago, 53 Ill. 87. So the word "days," used alone in a clause of demurrage for unloading in the river Thames, is to be understood of working or running days only, and not to comprehend Sundays or

4. Fractions of a Day.—In the legal computation of time there are no fractions of a day; and the day on which an act is done must be entirely excluded or included.¹

holidays, by usage of merchants in London. Cochran v. Retburg, 3 Esp. N. P. 121.

When the day of performance of contracts, other than instruments upon which days of grace are allowed, falls on Sunday, that day is not counted, and a compliance with the contract on Monday is a Wend. (N. Y.) 205; Gibbon v. Freel, 65 How. (N. Y.) Pr. 273; Stebbins v. Leowolf, 3 Cush. (Mass.) 137; Post v. Garτοw, 18 Neb. 682; Stryker v. Vanderbilt, 27 N. J. L. (3 Dutch.) 68. But if the last day of the three years limited for the redemption of land from a mortgage falls on Sunday, it has been held that a tender of the amount due on the mortgage upon the following day is too late. Haley v. Young, 134 Mass. 364. And where the 30th day after the rendition of a judgment falls on Sunday, the lien on attached property is not therefore extended to Monday. Alderman v. Phelps, 15 Mass. 225. But where a rule expires on Sunday, the last day is not reckoned and the party has all the next day to do what is required. Cock v. Bunn, 6 Johns. (N. Y.) 326; Goswiler's Est., 3 P. & W. (Pa.), 200; Catherwood v. Shepherd, 30 La. Ann., Part I., 677; Muir v. Galloway, 61 Cal. 498.

And where a statute prescribes that property seized for taxes shall be kept four days, and then sold unless the taxes are paid, the property must be sold on the fourth day (excluding the day of seizure), unless that falls on Sunday, and then the next. Cressey v. Parks, 75 Me. 387. See also Brainard v. Norton, 14 Ill. App. 643; Edmundson v. Wragg, 104 Pa. St. 500; s.c., 49 Am. Rep. 590; English v. Williamson, 34 Kan. 212.

A statute which provides that, in computing time, the last day, if Sunday, shall be excluded, has reference to such last day only, and does not necessarily aprly to an intervening Sunday. In respect to such intervening Sunday, however, the courts of *Missouri* will apply the well-settled rule that Sunday is a *dies non*. as to matters to be transacted in court. National Bank v. Williams, 46 Mo. 17.

In California it is held that the supreme court is always open, Sundays and holidays included. Where, therefore, a cause has been heard and decided by one of the departments, a hearing in banc cannot be granted after the expiration of

thirty days, although the last day of the thirty falls on Sunday: Adams v. Dohrmann, 63 Cal. 417.

In regard to the maturity of bills and notes on a dies non, see title BILLS AND NOTES ON MATURITY.

1. Jones v. Planters' Bank, 5 Humph. (Tenn.) 610; Portland Bank v. Maine Bank, 11 Mass. 204; Re Welman, 20 Vt. 653; Duffy v. Ogden, 64 Pa. St. 240; Small v. McChesney, 3 Cow. (N. Y.) 119; Clute v. Clute, 3 Denio (N. Y.), 263; Phelan v. Douglass, 11 How. (N. Y.) Pr. 193; Rusk v. Van Benschoten, 1 How. (N. Y.) Pr. 149; Blydensburg v. Cotheal, 4 N. Y. 418; Lester v. Garland, 15 Ves. 248; Wright v. Mills, 4 H. & N. 488; Queen v. St. Mary, 1 El. & Bl. 816; Revill v. Claxon, 12 Bush (Ky.), 588; Jones v. Ealer, 8 W. L. Jour. 500; Arnold v. United States, 9 Cranch (U. S.), 104; McGill v. Bank, 12 Wheat. (U. S.) 511.

Our law rejects fractions of a day more generally than the civil law does. The effect is to render a day a sort of indivisible point; so that any act done in the compass of it is no more referable to any one than to any other portion of it; but the act and the day are coextensive; and therefore the act cannot properly be said to be passed until the day is passed. Lester v. Garland, 15 Ves. 248.

Unless the law provides for fractions of days, all judgments entered on the same day will be regarded as if entered at the same time, and as creating liens equal in point of priority, and entitled to be paid pro rata out of the debtor's real estate. Freeman on Judgments, sec. 370; Rockhill v. Hanna, 4 McL. (U. S. C. C.) 555; Bruce v. Vogel, 38 Mo. 100; Mechanics' Bank v. Gorman, 8 W. & S. (Pa.) 304; Barney v. Boyett, 1 How. (Miss.) 39. And as to legislative acts, or public laws, or such judicial proceedings as are matters of record, it is held that the law allows no division of a day, and that a statute which takes effect from and after its passage goes into operation on the day on which it is approved, and has relation to the first moment of that day. Matter of Welman, 20 Vt. 653

Where land was sold at public auction for cash on the day when lands were by law assessed for taxes, both parties being ready to complete the sale, but the conveyance was made within the next two days, held, that the burden of taxes must be borne by the vendor and pur-

The general rule, however, that the law admits no fractions of a day is subject to numerous exceptions. It is generally regarded as a mere fiction, and if, by resort to such fiction, manifest injury and wrong will result, the truth and fact in point of time may always be averred and proved.¹

chaser equally; that although for the ends of justice a day may be divided, yet if priority would gain no such end, the law considers a day as punctum temporis, without fractions. Plowman v. Williams, 3 Tenn. Ch. 181.

Service on a particular day is one day's

notice. Duffy v. Ogden. 64 Pa. St. 240.

1. Matter of Richardson, 2 Story (U. S. C. C.), 571; Louisville v. Savings Bank, 104 U. S. 469; Maine v. Gilman, 11 Fed. Rep. 214; Grosvenor v. Magill, 37 Ill. 239; Follett v. Hall, 16 Ohio, 111; Tufts v. Carradine, 3 La. Ann. 430; Callihan v. Hallowell, 2 Bay (S. Car.), 8; Bigelow v. Wilson, 1 Pick. (Mass.) 485; Westbrook Mfg. Co. v. Grant, 60 Me 83; Symons v. Low, Style, 72; Chick v. Smith, 8 Dowl. 337; Roe v. Hersey. 3 Wils. 274; Combe v. Pitt, 3 Burr, 1423. In the Matter of Richardson, 2 Story U. S. C. C. C. Turk J. Judge Story edid.

(U. S. C. C.), 571, Judge Story said: "I am aware that it is often laid down that in law there is no fraction of a day. this doctrine is true only sub modo, and in a limited sense, where it will promote the right and justice of the case. It is a mere legal fiction, and therefore, like all other fictions, is never allowed to operate against the right and justice of the case. On the contrary, the very truth and facts, in point of time, may always be averred and proved in furtherance of the right and justice of the case; and there may be even a priority in an instant of time; or in other words it may have a beginning and an end. The common case put to illustrate the doctrine that there is no fraction in a day, is the case when a person arrives at majority. Thus if a man should be born on the first day of February, at eleven o'clock at night, and should live to the thirty-first day of January, twenty one years after, and should, at one o'clock of the morning of that day, make his will, and afterwards die by six o'clock in the evening of the same day, he will be held to be of age, and his will be adjudged good. Here the rule is applied in favor of the party, to put a termination to the incapacity of infancy. The case of Fitzhugh v. Dennington, 2 Ld. Raym. 1094, -s.c., 6 Mod. 260; I Salk. 44,-fully supports this doctrine, and it stands recognized and confirmed in other cases. But many cases may easily be put where the real fact is

allowed to prevail, and to be conclusive. Thus, for example, if a woman makes a deed of her land in the morning, and isafterwards married, or dies on the same day, the deed is good. So, if my ancestor die at five o'clock in the morning, and I enter into his lands at six o'clock of the same day, the lease is good. So, if the ancestor and his immediate heir both dieon the same day, and the inheritance would pass to different persons, according to the survivorship of the ancestor or the heir, then the actual fact, which survived the other, may be proved, so as topass the inheritance to the proper party entitled thereto. . . . So that we see that. there is no ground of authority, and certainly there is no reason to assert, that any such general rule prevails, as that the law does not allow of fractions of a On the contrary, common senseand common justice equally sustain the propriety of allowing fractions of a day, whenever it will promote the purposes of substantial justice. Indeed, I know of no case where the doctrine of relation, which is a mere fiction of law, is allowed to prevail, unless it to be in furtherance and protection of rights, pro bono publico."

In estimating the amount of damages caused by obstructing a public way, the jury may consider fractions of a day. Ferris v. Ward, 9 Ill. 499. And where questions of right growing out of deeds, judgments and other instruments bearing the same date, are concerned, the precise time of the approval of a statute may be inquired into, to prevent it from operating retrospectively. 3 Op. Att. Gen. 82. And where two persons claim the same tract of land from a common source, by different conveyances, executed on the same day, the time of day such conveyances were executed may be proved, for the purpose of showing who has the better. Murfree's Heirs v. Carmack, 4 Geiger (Tenn.), 270; Miller v. Estill, Meigs (Tenn.), 483.

The law sometimes expressly forbids

The law sometimes expressly forbids the different hours of the same day from being recognized as affecting the right of parties, but the prohibition must be confined to the cases enumerated. Tufts v. Carradine, 3 La. Ann. 430.

The Upited States supreme court has held that when the priority of one legal right over another, depending upon the

5. Other Matters.—The whole of a term of court is sometimes. considered as one day; and by a legal fiction the time between the submission and decision of a cause is also considered as but one day.1

During leap year, the 28th and 29th of February are sometimes

counted as one dav.2

Where two periods are fixed within which an act may be done. it is a general rule that it may be done on any intervening day, unless some day is expressly excluded.3

An order to give twenty days' notice by publication in a newspaper means publication each day.⁴ And publication of preliminary and other ordinances of street improvements, required to be

order of events occurring on the same day, is involved, the rule that for most purposes the law regards the entire day as an indivisible unit is necessarily departed from. Thus in an action by a bank on a guaranty, dated Feb. 23, of sums against C,—held, that C's check, presented on the morning of that day for deposit, was not included. Cincinnati Bank v. Burkhardt, 100 U.S. 686. And where a vote of a township authorizing the issuing of certain bonds was passed on the same day as, but prior to, the adoption of a new state constitution prohibiting such issue, -held, that the court would consider fractions of a day, and that the constitution did not take effect until the close of voting, and that therefore the issue of bonds was valid. Louisville v. Portsmouth Savings Bank, 104 U. S. 649.

In Virginia it has been held that where service of process has been made on a defendant on the day on which he was convicted of a felony, the court would be slow to decide that, by a fic-tion of law, defendant should be considered a felon before the conviction had actually taken place. Neale v. Utz, 75

Va. 480.

Where a case turns on the question of which of two things was done first, the party having the burden of proof fails in merely showing that both were done on the same day. Richards v. Fox, 52 N.

Y. Super. Ct. 56.

1. Thus, although a party to an action may die between the time of the decision in the cause by the supreme court of a State and the filing of a mandate of the supreme court of the United States reversing that decision, no change of parties in the State court is necessary before carrying the mandate into effect. Cunningham v. Ashley, 13 Ark. 653. principle was recognized in Follett v. Hall, 16 Ohio, 111, where it is held that a mortgage handed in for record on the first day of the term of court, but before the court actually convenes, will prevail against the lien of a judgment recovered at the same term. But it seems that this rule is less applied at the present

time than formerly.

2. A statute, 21 Hen. III., enacted that the intercalary day and the next before it should be accounted as forming together only one day. And this statute has been recognized in some of the States as applicable to and in force in this country, while in others the same rule has been re-enacted; as in 1 N. Y. Rev. Stat. 606, § The result of its adoption is of considerable importance in computation of time; for by it, in reckoning the time allowed for answering process, paying a bill or note drawn payable in a given number of days, or the like, when the 29th of February, so called, is involved in the period that day is not to be counted. One who is entitled to 30 days from February 20th for performance of any act has been held entitled, in Indiana (where the rule of Stat. Hen. III, is fully recognized), to the end of March 22d, just the same whether in the bissextile or in the ordinary year; the 28th and 29th of February being counted as one. Swift v. Tousey, 5 Ind. 196; Croft v. State Bank, 7 Ind. 219; Kohler v. Montgomery, 17 Jb. 220; Porter v. Holloway, 43 Ind. 35; Helphenstine v. Vincennes Nat. Bank, 65 Ind. 582. See Abbott's Law Dic., tit. Bissextile.

But the statute 21 Hen. III. has been held to have no effect by the Pennsylvania court in computing the time for entering an appeal. Harker v. Addis, 4 Pa. Št. 515.

See article in 10 Cent. L. J. 158, where the doctrine of the Indiana court is criti-

3. Russell v. Ostrander, 30 How. (N.

Y.) 43. 4. Allen Ø. Kerr, 13 Lea (Tenn.), 256.

DAYTIME-DE BENE ESSE-DE FACTO.

published in a paper of general circulation, is valid though made in a paper published only on Sunday.1

DAYS OF GRACE.—See BILLS AND NOTES.

DAYTIME.—That portion of the twenty-four hours in which there is sufficient daylight to distinguish a man's person and features or countenance 2

DE BENE ESSE.—(See also BILL TO PERPETUATE TESTIMONY: BILL TO TAKE TESTIMONY DE BENE ESSE; DECLARATION; EVI-DENCE: VERDICT; WITNESSES.)—A technical phrase applied to certain acts deemed for the time to be well done, or until an exception, or other avoidance. It is equivalent to provisionally, with which meaning the phrase is commonly employed.3

DE FACTO.—A Latin phrase meaning in fact; in point of fact; actually. The term is used to denote a thing actually done, or a condition actually existing. It is frequently employed in contradistinction from the phrase de jure, of right or by right.4

1. Hastings v. Columbus, 42 Ohio St. 585. But in Georgia it is held that the advertisement of a tax sale in a Sunday paper is illegal, and a sale thereunder passes no title. Sawyer v. Cargile, 72

2. Trull v. Wilson, 9 Mass. 154; Rex v. Tandy, 1 C & P. 297. In the first of these cases the word occurs in a statute, by which a certain class of persons, on giving bond, are allowed the liberty of the prison-yard in the daytime. In the other, its use in an act imposing a penalty on house-breaking in the daytime is defined.

In the Game Act, 9 Geo. iv.c. 69, "daytime" is defined, in sec. 34, which treats of poaching, to commence at the beginning of the last hour before sunrise and to conclude at the expiration of the first hour after sunset, I Ch. Gen. Pr. 403.

3. Bouv. Dict.

This phrase is technically applied to acts or proceedings done or permitted, deemed for the time to be well done, and to be formerly sufficient, but the validity or effect of which depends upon some subsequent act, fact, or proceeding. It is equivalent to conditionally or provisionally. Its most frequent application in practice is to examinations of a witness out of court before trial, subject to the contingency of his being able to attend at the trial. The peculiar structure of the Latin phrase renders a literal translation of it into English difficult. Cowel says that "de bene esse are common Latin words, but their meaning something more dark." There is no uncertainty, however, in regard to the practical import of the phrase, as explained above; it is in common use, and well understood. Abbott's Dict.

4. Abbott's Dict.

Officer de Facto. - See title DE FACTO OFFICERS.

Corporation de Facto. - See title COR-PORATION.

Government de Facto. -- See Govern-

De Facto Wife, - Referred to in 4 Kent's Com. 36, as one whose marriage is voidable by decree.

De Facto Contract.—By a de facto contract is meant one which has purported

tract is meant one which has purported to pass the property from the owner to another. Farmers & M. Bank v. Logan, 74 N. Y. 568, citing Cundy v. Lindsay, L. R. 3 App. Cas. 459.

De Facto King.—A king de facto is one actually reigning, as opposed to one de jure merely, who, although having the lawful succession, has either been ousted from or never actually taken the section. from, or never actually taken, the possession of the sovereignty. The constitutional Stat. II Hen. VII. c. I, enacts that obedience to the king for the time being de facto shall be a protection to the subject against all forfeitures under any succeedsovereign claiming adverselv. Brown's Dict. and Inst.

De Facto Office or Court .- There may be a de facto court or office the legality of which cannot be called in question, except in a direct proceeding by the State for that purpose. Thus when a court or office is established by a legislative act apparently valid, and the court has gone into operation, or the office is filled and exercised, under the act it is a de facto

DE FACTO OFFICERS.—(See also AGENCY; MUNICIPAL COR-PORATIONS: OFFICERS OF CORPORATIONS: OFFICERS OF MUNI-CIPALITIES.)

1. De Facto Officers of Private Corporations, 93.

(a) Who Are, 93. (b) Validity of their Acts, 94. (c) Personal Liability, 95.

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(a) Who Are, 96. (b) Right to Office Cannot be Atlacked

Collaterally, 106. (c) Validity of their Acts, 107.

(d) Their Responsibility, 108. (e) Rights of De Facto and De Jure Officers as to Compensation, 100.

1. De Facto Officers of Private Corporations.—(a) Who Are.—The expression officer de facto has been used to designate an agent actually occupying the position claimed by him, and exercising its incidental powers; it is said that only the rightful representatives of the corporation, under a proper election or appointment, are officers de jure.1

court or office. Burt v. Winona & St. P. R. Co. (Minn.) 4 Am. & Eng. Corp. Cas. 426. An office which does not have a de jure existence cannot, of course, have a de facto incumbent, and the acts of the incumbent of such an office are void, Norton v. Shelby Co., 118 U. S. 425; s. c., 14 Am. & Eng. Corp. Cas. 487.

De Facto Schools.—There may be

facto schools and school-masters. Kidder v. Challis, 59 N. H. 473; and de facto school houses. Chapin v. School Dis-

trict, 30 N. H. 25.

1. Morawetz on Corp., § 640. The same author says that the use of these expressions has been unfortunate, as it has led to confusion by reason of the application of the same terms to govern-

ment officers and public officials. § 640.

In Rex v. Corporation of Bedford Level, 6 East, 368, it is said that "an officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point

of law."

An officer who has not given bonds as required by the rules or by-laws of his company, but who has been permitted to exercise his office by the directors, is an officer de facto, and his acts as such are valid. Bank of U. S. v. Dandridge, 12 Wheat. (U. S.) 64. But there can be no such thing as an officer de facto in a direct proceeding to try the title to an office. People v. Albany, etc., R. Co., I Lans. (N. Y.) 108. But officers of a corporation who are removed by the judgment of a court continue to be de facto officers until such judgment is recorded. Mining Co. v. Anglo-Californian Bank, 14 Otto (U. S.), 192.

Until directors, holding under color of an election and having charge of the affairs of the company, are judicially ousted, they are de facto officers of their corporation. Anglo-Californian Bank v. Mahoney Mining Co., 5 Saw. (U. S.) 255.

Distinction between Officer De Facto of

Private Corporation and De Facto Government Officer .- Morawetz in his work on Corporations, 2d Ed. \$640, objects to the proposition suggested by some of the cases, that a de facto officer of a private corporation occupies a position similar to that of a de facto government officer, or other public official, in possession of his office under color of right. He says: "The two cases rest on different principles. Directors and other managers of a private corporation are merely agents, and the corporation can be charged with their acts only in accordance with the established doctrines of the law of agency. It is clear that, if a person assumes toact as agent for another without any authority, he does not thereby become. the agent of such person either in fact or in law. An agency can never be created by the act of the agent alone. It is clear also, that an appointment made by another person, assuming to act as agent for the common principal, does not bind the latter unless the appointing agent had authority. Hence if a person assumes to act as agent of a corporation under an informal, and therefore unauthorized, appointment by a superior agent, the corporation will not be responsible for the acts of the person so charged. . .

"The validity of acts performed by a public officer, actually in the exercise of the powers and duties of the office claimed by him, rests on a distinct rule of law. In order to secure the peaceful and orderly government of the community, the rule has been established that the right of a de facto public officer to exercise the powers of his office cannot be investi(b) Validity of their Acts.—As a general rule the acts of officers de facto of a private corporation, whether illegally elected or ineligible to office, are valid and binding upon the corporation.¹

gated in a collateral proceeding. It must be determined once for all times in a direct proceeding to oust the officer."
Citing Litchfield Iron Co. v. Bennett, 7
Cow. (N. Y.) 234; Johnston v. Jones, 23
N. J. Eq. 216; Despatch Line v. Bellamy
Mfg. Co., 12 N. H. 223. In the latter
case the court say: "If this election had been by a municipal corporation, coming into office under color of an election, he would have been an officer de facto, and his acts valid so far as third persons had an interest in them. And the regularity of the election could not in such case be inquired into, except in some proceeding to which he was a party. As a director of a private corporation, although called in common parlance an officer of the corporation, he is perhaps not technically to be considered an officer de facto. He is one of the agents elected by the vote of the corporation, for the management of its affairs, or some of them. But a similar rule must prevail in relation to the effect of his acts, so far as the corporation have held him out as an agent, and third persons have confided in his acts, done within the scope of the authority he appeared to possess." Compare McGarigle v. Hazleton Coal Co., 4 W. & S. (Pa.) 425; Mahoney Mining Co. v. Anglo-Californian Bank, 104 U. S. 192; Waller v. Flemming, 70 N. Car. 494; Central Trust Co. v. Wabash, etc., R. Co., 23. Fed. Rep. 858. peared to possess." Compare McGarigle

How Created.—Although an attempt to elect or appoint an agent or officer without complying with the prescribed formalities does not of itself confer any authority upon the agent so chosen, yet if such appointment or election is subsequently ratified by the corporation, or if by the laches of the corporation a regular appointment or election may be presumed, such officer may be said to become an officer de facto. See Browning v Great Cent. Mining Co., 5 H. & N. \$56; Smith v. Hull Glass Co., 11 C. B. \$97; Sampson v. Bowdoinham Mill Co., 36 Me. 78; Penobscot, etc., R. Co. v. Dunn, 39 Me. 587; Smith v. State Bank, 18 Ind. 327; Goodwin v. Union Screw Co.. 34 N. H. 378; Ohio, etc., R. Co. v. McPherson, 35 Mo. 13; Waite v. Windham County Min. Co., 36 Vt. 18; Charitable Association v. Baldwin, 1 Metc. (Mass.) 359; Allen v. Citizens' Steam Nav. Co., 22 Cal. 28; Southgate v. Atlantic, etc., R. Co., 61 Mo. 89; State Bank v.

Chetwood, 3 Hals. (N. J. L.) 1; Mechanics' Nat. Bank v. Burnett, 32 N. J. Eq. 236; Minor v. Mechanics' Bank, I. Pet. (U. S.) 96; Union Bank v. Call, 5 Fla. 409; Elwell v. Dodge, 33 Barb. (N. Y.) 336; Vernon Society v. Hills, 6 Cow. (N. Y.) 23; Beers v. Phenix Glass Co., 14 Barb. (N. Y.) 358; Farmers' Mut. Ins. Co. v. Taylor, 73 Pa. St. 342. Or if the officers selected are ineligible, but are allowed by the proprietors of the corporation to take control of its property and to exercise its functions and powers, they become officers de facto, and as such may act for and bind the corporation. Mechanics' National Bank v. Burnett Mfg. Co., 32 N. J. Eq. 236; Knight v. Corporation of Wells, Lutw. 508.

Thus where by a law under which a corporation was created, it was required that the directors and officers should be stockholders and be elected for one year, and the president became bankrupt and subsequently acted as president of the corporation, held, that notwithstanding his bankruptcy, he was the president de facto of the corporation, and as such his acts were, in the absence of fraud, the acts of the corporation. Atlas Nat. Bank v. Gardner, 8 Biss. (U. S. C. C.) 537. And see Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205; Delaware, etc., Canal Co. v. Pennsylvania Coal Co., 21 Pa. St. If an officer holds over after his term has expired, and the corporation neglects to choose another, he will be considered as an officer de facto, and his acts will bind the corporation. Thorington v. Gould, 59 Ala. 461.

1. In re County Life Ass. Co., 5 L. R. Ch. App. 288; Mahoney v. East Holyford Min. Co., 7 L. R. H. L. 894; Cahill v. Kalamazoo Ins. Co., 2 Doug. (Mich.) 124; Rockville v. Andrews, 2 Cranch (U. S. C. C.), 449; Bank of United States v. Dandridge, 12 Wheat. (U. S) 64; Minor v. Mechanics' Bank, 1 Pet. (U. S.) 46; Insurance Co. v. McCain, 96 U. S. 84; Savage v. Ball, 17 N. J. Eq. 142; Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548; s. c., 1 Am. & Eng. Corp. Cas. 690; Doremus v. Dutch Reformed Church, 2 Creene (N. J.), 332; Atlantic R. Co. v. Johnston, 70 N. Car. 349; Elizabeth City Academy v. Lindsey, 6 Ired. (N. Car.) 476; Matter of Mohawk, etc., R. Co., 19 Wend. (N. Y.) 135; Matter of Directors of M. & H. R. Co., 19 Wend. (N. Y.) 135; Vernon Society v. Hills, 6

And whenever the corporation is bound by the acts of its officers de facto, so, also, will third parties be bound to the corporation.1

The company cannot set up this defence.2

(c) Personal Liability.—The fact that an officer of a company was not legally elected, and was under no legal obligation to perform the duties of the office, does not relieve him from statutory personal liability for neglect in performing such duties while he was

an officer de facto of the company, and acting as such.3

(d) Removal.—A court of equity has no jurisdiction to remove an officer of a corporation from an office of which he has possession, or to declare the forfeiture of such office. Its decree will not, like the judgment of a court of law, operate in rem, and remove or oust any one from an office which he in fact holds. When the object is simply to determine the regularity of an election, or to declare an office to which any one has been duly elected forfeited, a court of law is the only competent and proper tribunal.4

Cow. (N. Y.) 23; Ebaugh v. German Ref. Church, 3 E. D. S. (N. Y.) 60; Matter of Chenango, etc., Ins. Co., 19 Wend. (N.Y.) 635; Beers v. Phœnix Glass Co., 14 635; Beers v. Phœnix Glass Co., 14
Barb. (N.Y.) 358; P. & K. R. Co. v. Dunn,
39 Me. 587; O. & M. R. Co. v. McPherson, 35 Mo. 13; s. c., 86 Am. Dec. 128;
Cooper v. Curtis, 30 Me. 488; Delaware
& H. Canal Co. v. Pa. Coal Co., 21 Pa.
St., 131; Baird v. Bank of Washington,
II S. & R. (Pa.) 411; State v. Williams,
27 Vt. 755; Burr v. McDonald, 3 Gratt.
(Va.) 215; Bank of St. Mary's v. St. John,
25 Ala. 566; Lester v. Webb. I Allen
(Mass.), 34; Union Mining Co. v. Rocky
Mt. Nat. Bank, 2 Col. 248; Allen v. Citizens' Steam Nav. Co., 22 Col. 28; Alaizens' Steam Nav. Co., 22 Col. 28; Alabama, etc., R. Co. v. Kidd, 29 Ala. 221; Town of Concord v. Concord Bank, 16 N. H. 26. Appointments made by a de facto board of directors are as effectual as if made by a regular board. Ellis v. N. C. Instit., 68 N. Car. 423.

Directors of a corporation which has been duly put into existence, who are elected at a meeting of the stockholders, held without the limits of the State creating the corporation, but who accept their offices, and order a call for payment upon subscriptions to stock, become directors de facto, and their authority to act as such cannot be questioned collaterally by a stockholder in an action against him for the call thus made, without showing a judgment of ouster against them in a direct proceeding by the government for that purpose. Ohio & M. R. Co. v. McPherson, 35 Mo. 13; s.c., 86

Am. Dec. 128.

1. State Bank v. Chetwood, 3 Halst. (N. Y.) I. And where a suit is commenced and prosecuted by a corporation, by direction of its officers de facto-no other persons claiming a right to act as its officers-the defendant cannot be permitted to show, for the purpose of procuring the suit to be dismissed, that those officers were illegally elected. Charitable Assoc. v. Baldwin, 1 Metc. (Mass.)359.

2. Hackensack Water Co. v. De Kay,

36 N. J. Eq. 548; s. c., 1 Am. & Eng. Corp. Cas. 670.

3. Steam Engine Co. v. Hubbard, 11
Otto (U. S.), 188; Thayer v. New England Lith., etc., Co., 108 Mass. 523.
4. Johnson v. Jones, 23 N. J. Eq. 216; Owen v. Whitaker, 20 N. J. Eq. 122; Mozley v. Alston, 1 Phila. 790. And in Neall v. Hill, 16 Cal. 145; s. c., 76 Am. Dec. 508, it is held that the power of removing the private or ministerial officers of a private corporation belongs to the corporation alone. Courts cannot remove such officers, and this is the general rule. See title, Officers of Cor-PORATIONS.

Morawetz (Priv. Corp. 2d Ed., § 543 a.) criticises this doctrine, saying: "This doctrine seems to have originated in the mistaken view that the same principles apply to the removal of a person claiming to be an officer or head agent of a private incorporated company as to a de facto officer of a public corporation or a person in possession of a government office. An entire stranger to a corporation may be enjoined by a court of equity at the suit of the corporation, from meddling with the corporate affairs, if an action for damages would not be an adequate remedy; and there is no reason founded upon principle, why similar relief should not be granted against a person who claims without right to be an officer or agent of 2. De Facto Public Officers.—(a) Who are.—An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised:

Firstly, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action,

supposing him to be the officer he assumed to be:

Secondly, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement, or condition, as to take an oath, give a bond, or the like:

Thirdly, under color of a known election or appointment, void, because the office was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public;

Fourthly. Under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged

to be such.1

the company. The rule excluding equitable relief in a case of this kind has not been applied to agents of individuals or unincorporated associations, nor to the inferior agents of corporations; nor has it been applied in any case in which the person claiming the office was not in actual possession under color of right. What constitutes such possession of an office under color of right as will constitute a person an officer de facto, within the meaning of this rule, is not clear from the cases."

1. This definition is given by Chief Justice Butler in State v. Carroll, 38 Conn. 449; s. c., 9 Am. Rep. 409; 12 Am. L. Reg. (N. S.) 165, where it was held that one exercising the functions of a judge under an unconstitutional statute was an officer de facto, in a very learned and exhaustive opinion, remarkable for its research and reasoning, and which will stand as a landmark of the law upon this subject.

Definition of De Facto Officers.—The books abound in judicial definitions of this term; some of the most concise are the following: A defacto officer is one who goes in under color of authority, or who exercises the duties of the office so long or under such circumstances as to raise a presumption of his right. People ω . Statoon, 73 N. Car. 546. One who exercises the duties of an office under color of right, by virtue of an appointment or

election to that office; being distinguished on the one hand, from a mere usurper of an office, and, on the other, from an ofan office, and, on the other, from an officer de jure. Plymouth v. Painter, 17 Conn. 585; Rice v. Commonwealth, 3 Bush (Ky.), 14; Brown v. Lunt, 37 Me. 423; Hooper v. Goodwin, 48 Me. 79; Gregg v. Jamison, 55 Pa. St. 468; Commissioners v. McDaniel, 7 Jones, L. (N. Car.) 107. An officer de facto is one who comes into a legal and constitutional office by color of a legal appointment or election to that office; Chancellor Walworth in People v. White, 24 Wend. 539; one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. Petersilea v. Stone, 119 Mass. 465; one who assumes the functions of an officer under color of title of the office. Attorney-general v. Crocker, 138 Mass. 214; s. c., 9 Am. & Eng. Corp. Cas. 61. These definitions, however, must be regarded as very general statements, and afford only a startingpoint for the consideration of particular cases. What is color of office, and what facts show that one assumes and is reputed to hold a particular office, are left open questions and perhaps no statements can be found sufficiently comprehensive and particular, to be applicable to the circumstances of every case which may arise. The review of authorities and discussion of principles, however, by the court in the leading case of State v

Carroll, 38 Conn. 449, in its endeavor to find a definition sufficiently accurate and comprehensive to cover the whole ground, is worth quoting at some length.

made him so presently abbot de jure that the office was legally full, so that F. could not be considered for that reason an abbot de facto, by reason of his instal-

is worth quoting at some length.

The chief justice says: "The first case to be found in the Year Books was that of The Abbey of Fountaine, which was tried in 1431. The action was debt on a bond given by one F., as the abbot of the convent of Fountaine, for supplies furnished the convent. The action was brought against one R., his successor. The defendant pleaded that the abbots of the order were elective; that, before the making of the bond, the abbacy being vacant, an election was held, at which R. had twenty-four votes and F, but eight; that F. procured himself to be instituted and inducted by the visiting ordinary, took possession of the convent, held the same wrongfully as against R., and, while so holding wrongfully, executed the bond. And, further, that he was thereafter dis-placed, and R., the duly elected abbot, duly inducted into office. The plaintiff claimed that the plea was not a proper plea in bar, in form or substance, and declined to answer it. The question heard, therefore, was whether the plea was in form and substance a good plea in bar. . . . The case is principally valuable on account of the opinion expressed by the different judges, and which were not dissented from. Among these I find the following by Babington, chief justice: 'In every case, if a man be made abbot or parson erroneously, and then is removed for precontract, or for any like matter, yet a deed made by him and the convent, or by the parson and the patron and the ordinary, is good; as if an abbacy or church be vacant, and a man who had no right pretended to be patron, and preferred one A, by force whereof he is installed, and then he is ousted by legal process inasmuch as the patron had no right, yet a deed which was made before is good. But if abbey or church be legally full, and the patron prefer one, who is instituted by the ordinary, without deposing the other by due process, and the other makes a re-entry and oust the other, in this case a deed made by him who was put in possession wrong-fully is void, because there was always another parson, so that the second was only an usurper.'

That statement of the law by the chief justice was not questioned by the judges or other counsel. His object in making it evidently was to bring the attention of counsel to the question on which, in his opinion, the case hinged, viz.: Whether the election of R. by twenty-four votes

made him so presently abbot de jure that the office was legally full, so that F. could not be considered for that reason an abbot de facto, by reason of his installation and possession, as some of the judges were inclined to consider him. The statement is undoubtedly sufficient evidence that it was not then necessary to constitute an officer de facto, that the person who made the appointment should have authority to make it, but that, if made by a pretender, and the officer was qualified, took possession of the office and acted, he would be a de facto officer in respect to the public and third persons.

In 1461, on the accession of Edward IV., parliament declared the previous Henrys of Lancaster usurpers; but, to avoid great public mischief, also declared them kings de facto, and persons were punished in that reign for treason to Henry VI., not in aid of the lawful claimant of the crown. I Bl. Com. 204.

"The next case chronologically was that of Knowles v. Luce, in the same century, Moore, 109. In that case two stewards were authorized to hold a manorial court jointly, and held it alone, and took a surrender, and it was held that the surrender was good; for although he could not alone receive the surrender, de jure, yet he had sufficient color to constitute him an officer de facto. In that case it was said by Manwood, J., in giving his opinion, that an officer continuing to exercise an office after his time had expired was a good officer de facto, and that where the clerk of the lord of the manor held a manorial court without general or special authority from the lord to do so, he was a good officer de facto until disturbed by the lord; for the tenants were not obliged to examine into his authority. nor was he compelled to give an account of it to them.

"In the case of O'Brian v. Knivan, decided in 1520, Cro. Jac. 552, a new bishop, instituted and put in possession before the old one had been legally removed, was holden a good bishop de facto as tothird persons.

"In Lord Dacre's Case, I Leonard, 228, decided in 1553, the servant of the steward held a manorial court without any authority, and was holden a good officer de facto, and his acts valid as to third persons.

In Leak v. Howell, decided in 1596, reported in Cro. Eliz. 533, the deputy of a deputy was holden a good officer de facto, although the deputy had no authority whatever to appoint.

"In Harris v. Jays, decided in 1599, reported in Cro. Eliz. 699, a steward for

one of the manors of the county, who could only be appointed by the lord, was appointed by the auditor and surveyor of the county, without any authority whatever, and acted as such, and he was held steward de facto, although he could not grant a copyhold which had escheated, because it was in prejudice to the queen; but that other acts done by him were good.

The case of Knight v. Corporation of Wells, decided in 1688, reported in Luttwych, 156, was a case where one was legally elected who was disqualified, and he was holden an officer de facto.

he was holden an officer de facto.

'The important case of Parker v. Kett was decided in 1693, and reported in 1 Raym. 658, and 12 Modern, 467. In that case the authorities were reviewed by Lord Holt, and it was again holden that the deputy of a deputy, although his authority was wholly without authority of law (inasmuch as a delegated authority could not be delegated), derived sufficient color from it to constitute him an officer de facto. Lord Holt in that case on such review cited the cases from Manwood's opinion in Knowles v. Luce, and the reason, approvingly, and gave the definition, which has since been adopted and prevailed in the English law, viz.: 'A steward de facto is no other than he who has the reputation of being such steward, and vet is not a good steward in point of law.

The next case was that of Rex v. Lisle, which was decided in 1738. This case deserves careful consideration. is a brief, inaccurate and deceptive report of it in Strange, 1090, but a very full report in Andrews, 163. The case was quo warranto against Lisle at the suit of the King, as a pretended burgess in the town of Christ Church. Lisle was nominated by an acting mayor, Goldwire, and elected burgess, but it was claimed that Goldwire was not mayor, neither de jure nor de facto, and had no right to nominate. It appeared that he never was in fact elected, but pretended to be so, was sworn in, and acted as such. It also appeared that a quo warranto was pending against him at the time of the election, and that the facts were all known to Lisle. Several questions were made, of which only two are material. The first was whether Goldwire was mayor de facto; the second was, whether, if he was such, the nomination and election of Lisle were good.

"Upon the first question, 'it was held by the whole court, except Lee, C.J., who gave no opinion as to this point, that Goldwire was not so much as mayor

de facto. For in order to constitute a mayor de facto it is necessary that there be some form or color of an election: but without this the taking the title and regalia of the office, and the acting and being sworn in as mayor, are not sufficent. And with this agrees the Abbot of Fountaine's Case. Now here it appears that Goldwire was never elected in fact; and, although it be stated that he was sworn at the liet, it does not appear. as it ought, that this was agreeable to the constitution of the borough. And it is not material that he acted as mayor, as it is found that a quo warranto was recently prosecuted against him, pending which the present election was made, and that he was thereupon adjudged to be an usurper. The consequence hereof plainly is, that the election is void.' And Lee, C.J., said: 'In these cases the proper question is, whether the person be an officer de facto as to the particular purpose under consideration, according to 1 Salk. 96.'

"Upon the second point the court said: 'By the whole court: Supposing that Goldwire was a mayor de facto, yet the acts here found to be performed by him are not good, because they were not necessary to the preservation of the corporation. In these cases the proper distinction is between such acts as are necessary for the good of the body, which comprehend judicial and ministerial acts. and such as are arbitrary and voluntary. The election of the defendant is of the latter kind. For as the number of burgesses is indefinite, it doth not appear nor is it stated, as it should have been, that the choice of a burgess was necessary.1

"The court in continuing their opinion distinguish that case from all others, using the following language: 'This case, therefore, differs from those which have been cited for the defendant, for in those either the act was such as the officer was obliged or compellable to do, as in Palmer, 479, or such in which a stranger was concerned and had a right to or paid a consideration for.' That case related solely to the internal working of a corporation, and the prior cases, to which I have alluded, were not considered as applicable.

The material part of the report in Strange is as follows: 'And upon this state of the case the court were all of opinion that Goldwire must be taken to have been a mere usurper, and that, in order to constitute a man an officer de facto, there must be at least the form of an election, though that upon legal

objections may afterward fall to the

'The other point was left undetermined, as not being necessary to deliver any opinion upon, as it was not pretended that the presiding of a mere usurper would do, and the court had determined that Goldwire was no more. But they strongly inclined that the presence of a mayor de facto, recently prosecuted, and against whom judgment of ouster had been obtained, would not be sufficient to authenticate the defendant's action. court gave judgment for the King.

"Upon comparing this report of Strange and I have copied all there is of it after the statement of facts) with the extracts I have given from the full report of the opinion of the court, it will be seen that the report of Strange is inaccurate and deceptive in three particulars. The first is the statement as a general proposition, that in order to constitute a man an officer de facto there must be at least the form of an election. The court said no such thing. They were dealing with a case which concerned the corporation only, and they said that in order to constitute a mayor de facto there must be some form or color of an election. The proposition contained in Strange is a general one, embracing all officers and opposed to all the cases before reported. The proposition of the court was confined to the particular case, involving the status of an officer of a corporation in respect to the proceedings of the corporation, and had no reference to the public or third persons. Moreover, it appears in Andrews that the court distinguished the case from cases in which strangers were concerned-an important fact, in respect to which the report in Strange is silent.

second misrepresentation of Strange is that the court all agreed in that proposition. But the fact appears that Lee, C.J., gave no direct opinion upon the point, but on the contrary said: 'In these cases the proper question is, whether a person be an officer de facto as to the particular purpose under considerthus limiting the opinion to the particular case. And that distinction is sustained by an irresistible current of

authority.

"The third misrepresentation is that the second point was left undetermined, whereas it was fully determined by the whole court, and it was distinctly held that, even if mayor de facto, the election was void on the ground that the act concerned the corporation only, and was not a necessary one.

"I have been thus particular about that case, because it was misrepresented by Strange, and related to the internal affairs of a corporation only, and not to the public or third persons, and is not, as his report makes it, in opposition to the whole current of English decisions before and since, but outside of that current; and because the courts of this country have been misled by his report into the adoption of erroneous definitions and conceptions of the subject. The case. however, as will be seen, even as reported by Strange, does not support the idea that there must always be competent or prima facie power in the appointing or electing body, and, so far as I can discover, as reported by Strange, has never been cited or approved by any English court for any purpose.

"The next case was that of Rex v. Bedford Level, decided in 1805, and reported The question in that case in 6 East, 356. was, whether a deputy recording officer, who continued to act after the death of his principal, was an officer de facto. The case was carefully considered, and Lord Ellenborough, giving the opinion for the court, disregarding Rex v. Lisle, and citing from Knowles v. Luce and Parker v. Kett approvingly, adopted the definition of Lord Holt as a general one, and said: 'An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.' The court held the acts of the deputy registrar to be good until the death of the principal was known, but not afterwards.

"There is the latter case of Margate Pier v. Hannam, 3 B. & Ald. 266, decided in 1833, where a justice was holden an officer *de facto*, though not properly qualified, and some still later cases of disqualification, but none which involved the competency of the appoint-

ing power, or which contain a definition.
"Upon this review of all the material English authorities running through four centuries, it will be seen that the idea that color can only be conferred by a body or person having power, or prima facie power, to elect or appoint in the particular case, has never been broached in England, but that, on the contrary, it has been holden, first, that a parson presented by an usurping patron who was wholly without authority to present, was a good parson de facto. Second, that a clerk of a lord facto. of the manor holding a manorial court without any authority whatever, and deriving color only from his known relation to the lord of the manor as a

simple clerk, was a good officer de facto. Third, so of the servant of a steward, holding a manorial court without any authority from the steward or the lord. Fourth, so of the deputy of a deputy, to whom authority could not be delegated. Fifth, so of the steward of a manor, appointed, not by the lord who alone had power to appoint, but by county officers who had no authority whatever to appoint. Sixth, a re-affirmance of the doctrine that the deputy of a deputy has sufficient color to make him a de facto officer, by Lord Holt, on a full review of all the cases, in Parker v. Kett, and the following broad and comprehensive definition given, viz.: 'A steward 'de facto is none other than he who has the reputation of being the officer he assumes to be, although he is not such in point of law.' Seventh, the adoption of Lord Holt's definition by Lord Ellenborough and a full court of King's bench as late as 1805, on careful consideration, and as applicable to all officers. And, finally, the fact that the definition has never been questioned since in England, and is now the rule there.

"Nor has the idea ever been suggested in this country in any of the more than one hundred and fifty cases which have been decided here, so far as I can discover. On the other hand, the authorities which are inconsistent with it are quite numerous. Such are the cases of Fowler v. Beebe, 9 Mass. 231, where the governor appointed an officer some months before the law creating the office and authorizing the appointment took effect. That case has been a leading one in this country, and been recognized as authority in at least fifty other

cases. "Such also is Parker v. Baker, 8 Paige, 428, where the governor appointed an officer without authority to appoint, and the vice-chancellor held his act void, and the chancellor reversed the decision, holding him to be an officer de facto. So in Nevada, where justices of the peace were elective by the county, and, no election being held, the selectmen, without authority, appointed a justice for the town and the governor commis-sioned him, and his acts were holden good as those of an officer de facto.

Mallett v. Uncle Sam Co., I Nev. 188. Such also were the following cases: Taylor v. Skrine, 3 Brevard, 516; People v. White, 24 Wend. (N. Y.) 520; People v. Kane, 23 Wend. (N. Y.) 414; Carleton v. People, 10 Mich. 250; Cocke v. Halsey, 16 Pet. (U. S.) 71; Common-

wealth v. McCombs, 56 Pa. St. 436; Clark v. Commonwealth, 29 Pa. St. 129.

"This review would be imperfect if I did not add that the definition, irrespective of the idea that there must be competent authority in the appointing or electing body, and as heretofore used in this court, is not sufficiently comprehensive or accurate. I am aware that it is a prevalent one in this country, but its introduction may be traced to the inaccurate and deceptive report of Rex v. Lisle, in Strange. It was so introduced in our law by Judge Hosmer in McCull v. Byram Mfg. Co., 6 Conn. 428, and has been retained because there has been no occasion for a particular examination of the subject. It was introduced into the State of New York in a somewhat singular manner. Counsel in the case of People v. Collins, reported 7 Johns. 549, claimed it as a definition, and in connection with it, that the acts of such an officer were valid as to the public and third persons. Chief Justice Kent expressed his assent to the proposition as settled law. In the opinion given in the case, however, he enlarged upon the validity of the acts of an officer de facto. but said nothing about the definition, At that time the definition was unknown to the law, and it is very evident that the assent of the chief justice, from the terms of it, had relation to the validity of the acts of such an officer, and not to the definition. In McInstry v. Tanner, 9 Johns. 135, the reporter in a note cited the proposition of counsel in People $v_{\cdot \cdot}$ Collins, and gave his readers to understand that the chief justice assented to the whole proposition. The definition was subsequently adopted in their courts, but they found it necessary to qualify it afterward. Thus introduced, it has been adopted by the courts of other States, but several of them have also found it necessary to qualify it, as we shall see.

"In respect to this subject, as to many others to which the principles of law are to be applied, concise, general definitions are difficult, and discrimination is neces-

sary.
"The de facto doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and individuals, where those in-terests were involved in the official acts of persons exercising the duties of an office, without being lawful officers. was seen, as was said in Knowles v. Luce, that the public could not reason ably be compelled to inquire into the title of an officer, nor he compelled to show a title, and these became settled principles in the law. But to protect those who dealt with such officers when apparent incumbents of offices under such apparent circumstances of reputation or color as would lead men to suppose they were legal officers, the law validated their acts as to the public and third persons, on the ground that, as to them, although not officers de jure, they were officers in fact, whose acts public policy required should be considered valid. It was not because of any quality or character conferred upon the officer. or attached to him by reason of any defective election or appointment, but a name or character given to his acts by the law for the purpose of validating them. When, therefore, in civil cases, the public or third persons had knowledge that the officer was not an officer de jure, the reason for validating the acts to which they submitted, or which they invoked, failed, and the law no longer protected them. That principle was recognized and applied even in Rex v. Lisle, and particularly in Rex v. Bedford Level.

"It should be remembered that among the earliest cases there was a distinct class entirely independent of color derived from any known appointment or election, where the law said to the public as a rule of policy: 'If you find a man executing the duties of an office, under such circumstances of continuance, reputation or otherwise, as reasonably authorize the presumption that he is the officer he assumes to be, you may submit to or employ him without taking the trouble to inquire into his title, and the law will hold his acts valid as to you, by holding him to be, so far forth, an officer de facto. If he has color of appointment or election, and yet is not a good officer for the want of authority in the appointing power, or irregularity in exercising it, or because there was another lawful officer entitled to the office, or because the incumbent was ineligible, or had not qualified as the law required, or his term had expired, your case is made stronger by the color, but that kind of color is not essential to your protection, for you are not bound to inquire to see that it exists.' So the law has spoken in England from the first introduction of the doctrine, as the cases abundantly show. speaks there now. So it spoke in this country until that deceptive definition was introduced from Strange, and so it has since spoken, and the definition been modified accordingly, whenever a case has arisen where the policy on which the law was founded has made it necessary

that it should so speak to save the public from mischief or individuals from loss.

"Thus, in 1830, in the case of Wilcox v. Smith, 5 Wend. (N. Y.) 231, the question arose as to the validity of an execution issued by one who was reputed to be a justice of the peace, and had acted as such for three years preceding the trial. For the first year of that time the town in which he resided was a part of the county of Genesee, for the last two it was a part of the county of Orleans. It was shown that he had not been appointed by the officers of the county of Orleans, of Genesee. All that was shown was, that he took the oath and acted as a justice while the town was a part of the There being no county of Genesee. color by election or appointment shown, the court of common pleas charged the jury that the process issued by him was void, as they properly should have done if the definition from Strange was law. The case went to the supreme court, and they had before them the question whether the acts of an officer involving the interests of third persons, where no color of election or appointment was shown, could be validated or not—a question which tested the truth of the definition. The court held that they could be, and put it upon the ground that, without color of election or appointment, he should, under the circumstances, be presumed to be an officer de facto, and say: 'The mere claim to be a public officer, and the performance of a single, or even of a number of acts in that character, would not perhaps constitute a man an officer de facto. There must be some color of an election or appointment, or an exercise of the office, and an acquiescence on the part of the public, for a length of time which would afford a strong presumption of at least a colorable election or appointment.'

"Another case which in like manner tested the accuracy of the definition arose in North Carolina in 1844, and may be found in Gilliam v. Reddick, 4 Iredell, 368. The question there was whether a deed of trust was duly approved before the clerk, and recorded by the register of Gates county. It appeared that one John Walton was duly elected register in 1829 for the term of four years, that being a statutory term, and there being no provision authorizing him to hold over. It further appeared that, without any new appointment or a legal right to continue in the office, he did continue to exercise the duties of register until

1843, and until after he recorded the deed in question. It was claimed that all his acts after the expiration of his official term under the original appointment were wholly void, and therefore that the deed had not been duly registered, and that no estate had passed. The court did not attempt to hold that the original appointment gave any color to Walton during his occupancy of the subsequent terms, but held upon broad. general principles that his acts must be validated to prevent private losses and general mischief, which the reporter embodied in the following syllabus:
'The acts of officers de facto, acting
openly and notoriously in the exercise of the office for a considerable length of time, when they concern the rights of third persons or the public, are valid as if they were the acts of rightful officers. The court refer to a prior case in the same volume-that of Burke v. Elliottin which they say that there must be at least some colorable election and induction into office ab origine, or so long an exercise of the office, and acquiescence therein by the public authorities, as to afford the individual citizen a presumption strong that the party was duly appointed, and therefore that every person might compel him, for the legal fees, to do his business, and for the same reason was bound to submit to his authority as the officer for the country. 'A public office,' they say, 'is to be supposed necessary for the public service, and for the convenience of all the various members of the community; and therefore that it will be duly filled by the public authority. When one is found actually in office, and openly and notoriously exercising its functions in a limited district, so that it must be known to those whose official duty it is to see that the office is legally filled, and also that it is not illegally usurped; and when this goes on for a great length of time, or for a period which covers much of the time for which the office may be lawfully conferred, it would be entrapping the citizen and betraying his interests, if, when he had applied to the officer de facto to do his business, and got it done as he supposed by the only person who could do it, he could yet be told that all that was done was void, because the public had not duly appointed that person to the office which the public allowed There again it was him to exercise.' found that the definition was not sufficiently broad and comprehensive.

"A similar case arose in Maine, in 1854, Brown v. Lunt, 37 Me. 423. A justice

of the peace, an annual officer, without any legal right to hold over, who had been justice for many years in succession, was not reappointed, but continued to act, and took the acknowledgment of an important deed. The question was raised whether the act was valid and the deed good. The deed was executed about two years after his term of office expired, and the court held the acknowledgment good. In an elaborate and learned opinion they say that an officer de facto is one who has the reputation of being an officer (citing from Parker v. Kett and Rex v. Bedford Level), or one who actually performs the duties of an office with apparent right, and under claim and color of an appointment or election, or one who exercises the duties of an office with at least a fair color of right, or an acquiescence by the public in his official acts, so long that he may be presumed to act as an officer by right of an appointment or election. The case was sustained on all these grounds. It was a case where there was sufficient reputation, and sufficient ground for presumption, but, in my judgment, not a case of color. It seems to me absurd to say that color from election or appointment can extend beyond the distinct and independent term for which the officer was elected or appointed-beyond the term when the election or appointment could be operative, if legal.

"These cases seem to me sufficient to show that even our definition of a de facto officer, as introduced by Judge Hosmer from Strange, is imperfect and tends to obscure the true character of the doctrine. They are all cases of usurpation, without election or appointment for the terms during which the acts were done, or color from that source, and sustainable only on the ground of reputation and

presumption.

"Doubtless the color of election or appointment from competent authority is necessary for the protection of an officer de facto, when he is assailed directly because of his acts. And there are other distinctions which bear upon the relation of an officer, as that he cannot collect his fees, or claim any rights incident to his office, without showing himself to be an officer de jure, but which do not bear upon the case in hand. I will not pursue that branch of the subject any farther than to say that we shall see hereafter that an officer will be protected in relation to all acts done under or pursuant to public law, before it is judicially determined to be unconstitutional."

It has been thought well to collect the

decisions (excepting those reviewed in the above extract) relating to this part of the subject, and arrange them under the four heads suggested in the definition

given in State v. Carroll, supra.
Without a Known Appointment or Election, but under such Circumstances of Reputation or Acquiescence as were Calculated to Induce People, without Inquiry, to Submit to or Invoke his Action, Supposing him to be the Officer he Assumed to be.—At the time and place designated for the annual meeting of the board of chosen freeholders of Hudson county the members assembled. A person who, by virtue of his election as director, had previously been entitled to preside at meetings of the board, but whose office of director was then legally abolished, and who had become ineligible to the office of president, claimed the right still to preside, and assumed the The board acquiesced and proceeded to business, and by ballot chose the relator to be county collector. that the board was a board de facto, and the relator was legally elected. State v. Farrier (N. J.), 11 Am. & Eng. Corp. Cas. 156. Persons who have been regarded as public officers for the greater part of the time during which the office existed, and whose acts are recognized by other public functionaries, must be taken to be officers de facto. Burton v. Patton, 2 Jones L. (N. Car.), 124; s. c., 62 Am. Dec. 194. So a person declared elected and inducted into office is a de facto officer, though not lawfully elected. State v. Megin (N. H.), 9 Am. & Eng. Corp. Cas. 68. And if an officer is eligible, and he has taken such oaths as he is supposed to be required, he may be deemed an officer de jure as well as de facto, until a regular proceeding and judgment declaring his office vacant. Morgan v. Vance, 4 Bush (Ky.), 323. But there cannot be an officer de jure and one de facto in possession of the same office at the same time. Boardman v. Halliday, 10 Paige (N. Y.), 223. See also Police Jury v. How, 2 La. 41; s. c., 20 Am. Dec. 294.

Where there is a Valid Appointment

or Election, but Officer Fails to Qualify. -Where an officer duly elected or appointed begins to discharge the functions of his office before duly qualifying, he is, or may be, an officer de facto during such time as he continues to fill the office without qualifying. Sharp v. Thompson, 100 Ill. 447; Coles County v. Allison, 23 Ill. 437; Douglass v. Neil, 7 Heisk. (Tenn.) 438; Soudant v. Wadhams, 46 Conn. 218; Gunn v. Tackett, 67 Ga. 725; State v.

Perkins, 4 Zab. (N. J.) 409; McBee v. Hake, 2 Speers (S. Car.), 138; Kattman v. Ayer, 3 Strobh. (S. Car.), 135; Kattman v. Ayer, 3 Strobh. (S. Car.) 92; Knight v. Corporation of Wells, Lutw. 508; Dows v. Irvington, 13 Abb. N. C. (N. Y.) 162; People v. Collins, 7 Johns. (N. Y.) 554; Horton v. Parsons, 37 Hun (N. Y.), 42; Farmers, etc., Bank v. Chester, 6 Humph. (Tenn.) 458; s. c., 44 Am, Dec.

Where the Election or Appointment was Void, because the Officer was Not Eligible, or because of Want of Power in the Electing or Appointing Body, or by reason of some Defect in its Exercise. -(a) One who is appointed to an office to which he is ineligible may be an officer de facto. The following authority is on this point:

One ineligible to a judgeship, who nevertheless exercises the functions of nevertneress exercises the functions of the office, may be judge de facto. Ostrander v. People, 29 Hun (N. Y.), 513. And see Gregg v. Jamison, 55 Pa. St. 468; McInstry v. Tanner, 9 Johns. (N. Y.) 135; Morrison v. Sayre, 40 Hun (N. Y.), 465; People v. White, 24 Wend. (N. Y.) 540; St. Louis Co. Ct. v. Sparks, 10 Mo. 117; s. c., 45 Am. Dec. 355; Darrow v. People, 8 Colo. 417.

(b) One appointed or elected by a person or body who had no authority to appoint, or elect, may be an officer de facto. On this point the following authorities are

cited:

Where statute gave a board the power to appoint to certain offices in case they were not validly filled by election, held, that one appointed by the board was officer de facto, even though there was a valid election. People v. Lieb, 85 Ill. 484. And officers appointed under a statute under the constitution, they should have been elected, are, nevertheless, officers de facto, whose official acts cannot be questioned collaterally. Chicago, etc., R. Co. v. Langlade Co., 56 Wis.

In Attorney-general v. Crocker, 9 Am. & Eng. Corp. Cas. 57; s. c., 138 Mass. 214, the selectmen of a town undertook to appoint a town clerk pro tempore to act at a town-meeting. By statute the power to elect a clerk pro tempore was vested in the town meeting. The appointee of the selectmen, however, acted as clerk at the town-meeting, and his acts were acquiesced in. Held, he was clerk de facto.

One elected to a judgeship and commissioned a judge by governor, and exercising the functions of the office is judge de facto, though the Supreme Court afterward decide that the term of his predecessor had not expired. McCraw v. Williams, 33 Gratt. (Va.) 510.

In Diggs v. State, 40 Ala, 311, it was held that one appointed by the proper authority to an office already full, was officer de facto. Where the county commissioners wrongfully declared that the office of county treasurer was vacant, and made an appointment to fill the vacancy, held, that appointee was a de facto officer, and a tax rule made by him valid. Watkins v. Lange, 24 Kan. 612. See also Gregg v. Jamison, 55 Pa. St. 468; Nichols v. McLean (N. Y.), 13 Am. & Eng. Corp. Cas. 153. And a person specially appointed by a person to serve a writ, though his appointment is not under seal, is an officer de facto for that purpose. Jewell v. Gilbert (N. H.), 13 Am. & Eng. Corp. Cas. 117.

Where a board of aldermen empowered to fill a vacancy in their number wrongfully declared a vacancy and proceeded to fill it, their nominee being inducted into the office, held, that he was alderman de facto. Ellison v. Aldermen of Raleigh. Am. & Eng. Corp. Cas. 477; s. c., 89

N. Car. 125.

In McLean v. State of Tennessee, 8 Heisk. (Tenn.) 22, it was held that an assessor appointed by persons who claimed to be county commissioner, but whose claim was wholly without foundation and who were not even officers de facto, was

Am. & Eng. Corp. Cas. 68; Aulanier v. Governor, 1 Tex. 653; Ex parte Strang, 21 Ohio St. 610; Kelley v. Story, 6 Heisk. (Tenn.) 202; Campbell v. Commonwealth,

o6 Pa. St. 344.

But a road commissioner, declared elected by the court of common pleas, after reversal of that decision by the su-perior court, but before the declaration by the court of common pleas of the election of another person, in obedience to the mandamus of the superior court, was held to be no longer an officer de facto, and his acts as such were void. Petition of Portsmouth, 19 N. H. 115. And a claim under appointment, of title to an office which by law is elective, or a claim under election to an office which by law must be filled by appointment, is no color of title, and cannot constitute the claimant an officer de facto, so that perjury can be assigned of an oath administered by him. People v. Albertson, 8 How. Pr. (N. Y.) 363; and see Wilcox v. Smith, 8 Wend. (N. Y.) 231. But in Chicago, etc., R. (N. Y.) 231. But in Chicago, etc., R. Co. v. Langlade, 56 Wis. 614, it was held that officers appointed under a statute where the constitution requires their election may yet be de facto officers.
(c) Where there has been irregularity

in the exercise of the appointing or electing power, the person elected or appointed may be a *de facto* officer. Members of a local board of health appointed under an ordinance which had not been validly and regularly passed, held de facto officers. Smith v. Lynch, 39 Ohio St. 261.

County commissioners irregularly elect-Waller v. Pered held officers de facto. Hamlin v. Dingman, 5 Lans. (N. Y.) 61; Brady v. Howe, 50 Miss. 607; State v. Farrer, 47 N. J. L. 383; Yorty v. Paine,

62 Wis. 154.

A Person Elected or Appointed under an Unconstitutional Law may be an Officer de Facto. - Judges elected and duly qualified who exercise the functions of their office are de facto officers though the act under which they are elected is unconstitutional. Campbell v. Commonwealth, 96 Pa. St. 344. So where a State constitution permitted the election of separate judges for the supreme and circuit courts when the State should have a population of 200,000, and the State legislature, before the State had that population, passed an act to provide for the election of such judges, and empowered the governor in the mean time to fill such office by appointment, held, that the appointees of the governor exercising the functions of Lee, 6 Saw. (U. S. C. C.), 410; see also Carland v. Custer, 5 Mont. 579.

Town officers elected under an uncon-

stitutional statute are yet officers de facto. Cole v. Black River Falls, 57 Wis. 110. And see People v. Kane, 53 Wend. (N.Y.) 414. In re Kendall, 85 N. Y. 302; Fowler v. Bebee, 7 Mass. 231; Tucker v. Aiken, 7 N. H. 113; Brown v. Lunt, 37 Me. 423; State v. Carroll, 38 Conn. 449; Cocke v. Halsey, 16 Pet. (U.S) 71; Kreidler v. State, 24 Ohio St., 22; McLean v. State, 8 Heisk. 22; Burke v. Elliott, 4 Ired. (N. Cas.) 55; Gibb v. Washington, I McAll. (U. S. C. C.) 430; Burt v. Winona & St. P. R. Co., (Minn.), 4 Am. & Eng. Corp. Car. 426; State v. Bloom, 17 Wis. 521; People v. Bangs, 24 Ill. 184; Sharp v. Thompson, 100 Ill. 447; Bailey v. Fisher, 38 Iowa, 229; Clark v. Comm., 29 Pa. St. 129; Ex parte Norris, 8 S. Car. 408; Threadgill v. Railroad Co., 73 N. Car. 178.

But in Burt v. Winona and St. P. R. Co. (Minn.), 4 Am. & Eng. Corp. Cas. 426, in the dissenting opinion of Judge Mitchell the question of de facto officers under an unconstitutional statute is presented as follows: "I concur in the conclusion that under the facts of this case

the legal existence of the municipal court, but whose successor had not been apof Mankato cannot be attacked collaterally in this action, but only by direct proceeding for that purpose, and this, as I understand it, is, strictly speaking, the only matter properly before us at this time. But I am unable to concur in the views expressed in the majority opinion. that even if the act creating the court was never constitutionally passed, still it would be a de facto court. The logical result of this would be that the person assuming to act as judge of that court would be an officer de facto, and the judgments of the court as valid as those of a legal court. To borrow an expression from the majority opinion. I think that a de facto court or officer is a political solecism. The idea of an officer de facto presupposes the existence of a legal office. It seems to me that there cannot be an officer de facto unless there is a legal office, so that there might be an officer de jure. There are many cases to the effect that a person holding an office under an unconstitutional law is an officer de facto, but I think that in every one it will be found that there was a legal office, and that the law only went to the mode or manner of filling it. As suggested in the opinion, the de facto doctrine is founded on reasons of public policy and necessity, but it must have some reasonable limit, unless we are ready to recognize practical revolution and legislative right to ignore all constitutional barriers. As bearing on the views here suggested, see Dill. Mun. Corp. § 276; Cooley Const. Lim. 750, 751, and note; Carlton v. People, 10 Mich. 250; In re Boyle, 9 Wis. 240; Ex parte Strang, 21 Ohio St. 610; Decorah v. Bullis, 25 Iowa, 15; Hildrith's Heirs v. McIntire's Devise, 1 J. J. Marsh. (Ky.)

If the statement of Justice Mitchell that although there are many cases to the effect that a person holding an office under an unconstitutional law is an officer de facto, yet that in every one it will be found that there was a legal office, and that the law only went to the mode or manner of filling it, is strictly accurate, these views are not unsupported. It is believed, however, that the latter authorities strongly stend to sustain the position of the majority. See authorities above cited.

One Appointed to an Office which has No Legal Existence may yet Fill that Office as a de Facto Officer. - This has been held where officers have attempted to depute their offices or functions in cases where it could not be legally done. Thus, in Kelley v. Story it was held that where a clerk of court whose term had expired. pointed, procured a third person to act while he was absent, this third person was a deputy de facto. Kelley v. Story, 6 Heisk. (Tenn.) 202. And see Campbell v. Commonwealth, 96 Pa. St. 344. This doctrine, however, that there can be an officer de facto, where the office itself does not lawfully exist, has been denied. See Ex parte Snyder, 64 Mo. 58; In re Hinkle, 31 Kan. 712.
One Holding Over after his Term of

Office has Expired may be a de Facto Officer. - One holding over after the expiration of his term of office, and publicly continuing to exercise its functions, is an officer de facto. Morton v. Lee. 28 Kan.

In Woodside v. Wagg, 71 Me. 207, a judge whose office was vacated by his taking a seat in the legislature, but who continued to exercise the functions of

judgeship, was held a de facto officer.
Where a judge signed findings of law and fact a few minutes after his successor had qualified, but before such successor had entered upon the functions of the office, and before the judge knew of this fact, held, that the findings of law and fact were valid as the acts of a de facto officer. Carli v. Rhener, 27 Minn. 292. See also State v. Williams, 5 Wis. 308; s. c., 68 Am. Dec. 65; Cary v. State, 76 Ala. 78; Threadgill v. Carolina, etc., R. Co., 73 N. Car. 178. But where an incumbent of the office of governor was a candidate for re-election, but received fewer votes than his opponent, held, that he could not claim to continue to occupy the office as governor de facto, under a provision of the constitution that officers should hold over until their successors were elected and had qualified, on the ground of irregularities in the election, and that the rival candidate had not been elected and had not qualified. Ex parte Norris, 8 S. Car. 408; Ex parte Smith, 8 S. Car.

Holding Over after Office is Abolished or Officer Becomes Disqualified .- A constable who vacates his office by removal from the county, but nevertheless continues to exercise the functions of his office, is constable de facto. Case v. State, 69 Ind. 46. And where a judge vacated his office by accepting a seat in the legislature, his authority as judge de jure ceases; still if he continues to act peaceably under his commission, and to exercise the functions of judge, with the usual insignia of his office, he is an officer de facto. Woodside v. Wagg, 71 Me. 207.

But where the legislature abolishes a township organization, this fact is

But an officer de facto must be in the actual possession of the office and have the same under his control. If the officer de jure is in possession of the office—if the officer de jure is also the officer de facto—then no other person can be an officer de facto for that office. Two persons cannot be officers de facto for the same office at the same time.1

(b) Right to Office Cannot be Attacked Collaterally.—The right of a person who claims an office by color of title, and exercises it de

facto, cannot be attacked collaterally.2

deemed of sufficient notoriety to inform the public that all township offices are abolished: so that if the incumbents continue to act, they do so wholly without appearance or color of right, and hence are not de facto officers.

Where the legislature abolishes a municipal township, township officers must go with it: and where such officers continue the exercise of their official functions after such abolition, they do not thereby become de facto officers, since there can be no de facto officer where there is no office

to fill. In re Hinkel, 31 Kan. 712.
So also in Conway v. St. Louis it was held that when it is notorious that incumbent is holding over without right, he is not an officer de facto. Conway v. St.

Louis, 9 Mo. App. 488.

But in Adams v. Lindell, 5 Mo. App. 197, it was held that acts done by an officer after abolition of the office and before the fact, owing to the false announcement of election returns, was known, may be validated for the purpose of supporting contracts made with him, whereunder money and labor have been expended on the faith of his authority to contract as such officer.

1. McCahon v. Commissioners, 8 Kan.

Where an office is in dispute between two persons, and the one in actual possession of the office steps out of the place where the business is usually performed, with no intention of abandoning the office, or of giving it to the other person, and such other person, with full knowledge of the facts, steps in, and immediately proceeds to do business, as though he was in fact the officer,—as between such two persons, the one previously in possession must be considered the officer de facto.

must be considered the officer de facto.
Braidy v. Theritt, 17 Kan. 464.
2. Cornish v. Young, I Ashm. (Pa.)
153; Hagner v. Heyberger, 7 W. & S.
(Pa.) 104; Campbell v. Commonwealth,
96 Pa. St. 344; s. c., 42 Am. Dec. 220;
Bean v. Thompson, 19 N. H. 290; Morse
v. Calley, 5 N. H. 223; s. c., 49 Am. Dec.
154; Plymouth v. Painter, 17 Conn. 585;
s. c., 44 Am. Dec. 574; Douglass v.

Wickwire, 19 Conn. 492; Coolidge v. Brigham, 1 Allen (Mass.), 336; Fowler v. Bebee, 9 Mass. 231; Aulanier v. Governor, Bebee, 9 Mass. 231; Aulanier v. Governor, 1 Tex, 653; Crosier v. Cornell S. B. Co. 27 Hun (N. Y.), 215; Snyder v. Schram, 59 How. Pr. (N. Y.) 404; Golden v. Bressler, 105 Ill. 419; People v. Weber, 86 Ill. 283; Desmond v. McCarthy, 17 Iowa, 525; Leach v. Cassidy, 23 Ind. 449; State v. Pertsdorf, 33 La. Ann. 1411; Ex parte Parks, 3 Mont. 426, Proof of Official Character.—When an officer's official character is in issue

officer's official character is in issue he need not prove that the appointing power was de jure. Stevens v. Newcomb, 4 Denio (N. Y.), 437. If he produces a record of his appointment issued by an authority having apparent jurisdiction, this is conclusive. State ex rel. Leonard v. Sweet, 27 La. Ann. 541; Wood v. Peake, 8 Johns. (N. Y.) 69. And parol evidence is sufficient to prove the appointment where there is no writing, and none is required by law. Hoke v. Field, 10 Bush (Ky.), 144. In regard to proof of official character where an official is trying to justify an official act complained of, three rules are formulated: (1) He must aver and prove that he was legally an officer duly elected or appointed, and qualified to act. Conover v. Devlin, 15 How. Pr. (N. Y.) 478; Green v. Burke, 23 Wend. (N.Y.) 490; Blake v. Sturtevant, 12 N. H. 567; Cummings v. Clarke, 15 Vt. 653; Colburn v. Ellis, 5 Mass. 427; (2) That he must at least show color of election or appointment from competent authority. State v. Carroll, 38 Conn. 449; s. c., 9 Am. Rep. 409. And that this is prima facie sufficient for the protection of an officer de facto. Willis v. Sproule, 13 Kan. 257. (3) That he may prima facie establish his official character by proof of general reputation, and that he acted as such officer,—Colton v. Beardsley, 38 Barb.(N.Y.) 29, -in other matters besides those in question. Hutchings v. Van Bokkelen, 34 Me. 126. When official character arises collaterally, parol evidence is admissible to show an actual incumbency de facto. Druse v. Wheeler, 22 Mich. 439.

(c) Validity of their Acts.—In this country the acts of de facto officers are everywhere considered valid as respects the public, but

1. Acts of De Facto Officers Valid as to Public.—Thus in People v. Staton, 73 N. Car. 46, it was held that an officer appointed by a de facto judge is a de jure officer, and is entitled to the office as against an appointee of the de jure judge. See also People v. County Court of New Orleans Co., 28 Hun (N. Y.), 14. And on a writ of habeas corpus the prisoner cannot question the legality of the title to office of the magistrate committing him when the latter is the regular incumbent de facto. State of Louisiana v. Perts-dorf, 33 La. Ann. 1411; Ex parte John son, 15 Neb. 512. In Brady v. Sweetland, 13 Kan. 541, an injunction was granted to prevent interference with the official acts of one in possession of an office by another who claimed the office pending the result of quo warranto proceedings brought by such other person.

A court will not enjoin de facto assessors from making an assessment. Dows v. Village of Irvington, 13 Abb. N. C. (N. Y.) 162. And a penalty inflicted by aboard of health not legally appointed is valid. Bedford v. Rice, 58 N. H. 446. But where one usurps an office without color or appearance of right a court of equity will enjoin him from acting.

Armijo v. Baca, 6 Pac. Rep. (N. M.) 938.

And see, generally, to effect that acts of de facto officers are valid as to public, Cushing v. Frankfort, 57 Me. 541; Johnson v. McGinley, 76 Me. 432; Woodside v. Wagg, 71 Me. 207; Bliss v. Day, 68 Me. 201; People v. Runkle, 9 Johns. (N. Y.) 147; McInstry v. Farmer, 9 Johns. (N. Y.) 135; People v. Collins, 7 Johns. (N. Y.) 1551; Trustees, etc., v. Hill, 6 Cow. (N. Y.) 23; People v. Albany, etc., R. Co., 55 Barb. (N. Y.) 344; People v. Hopson, 1 Denio (N. Y.) 574; Greene v. Burke, 23 Wend. (N. Y.) 490; Hamlin v. Dingman, 5 Lans. (N. Y.) 61; Snyder v. Schram, 59 How. Pr. (N. Y.) 404; People v. Nostrand, 46 N. Y. 375; Conover v. Devlin, 15 How. Pr. (N. Y.) 470; Olmsted v. Dennis, 77 N. Y. 378; Exparte Strang, 21 Ohio St. 126; State v. Jacobs, 17 Ohio St. 143; Pritchard v. People, 1 Gilm. (Ill.) 520; People v. Lieb, 85 Ill. 484; Sharp v. Thompson, 100 Ill. 447; Williams v. School District, 21 Pick. (Mass.) 75; Fowler v. Bebee, 9 Mass. 231; Gilmore v. Hall, 9 Pick. (Mass.) 257; Cochran v. McCleary, 22 Iowa, 75; Decorah v. Bullis, 25 Iowa, 12; In re Strohl, 16 Iowa, 360: Lavir v. McGlochlin, 28 Wis. 364; Riddle v. Bed-

ford, 7 S. & R. (Pa.) 386; McKim v. Somers, I Pa. 297; Rex v. Mayor, 9. Mod. 11; De Grave v. Monmouth, 4 Car. & P. 411; McGregor vv. Balch, 14. Vt. 428; Douglas v. Wickwire, 19 Conn. 489; Lynch v. Loffland, 4 Coldw. (Tenn.) 96; Hinton v. Lindsay, 20 Ga. 746; State v. Megin (N. H.), 9 Am. & Eng. Corp. Cas. 68; Carli v. Rhener, 27 Minn. 292; McCormick v. Fitch, 14 Minn. 252; State v. Tolan, 32 N. J. L. 195; State v. Perkins, 24 N. J. L. 409; Savage v. Ball. 17 N. J. Eq. 142; Wayne Co. v. Benoit, 20 Mich. 176; Cooper v. Moore, 44 Miss. 386; Lockhart v. City of Troy, 48 Ala. 579; People v. Staton, 73 N. Car. 546. And this rule applies equally to personsacting in a public or quasi public fiduciary capacity. Golder v. Bressler, 105. Ill. 419.

In Auditors v. Benoit, 20 Mich. 176, Chief Justice Campbell says: "The doctrine of the validity of the acts of de factoofficers has been carried as far as possible. In State v. Williams, 5 Wis. 308, it. was held to make good the approval of a. statute by a governor usurping that office. In Venable v. Curd, 2 Head (Tenn.), 582, it was carried to the questionable extent of making good the action of a court under an invalid statute. In Doty v. Gorham, 5 Pick. (Mass.) 487, where an officer de facto had made a sale, it was held that in a suit against himself, with others, for removing property thus sold, he could justify under the sale. In Leach v. Cassidy, 23 Ind. 449, it was held that a school officer de facto could not have his title questioned in an application made by him for a mandamus to compel the payment to him of school moneys by local officers. In Desmond v. McCarthy, 17 Iowa, 525, it was held that in a replevin by an officer de facto to recover thepapers belonging to his office which had. been withheld on a claim that he was not the lawful officer, his title could not be questioned, but that the only inquiry on that must be in proceedings to oust him."

An acknowledgment taken by an officer de facto is good if it would be so if he were an officer de jure, although the person taking it may be liable to a statutory penalty for doing so. Woodruff v. Mc-Henry, 56 Ill. 218; Brown v. Lunt, 37 Me. 423; Prescott v. Hayes, 42 N. H. 56. But the acts of officers de facto when declared void by constitution or statute cannot be held valid upon any assumed principle of public expediency. Shelby v. Alcorn, 36 Miss. 273; 72 Am. Dec.

invalid as to themselves:1

(d) Their Responsibility.—The rule of law that the acts of a de facto officer are valid is established for the benefit of the public, not the officer. It confers on him no rights, absolves him from no responsibility. If sued for money received by him under color of his office. It is no defence that he was an officer de facto.2 And in a suit on the bond of an officer de facto, neither he nor his sureties can be heard to allege that he was not an officer de jure; they are estopped to deny their liability on the bond. So, also, if an action is brought against him for malfeasance or misfeasance in office.4

160. And when it has been adjudged by a judgment of the court of last resort in a State in a direct proceeding to determine the title of officers de facto, that they have no rightful title to the office, but are mere usurpers, the color of authority has ceased, at least to all persons who have notice of such judgment; and their acts can no longer be sustained, although they still have possession, and profess to perform the duties of the office. The fact that an appeal has been taken to the supreme court of the United States will not release the State court from the duty of following such decision. It is the law of the land until reversed. Rochester, etc., R. Co. v. Clarke Nat. Bank, 60 Barb. (N. Y.) 237. Nor will the doctrine that the official acts of officers de facto should be treated as valid be applied to a case where a contract was made with an officer after his right to perform the functions of his office had ceased, and the fact was notorious, and the other party to the contract had notice that the municipality which the officer claimed to represent had no interest in the subjectmatter of the contract. Conway v. St. Louis, 9 Mo. App. 448.

And in Vaccari v. Maxwell, 3 Blatch. (U. S. C. C.), it is said that the rule that the acts of *de facto* officials who fail to qualify themselves by taking oath or giving bond are valid as to third parties, should be restricted to those who hold office under some degree of notoriety, or are in the continuance of official acts, or are in the possessionof a place which has

the character of a public office.

1. But not as to Himself .- The doctrine as to officers de facto can have no application as against the people, in an action brought in their name to try the title to the office. The doctrine applies only to and in favor of third persons, and to protect parties who have trusted to the apparent title of an officer. People v. Albany, etc., R. Co., 55 Barb. (N. Y.) 344; s. c., 38 How. Pr. (N. Y.) 228. And see, generally, Conover v. Devlin, 15 How.

(N. Y.) Pr. 470; United States v. Maurice, 2 Brock. (U. S. C. C.) 96; Green v. Burk, 23 Wend. (N. Y.) 490; People v. Hopson, I Denio (N. Y.), 574; Neale v. Overseers, 5 Watts (Pa.), 539; Parker v. Luffborough, 10 S. & R. (Pa.) 249; Riddle v. County Beauty S. & P. (Pa.) 249; Riddle v. County Beauty S. & P. (Pa.) dle v. County Bank, 7 S. & R. (Pa.) 392; Keyser v. McKissen, 2 Rawle (Pa.), 130: Cummings v. Clark, 15 Vt. 653; Blake v. Sturtevant, 12 N. H. 567; Venable v. Curd, 2 Head (Tenn.), 582; Pearce v. Hawkins, 2 Swan (Tenn.), 89; Patterson v. Miller, 2 Metc. (Ky.) 493; Gourley v. Hankins, 2 Iowa, 75; Kimball v. Alcorn 45 Miss. 151; Miller v. Callaway, 32 Ark. 666; People v. Weber, 86 Ill. 283. But in Soudant v. Wadhams, 46 Conn. 218, where one was lawfully elected con-

stable and exercised the office, but had not given the required official bond, he was held to be justified in making a seizure of liquors; and his command, as officer de facto, to justify an assistant

therein.

2. United States v. Maurice, 2 Brock.

2. United States v. Maurice, 2 Brock. (U. S. C. C.) 96. And see Conover v. Devlin, 15 How. Pr. (N. Y.) 470.
3. Lionberger v. Kreiger (Mo.), 14 Am. & Eng. Corp. Cas. 87; Commonwealth v. Teal, 14 B. Mon. (Ky.) 29; Sprowl v. Lawrence, 13 Ala. 674; Williamson v. Woolf, 37 Ala. 296; Corbett v. Carroll, 5 Ala. 315; Green v. Wardell, 17 Ill. 278; State v. Cooper, 53 Miss. 615; Jones v. Scanland, 6 Humph. (Tenn.) 195; 44 Am. Dec. 300; State v. Maurice, 2 Brock. (U. S. C. C.) 97; State v. Wells, 8 Nev. 105; State v. Rhoades, v. Wells, 8 Nev. 105; State v. Rhoades, 6 Nev. 352. See Ford v. Clough, 8 Me. But in McNull v. Lancaster, 9 Smed. & M. (Miss.), it was held that the official bond of a person who had been duly elected to the office of rax collector, but who had not qualified by taking the oath prescribed by statute, was absolutely void. This decision, however, was made under a statute declaring that all acts performed by the officer before taking the prescribed oath should be void.

4. Neal v. Overseers, 5 Watts (Pa.),

He is punishable criminally for malfeasance in office the same as an officer de jure. If he undertakes to justify an official act complained of, he must aver and prove that he was legally an officer

duly elected or appointed, and qualified to act.2

(e) Rights of De Facto and De Jure Officers as to Compensation. The salary and emoluments annexed to a public office in a municipality are incident to the title to the office, and not to its exercise or occupation. A party entitled to the office is therefore held to be entitled to such salary and emoluments, although he has never actually discharged the duties of the office.3

539. But in Olmsted v. Dennis, 77 N. Y. 378, it was held that an officer de facto incurs no liability by his mere omission

1. State v. Goss, 69 Me. 22. In this case it was held that the term "officer" is generic, and when used in a statute. and there is nothing in the context, or in reason or authority, to indicate that it is used in a different sense, may properly be held to include all classes of officers officers de facto as well as officers de jure. The section of the revised statutes of Maine declaring that if a "public officer" embezzles, etc., he shall be deemed guilty of larceny, and punished accordingly, is held to include officers de facto as well as de jure. And see Diggs v. State, 49 Ala. 311.

2. Green v. Burke, 23 Wend. (N. Y.) 490; Blake v. Sturtevant, 12 N. H. 567; Cummings v. Clarke, 15 Vt. 653; Col-

burn v, Ellis, 5 Mass. 427.

3. People v. Tieman, 8 Abb. Pr. (N. Y.) 359; People v. Hopson, 1 Denio (N. Y.), 579; Dolan v. Mayor, 80 N. Y. 192; Memphis v. Woodward, 12 Heisk. (Tenn.) 499; People v. Smith, 28 Cal. 21; People v. Oulton, 28 Cal. 44; Carroll v. Siebenthaler, 37 Cal. 195; Glascock v. Lyons, 20 Ind. 3; Comstock v. Grand Rapids, Mich. 399; Stadler v. Detroit, 13 Mich. 347; Philadelphia v. Given, 60 Pa. St. 136; Beard v. City of Decatur (Tex.), 7 Am. & Eng. Corp. Cas. 145.

In the case of Auditors v. Benoit, 20 Mich. 176, Judge Cooley, in a dissenting opinion, after examining the cases that were cited to support an adverse view, said: "The general language employed in these cases, that the right to fees grows out of the rendition of services, is, on all logical rules, to be understood with reference to the particular facts then before the court, and cannot be applied universally, as claimed by the defence, without coming in conflict with the decision of this court in Stodder v. Detroit, 13 Mich. 347. We there held that a municipal corporation which had excluded a salaried

officer from the performance of his duties was bound to pay him a salary. We are still. I believe, satisfied with this decision. That the right to fees does not necessarily depend upon the performance of official duties is also declared in Glascock v. Lyons, 20 Ind. 3."

But some cases hold that a mere offer

to perform the duties of the office is not enough to entitle a de jure officer to recover, and that a person is not entitled to the salary of a public office unless he both obtains and exercises the office. Farrell v. Bridgeport, 45 Conn. 191; Auditors v. Benoit, 20 Mich. 176. See also Samis v. King, 40 Conn. 298; City of Central v. Sears, 2 Colo. 588. And in Smith v. Mayor, 37 N. Y. 518, it was held that no claim could be brought for salary or perquisites against a municipal. corporation, covering any period when the claimant was not actually in office; and this was put upon the ground that these are the reward of express or implied services, and therefore cannot belong to one who could not lawfully perform these services, although wrongly hindered from occupying a position in which he might render them. And in the previous case of Conner v. Mayor, 5 N. Y. 285, the same doctrine as to the nature of official salaries and fees was laid down.

No Difference between Fees and Salaries .- That there is no difference in principle as to the right of an officer de jure, but who has not performed the duties of his office, to recover fees and to receive a salary, is considered in the cases of Glascock v. Lyons, 20 Ind. 3, and McVeany v. Mayor, 80 N. Y. 192. In the case last cited the court said. "The learned counsel for the appellant in the case in hand sought to distinguish between cases where the compensation was fixed by fees for the specific service rendered, and where it was by an annual salary payable at recurring periods. We are not able to perceive such a distinction as will affect the applicability of the cases.

Actual incumbency in a municipal office, without title thereto, confers no right to compensation. But where there has been a de facto officer actually in office who has received the salary fixed by law, the municipality is not liable to pay the salary over again to an officer de jure.

cited." The court then examined the cases theretofore decided and cited, and held that the rule was the same whether the compensation to the officer was by salary or fees, and declared that "the difference would be only that that by salary was a fixed and certain sum, and that by fees uncertain." And see Beard v. City of Decatur (Tex.), 7 Am. & Eng.

Corp. Cas. 145.

1. People v. Hapson, I Denio (N. Y.), 579; People v. Tiernan, 30 Barb. (N. Y.) 193; People v. Van Nostrand, 46 N. Y. 382; Dolan v. Mayor, 68 N. Y. 274; s. c., 23 Am. Rep. 168; Mayor, etc. v. Flagg. 6 Abb. Pr. (N. Y.) 296; Riddle v. Bedford Co. 7 S. & R. (Pa.) 392; Prescott v. Hayes, 42 N. H. 56; Kimball v. Alcorn, 45 Miss. 151; Mathews v. Supervisors, 53 Miss. 715; s. c., 24 Am. Rep. 715; Beard v. City of Decatur (Tex.), 7 Am. & Eng. Corp. Cas. 145; Christian v. Gibbs, 53 Miss. 314; Meagher v. Storey, 5 Nev. 245; Auditors v. Benoit, 20 Mich. 176. And see authorities cited supra.

But in Queen v. Mayor of Cambridge, 12 Ad. & El. 702, the defendant had, under statutory authority, removed a town clerk elected to hold during good behavior, but who had not made the declaration required by statute. Held, that, as an officer de facto, he was entitled to compensation provided by that statute, although he had not made the declaration. The judges said he was in office until removed, and thus entitled to compensation, and if he had not been removed might have cured the defect by taking the dec

laration.

This rule, however, is not construed so as to render a municipal corporation which has paid the salary attached to the office to the *de facto* incumbent liable to pay it over again to the officer *de jure*.

See infra.

2. Auditors o. Benoit, 20 Mich. 176; Smith v. Mayor, 37 N. Y. 518; Dolan v. Mayor, 68 N. Y. 274; s. c., 23 Am. Rep. 168; Conner v. Mayor, 5 N. Y. 285; McVeauxy v. Mayor, 30 N. Y. 185; s. c., 36 Am. Rep. 600; Michel v. New Orleans, 32 La. Ann. 1094; Commissioners of Salne Co. v. Anderson, 20 Kan. 298; s. c., 27 Am. Rep. 171; Parker v. Supervisors, 4 Minn. 59; McAffee v. Rüssell, 29 Miss. 84; Wheatley v. City of Covington, 11 Bush (Ky.), 18.

In accordance with this rule it is held that disbursing officers charged with the duty of paying official salaries have, in discharge of that duty, the right to rely upon the apparent title of an officer de facto. and to treat him as an officer de jure without inquiring whether another has the better right. In Dolan v. Mayor, 68 N.Y. 274; s. c., 23 Am. R. 168, Anderson, J., states the reasons for this doctrine:
"If fiscal officers, upon whom the duty is imposed to pay official salaries, are only justified in paying them to the officer de jure, they must act at the peril of being held accountable in case it turns out that the de facto officer has not the title: or. if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. It would be unreasonable, we think, to require them, before making payment, to go behind the commission and investigate and ascertain the real right and title . . . Disbursing officers charged with the

payment of salaries, have, we think, the right to rely upon the apparent title, and treat the officer who is clothed with it as the officer de jure, without inquiring whether another has the better right. Public policy accords with this view. Public offices are created in the interests and for the benefit of the public; such at least is the theory upon which the statutes creating them are enacted and justified. . . . It is important that the public offices should be filled, and that at all times persons may be found ready and competent to exercise official powers and duties. If, on a controversy arising as to the right of an officer in possession. and upon notice that another claims the office, the public authorities could not pay the salary and compensation of the office to the *de facto* officer, except at the peril of paying it a second time; if the title of the contestant should subsequently be established, it is easy to see that the public service would be greatly embarrassed and its efficiency impaired. bursing officers would not pay the salary until the contest was determined, and this in many cases, would interfere with the discharge of public functions.'

Cases Holding the Contrary.—The statement in the text is undoubtedly supported by the weight of authority, al-

The *de jure* officer may, however, recover of the *de facto* incumbent the salary and emoluments received while in office, after deducting the expenses incurred in earning them.¹

though there are decisions holding to the contrary. Thus, W. was elected physician to the Memphis City Hospital, and the mayor of the city was about to induct him into office, when L., the prior incumbent, obtained an injunction restraining the mayor and W. from interfering with his enjoyment of the office; and, under this injunction, made perpetual at the hearing, L. succeeded in retaining the office himself until its discontinuance, some six months afterward, for which period he drew the salary. The injunction bill was dismissed by the supreme court, which declared that W. was validly elected and entitled to all the privileges and emoluments of the office; whereupon W, sued the city for the salary of the office during the period of his merely de jure incumbency.—he having always been willing and ready to perform the duties, and to receive the salary. Held, that he was entitled to recover; that the payment of the salary for this period to L., a mere officer de facto, was wrongful, the injunction only preventing L.'s extrusion from the office, and not requiring the payment to him of the salary. Mayor v. Woodward, 12 Heisk. (Tenn.)

And so it is held otherwise in California. People v. Smith, 28 Cal. 21; Carroll v. Siebenthaler, 37 Cal. 103. But Chief-Justice Campbell of Michigan says in Benoit v. Auditors, 20 Mich. p. 183, that "the California authority (Dorsey v. Smith, 28 Cal. 21) is based entirely upon New York cases which are not law in the latter States, and which were made in disregard of the previous decision in Conner's Case. It has no reasoning of its own and does not seem warranted by principle." The decision in the other California case, that of Carroll v. Siebenthaler, is founded upon that of the previous case of Dorsey v. Smith.

The case of People v. Tieman, 30 Barb. (N. Y.) 793, concerning which there has been considerable misunderstanding, was by the de facto officer to recover his salary, and the court held that he cannot recover. It is not decided, however, that if it had been paid him, it would not have been valid as against a claim by the de jure officer for the same salary. The court say: "The salary and fees are incident to the title and not to the usurpation and colorable possession of an office. An officer de facto may be protected in

the performance of acts done in good faith in the discharge of the duties of an office under color of right, and third persons will not be permitted to question the validity of his acts by impeaching his title to the office. . . . It does not follow that a right can be asserted and enforced on behalf of one who acts merely under color of office without legal authority, as if he were an officer de jure. When an individual claims by action the office, or the incidents to the office, he can recover only upon proof of title. Possession under color of right may well serve as a shield for defence, but cannot as against the public be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office." the proper construction is placed upon this decision there is nothing to render it inconsistent with the other New York cases which directly support the proposition in the text.

The case of People v. Brennan, 30 How. Pr. (N. Y.) 417, supports the doctrine contrary to the text, but this case may now be considered as practically

overruled.

Judge Cooley gives his support to the doctrine of the California cases. In a dissenting opinion to the case of Auditors v. Benoit, 20 Mich. 176, on page 192, he says, referring to the case of People v. Smyth, 28 Cal. 21: "This decision appears to me to be sustainable on the soundest reasons of public policy. A wrong is done to society and to public order in every instance in which the usurpation of a public office takes place; and the rules of law ought to be such as to give the greatest possible discouragement to such a proceeding. The county authorities, in a case like this, ought not to be told that they may countenance the intrusion with impunity, and deliver over to a usurper the emoluments of an office to which he has neither a legal or moral claim. Such a rule encourages usurpations, and tends to lower the standard of public morality. Public policy requires that municipal officers should be allowed to sanction or recognize the intrusion only so far as may be necessary to give the full benefit of protection, which the rule regarding the acts of officers de facto was designed to afford."

1. Mayfield v. Moore, 53 Ill. 528; Dolan v. Mayor, 68 N. Y. 274; Nichols v. Mc-Lean (N. Y.), 13 Am. & Eng. Corp. Cas.

DE FAIRE ECHELLE-DE MINIMIS NON CURAT LEX.

DE FAIRE ECHELLE -A clause inserted in French marine policies, which is equivalent to a license to touch and trade at intermediate ports.1

DE MINIMIS NON CURAT LEX .- A maxim of the law, meaning. The law does not concern itself about trifles.2

152: Michel v. New Orleans, 32 La. Ann. 152, Michel v. New Orleans, 32 La. Ann. 1094; Sigur v. Crenshaw, 10 La. Ann. 297; Douglass v. State, 31 Ind. 429; Glasscock v. Lyons, 20 Ind. 1; People v. Miller, 24 Mich. 458; People v. Smith, 28 Cal. 21; United States v. Addison, 6 Wall. (U. S.) 291; Lawlor v. Alton, 8 Ir. R. C. L. 160: Harwood v. Wood, 2 Lev. 245; Chowning v. Boger (Tex.), 9 Am. & Eng. Corp. Cas. 91; Aris v. Strekley, 2 Md. 260; Croskie v. Hurley, I Alcock & Napier, 431.

But where one intrudes into an office without pretence of legal right he is liaable to the rightful claimant for the fees and emoluments without any deduction for the necessary expenses in earning Mayfield v. Moore, supra. And see Douglass v. State, 31 Ind. 429.

And where an officer, duly elected, is kept out of office by one to whom the returning board has given a certificate of election, he is not at fault for not qualifying before he has obtained judgment of ouster, as such an attempt might be nugatory in the absence of the documentary title. He is therefore entitled to recover damages for the whole official term, from the beginning until he obtains possession of the office. He is entitled to recover for that period the entire official salary, without any deduction for the services of the incumbent, or for what he may have earned himself while ousted. An official salary is not made dependent on the amount of work done, and belongs to the office itself without regard to the personal services of the officer. People v. Miller, 24 Mich. 458. In fact the occupation of an office by an intruder does not have even the effect of deferring the time of payment of the salary until the intruder is ousted. Carroll v. Siebenthaler, 37 Cal. 193.

1. Am. Ins. Co. v. Griswold, 14 Wend. (N. Y.) 399, 491.

2. Courts of justice do not in general take trifling and immaterial matters into account; and they will not, for instance, take notice of the fraction of a day, except in those cases where there are conflicting rights, for the determination of which it is necessary that they should do so. See title DAY.
"In ordinary," as remarked by Lord

Kenyon, C. I., "where the damages are small, and the question too inconsiderable to be retried, the court have frequently refused to send the case back to another jury. But wherever a mistake of the judge has crept in and swayed the opinion of the jury, I do not recollect a single case in which the court have ever refused to grant a new trial." Wilson v. refused to grant a new trial." Wilson v. Rastall, 4 T. R. 753. See Vaughan v. Wyatt, 6 M. & W. 496. 497; per Parke, B., Twig v. Potts, 1 Cr. M. & R. 93; Lee v. Adams, 12 C. B. N. S. 368; 104 E. C. L. R.; Mostyn v. Coles, 7 H. & N. 872, 876. In Haine v. Davey, 4 A. & E. 892; 31 E. C. L. R., a new trial was granted for misdirection, though the amount in question was less than £1. See Poole v. Whitcombe, 12 C. B. N. S. 770; 104 E. C. L. R.
An error of \$9.70 in a decree for

\$2441, where defendant allows five years to elapse before suing out a writ of error, McNutt v. Dickwill not be noticed. son, 42 Ill. 498; Livingston v. St. Clair Co., 64 Ill. 56. A judgment of \$1.65 involving no important principle is indeed a very trifling case. Fisher v. Haggerty, 36 Ill. 128. Forty-six cents do not come within the maxim. Badgley v. Heald, 4. Gilm. (Ill.) 64.

The evidence showed that the value of the property replevied did not exceedthree hundred and sixty dollars, but the court found the value to be three hundred and sixty-five dollars. Held, that considering the amount involved, the judgment ought not to be affirmed on the maxim de minimis, etc. Merrill v. Hurl-

burt, 63 Cal. 494.

In Willson v. McEvoy, 25 Cal. 170, the court say: "The only remaining point necessary to be noticed is, that the court, upon the findings, should have rendered judgment for him for at least nominal damages. The only benefit that would have accrued to him by having the judgment entered for him for that sum was, that he would have been relieved of the payment of costs, taxed in the judgment at four dollars and a half. We think we are justified, in this respect, in invoking the maxim de minimis non curat lex. McConihe v. New York & Erie R. Co., 20 N. Y. 495; Jenning v. Loring, 5

Ind. 250." And see Bustamente v. Stew-

art, 55 Cal. 115.

In further illustration of the maxim de minimis non curat lex, it may be observed that there are some injuries of so small and little consideration in the law that no action will lie for them. See per Powys, J., Ashby v. White, 2 Lord Raym. 944, answered by Holt, C. J., 2 Lord Raym. 953; Whitcher v. Hall, 5 B. & C. 269, 277; II E. C. L. R.; 2 Bla. Com. (21st Ed.) 262, where the rule respecting land gained by alluvian is referred to the maxim. The maxim "would apply only with respect to gradual accretions not appreciable except after the lapse of time," per Pollock, C. B., 2 H. & N. 138; and in Ford v. Lacey, 7 H. & N. 155.

It may be observed, however, that for an injury to real property incorporeal an action may be supported, however small the damage, and therefore a commoner may maintain an action on the case for an injury done to the common, though his proportion of the damage be found to amount only to a farthing. Pindar v. Wadsworth, 2 East, 154. See 22 Vin. Abr. "Waste" (n.); Harrop v. Hirst, L.

R. 4 Ex. 43.

In Seneca Road Co. v. Auburn, etc., R. Co., 5 Hill (N. Y.), 170, the court say: "It is said, however, de minimis non curat lex. This maxim is never applied to the positive and wrongful invasion of another's property. To warrant an action in such case, says a learned writer, 'some temporal damage, be it more or less, must actually have resulted, or must be likely to ensue. The degree is wholly immaterial; nor does the law, upon every occasion, require distinct proof that an inconvenience has been sustained. For example, if the hand of A touch the person of B, who shall declare that pain has or has not ensued? The only mode to render B secure is to infer that an inconvenience has actually Hamm. N. P. 39, Am. Ed. of 'Where a new market is erected near an ancient one, the owner of the ancient market may have an action; and yet perhaps the cattle that would have come to the old market might not have been sold, and so no toll would have been gained, and consequently there would have been no real damage; but there is a possibility of damage.' 2 Ld. Raym. 938. In Ashby v. White, wherein Powel, J., laid down this rule as to the market, it was held finally by the House of Lords, that to hinder a burgess from voting for a member of the House of Commons was a good ground of action. No one could say that he had

been actually injured or would be; so far from it, the hindrance might have benefited him. But his franchise had been The owner of a horse might violated. be benefited by a skilful rider taking the horse from the pasture and using him; yet the law would give damages. and, under circumstances, very serious damages, for such an act. The owner of a franchise, as well as of other property. has a right to exclude all persons from doing anything by which it may possibly be injured. The rule is necessary for the general protection of property; and a greater evil could scarcely befall a country than the rule being frittered away or relaxed in the least, under the idea that though an exclusive right be violated, the injury is trifling or indeed nothing at all."

Where an officer who had attached a quantity of hay used a pitchfork belonging to the debtor for the purpose of removing it, and when he had completed the work returned it uninjured to the place where he found it, where it was received by the debtor, the officer was held not liable for the use of the fork. Paul v. Slosson, 22 Vt. 231.

And where an action was brought for escape on mesne process, but the prisoner had returned to the custody of the sheriff and no actual damage had been sustained, it was held that not even

sustained, it was held that not even nominal damages could be recovered. Williams v. Mostyn, 4 Mees. & W. 144; Young v. Spencer, 10 Barn. & C. 145.

A slight mistake made by the collector in computing the amount of taxes and costs, by which the property was sold for a small sum more than the amount actually due, does not invalidate the sale, particularly when it is not made to appear that the owner of the land suffered any injury by the mistake. O'Grady v. Barnhisel, 23 Cal. 287.

If a sale of land for delinquent tax is made for a sum in excess of the tax and legal costs, the sale is void, unless the excess is less than the smallest fractional coin authorized by law, when the maxim de minimis applies. Treadwell v. Pat-

terson, 51 Cal. 637.

The law having reference to the rights of a riparian proprietor to apply to his own use the running water, as stated by Mr. Chancellor Kent in his Commentaries (vol. iii. pp. 537-539), illustrates how the maxim under notice may be applied. Every proprietor of land on the banks of a river has naturally an equalright to the use of the water flowing in the stream adjacent to his land, as it was wont to run without diminution or altera-

DEAD.—Deprived or destitute of life.¹

No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. Streams of water, however, are intended for the use and comfort of man, and it would be unreasonable and contrary to the universal sense of mankind to debar every riparian proprietor from the application of the water to domestic, agricultural, and manua facturing purposes, provided the use of it be made without causing material injury or annoyance to his neighbor below him. There will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current; but de minimis non curat lex; and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose land the stream passes is that he should use the water in a reasonable manner, and so as not to destroy or render useless or materially diminish or affect the application of the water by the proprietors above or below on the stream.

"The same law," it has been observed, "will be found to be applicable to the corresponding rights to air and light. These also are bestowed by Providence for the common benefit of man; and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. A man cannot occupy a dwelling and consume fuel in it for domestic purposes without its in some degree impairing the natural purity of the air; he cannot erect a building or plant a tree near the house of another without in some degree diminishing the quantity of light he enjoys; but such small interruptions give no right of action, for they are necessary incidents to the common enjoyment by all." Judgm ... 6 Exch. 372-3.

1. Webster.

Dead Animals.—An ordinance which makes it the duty of an inspector to cause the immediate removal of "all putrid and unsound beef, pork, fish, hides, or skins, all dead animals, and every putrid, offensive, unsound, and unwholesome sub-

stance found in any street or other place in the city, . . . so as most effectually to secure the public health," does not justify the removal from a railroad car of hogs that have suffocated on the passage. The owner of such hogs may in case of such removal recover damages from the "A dead hog is not per se a nuisance, even though it died of suffocation, and is not necessarily dangerous to public health. The owner may still put it to a useful and innocent purpose. This ordinance, so far as it relates to 'dead animals,' cannot be literally construed, because, if it should be, a city inspector might with impunity remove dead animals provided for food. The connection in which the terms are used, and the object of the ordinance, render it quite manifest that only such dead animals were meant as were nuisances or dangerous or deleterious to public health." Underwood v. Green, 42 N. Y. 140.

Dead Freight.—The compensation in damages which the owner of a vessel is entitled to, for the freighter's breach of contract in not putting a full load on board when he has agreed to do so. Philips v. Rodie, 15 East, 547. The freight which would have been payable for that part of the vessel which has not been occupied by merchandise, but ought to have been. Gray v. Carr, L. R. 6 Q. B. 528. See LIEN: SHIPPING.

528. See LIEN; SHIPPING.

Deadhead.—"The term 'deadhead' is applied to persons other than the president, directors, officers, agents, or employees of a railroad company, who are permitted by the company to travel on the road without paying any fare therefor." A tax levied on deadheads is not a capitation tax; and the laying of such a tax is a proper exercise of the power of taxation and is not a violation of charter privileges. Gardiner v. Hall, Phil. (N. Car.) 21.

Live and Dead Stock.—Where a testator bequeathed "his furniture, and stock of carriages and horses, and other live and dead stock," the latter phrase, taken together with "carriages and horses," was held to be antithetical to "furniture," and to refer only to out-of-door stock, Arden, M. R., saying: "I do not pretend to say what 'live and dead stock' might mean if it stood independent of everything else; but upon the whole of this will taken together I cannot by any fair inference deduce that the testator did intend under the words 'live and dead stock,' as they stand here, his books and

DEAD BODY.—(See also CEMETERIES.)—Neither the husband nor the next of kin have, strictly speaking, any right of property in a dead body; but controversies between them as to the place of its burial are in this country, where there are no ecclesiastical courts, within the jurisdiction of a court of equity.¹

wine. Consider first what would be the interpretation of these words if nothing were said of furniture at all. No person could have conceived that those words preceded by 'carriages and horses' would have meant in-door stock, furniture, etc.; which though dead could not be coupled with carriages and horses. Therefore it is clear, if those words stood alone the interpretation would be out-of-door stock. The words would mean corn, hay, straw, carts, etc." "This must never," continued the court, "be quoted as a governing case; because it does not determine what 'live and dead stock' may mean, not coupled with other words." Porter v. Tournay, 3 Ves. 311. Growing crops come within the expression as used in a will. Blake v. Gibbs, 5 Russ. 13, n. Rudge v. Winnall, 12 Beav. 357.

1. 2 Bl. Com. 429; Weld v. Walker, 130 Mass. 422; s. c., 39 Am. Rep. 465; Meagher v. Driscoll. 99 Mass. 281; In re Beekman Street, 4 Bradf. (N. Y.) 503; Snyder v. Snyder, 60 How. Pr. (N. Y.) 368; Pierce v. Swan Point Cemetery, 10 R. I. 227; s. c., 14 Am. Rep. 667.

Bodies of the dead belong to the surviving relatives in order of inheritance as property. Bogert v. Indianapolis, 13 Ind. 135. See Snyder v. Snyder, 60 How. Pr. (N. Y.) 368; Wyncoop v. Wyncoop, 42 Pa. St. 293.

The words "next of kin" used simplixiter, without anything in the context to indicate a different meaning, mean those of the kindred or blood, excluding the widow. Snyder v. Snyder, 60 How. Pr. (N. Y.) 368; Slosson v. Lynch, 43 Barb. (N. Y.) 147.

It is otherwise as to statutes in which the intent is plain that the widow is included. Snyder v. Snyder, 60 How Pr. (N. Y.) 368.

In a contention between the widow of the deceased (who was his second wife) and his only son and heir (being the child of his first marriage), as to the disposition of his remains after taking into consideration all the circumstances, held, that the claim of the son was to be preferred. Snyder v. Snyder, 60 How. Pr. (N. Y.) 368. See Wyncoop v. Wyncoop, 42 Pa. St. 293; Pierce v. Proprietors, etc., 10 R. I. 227; s. c., 14 Am. Rep. 667.

An executor or administrator is liable to a stranger for the proper burial of the testator or intestate, if he die among strangers, but not for mere gratuitous services or acts. Hewett v. Bronson, 5 Dalv (N. Y.), 1.

A dead body by law belongs to no one, and is therefore under the protection of the public. If it lies in consecrated ground the ecclesiastical law will interpose for its protection; but whether in ground consecrated or unconsecrated, indignities offered to human remains, in improperly and indecently disinterring them, are the ground of an indictment. Foster v. Dodd. 8 B. & S. 842, 854

them, are the ground of an indictment. Foster v. Dodd, 8 B. & S. 842, 854.

A testator directed W. to burn his body, and directed his executors to repay W. the expense of so doing. The body was buried in unconsecrated ground with the assent of the executors. Afterwards W., representing to the Under Secretary of State that she intended to bury it in consecrated ground, obtained his license to remove it. She caused it to be burnt in Italy, and then brought an action against the executors for the expenses. The action was dismissed. Held, that there is no property in a dead body, but the executors have a right to the possession of the body, and their duty is to bury it. Held, that a direction by will as to the disposition of the testator's body cannot be enforced.

Williams v. Williams, L. R. 20 Ch. D. 659.

By the 2 & 3 Will. IV. c. 75, s. 7, it is provided that "it shall be lawful for any executor, or other party, having lawful possession of the body of any deceased person, and not being an undertaker, or other party intrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless to the knowledge of such executor, or other party, such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination." Section 8 provides for the

It is the husband's right and duty to bury his deceased wife.1 When a body has once been buried, no one has the right to remove it without the consent of the owner of the grave, or leave of the proper ecclesiastical, municipal, or judicial authority.2

party lawfully in the possession of a dead body directing and permitting anatomical examination, where the deceased shall, during his life, have directed it. "unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examina-tion." By section 10, professors of anatomy, and the other persons therein described, being duly licensed, are not liable to punishment for having in their possession human bodies according to the provision of the act. The 18th section of this statute makes offences against the act misdemeanors, and subjects offenders to be punished by im-prisonment not exceeding three months, or by fine not exceeding fifty pounds.

Roscoe's Cr. Ev. (10th ed.) 446. In R. v. Feist, Dears. & B. C. C. 590; 27 L. J. M. C. 164, the defendant was master of a workhouse, and had lawful possession of the bodies of deceased paupers. He was in the habit of having the appearance of a funeral gone through with a view of preventing the relatives requiring that the bodies should be buried without being subject to anatomical examination, and the jury found that but for that deception the relatives would have required the bodies to be so buried. The bodies, instead of being buried, as was supposed by the relatives, were delivered to an hospital for the purpose of undergoing anatomical examination, and for this service the master received from the hospital a sum of money. The prisoner was found guilty of an offence at common law in disposing of a body for the purpose of dissection; but the question was reserved, whether the defendant was protected by s. 7 of the above act. The court of criminal appeal held that he was, as the requirement mentioned in that section had not been actually made. Willes, J., pointed out that this was an offence specially provided for by the 7 & o Vict. c. 101, s. 31.

1. Weld v. Walker, 130 Mass. 422; s. c., 39 Am. Rep. 465; Durell v. Hayward, Gray (Mass.), 248; Lakin v. Ames, 10 Cush. (Mass.) 198; Cunningham v. Reardon, 98 Mass. 538.

If a husband by his cruelty compels

his wife to leave him, and makes no provision for her afterwards, and she dies, while so apart, he is liable for the reasonable expenses of her funeral, without notice of the death. Cunningham v. Reardon, 98 Mass. 538.

The husband is liable for the necessary expense of the decent interment of his wife from whom he has been separated, whether the party incurring such expense is an undertaker or a mere volunteer. Ambrose v. Kerrison, 10 C. B. 776; 20 L. J. C. P. 135. Or whoever the party may be who buried her, Bradshaw υ. Beard, 12 C. B. N. S. 344; 6 L. T. N.

2. Weld v. Walker, 130 Mass. 422; Meagher v. Driscoll, 99 Mass. 281; Com. v. Cooley, 10 Pick. (Mass.) 37; Com. v. Slack, 19 Pick. (Mass.) 304; Wyncoop v. Wyncoop, 42 Pa. St. 293; Pierce v. Swam Point Cemetery, 10 R. I. 227; s. c., 14. Am. Rep. 667; State v. Wilson, 94 N. Car. 1015; State v. McClure, 4 Blackf. (Ind.) 328; McNamee v. People, 31 Mich. 472; Kanavan's Case, 1 Me. 226; R. v. Sharpe, D. & B. 160; s. c., 7 Cox C. C. 214.

The legislature has power to authorize the removal of the remains of the dead from cemeteries, and may delegate such power to municipalities. Nor has the owner any claim for compensation, for it cannot be said in any sense that his property has been taken for public use. Coates v. N. Y. City, 7 Cow. (N. Y.) 585; Charlestown v. Wentworth First Baptist Ch., 4 Strob. (S. Car.) 306; Craig v. First. Pres. Ch., 88 Pa. St. 42; s. c., 32 Am.

Rep. 417.

If a husband has not freely consented to the burial of his wife in a lot of land owned by another person, with the inten tion or understanding that it should beher final resting-place, a court of equity may permit him, after such burial, to remove her body, coffin, and tombstones to his own land, and restrain that person from interfering with such removal. Weld v. Walker, 130 Mass. 422.

A. requested to be buried in her sister's lot. All her children, except one, acc esced in her wish. Held, that one of the children, or his executors, could not remove the remains. Lowrie v. Pitt, 11 Phila. (Pa.) 303.

A father, acting under the advice of counsel, caused the body of his child to be exhumed, and a portion of the thighbone to be removed in order that it might be used in evidence on a trial of malpractice, Held, that the body was not removed from the grave "for the purposes of dissection or from mere wantonas these terms were used in the statute, nor had any offence against public decency been committed. Rhodes v. Brandt, 21 Hun (N.Y.), 1.

Selling the dead body of a person capitally convicted, for dissection, where dissection was no part of the sentence, was a misdemeanor at common law; and in order to support an indictment for such offence, it was not necessary that there should be direct evidence that the defendant sold the body for lucre and gain, and for the purpose of being dissected. R. v. Cundick, D. & R. N. P. C. 13.

A purchaser of land upon which is a burial ground has no right to remove the bodies against the wishes of those interested. First Presb. Ch. v. Second Presb. Ch., 2 Brewst. (Pa.) 372.

An answer to an action of trespass for removing a body set forth that at the time of the tresspass charged, and for a long time prior thereto, one A, a third person, was and had been the owner of said lot, and was in possession thereof, and that the removal was made under his authority in good faith, with care and decency. Held, that the answer was good on demurrer, without showing from whom or how A acquired his title. Hamilton v. New Albany, 30 Ind. 482.

An indictment accused the defendant of the crime of "Violating sepulture, committed as follows: The said D., on the 8th day of July, 1879, at the city and county of San Francisco, without authority of law, disinterred and removed from its place of sepulture, at Laurel Hill Cemetery, in said city and county, the dead body of E. L., a human being, the said dead body not being the dead body of a friend or relative of the said D., removed for disinterment," etc. Held, that the indictment sufficiently designated and described the offence, and that a demurrer thereto was improperly sustained. People v. Dalton, 58 Cal. 226.

An indictment charging the defendant with removing from its grave a certain deceased child of B., "that had yet no name given to it," without consent. etc., is sufficient. Tate ν . State, 6 Blackf. (Ind.) 110.

Mr. Roscoe says (Roscoe's Cr. Ev., 10th Ed., 445): "Although larceny cannot be committed of a dead body, no one having any right of property therein, yet

it is an offence to remove a body without lawful authority; and such offence is punishable with fine and imprisonment as a misdemeanor. An indictment charged (inter alia) that the prisoner, a certain dead body of a person unknown, lately before deceased, wilfully, unlawfully, and indecently did take and carry away, with intent to sell and dispose of the same for gain and profit. It being evident that the prisoner had taken the body from some burial ground, though from what particular place was uncertain, he was found guilty upon this count; and it was considered that this was so clearly an indictable offence that no case was reserved. R. v. Gilles, I Russ. Cri. (5th Ed.) 611; Russ. & Ry. 366 (n). So to take up a dead body, even for the purpose of dissection, is an indictable offence. Where, upon an indictment for that offence, it was moved in arrest of judgment that the act was only one of ecclesiastical cognizance, and that the silence of the older writers on crown laws showed that there was no such offence cognizable in the criminal courts, the court said that common decency required that the practice should be put a stop to; that the offence was cognizable in a criminal court as being highly indecent, and contra bonos mores; that the purpose of taking up the body for dissection did not make it less an indictable offence, and that as it had been the regular practice at the Old Bailey, in modern times, to try charges of this nature, the circumstance of no writ of error having been brought to reverse any of those judgments was a proof of the universal opinion of the profession upon this subject. R. v. Lynn, 2 T. R. 733; I Leach, 497. See also R. v. Cundrick; Dowl. & Ry. N. P. C. 13. And it makes no difference what are the motives of the person who removes the body; the offence being the removal of the body without lawful authority. See R. v. Sharpe, Dear. & B. 160; 26 L. J. M. C. 43; where the defendant, from motives of filial affection, had removed the corpse of his mother from its burying place. The defendant had in this case committed a trespass against the owner of the soil of the burying place; but quære whether, if no such trespass was committed, the offence might not be still complete.

Accessories.—A person without being actually present at the unlawful disinterment of a dead body may be found guilty of the offence if, with the intention of giving assistance, etc., he be near enough to afford it, should it be needed. Tate v. State, 6 Blackf. (Ind.) 110,

It was a felony at common law to steal shroud or apparel; 1 but the dead body of a human being is not capable of being stolen.2

To bury the dead body of a person who has died a violent death. before the coroner has sat upon it, is punishable as a misdemeanor. The preventing a dead body from being interred has likewise been considered an indictable offence.4

1. Pierce v. Proprietors, etc., 10 R. I. 227; s. c., 14 Am. Rep. 667; State v. Doepke, 68 Mo. 208.

The taking of articles of dress from the body of a dead body thrown ashore from a wreck is a felony. Wonson v, Sayward, 13 Pick. (Mass.) 402.

It is larceny to steal a coffin in which the remains of a human being are interred. State v. Doepke, 68 Mo. 208.

2. Steph. Dig. Cr. L. art. 292; Ros-

coe's Cr. Ev. (10th Ed.) 445.

3. The coroner ought to be sent for. since he is not bound ex officio to take the inquest without being sent for. coe's Cr. Ev. (10th Ed.) 446; R. v. Clerk, I Salk. 377; Anon., 7 Mod. 10. And if a dead body in a prison or other place, upon which an inquest ought to have been taken, is interred or is suffered to lie so long that it putrefies before the coroner has viewed it, the jailer or township shall be amerced. Hawk, P. C. b. 2, c. 9, s. 23; see also Sewell's Law of Coroner, p. 29. It is a misdemeanor to burn or otherwise dispose of a dead body, with intent thereby to prevent the hold-ing upon such body of an intended coroner's inquest, and so to obstruct a coroner in the execution of his duty, in a case where the inquest is one which the coroner has jurisdiction to hold. A coroner has jurisdiction to hold, and is justified in holding, an inquest, if he honestly believes information which has been given to him to be true, which, if true, would make it his duty to hold such inquest. The Queen υ. Stephenson, L. R. 13 Q. B. D. 331; The Queen υ. Price, L. R. 12 Q. B. D. 247.

4. Roscoe's Cr. Ev. (10th Ed.) 446.

The master of a workhouse, a servant, and another person were indicted for a conspiracy to prevent the burial of a person who died in a workhouse. R. v.

Young, cited 2 T. R. 734.

A parent who has not the means of providing burial for the body of his deceased child is not liable to be indicted for a misdemeanor in not providing for its burial, even though a nuisance is occasioned by allowing the body to remain unburied, and although the poor-law authorities of the union have offered him certain claims made by the jailer. An money to defray the expenses of burial, indictment stated that a prisoner had

by way of loan, as he is not bound under such circumstances to contract a debt. R. v. Vann, 2 Den. C. C. 325.

It is an indictable offence to cast a dead body into a river. Kanavan's Case, r

Me. 226.

Hyde, C. J., upon a question how far the forbearance to sue one who fears to be sued is a good consideration for a promise (Quick v. Coppleton, I Vent. 161), cited a case where a woman who feared that the dead body of her son would be arrested for debt was holden liable, upon a promise to pay in consideration of forbearance, though she was neither executrix nor administratrix; yet the other judges are said to have doubted of this. Quick v. Coppleton, 1 Vent. 161. And in a recent case Lord Ellenborough, C. J., said it would be impossible to contend that such a forbearance could be a good consideration for an assumpsit, Jones v. Ashburnham, 4 East, 460. Lord Ellenborough, C. J., continued: "To seize a dead body upon any such pretence would be contra bonos mores, and an extortion upon the relatives." And in a subsequent part of the case, his Lordship said: "As to the case cited by Hyde, C. J., of a mother who promised to pay on forbearance of the plaintiff to arrest the dead body of her son, which she feared he was about to do, it is contrary to every principle of law and moral feeling; such an act is revolting to humanity, and illegal,"

A jailer has no right to detain the body of a person who died in prison for any debts due to himself. R. v. Fox, 2 Q. B. 247. Where, therefore, a jailer refused to deliver up the body of a person, who had died while a prisoner in execution in his custody, to the executors of the deceased, unless they would satisfy certain claims made against the deceased by the jailer, the court of Queen's Bench issued a mandamus, peremptory in the first instance, commanding that the body should be delivered up to the executors. R. v. Fox, 2 Q. B. 247. And a jailer is indictable at common law for detaining the body of a person who has died in jail in order to compel the payment of

DEAD BODY-DEAF AND DUMB PERSONS.

Digging up a disused burial-ground for building purposes is a misdemeanor at common law.1

To leave a dead body exposed in a highway is an indictable nuisance.2

A friend of deceased who sends his remains to relatives by a carrier cannot maintain an action against the carrier for failure to carry them.3

Cremation.—To burn a dead body, instead of burying it, is not a misdemeanor, unless it is so done as to amount to a public nuisance.4

DEADLY WEAPON.—See Affray: Assault.

DEAF AND DUMB PERSONS.—(See also WILLS.)

 Not Idiots, 119.
 Their Civil Capacity, 120. 4. Manner of Trial, 120. 5. As Witnesses, 121.

3. Responsibility for Crime, 120.

1. Not Idiots.—One who was born deaf and dumb was formerly considered, in presumption of law, an idiot.⁵ But it seems very clear that a person is not now to be considered an idiot from the mere circumstance of his being deaf and dumb.6

died in jail, and the body remained in jail in the possession of the defendant, then being jailer; and the executors requested him to deliver up the body to them, and suffer them to take it away, in order that they might bury it; and it thereupon became the defendant's duty to deliver up the body, but that he re-fused to do so, and unlawfully, and in abuse of his office, without legal authority or excuse, and against the will of the executors, detained the body a long time in jail, until the defendant unlawfully and indecently buried the body without any rite of Christian burial, or any funeral ceremony or observance, in a place not being a consecrated burial-ground, or a customary or fit place for burial, to wit, a yard within the precincts of the jail. The second count alleged a refusal to deliver up, etc., unless the executors would account with the defendant concerning certain claims of money, which he pretended to have against the deceased's estate, and pay the defendant what should appear due; that the defendant wrongfully detained, etc., under pretext of such claims, the executors not accounting, etc., until, etc., when he buried, etc. Maule, J., said, at the close of the case, that the notion of a jailer being authorized to detain a dead body on account of pecuniary claims was a mistake, and that a jailer doing so was guilty of a m sconduct in his public character, for which he was liable to prosecution. R. v, Scott, 2 Q. B. 248.

Judge Sharswood mentions a Massachusetts case (not reported) in his edition

of Russell on Crimes (1877), p. 636, n. 1.

1. Roscoe's Cr. Ev. (10th Ed.) 446; R.

v. Jacobson, 14 Cox C. C. 522.

2. Roscoe's Cr. Ev. (10th Ed.) 446; R.

v. Clark, 15 Cox C. C. 171.
3. Dircoll v. Nichols, 5 Gray (Mass.), See Epply v. Amer. Ex. Co., 3

Wash. L. Rep. 93.
4. R. v. Price, L. R. 12 Q. B. D. 247.
See Williams v. Williams, L. R. 20 Ch. D. 659

5. Hale P. C. 34.

A man who is born deaf, dumb, and blind is looked upon by the law as in the same state with an idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas. Black. Com. 304.
6. Ewell's Leading Cas. on Disabilities,

note, 724.
"This presumption of law, if it still exists, like every other presumption yields to proof to contrary, and Lord Hardwicke decreed an estate to one born deaf and dumb, upon his answering properly questions put to him in writing. But science and benevolence have together rectified the public mind as to such persons; and it is no longer, in common understanding, any evidence that an individual is an idiot, because deprived from his birth of the power of speech and hearing. No one who has witnessed the wonders worked in modern

- 2. Their Civil Capacity.—Such persons may lawfully intermarry; and, if married women, may make acknowledgments. So it is now held that a person born deaf and dumb is not incapacitated to make a will; but it is said their wills are regarded with much suspicion.
- 3. Responsibility for Crime.—The want of hearing may exist in connection with responsibility for crime; and if a deaf and dumb person is shown to be able to comprehend the nature of crime, he may be convicted.⁵
- 4. Manner of Trial.—Where one alleged to be deaf and dumb from his birth is arraigned for a crime, it should be left to the jury to determine whether he is of unsound mind, incapable of understanding the charge against him, and the nature and purpose of the trial, and his rights therein. If the jury find these issues in his favor, he should not be placed upon his trial.

times, in giving instruction to unfortunate persons of this class, would, after hearing the testimony in this case, doubt that Leonidas Christmas might have been instructed, not only in the mechanic arts, but that his mind might have been enlightened to receive the high moral obligations of civil life, and the still more profound truths of our holy religion. We are constrained, then, to say that he does not come within the exception contained in the statutes." Christmas v. Mitchell, 3 Ired. (N. Car.) Eq. 541.

In Brower v. Fisher, 4 Johns, (N. Y.) Ch. 441, it was held that a person deaf and dumb from his nativity is not, therefore, an idiot, or non compos mentis; though such, perhaps, may be the legal presumption, until his mental capacity is proved, on an inquiry and examination

for that purpose.

Judge Ewell, in a note to this case, Ewell's Lead. Cas. on Disabilities, 726, says: "And if it be considered that there is still a presumption of some degree of incapacity, civil or criminal, in one who is deaf and dumb, still it is very certain that it may be rebutted by evidence. See Commonwealth v. Hill, 14 Mass. 207; Morrison v. Lennard, 3 C. & P. 127; Rushton's Case, I Leach's Crown Law, 445; Rex v. Pritchard, 7 C. & P. 303; Rex v. Dyson, 7 C. & P. 305; State v. Harris, 8 Jones L. (N. Car.) 140; Brown v. Brown, 3 Conn. 303. Such presumption of quasi incapacity, however, if one there is, is at most a weak presumption; and perhaps it may now be said that there is, in the United States at least, no presumption of a defective understanding in persons deaf and dumb. See Christmas v. Mitchell, 3

Ired. Eq. (N, Car.) 541; Potts v. House, 6 Geo. 346." See also Reynolds v. Reynolds, I Spears (S. Car.), 256; Barnett v. Barnett, I Jones Eq. (N. Car.) 222.

1. Harrod v. Harrod, I. Kay & J. 4.

3. Jarman on Wills (5th ed. Bigelow),
4. See title WILLS.

34. See title WILLS.
4. Goods of Owston, 2 S. & T. 461.
5. Desty's Crim. Law. § 24a; State v. Harris, 8 Jones (N. Car.), 136; Rex v. Pritchard, 7 Car. & P. 303; Regina v. Whitfield, 3 Car. & K. 121. And see Arch. Crim. Prac. & Pl. (Pomeroy's Notes) 17; State v. Harris, 8 Jones L. (N. Car.) 272; s. c., 78 Am. Dec. 272.

(N. Car.) 272; s. c., 78 Am. Dec. 272.

A deaf and dumb person may be convicted of larceny.

Commonwealth v.

Hill, 14 Mass. 207.
6. State v. Harris, 8 Jones L. (N. Car.)

136; s. c., 78 Am. Dec. 272.

In Commonwealth v. Hill, 14 Mass. 207, the defendant was indicted for larceny, and being set to the bar for his arraignment, the solicitor-general suggested to the court that he was deaf and dumb, but that the evidence would prove him of sufficient capacity to be a proper subject for a criminal prosecution, and that he had formerly been convicted of a larceny; and he moved that a party then in court, and an acquaintance of the prisoner, should be sworn to interpret the indictment to him, and it should be read by the clerk. The indictment was accordingly read by a sentence at a time, and the interpreter, having been sworn, explained its purport to him, making signs with his fingers, etc., after which the court ordered the trial to proceed, as on a plea of not guilty.

In Rex v. Dyson, reported in Russ. & Ry. 523, and also in note to Rex v.

5. As Witnesses.—Deaf and dumb persons may be witnesses if any person can be found who can interpret their signs to the court

Pritchard, 7 Car. & P. 303; s. c., 32 Eng. Com. L. 518, the prisoner was indicted for the murder of her bastard child by cutting off its head. She stood mute; and a jury was impanelled to try whether she did so by malice or by the visitation of God; and evidence having been given of her always having been deaf and dumb, the jury found that she stood mute by visitation of God. The judge then examined a witness on oath, who swore that he was acquainted with her, and that she could be made to understand some things by signs, and could give her answers in the same way. The witness was then sworn as follows: "You swear that you will well and truly interpret and make known to the prisoner at the bar, by such signs, ways, and methods as shall be best known to you. the indictment wherewith she stands charged: and also all such matters and things as the court shall require to be made known to her; and also well and truly to interpret to the court the plea of the said prisoner to the indictment, and all answers of the said prisoner to the said matters and things so required to be made known to her, according to the best of your skill and understanding, so help you God." The witness then explained to her by signs what she was charged with, and she made signs which obviously imported a denial, and which he explained to be so. This being done, the judge directed a plea of not guilty to be recorded. The witness was then called upon to explain to her that she was to be tried by a jury, and that she might object to such as she pleased; but he and another witness stated that it was impossible to make her understand a matter of that nature, though upon common subjects, of daily occurrence, which she had been in the habit of seeing, she was sufficiently intelligent. One of the witnesses had instructed her in the dumb alphabet, but she was not so far advanced as to put words together, and the witness swore that though she was then incapable of understanding the nature of the proceedings against her, and making her defence, yet he had no doubt that with time and pains she might be taught to do so, by the means used for the instruction of the deaf and dumb. The judge then directed the jury to be impanelled and sworn to try whether she was sane or not; whereupon the same witness was sworn and examined, and proved her incapacity at that time to understand the mode of her trial or conduct her defence. The judge, in charging the jury so impanelled, referred to Lord Hale, who, in his Pleas of the Crown, vol. i. p. 34, says: "If a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad. he ought not, by law, to be arraigned during such his frenzy, but be remitted to prison until that incapacity be removed. The reason is, because he cannot, advisedly, plead to the indictment, and if such person, after his plea and before his trial, become of non-sane memory, he shall not be tried; or if, after his trial, he become of non sane memory, he shall not receive judgment, or if after judgment he become of nonsane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution. But because judgment or execution. there may be great fraud in this matter. yet, if the crime be notorious, as treason or murder, the judge, before such respite of trial or judgment, may do well to impanel a jury to inquire, ex officio, touching such insanity, and whether it be real or counterfeit." The judge then told the jury that if they were satisfied that if the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her "not sane," which they accordingly did. His lordship then ordered her to be kept in strict custody under the 39 & 40 Geo. III. c. 94, sec. 2, till his majesty's pleasure should be known

A similar cause occurred afterward before Baron Alderson, Rex v. Pritchard, 7 Cav. & P. 303; s. c., 32 Eng. Com. L. 517, when he referred to Rex v. Dyson, Russ. & Ry. 523, and said the course which Mr. Justice Parke had pursued had been approved of by several of the judges, and that he should follow it.

It will be borne in mind, however, that when a jury is impanelled now, in the case of a deaf and dumb prisoner, there is no need of an issue to try whether he stands mute of malice, because even if he could speak, and yet stood mute designedly, the court must order the plea of "not guilty" to be netered for him. State v. Harris, 8 Jones L. (N. Car.) 196; s. c., 78 Am. Dec. 274.

DEAF AND DUMB PERSONS-DEAL-DEALER.

and jury upon oath, or if they can write and read writing, so that the questions and answers may be conveyed in writing. 1

DEAL—DEALER.—(See also LICENSE LAWS; LIQUOR LAWS; MANUFACTURER; MERCHANT; TAXATION; TRADE.)—To trade; to buy and sell for the purpose of gain; to traffic; to have to dowith

1. Arch. Crim. Pl. & Pr. 150; I Bishop on Crim. Proc. § 1146; Best's Prin. of Ev. 144; State v. DeWolf, 8 Conn. 93; People v. McGee, I Denio (N. Y.), 19; Snyder v. Nations, 5 Blackf. (Ind.)

In one case, where it appeared that such a person could write, Best, C. J. doubted whether he ought to be compelled to give his evidence in that way, and not by signs. Morrison v. Lennard, 3 C. & P. 127. "But it would be difficult to maintain this as a proposition of law, even supposing it to hold good as a principle of convenience. Neither of these modes of giving evidence is derivative from, or secondary to, the other; besides which, a deaf and dumb witness might be very expert in making and understanding signs, and yet express his thoughts very indifferently in writing. In a much more recent case before Lord Campbell, which was an action for seduction, the seduced party was deaf and dumb, but could write very well, and two letters written by her to the defendant were put in evidence. Her examination in court, however, was chiefly carried on by signs, and, occasionally, when these were not understood, by writing. tholomew v. George, Kent Sp. Ass. 1851, Best's Prin. of Ev. 144.

Where a man, deaf and dumb from birth, was produced as a witness on a trial for larceny, he was allowed to be examined through the medium of his sister, who was sworn to interpret to the witness "the questions and demands made by the court to the witness, and the answers made to them." The sister stated that for a series of years she and her brother had been enabled to understand one another by means of certain arbitrary signs and motions, which time and necessity had invented between them. She was certain that her brother had a perfect knowledge of the tenets of Christianity, and that she could communicate to him notions of the moral and religious nature of an oath, and of the temporal danger of perjury. Rex v. Ruston, I Leach, 408.

Upon a trial for rape in Scotland, the woman, who was deaf and dumb, but had been instructed by teachers, by means of

signs, with regard to the nature of an oath, of a trial, and of the obligations of speaking the truth, was admitted to be examined. Martin's Case, Allison's Prac. Crim. Law of Scotl. 486.

In I Greenleaf on Ev. (14th Ed.) § 366, is is said: "In regard to persons deaf and dumb from their birth, it has been said that, in presumption of law, they are idiots. And though this presumption has not now the same degree of force which was formerly given to it, this unfortunate class of persons being found by the light of modern science to bemuch more intelligent in general, and susceptible of far higher culture, than was once supposed; yet still the presumption is so far operative as to devolve the burden of proof on the party producing the witness, to show that he is a person of sufficient understanding.

2. A bank, by its charter, was forbidden to "deal in articles of goods, wares, and merchandise, in any manner whatever, unless to secure a debt of the bank, incurred by the regular transactions of the same." The bank advanced money the same." on cotton, which was delivered to its agent, who took a bill of exchange for the amount advanced. The cotton was then shipped by the bank at the expense and risk of the owner, sold, and the next proceeds placed to the credit of the bill. This was held not to be dealing within the prohibition. "The phrase to 'deal in' evidently means to buy and sell for the purpose of gain; or it might without any strained construction be construed. to mean the taking or receiving of goods, wares, or merchandise, to be sold for the owner for a profit or commission. The interdict of the clause would, therefore, embrace not only the mercantile pursuit of buying and selling goods, wares, and merchandise for gain, but would also include the sale of merchandise for and on account of the owner-or what is commonly called a brokerage or commission business." Bates v. State Bank, 2 Ala. 8 Wheat. (U. S.) 338; Slack v. Tucker, 23 Wall. (U. S.) 321; Bank of U. S. v. Waggener, 9 Pet. (U. S.) 378. Where a railroad company is prohibited. railroad company is prohibited from holding, purchasing, or dealing in lands, the

A dealer is therefore one who makes a business of buying and selling; he is the middleman between the producer and consumer of a commodity.1

restriction is intended to prevent a dealing directly, in a manner unconnected with its proper business, and not to prevent its acquiring an interest in lands incidentally, by way of mortgage, when necessary to protect its legal rights. "By a dealer in real estate we understand a person who buys and sells for the purpose of gain and profit," not one whose business is to loan money upon bonds, or notes and mortgages. Blunt v. Walker, 11 Wis. 334. And a prohibition in a charter from dealing in commercial paper does not prevent the receiving and selling notes given for lands sold by the corporation, the object of whose creation was the sale of lands. Buckley v. Briggs, 30 Mo. 452.

A wider meaning is given to the word when used not in a restrictive clause, but in a grant of power, as "to deal in bills of exchange," in a bank charter. It is then not confined to buying and selling bills, but includes the taking of them for to do with." This power necessarily extends to all transactions with bills of exchange which are in themselves lawful, and considered by the bank as expedient to enable it to transact its business or increase its profits. State Bank v. Knox,

I Ala. 148. There are various provisions in the English bankrupt acts that bona fide dealings with the bankrupt before the filing of the petition shall be deemed valid. The taking of goods by their true owner, out of the possession of a bankrupt, after a secret act of bankruptcy, is a dealing within these provisions. Graham v. Furber, 14 C. B. 134. An attachment or garnishee order is not. Ex parte Pillers, 17 Ch. Div. 653 (and see notes to Course). Where goods were deposited as security by a company, that subsequently became bankrupt, and after the payment of the debt the creditor refused to surrender them, because the company owed him an account for goods supplied, the parties were held to have had mutual dealings within a section of a bankrupt act allowing set-off in such cases. "Whatever comes within the description of an ordinary business transaction would be a dealing within the section." The set-off was not allowed in this case, on the ground that the act was only applicable where there is pecuniary liability

on both sides. Eberle's H. & R. Co. v. Jonas, 18 Q. B. D. 459; s. c., 35 W. R.

467.
The holder of a firm's accommodation tiated by him, is a dealer with the firm so as to be entitled to actual notice of dissolution. Johnson's definition of "deal" aption. Johnson's definition of "deal" approved: "to traffic; to transact business; to trade." Vernon v. Manhattan Co., 17 Wend. (N. Y.) 524. "Deal" and "traffic" were said to be synonymous in Clifford v. State, 29 Wis. 327.

1. The word "dealer" has presented

itself for interpretation in statutes imposing penalties for dealing or selling as a dealer without having been licensed so to do, or in statutes imposing license taxes upon dealers of different kinds. A dealer under these acts is one who buys goods, etc., and sells the same goods at a profit. One who buys raw material, manufactures it, and sells the manufactured product, is not a dealer, but a manufacturer. The former "depends for his profit not upon the labor he bestows upon his commodities, but upon the skill and foresight with which he watches the markets." Norris Bros. v. Comm., 27 Pa. St. 494; Comm. v. Campbell. 33 Pa. St. 385. These cases overruled, Berks Co. v. Bertolet, 13 Pa. St. 522, where a miller was held to be a dealer. A butcher is not a dealer. "He does not buy and sell the same article, and in the same condition as a mere trader." State v. Yearby, 82 N. C. 561. Nor is a farmer who sells the product of his farm, and occasionally that of his neighbors, at a market-stand in a city. He does not buy, but only sells. Barton v. Morris, 10 Phila. (Pa.) And see Ex parte Herbert, 2 Ves. & B. 399.

To constitute one a dealer, buying and selling must be his business: a single instance of buying and selling is not sufficient. "A dealer is one who makes successive sales as a business." One who owned a quantity of liquors and sold them in gross is not a wholesale dealer within a revenue act: by doing so, he shows a determination not to be a dealer. Overall v. Bezean, 37 Mich. 506. So one who had been licensed as a dealer in tobacco does not, by selling out his whole stock shortly after the expiration of his license, constitute himself a dealer. A single sale must, to subject one to the penalties of dealing without a license, be

DEAR.—See note 1.

accompanied by evidence of preparation and readiness to make other sales. Goodwin v. Clark, 65 Mo. 280; Archer v. St., 10 Tex. Ap. 482. But under the Vt. act of 1846 a single act is sufficient to constitute the offence of selling without a license as a retailer, who is defined by the act to be "any person who shall deal in the selling of distilled spirituous liquors, and in quantities of one pint or more and less than 20 gallons." State v. Bugbee, 22 Vt. 32; State v. Paddock, 24

Vt. 312. In construing the sections of the Revised Statutes of the United States on the subject (\$\\$ 3242 et seq.), a plurality of instances is held necessary to constitute the offence: but it is to be borne in mind that the only purpose of the tax laid upon dealers in liquors or other commodities is the raising of revenue, while the States issue licenses generally as a measure of police regulation. U. S. v. Jackson, I Hughes (C. C.), 531; U. S. v. Feigelstock, 14 Blatchf. (C. C.) 321. In the former case it was held that a few instances of selling liquor in small quantity by one having no bar-room and none of the usual appliances of liquor-dealers, and with no intention apparent of defrauding the national revenue is not sufficient to convict one of carrying on the business of a liquor-dealer without a license. The offence under the U.S. statutes, it is to be observed, is the "carrying on the business of a dealer." How many sales and what preparation and appointments of a bar-room are necessary in each case to amount to this, are for the jury. U. S. v. Jackson, I Hughes (C. C.), 531.

As to whether, in order to be a dealer in a particular commodity, a person must be principally occupied in the buying and selling of that commodity, the authorities On the one hand, one was held to be a dealer in spirituous, etc., liquors, though he is engaged in the general merchandise business, and sold whisky rather to accommodate his regular customers than to derive profit, and as a minor part of his business. Koopman v. State, 61 Ala. 70; Weil v. State. On the other hand, a general dry-goods merchant, who had tobacco in small quantities, and by way of variety sold it by the plug, is not a "dealer in tobacco." "The common-sense interpretation of the words 'dealer in tobacco,' as here used, must mean that it is the business of the party, his usual occupation, employment, vocation." When a party is indicted, however, for selling without a license under these circumstances, his good faith must be considered, i.e., whether he used the dry-goods business as a cover for his dealing in tobacco. Carter v. State, 44 Ala. 29.

A physician who keeps on hand intoxicating liquors for the purpose of sale and profit is a dealer within the meaning of an act prescribing a penalty for selling such liquors to minors. State v. Mc-

such liquors to mano... Bryer (N. C.), 2 S. E. Rep. 755. second-hand goods "to purcure a license. defined such a dealer to be "any person who keeps a store, office, or place of business for the purchase or sale of secondhand clothing, or garments of any kind, or second-hand goods, wares, or merchandise." Booksellers, who in addition to their regular business incidentally bought and sold old books, were held not to be within the meaning of the ordinance. The trading in old books was not their principal business, and dealers in old and rare books, like dealers in old paintings, are not to be construed to come under a classification with dealers in cast-off clothing. Eastman v. Chicago, 79 Ill. 178.

"In order to constitute one a dealer . . . it is not necessary that he should actually do the business in person or even that it should be done in his presence or by his express command. A merchant who keeps liquors in his store for sale, and clerks to deal it out in common with other commodities kept for sale, is equally liable for sales made by such clerks as if made by him in person; it is a dealing by him." And where the owner resides outside of the State, and the business of the store is managed by a general agent, the latter is liable to the penalty for dealing without a license. State v. Dow, 21 Vt. 484.

The term "wholesale dealers" in the

The term "wholesale dealers" in the U. S. Internal Rev. Act of 1864, as amended 13th July, 1866, includes commission-merchants. Slack v. Tucker, 23 Wall. (U. S.) 321. And see Bates v. State Bank, 2 Ala. 451.

Under an act requiring dealers in foreign wines to take out licenses before laying in their stocks, one begins to be a dealer from the time he buys with the intention of selling again, although he has yet sold nothing. The King v. Commrs. of Excise, 2 T. R. 381.

1. A devise by a husband to his "dear wife," not mentioning her name, applies exclusively to the individual who answers the description at the date of the will,

DEATH. (PRESUMPTION OF DEATH, see ABSENCE.)

- I. Right of Action for Causing Death,
- 2. Who may Bring the Action, 125.
- 3. Law of Place, 127.
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- 5. Effect on Actions, 130. (a) Abatement, 130.
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- (d) Judgment nunc pro tunc, 135. (e) Statute of Limitations, 136.
- 6. Effect on Contracts, 137.
- 7. Proof of Death, 140.

1. Right of Action for Causing Death.—It is well settled that at common law no damages can be recovered for occasioning the death of a human being. In England the law upon this subject. was completely changed in 1846 by the passage of Stat. 9 and 10 Vict. c. 62, commonly known as Lord Campbell's Act. By the terms of this statute it is provided that an action shall be maintainable against any person or corporation causing death through his or its wrongful act, neglect, or default, although the death may have been caused under such circumstances as amount to a felony. Statutes containing provisions substantially similar to those of Lord Campbell's Act are in force in all of the United States.2

2. Who may Bring the Action.—By the terms of most of these statutes giving a right of action for causing death it is provided that the right of action shall vest in the personal representatives of the deceased, and that the damages recovered shall inure to the

and not to an after-taken wife. Johnson v. Johnson, I Tenn. Ch. 621. "The original intent of the testator, every one will concede at once, was to give the property devised to his then existing wife. The words 'my dear wife' point to a person then existing, the qualifying adjective necessarily implying affection for an individual; such affection being, of course, inconceivable of a person not then occupying the designated rela-

A testator had a wife who survived him, but before his death he went through the ceremony of marriage with a woman whose Christian name was Caroline, and who continued to reside with him to the time of his death. Held, that under a devise made shortly before his death to " my dear wife Caroline," Caroline took. though the whole description was not applicable to her. Doe d. Gains v. Rouse, 5 C. B. 422. "The testator could hardly have meant to refer to the latter [his lawful wife] when he speaks of his dear wife, seeing that he had repudiated her, and contracted an engagement of some sort with another woman. There is an old maxim that veritas nominis tollit errorem demonstrationis.'

1. Higgins v. Butcher, Yelv. 89; Baker v. Bolton, I Camp. 493; Cross v. Guthery, 2 Root (Conn.), 90; Carey v. Berkshire

R. Co., Cush. (Mass.) 475; Skinner v. Housatonic R. Co., I Cush. (Mass.) 475; Housatonic K. Co., I Cush. (wass.) 475; Kearney v. Boston, etc., R. Co., 9 Cush. (Mass.) 108; Connecticut Ins. Co. v. N. Y., etc., R. Co., 25 Conn. 265; Richardson v. New York, etc., R. Co., 98 Mass. 85; Needham v. Grand Trunk R. Co., 38 Vt. 294; State v. Grand Trunk R. Co., 38 Mo. 176; Whitford v. Panama R. Co., 23 N. Y. 465; Penna. R. Co. v. Adams, 55 Pa. St. 499; Western, etc., R. Co. v. Strong, 52 Ga. 461; Woodward v. Michigan, etc., R. Co., 10 Ohio St. 121; Insurance Co. v. Brame, 95 U. S. 754. 2. Halsey v. Mobile & O. R. Co. et al.

7 Baxter (Tenn.), 239; s. c., 8 Am. & Eng. R. R. Cas. 541. In the construction of these acts it is universally held that an action is not maintainable unless the deceased could himself have sued for the injury done him had his death not taken place. If, therefore, the deceased was guilty of contributory negligence, no action is maintainable. So also where the death was occasioned by the act of a fellow-servant.

A statute authorizing the recovery of damages for negligently causing the death of a person is not unconstitutional. Carroll v. Mo. Pac. R. Co., 26 Am. & Eng. R. R. Cas. 268; Ga. R. Co. v. Pittman, 73 Ga. 325; s. c., 26 Am. & Eng. R. R. Cas. 474.

benefit of and be distributed among his widow and next of kin in such manner as is provided by law with reference to the estates of To this effect are the statutes of persons dying intestate.1 Alabama, Arkansas, Arizona, California, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky (in cases of death caused by the negligence of the servants or agents of railroad corporations). Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Iersey, New York, Nevada, North Carolina, Ohio,

1. Haley v. Mobile & O. R. Co. et al., 7 Baxter (Tenn.), 239; s. c., 8 Am. & Eng. R. R. Cas. 541. It is well settled that the term "personal representative employed in those statutes means the executor or administrator of the deceased. executor or administrator of the deceased, and not his next of kin. Chicago v. Major, 18 Ill. 349; Kramer v. Market St. R. Co., 24 Cal. 434; Whiton v. Chicago, etc., R. Co., 21 Wis. 305; Woodward v. Chicago, etc., R. Co., 23 Wis. 400; Needham v. Gr. Trunk R. Co., 38 Vt. 294; Boutiller v. Milwaukee, 8 Minn. 97; Hagan v. Kean, 3 Dill. 124; Ryall v. Kennedy, 8 Jones & Sp. (N. Y.) 347. And where it is provided that the action shall inure to the benefit of the widow or next of kin it is sufficient if

widow or next of kin, it is sufficient if any person answering either of these descriptions be in existence. Balt., etc., v. Major, 18 Ill. 349; McMahon v. New York, 33 N. Y. 642; Haggerty v. Central R. Co., 31 N. J. L. 349.

Husband and wife are not regarded as next of kin to each other. Townsend v. Radcliffe, 44 Ill. 446; Lucas v. N. Y., etc., R. Co., 21 Barb. 245; Dickens v. N. Y., etc., R. Co., 23 N. Y. 158; Drake v. Gilmore, 52 N. Y. 389; Adm. of Dunhene v. Ohio L. I. Co., r Disn. 257.

Suits by Foreign Administrators.-An administrator appointed by a foreign State may ordinarily institute an action to recover damages for causing the death of his decedent. Kansas Pacific R. Co. v. Cutter, 16 Kans. 568; South Carolina R. Co. v. Nix, 68 Ga. 572; Wabash, St. L. & P. R. Co. v. Shacklett, 105 Ill. 364; s. c., 12 Am. & Eng. R. R. Cas. 166; Jeffersonville, etc., R. Co. v. Hendricks, 41 Ind. 49; Kansas, etc., R. Co. v. Cutter, 16 Kans. 568; Taylor's Admr. v. Penna. Co., 7 Am. & Eng. R. R. Cas. 23. But see Commonwealth v. Sanford, 12 Gray, 174. But see, contra, Vawter, Admr., v. Missouri Pacific R. Co., 19 Am. & Eng. R. R. Cas. 176; Morris, Admr., v. Chicago, R. I. & P. R. Co., 19 Am. & Eng. R. R. Cas. 180. But see Limekiller, Admx., v. Hannibal & St. Jo. R. Co., 19 Am. & Eng. R. R. Cas. 181.

In Massachusetts it is held that an indictment under the act of 1840 against a railroad company to recover damages for the death of a person, occasioned by the negligence of the company's servants or agents, must set out distinctly that letters on the estate of the deceased have been taken out within the State, otherwise such indictment is demurrable. Comm. v. Sanford, 12 Gray, 174.

Where the death of a person has been caused within the limits of a State, his administrator may take out auxiliary letters there to enable him to recover damages, though the decedent has no property in the State. Hartford, etc., R. Co. v. Andrews, 36 Conn. 213. But see, contra, Perry v. St. Joseph & W. R. Co., 11 Am. & Eng. R. R. Cas. 663.

Parents may entertain suit to recover damages for the death of their minor damages for the death of their minor child. Duckworth v. Johnson, 4 H. & N. 653; Ewen v. Chicago & N. W. R. Co., 38 Wis. 613; Oldfield v. N. Y. & H. Riv. R. Co., 14 N. Y. 310; Ihl v. Forty-second St. R., 47 N. Y. 317; Penn. R. Co. v. Bantom, 54 Pa. St. 495; Chicago v. Scholten, 75 Ill. 468; Balt., etc., R. Co. v. Kelly, 24 Md. 271; Chicago v. Hesing, 82 Ill. 272 At least if there he any 83 Ill. 237. At least if there be any reasonable expectation that his services will be of value to them. Potter, Admr., v. C. & N. W. R. Co., 21 Wis. 372.

There must be a reasonable expectation of pecuniary benefit to the parents from the continuance of the child's life to entitle them to any damages for causing his death. Franklin v. Southeastern R. Co., 3 H. & N. 211; Walton v. Southeastern R. Co., 4 C. B. (N. S.) 296; Heatherington v. Northeastern R. Co., L. R. 11 Q. B. D. 160; Rain v. St. Louis Co. Louis, etc., R. Co., 71 Mo. 164; s. c., 5 Am. & Eng. R. R. Cas, 610.

Evidence of specific or particular pecuniary damage is, however, not essential to recovery. The jury may infer such damage unless there are facts in the case which render such inference impossible. Gorham v. New York Central R. Co. 23 Hun (N. Y.), 449; Ihl v. Forty-second St. R. Co., 47 N. Y. 317; Oldfield v. New York, etc., R. Co., 14 N. Y. 310; McOregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont,

Virginia, West Virginia, and Wisconsin.1

3. Law of Place.—The right of action for causing death is governed by the law of the place where the death is occasioned, and a recovery therefor can only be had in accordance with the law of the place where the injury occurred.2 It seems, however, that if the

Govern v. New York, etc., R. Co., 67 N. Y. 417; Nagel v. Missouri Pac. R. Co., 10 Am. & Eng. R. R. Cas. 702. But see Pennsylvania Co. v. Lilly, 73 Ind. 252; s. c., 4 Am. & Eng. R. R. Cas. 540.

It seems clear, moreover, that parents may recover for the death of a child who has attained his majority, provided that they can prove any pecuniary damage resulting to them therefrom, as, for exam-

ple, loss of support by him.

Where a person whose death has been occasioned by negligence leaves him surviving a widow but no children, and also parents, the right to recover damages for his death is, by virtue of the provisions of the Act of April 26, 1855 (P. L. 309), vested solely in the widow, and the parents are entitled to no part of the damages which said widow may recover.

Under the provisions of said Act parents are only entitled to recover damages for the death of a child where the family relation exists at the time of the accident. If the child be free, either by age or emancipation, and be living apart from his parents, and in no way con-tributing to their support, they cannot maintain such an action. Lehigh Iron Co. v. Rupp, 7 Am. & Eng. R. R. Cas.

The adult child of one who has been killed by a railroad company, and who has left neither widow nor minor child, cannot maintain an action against the company for damages. Mott v. Central R., 70 Ga. 680. Compare N. Y., L. E. & W. R. Co. v. Lockwood, 98 N. Y. 523.

1. In some States the statutes contain other provisions relative to the right to sue. In Alabama and California a father is entitled to recover damages for the death of a minor child; or if the father be dead, then the mother is held entitled to

recover such damages.

In Colorado the husband or wife of the deceased is held entitled to sue. If there be no husband or wife, the heirs of the deceased may maintain the action; if there be no heirs and the deceased be unmarried and a minor, the father and mother may sue jointly, or in case either be dead, then the survivor.

In Delaware the widow is held entitled to sue; if there be no widow, then the personal representatives may maintain an action.

In Georgia the widow may sue; if there be no widow, a child may maintain an action.

In Maryland such actions are brought in the name of the State to the use of such person or persons as would have been entitled to maintain an action had death not occurred.

In Kentucky the widow, heir, or per-

sonal representative may sue.

In Louisiana the minor children or widow may sue, or if there be none, then the father and mother of the deceased, or either, or both.

In Mississippi the husband or wife of the deceased may sue. If the wife, however, have children, the damages recovered must be shared by her with them in the manner specified by the intestate law. A father may sue for the death of his child, or, if the father be dead, the mother

In Missouri the law is substantially the

same as in Louisiana.

In Pennsylvania the husband, widow, children, or parents of the deceased may sue, but no other relative. The sum recovered goes to them in the proportion they would take the personal estate of the decedent in case of intestacy. where the husband, wife, or children of the deceased survive, his parents have no right of action, nor can they share in the damages recovered in an action brought to procure compensation for his death. Lehigh Iron Co. v. Rupp, 7 Am. & Eng. R. R. Cas. 25.

In Texas a suit may be brought by the husband, wife, children, or parents, or

any or all of them.

2. Ill. Cent. R. Co. v. Cragin., 71 Ill. 177; Hyde Admr. v. Wabash, St. L. & R. R. Co., 15 Am. & Eng. R. R. Cas. (Ia.) 503; State v. Pittsburg, etc., R. Co., (Ia.) 503; State v. Pittsburg, etc., R. Co., 45 Md. 41 (but see Berry v. Montgomery, etc., R. Co., 39 Ga. 554); Richard v. N. Y. Cent. R. Co., 98 Mass. 84; Whitford v. Panama R. Co., 23 N. Y. 465; Beach v. Bay State, etc., 30 Barb. (N. Y.) 433; Mahler v. Norwich, etc., Trans. Co., 35 N. Y. 352; Debevoise v. N. Y., L. E. & W. R. Co., 99 N. Y. 377; s. c., 25 Am. Eng. & R. R. Cas. 335; McDonald v. Mallory, 77 N. Y. 546; Crowley v. Panama R. laws of the State where the injury causing death has been inflicted authorize the bringing of an action, there is no good reason why those laws may not be recognized and given full effect to in a foreign tribunal, provided, of course, it be consistent with public policy.¹

4. Measure of Damages.—The proper measure of damages is the pecuniary loss suffered by the parties entitled to the sum to be recovered.² In estimating such damages the jury may also consider

Co., 30 Barb. (N. Y.) 99; Hover v. Penna. Co., 25 Ohio St. 667; Woodard v. Mich. S. & N. Ind. R. Co., 10 Ohio St. 121; Nashville, etc., R. Co. v. Eakin, 6 Coldw. (Tenn.) 582; Willis v. Mo. Pac. R. Co., 61 Tex. 432; s. c., 23 Am. & Eng. R. R. Cas. 379; Hagan v. Kean, 3 Dill. 124; Needham v. Grand Trunk R. Co., 38 Vt. 294; Balt., etc., R. Co. v. Wightman's Admr., 29 Gratt. (Va.) 431. Compare Central R. et al. v. Swinb., 73 Ga. 651; 8. c., 26 Am. & Eng. R. R. Cas. 482.

1. Woodard, Admx. v. Mich. S. & N. I. R. Co. vo. Ohio St. 121; McCarthy

1. Woodard. Admx. v. Mich. S. & N. I. R. Co., 10 Ohio St. 121; McCarthy, Admr. v. Chicago, R. I. & P. R. Co., 18 Kans 46; Hover v. Pennsylvania Co., 25 Ohio St. 667; Whitford v. Panama R. Co., 23 N. Y. 465; Leonard v. Columbia, 84 N. Y. 48; Nashville, etc., R. Co. v. Eakin, 6 Coldw. (Tenn.) 582; Vanderwerken v. New York, etc., R. Co., 6 Abb. Pr. (N. Y.) 269; Beach v. Bay State, etc., Co., 10 Abb. Pr. (N. Y.) 71; N. Y., L. E. & W. R. Co. v. Lockwood, 98 N. Y. 523; State v. Pittsburg, etc., R. Co., 45 Md. 41; Needham v. Grand Trunk R. Co., 38 Vt. 294; Mackay v. Central R. Co., 4 Fed. Rep. (U. S.) 617; Taylor v. Pennsylvania Co., 78 Ky. 348; s. c., 7 Am. & Eng. R. R. Cas. 23; State v. Pittsburg & Connellsville R. Co., 45 Md. 41; Hyde v. Wabash, St. L. & P. R. Co., 15 Am. & Eng. R. R. Cas. 503.

Causes of action arising under the statutes of one State may be enforced in the courts of another, when the laws of both States are substantially the same, and the action is not opposed to the general policy of the State in which suit isbrought. Selma, etc., R. Co. v. Lacey, 43 Ga. 461; Western, etc., R. Co. v. Strong. 52 Ga. 461; Stallknocht v. Penna. R. Co., 53 How. Pr. 305; Richardson v. New York, etc., R. Co., 98 Mass. 85; Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977; s. c. 8 Am. & Eng., R. R. Cas. 171; Nash ville & C. R. Co. v. Sprayberry, 8 Baxt. (Tenn.) 341; Dennick v. Central R. of N. J., 103 U. S. 11; s. c., 1 Am. & Eng. R. R. Cas. 309; Patton v. Pittsburg, C. & St. L. R. Co., 96 Pa. St. 169; s. c., 11 Am. & Eng. R. R. Cas. 658; Knight v. West Jersey R. Co., 108 Pa. St. 250;

Morris, Admr. v. Chicago, R. I. & P., Co., 19 Am. & Eng. R. R. Cas. 180. See, contra, McCarthy v. Chicago, etc., R. Co., 18 Kans. 46.

But where the suit is not in conformity with the laws or practice of such State, it does not lie. Richardson v. New York, etc., R. Co., 98 Mass. 85; Woodard v. Michigan, etc., R. Co., 10 Ohio St. 121.

When the statute is penal, it would seem that it would not be enforced in another jurisdiction. Bettys v. M. & St.

P. R. Co., 37 Wis. 323.

A right of action for causing the death of a human being given by a State statute may be enforced in the United States courts. Holmes v. Oregon, etc.,

R. Co., 5 Fed. Rep. (U. S.) 75.

2. In the following States the amount which can be recovered is limited to the sums named: Colorado, \$3000 to \$5000; Connecticut, \$500 to \$5000; Illinois, \$5000; Indiana, \$5000; Kansas, \$10,000; Maine, \$500 to \$5000; Mansachusetts, \$5000; Indiana, \$5000; Massachusetts, \$5000; Minnesota, \$5000; Missouri, \$5000; Mew York, \$5000; Ohio, \$10,000; Oregon, \$5000; Vest Virginia, \$5000; Visconsin, \$5000. Market Street R. Co. v. McKeever, 59 Cal. 294; s. c., 19 Am. & Eng. R. R. Cas. 123; Kansas, etc., R. Co. v. Miller, 2 Col. 442; Denver, S. P. & P. R. Co. v. Woodward, 4 Col. 1; Kansas Pac. R. Co. v. Lundin, 3 Col. 94; Southwestern R. Co. v. Lundin, 3 Col. 94; Southwestern R. Co. v. Johnson, 38 Ga. 409; David v. Southwestern R. Co., 41 Ga. 223; Cent. R. & B. Co. v. Roach, 64 Ga. 635; s. c., 8 Am. & Eng. R. R. Cas. 79; Chicago v. Majn, 18 Ill. 349; Chicago v. Scholten, 75 Ill. 468; Chicago v. Harwood, 80 Ill. 88; Chicago, etc., R. Co. v. Sykes (Ill.), 2 Am. & Eng. R. R. Cas. 254; Long v. Morrison, 14 Ind. 595; Beems' Admrs. v. C., R. I. & P. R. Co., 10 Am. & Eng. R. R. Cas. 658; Donaldson v. Miss, R. Co., 18 Iowa, 280; Beems v. Chicago, R. I. & P. R. Co., 10 Am. & Eng. R. R. Cas. 658; Covington Street R. Co. v. Packer, 9 Bush (Ky.), 455; Baltimore, etc., R. Co. v. Trainor, 33 Md. 542; Baltimore,

the decedent's personal character and mental and physical capacity.1

etc., R. Co. v. Kelly, 24 Md. 271; Hyatt v. Adams, 16 Mich. 180; Mynning v. Detroit, L. & N. R. Co., 23 Am. & Eng. R. R. Cas. 317; Scheffler v. Minneapolis & St. L. R. Co., 19 Am. & Eng. R. R. Cas. 173; James v. Christy, 18 Mo. 162; Porter v. Hannibal & St. Jo. R. Co., 71 Mo. 66; s. c., 2 Am. & Eng. R. R. Cas. 44; Owen v. Brockschmidt, 54 Mo. 285; Kesler v. Smith, 66 N. Car. 154; Paulmier v. Erie R. Co., 34 N. J. L. 151; Green v. Hudson R. R. Co., 32 Barb. (N. Y.) 125; Murphy v. N. Y. C. & H. Riv. R. Co., 88 N. Y. 445; s. c., 8 Am. & Eng. R. R. Cas. 490; Roeder v. Ormsby, 22 How. Pr. (N. Y.) 270; Pennsylvania R. Co. v. McCloskey's Admr., 23 Pa. St. 256; Huntingdon & B. R. Co. v. Decker, 84 Pa. St. 419; Pennsylvania R. Co. v. Butler, 57 Pa. St. 335; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282; Pennsylvania R. Co. v. Bantorn, 54 Pa. St. 495 Nashville, etc., R. Co. v. Stevens, 9 Heisk. (Tenn.) 12; March v. Walker, 48 Tex. 372; Kelley's Admr. v. Chicago, M. & St. P. R. Co., 50 Wis. 381: s. c., 2 Am. & Eng. R. R. Cas. 65; Barley v. Chicago R. Co., 4 Biss. (U. S.) 430; Blake v. Midland R. Co., 18 Ad. & Ell. (N. S.) 93; St. Lawrence & Ottawa R. Co. v. Lett, 11 Sup. Ct. Canada, 422; s. c., 26 Am. & Eng. R. R. Cas. 454. Contra, Bavary v. Grand Trunk R. Co., L. Can. Jur. 49.

Where a parent brings suit to recover damages for the death of a minor child occasioned by the negligence of the defendant, he is only entitled to recover the value of the child's services during minority, in addition to the expenses caused by the injury and death. Chicago v. Hesing, 83 Ill. 205; Chicago, etc., R. Co. v. Becker, 84 Ill. 483; Caldwell v. Brown, 53 Pa. St. 453; Barley v. Chicago, etc., R. Co., 4 Biss. 430. Kramer v. Waymark, L. R. I Exch. 241; St. Louis, Iron Mt. & S. R. Co. v. Freeman, 4 Am. & Eng. R. R. Cas. 608; Lehigh Iron Co. & Eng. R. R. Cas. 008; Lenigh from Co. v. Rupp., 7 Am. & Eng. R. R. Cas. 25; St. Jo. & W. R. Co. v. Wheeler, 26 Am. & Eng. R. R. Cas. 173; State of Md. v. Balt. & Ohio R. Co., 24 Md. 117; Pennsylvania R. Co. v. Kelly, 31 Pa. St. 370; Telfer Admr. v. N. R. R. Co., 30 N. J. L. 198; Walters v. Chicago, R. I. & Peoria R. Co., 36 Iowa, 458; Rockford, etc., R. Co. v. Delany, 82 Ill. 198; Mc-Govern v. New York, etc., R. Co., 67 N. Y. 417. But see, contra, Potter v. Chicago, etc., R. Co., 21 Wis. 372; s. c., 22 Wis. 615. In determining the value of these services it seems that the occupation and condition in life of the plaintiff may be taken into account. Ewen v. Chicago R. Co., 38 Wis. 613; Barley v. Chicago & Alton R. Co., 4 Biss. 430; Chicago v. Powers, 42 Ill. 169.

To authorize a verdict for substantial damages in an action by a parent for the negligent killing of his infant child it is not necessary to make proof of the amount of damages sustained. The jury may infer this from all the facts in evidence. Nagel v. Mo. Pac. R. Co., 75 Mo. 653; s. c., 10 Am. & Eng. R. R. Cas. 702; Gorham v. N. Y. C. R. Co., 23 Hun (N. Y.), 449; Ihl v. Forty-second Street R. Co., 47 N. Y. 317; Oldfield v. N. Y., etc., R. Co., 14 N. Y. 310; McGovern v. N. Y.. etc., R. Co., 67 N. Y. 417; Little Rock & F. S. R. Co. v. Barker, 39 Ark. 491; s. c., 19 Am. & Eng. R. R. Cas. 195. But see Pennsylvania Co. v. Lilly, 73 Ind. 282; s. c., 4 Am. & Eng. R. R. Cas. 540.

Fourteen hundred dollars' damages in an action by an administrator against a railroad company, to recover for gross negligence causing the death of the plaintiff's intestate, is not so large as to require reversal. C. & A. R. Co. v. Bonfield, 8 Am. & Eng. R. R. Cas. 493. See also Hoppe's Admr. v. Chicago, M. & St. P. R. Co., 61 Wis. 357; s. c., 19 Am. & Eng. R. R. Cas. 74; Pennsylvania R. Co. v. Banton, 54 Pa. St. 445: Louisville & N. R. Co. v. Connor, 9 Heisk. (Tenn.) 19; Chicago v. Majn, 18 Ill. 349: Cent. R. Co. v. Roach, 70 Ga. 434; Georgia R. Co. v. Pittman, 73 Ga. 325; s. c., 26 Am. & Eng. R. R. Cas. 474.

In an action to recover damages for a death caused by negligence it is the duty of the court to give some specific directions as to the measure of damages and not to leave the whole question to the jury. Chicago, B. & Q. R. Co. v. Sykes, 2: Am. & Eng. R. Ř. Cas. 254; Burlington, C. R. & N. R. R. Co., 15 Am. & Eng. R. R. Cas. 265; Kentucky Cent. R. Co.

R. R. Cas. 205; Kentucky Cent. K. Co. v. Gastineau's Admr., 7 Ky. L. Rep. 3.

1. Costello v. Landwehr, 28 Wis. 532; Macon, etc., R. Co. v. Johnson, 38 Ga. 409; Atlanta, etc., R. Co. v. Ayres. 53 Ga. 12; Balt., etc., R. Co. v. Trainor, 33 Md. 452; Atchison v. Twine. 9 Kans. 350; Shuber v. St. P., M. & M. R. Co. 2 Am. & Eng. R. R. Cas. 185; East. Tenn., V. & G. R. Co. v. White, 5 Lca. (Tenn.), 540; s. c., 8 Am. & Eng. R. R. Cas. 65; Johnson v. Chicago & N. R. Co., 25 Am. & Eng. R. R. Cas. 388; Georgia R. Co. v. Pittman, 73 Ga. 325; s. c., 26 Am. & Eng. R. R. Cas. 474.

In a few of the States exemplary damages are authorized by

Effect on Actions.—(a) ABATEMENT.—1. Before Judgment.—A distinction must be noted between an action and a right of action.

At common law an action is abated by the death of a sole plaintiff or defendant before judgment.2 This has been changed by

There is a limit, however, to what the jury will be permitted to consider in such cases as elements of damage. They cannot, for example, take into account "the opportunities of acquiring wealth or fortune by change of circumstances of life."
In Mansfield Coal & Coke Co. v. Mc-Enery, 8 Weekly Notes of Cases (Phila.), 83, the court below charged the jury that they might take such opportunities into consideration. The supreme court, however, declared the instruction erroneous.

1. Exemplary damages are authorized by statute in *Kentucky*, *California*, and Texas; so also under interpretation of the courts exemplary damages are allowed in Connecticut and in Tennessee. Goddard v. Grand Trunk R. Co., 2 Am.

Rep. 39.
2. Guyer v. Wookey, 18 Ill. 536; Boor v. Lowrey, 103 Ind. 468; Ryder v. Robinson, 2 Me. 127.

A divorce suit being a personal action, the death of either party before decree abates the divorce proceedings; and this effect extends to whatever is identified

with those proceedings.

Where, pending a suit by the wife for a divorce a mensa et thoro, the husband dies before a final decree, the court cannot, after the death of the husband, require his executor to become a party to the suit, to answer the demand of the wife for an additional allowance for counsel fees for services rendered in the cause during the lifetime of the husband, nor pass an order requiring such executor to pay the same. McCurley v. McCurley, 60 Md. 185; Stillman v. Hollenbeck, 4 Allen (Mass.), 391; Nettleton v. Dine-hart, 5 Cush. (Mass.) 543: Walters v. nart, 5 Cush. (Mass.) 543: Watters v. Nettleton, 5 Cush. (Mass.) 544; Torry v. Robertson, 24 Miss. 192; McClure v. Miller, 4 Hawks (N. Car.), 133; Estis v. Lenox, Cam. & N. (N. Car.) 72; Smith v. Walker, 2 Law Repr. (N. Car.) 245; Cuningham v. Jacques, 19 N. J. L. (4 Harr.), 42; Evans v. Cleveland, 72 N. Y. 482: Messlev v. Alb. N. R. Co. J. How. Harr.) 42; Evans v. Cleveland, 72 N. Y. 488; Moseley v. Alb. N. R. Co. 14 How. Pr. (N. Y.) 71; Vrooman v. Jones, 5 How. Pr. (N. Y.) 369; Wade v. Kalbfleisch, 58 N.Y. 282; Matter of Beckwiths, 87 N. Y. 503; Kissam v. Hamilton, 20 How. Pr. (N.Y.) 369; Freeman v. Frank, 10 Abb. Pr. (N.Y.) 370; Bradstreet v. Clark, 18 Wend. (N.Y.) 620; Wood v.

Phillips, 11 Abb. (N. S.) 1; Putnam v. Van Buren, 7 How. Pr. (N. Y.) 31; Kelsey v. Jewett, 34 Hun (N. Y.), 11.

An action against a trustee of a corporation organized under the General Manufacturing Act (chap. 40, Laws of 1848), to recover the penalty imposed by that act (§ 12), because of failure to make and file an annual report, is not within the provisions of the statute, authorizing the survivorship of certain actions for tort (2 R. S. 448, § 1), as it is not for "wrongs done to the property rights or interests of another;" and upon the death of the defendant the action cannot be revived against his personal representatives. Stokes v. Stickney, 96 N.Y. 323; Blake v. Griswold, 104 N. Y. 613; Signature v. Griswold, 104 N. Y. 013; Clarke v. McClelland, 9 Pa. St. 128; Hench v. Metzer, 6 S. & R. (Pa.) 272; Farmer v. Frey, 4 McCord (S. Car.), 160; Gibbs v. Belcher, 30 Tex. 79; Watson v. Loop, 12 Tex. 11: Whitcomb v. Cook, 38 Vt. 477; Wright v. Eldred, 2 D. Chip. (Vt.) 37; Drago v. Stead, 2 Rand. (Va.) 454. When it was agreed that the death of either party should not abate the suit, held, that the agreement was obligatory, and upon being entered upon the record it served as a release of error. Garlington v. Clutton, r Call (Va.), 520. See also Cox v. N. Y. C. & H. Riv. R. Co. 63 N. Y. 414 (reversing 4 Hun (N. Y.), 176).

Pending a suit against a lunatic represented by his committee, the lunatic dies, the committee ipso facto becomes functus officio, and the suit abates, and must be revived and proceed in the name of the lunatic's personal representative and heirs; and all proceedings had after lunatic's death, and before such revival, are void. Paxton v. Stuart, 80 Va. 873; Green v. Watkins, 6 Wheat. (U. S.) 260; Henshaw v. Miller, 17 How. (U. S.) 212; Hatch v. Eustis, I Gall. (U. S.) 160.

A husband filed his bill for a divorce from his wife a divorce was decreed, and the question of alimony continued to the next term of the court. Before the next term the husband died, and upon motion of the defendant's counsel the suit was abated as far as the alimony was concerned. Wren v. Moss, 6 Ill. 560. As to whether an action begun by an administrator or executor is abated by his death or may be continued by the administrator statute of Congress, and in many of the States, and also in England, so that if the cause of action survive, the suit may be continued by

the representative of the deceased.1

Originally, the death of one party would abate a suit where there were two or more plaintiffs or defendants, but by 8 & 9 Wm. III., c. 11, s. 7, it was enacted that, "If there be two or more plaintiffs or defendants and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs or against the surviving defendant or defendants, the writ or action shall not be thereby abated, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."2

de bonis non, see Crane v. Alling, 14 N. J. L. (Green), 593; Gormly v. Skinner, Wright (Ohio), 680; Portevant v. Pendle-

ton, 23 Miss. 25,

1. Phillips v. Ash, 63 Ala. 414; Chenault v. Walker, 22 Ala. 275; Ward v. Blackwood, 41 Ark. 295; Glisson v. Carter, 28 Ga. 516; Henderson v. Alex-Carter, 28 Ga. 510; Henderson v. Alexander. 2 Ga. 81; Neal v. Haygood, 1 Ga. 514; C. & E. I. Ry. Co. v. O'Connor, 19 Ill. App. 591; Holton v. Daly, 106 Ill. 131; Huggins v. Toler, 1 Bush (Ky.), 192; Woodman v. Richardson, 15 La. Ann. 508; Todd v. Young. 16 La. Ann. 162; Balt., etc., R. Co. v. Ritchie, 31 Md. 191; Absentity v. Moore 82 Mo. 67; Beler. Abernathy v. Moore, 83 Mo. 65; Baker v. Crandall, 78 Mo. 584; Farrell v. Brennan, 25 Mo. 88.

The provisions of the New York Code of Civil Procedure (§ 757, as amended by chap. 542, Laws of 1879) providing for the continuance of an action "in case of the death of a sole plaintiff or a sole defendant," when the cause of action survives, applies to a case where a sole plaintiff and a sole defendant are both dead.

It is obligatory upon the court to grant a motion to revive, made upon proper affidavits showing the necessary facts; no mere lapse of time can defeat the application. Holsman v. St. John, 90 N. Y. 461. See also Moore v. Hamilton, 44 N. V. 666; Livermore v. Bainbridge, 49 N. Y. 125; Wade v. Kalbfleisch, 58 N. Y. 282; Bond v. Smith, 4 Hun (N. Y.), 48; Morris v. Corson, 7 Cowen (N. Y.), 281; Potter v. Van Vranken, 36 N. Y. 619; Potter v. Van Vranken, 36 N. Y. 619; Moriarty v. Bartlett, 34 Hun (N. Y.), 272; Evans v. Cleveland, 72 N. Y. 488; Wood v. Phillips, 11 Abb. N. S. (N. Y.) 2; Mc Clure v. Miller, 4 Hawks (N. Car.), 133; Peeble v. N. Car. R. Co. 63 N. Car. 238; Estis v. Lenox, Cam. & N. (N. Car.) 72; Smith v. Walker, 2 Law Rep. (N. Car.) 245; Clindenin v. Allen, 4 N. H. 385; Parker v. Badger, 26 N. H. 466; Wilson v.

Knox, 12 N. H. 347; Sawyer v. Concord Rhox, 12 N. H. 347; Sawyer v. Controld R. Co. 58 N. H. 517; Miller v. Wilson, 24 Pa. St. 114; Clarke v. McClelland, 9 Pa. St. 1128; Nicholson v. Elton, 13 S. & R. (Pa.) 415; Watson v. Loop, 12 Tex. 11; Galveston City R. Co. v. Nolan, 53 11; Galveston City R. Co. v. Nolan, 53
Tex. 139; s. c., 3 Am. & Eng. R. R. Cas.
387; Barrett v. Copeland, 20 Vt. 244;
Dana v. Lull, 21 Vt. 383; Bellows v. Allen,
22 Vt. 108; Winhall v. Sawyer, 45 Vt.
466; Manwell v. Briggs, 17 Vt. 176;
Wright v. Eldred, 2 D. Chip. (Vt.) 37;
Cuningham v. Sayre, 21 Va. 440; Hatfield
v. Bushnell, 1 Blatchf. (U. S.) 393.

2. Rosser v. Timberlake, 78 Ala. 162; 2. Rosser v. Limberiake, 78 Ala. 102; Rupert v. Elston, 35 Ala. 79; Harrison v. King, Minor (Ala.), 364; Bundy v. Williams, I Root (Conn.), 543; Castor v. Pace, 24 Ga., 137; Todd v. Young, 16 La. Ann. 162; Boynton v. Rees, 9 Pick. (Mass.) 528; Wright v. Eldred, 2 D. Chip. (Vt.) 37; Haven v. Brown, 7 Greenl. (Me.) 421; Farrell v. Brennan, 25 Mo. 88; King v. Bell, 13 Neb. 409; Brinn v. Andrews, I Barb. (N. Y.) 227; Smith v. Ballard, 2 Hayw, (N. C.) 156; Breedlove v. Stump, 3 Yerg. (Tenn.) 257; Syme v. Sanders, 2 Strobh. (S. Car.) 332.

Where one of two plaintiffs in a supersedeas dies, the cause will abate as to the deceased and continue in the name of the survivor. Hairston v. Woods, o Leigh

(Va.), 308.

A suit against partners survives against the administrator of a 'deceased partner. Clark v. Stoddard, 3 Ala. 366; Travis v. Tartt, 8 Ala. 574. Compare Alexander v. Davidson, 2 McMull. (S. Car.) 49.

The death of a nominal party to a suit will not abate the suit. Campbell v. Strong, I Hempst. (U. S.) 265; Denton v. Stephens, 32 Miss. 194. Compare Humphreys v. Irvine, 14 Miss. 205.

An action against a husband and wife for a debt of the wife contracted before marriage is abated by the death of the

A right of action ex contractu, upon the death of either party. survives to and against the executor or administrator of the deceased. but in the case of torts, when the action must be in form ex delictu and the plea "not guilty," the rule is otherwise, and the maxim actio personalis moritur cum persona applies.2 The last statement is subject to the qualification that, if the wrong has caused a loss to the estate of the aggrieved party, or has been a

wife before judgment. Williams v. Kent, 15 Wend. (N. Y.) 360; Archer v. Colby, 4 Hen. & M. (Va.) 410. See also Nutz v. Reutter, I Watts (Pa.), 229; Donge v. Pearce, 13 Ala. 227.

When a husband and wife brought suit upon a claim of the wife, and the husband died, the suit survived to the wife, but upon her death the husband's adminis-Vaughan trator could not revive the suit. v. Wilson, 4 Hen. & M. (Va.) 452. See also McDowl v. Charles, 6 Johns. (N. Y.) Ch. 132.

If, pending a real action brought by husband and wife in her right, the wife die, the husband cannot proceed in that suit for his estate by the curtesy, but the suit abates. Ryder v. Robinson, 2 Me.

Where a decree has been issued against several executors or trustees ordering them to account, and one of them dies, the adverse party may revive the suit against the personal representatives of the deceased, or he may continue his suit against the survivors. Rogers v. Paterson, 4 Paige (N. Y.), 409.

Where the action has abated as to one

of two persons sued jointly, no judgment can be properly pronounced on a verdict against both, over a motion in arrest.

Barr v. Lowrey, 103 Ind. 468.

If one of two defendants dies before the writ is served, though after its date, the action abates as to both. Clark v. Holmes, I Root (Conn.), 486.

1. Nettles v. Barnett, 8 Porter (Ala.), 181; Trammell v. Harrell, 4 Ark. 602; Dempsey v. Hertzfield, 30 Ga. 866; Long v. Morrison, 14 Ind. 595; Jenkins v. French, 58 N. H. 532; Hunt v. Whitney, 4 Mass. 630; Mellen v. Baldwin, 4 Mass. 480; Wright v. Eldred, 2 D. Chip. (Vt.) 37; Roberts v. Barton, 27 Vt. 396; Stimpson v. Sprague, 6 Greenl. (Me.), 470.

An action for the breach of a promise of marriage, where no special damage is alleged, does not survive against the administrator of the promisor. Stebbins v. Palmer, 1 Pick. (Mass.) 71; Smith v. Sherman. 4 Cush. (Mass.) 408, Kelley v. Riley, 106 Mass. 339; s. c., 8 Am. Rep. 336; Chase v. Fitz, 132 Mass. 359; Hovey v. Page, 55 Me. 142; Wade v. Kalbfleisch, 58 N. Y. 282; s. c. 17 Am. Rep-250; Zabriski v. Smith, 13 N. Y. 322; Lat timore v. Simmons, 13 S. &. R. (Pa.) 183; Grubbs v. Sult. 32 Grat. (Va.), 203; s.c., 34 Am. Rep. 765; Chamberlain v. Wil-liamson, 2 M. & S. 408.

2. Coker v. Crozier, 5 Ala. 369; Ward v. Blackwood, 41 Ark. 295; Brawner v. Sterdevant, 9 Ga. 69; Newson v. Jackson, 29 Ga. 61; Shafer v. Grimes, 23 Ia. 550; Reed v. R. Co., 18 Ill. 403; Guyer v. Wookey, 18 Ill. 536; Long v. Morrison, 14 Ind. 595; Walters v. Nettleton, 5. Cush. (Mass.) 544; Cutting v. Tower, 14. Gray (Mass.), 183; Read v. Hatch, 19. Pick. (Mass.) 47; Holmes v. Moore, 5. Pick. (Mass.) 257; Little v. Conant, 2 Pick. rick. (Mass.) 257; Little v. Conant, 2 Pick. (Mass.) 527; Green v. Hudson Riv. R. Co., 28 Barb. (N. Y.) 9; Whitford v. Panama R. Co., 23 N. Y. 465; People v. Tioga Com. Pleas, 19 Wend. (N. Y.) 73; Zabriski v. Smith. 13 N. Y. 322; Stokes v. Stickney, 96 N. Y. 323; Price v. Price, 75 N. Y. 244; Hegerich v. Keddie, 99 N. Y. 258; Kelsey v. Jewett. 24 Hug. 75 N. Y. 244; Inegerica v. Reddie, 99. N. Y. 258; Kelsey v. Jewett, 34 Hun (N. Y.), 11; Cregin v. R. Co., 75 N. Y. 192; Murphy v. R. Co., 31 Hun (N. Y.), 358; Wilson v. Knox, 12 N. H. 347; Wyatt v. Williams, 43 N. H. 102; Sawyer v. Concord R. Co., 58 N. H. 517; Jen-kins v. French. 58 N. H. 532; Grim v. Carr, 31 Pa. St. 533; Reed v. Cist, 7 Serg. & R. (Pa.) 184

Where a plaintiff sued in form ex delicto, and the defendant died before judgment, the action cannot be revived against. the personal representative of the deceased. Huff v. Watkins, 20 S. Car. 477; Chaplin v. Barrett, 12 Rich. (S. Car.) 284;; Chaplin v. Barrett, 12 Rich. (S. Car.) 284; Nettles v. D'Oyley, 2 Brevard (S. Car.), 27; Winhall v. Sawyer, 45 Vt. 466; Whitcomb v. Cook, 38 Vt. 477; Barrett v. Copeland, 20 Vt. 244; Wright v. El-dred, 2 D. Chip. (Vt.) 37; Woodward v. Chicago R. Co., 23 Wis. 400. At common law actions on penal

statutes do not survive (Com. Dig. tit. Administration, B. 15), and there is no act of Congress which establishes any other rule in respect to actions on the penal statutes of the United States. Schreiber v. Sharpless, 110 U. S. 76; Henshaw v. Miller, 17 How. (U. S.) 212; U. S. v. Daniel, 6 How. (U. S.) 11. source of profit to the offender, the right of action will survive to the representative of the deceased.

In equity, the death of either pending the suit does not, where the cause of action survives, amount to a determination of the suit?

1. "It may be conceded that by the old common law prior to 4 Edward III., c. 7, and 31 Edward III., c. 11—the general rule in cases of torts and in actions ex delicto was, that upon the death of either party the right of action did not survive to or against the personal representative of either. But by these statutes, which were passed long before the emigration of our ancestors, and which, under the authorities above cited, constitute a part of the common law, this rule was altered in its relations to personal property and in favor of the personal representative of the party injured. The extent and effect of that alteration, as gathered from a careful examination of the numerous authorities, may, we think, without going into particulars, be briefly stated thus: Under the operation of these statutes, and the adjudications thereunder, it was held that the cause of action for any wrong to personal property, by which it was rendered less beneficial to the injured party, survived to his personal repre-It was also held that wrongs sentative. contemplated by these statutes were not limited to injuries to specific articles of personal property, but extended to other wrongs by which his personal estate was injured or diminished in value, etc." Baker v. Crandall, 78 Mo. 584; Roberts v. Nelson, 86 Mo. 21; Higgins v. Breen, 9 Mo. 497; James v. Christy, 18 Mo. 162.

The assignability and survivability of things in action have frequently been held to be convertible terms, and perhaps furnish as clear and intelligible a rule to determine what injuries to property rights or interests are meant by the statute, as it is possible to lay down. People v. Tioga Co. Com. Pleas, 19 Wind. (N. Y.) 73; Nettles v. Barnett, 8 Porter (Ala.), 181; Ward v. Blackwood, 41 Ark. 295; Coleman v. Woodworth, 28 Cal. 567; Burr v. Lowrey, 103 Ind. 468; Reed v. R. Co., 18 Ill. 403; Carson v. McFadden, 10 Iowa, 91; McKinley v. McGregor, 10 Iowa, 91; Shafer v. Grimes, 23 Iowa, 550; Nutting v. Goodridge, 46 Me. 82; Hooper v. Gorham, 45 Me. 209; Pitts v. Hale, 3 Mass. 321; Meilen v. Baldwin, 4 Mass. 480; Stetson v. Kempton, 13 Mass. 272; Cravath v. Plympton, 13 Mass. 459; Jones v. Hoar, 5 Pick. (Mass.) 285; Wilbur v. Gilmore, 21 Pick. (Mass.) 250; Arnold v. Lanier, 4 Law Rep. (N. Car.) 529;

Smith v. Walker, 2 Law Rep. (N. Car.) 245; Whealey v. Lane, I Sandf. (N. Y.) 217; Byxbie v. Wood, 24 N. Y. 607; People v. Gibbs, 9 Wend. (N. Y.) 29; Benjamin's Exrs. v. Smith, 17 Wend. (N. Y.) 208; Freeman v. Frank, 10 Abb. Pr. (N. Y.) 370; Haight v. Hoyt, 19 N. Y. 464; Kelsey v. Jewett, 34 Hun (N. Y.), 11; Moriarty v. Bartlett, 34 Hun (N. Y.), 272; Cregin v. R. Co., 75 N. Y. 192; Murphy v. R. Co., 31 Hun (N. Y.), 358; Tichenor v. Hayes, 41 N. J. L. 193; s. c., 32 Am. Rep. 186; 9 Cent. L. J. 470; Bayard v. Holmes, 23 N. J. L. 113; Ten Eyck v. Runk, 31 N. J. L. 428; Cooper v. Crane, 9 N. J. L. 173; Wittum v. Gilman, 48 N. H. 416; Jenkins v. French, 58 N. H. 532; Wilson v. Knox, 12 N. H. 347; Sawyer v. Concord R. Co., 58 N. H. 517; Jenkins v. French, 58 N. H. 532; M. E. Church v. Rench, 7 Ohio St. 370; Wolf v. Wall, 40 Ohio St. 111; Reed v. Cist, 7 Serg. & R. (Pa.) 184; Nettles v. D'Oyley, 2 Brevard (S. Car.), 27; Middleton v. Robinson, I Bay (S. Car.), 58; Watson v. Loop, 12 Tex. 11; Lee v. Cooke, Gilmer (Va.), 331; Dana v. Lull, 21 Vt. 383; Bellows v. Allen, 22 Vt. 108; Wright v. Eldred, 2 D. Chip. (Vt.) 37; Woodward v. Chicago R. Co., 23 Wis. 400; Henshaw v. Miller, 17 How. (U. S.) 212; U. S. v. Daniel, 6 How. (U. S.) 11; Kirk v. Du Bois, 28 Fed. Rep. 460; Hambly v. Trott, Cowp. 372.

Cowp. 372.

2. "The death of a party pending a suit does not, where the cause of action survives, amount to a determination of the suit. It might, in suits at common law, upon the mere principles of that law have produced an abatement of the suit which would have destroyed it. But in courts of equity, an abatement of the suit by the death of the party has always been held to have a very different effect; for such abatement amounts to a mere suspension, and not to a determination It may again be put in of the suit. motion by a bill of revivor; and the proceedings being revived, the court proceeds to its determination as an original bill." Clarke v. Mathewson, 12 Pet.(U.S.) 164; Howard v. Bank of Darien, R. M. Charlt. (Ga.) 216; Harper v. Drake, 14 Ia. 533; Evans v. Cleveland, 72 N. Y. 488; Lachaise v. Libby, 13 Abb. Pr. (N. Y.) 6; s. c., 21 How. Pr. (N. Y.) 362; Lynde v. O'Donnell, 12 Abb. Pr. (N. Y.) In admiralty, the proceeding being in rem, the death of a party does not cause an action to abate.¹

2. After Judgment.—The death of the plaintiff in error after judgment and before assignment of error abates the writ. The death of the plaintiff in error after assignment of error, or the death of the defendant in error either before or after the assignment of error, does not abate the writ.²

(b) ATTACHMENT.—At common law and by statute in a number of the States an attachment is dissolved by the death of the defendant before judgment.³ By statutes and decisions under

286; s. c., 21 How. Pr. (N. Y.) 34; Hall v. Clifton, 2 McCord (S. Car.), 88; Towers v. Birchett, 12 Leigh (Va.), 173.

The death of a party to a suit in chancery does not abate it, until an order of the court is entered abating it. Crook v. Turpin, 10 B. Mon. (Ky.) 243. Compare Gleen v. Clapp, 11 Gill. & J. (Md.) 1.

1. Penhallow v. Doane, 3 Dall. (U.S)

2. Green v. Watkins, 6 Wheat. (U. S.)
260). See also Turner v. Booker, 2 Dana (Ky.), 335; Tony v. Robertson, 24 Miss.
192; Jenney v. Jenney, 14 Mass. 232; Carrollton v. Rhomberg, 78 Mo. 547; Lewis v. R. Co., 59 Mo. 495; Woehrlin v. Schaffer, 17 Mo. App. 442; Remmler v. Shennit, 15 Mo. App. 192; Blake v. Griswold, 104 N.Y. 613; Smith v. Kibbe, 31 Hun (N. Y.), 390; Comstock v. Dodge, 43 How. Pr. (N. Y.) 97; Benjamin v. Smith, 17 Wend. (N. Y.) 208; Ireland v. Litchfield, 8 Bosw. (N. Y.) 634; Long v. Hitchcock, 3 Ohio, 274; Gemmil v. Butler, 4 Pa. St. 232; Kimbrough v. Mitchell, I Head (Tenn.), 530; Harrison v. Moseley, 31 Tex. 608; Galveston City R. Co. v. Michael Nolan, 53 Tex. 139; s. c., 3 Am. & Eng. R. R. Cas. 387.
3. By the common law the death of a sole defendant at any time before final

3. By the common law the death of a sole defendant at any time before final judgment would have abated the suit altogether, and no judgment could have been rendered therein. The suit must have been dismissed; any attachment made therein dissolved and lost; and the plaintiff put to a new action against the executor or administrator of the deceased, in which the writ would authorize neither an arrest nor an attachment of real estate. Vaughn v. Sturtevant, 7 R. I. 372; Upham v. Dodge, 11 R. I. 621; Dwyer v. Benedict, 12 R. I. 459.

In Davenport v. Tilton, 10 Met. (Mass.) 320. Shaw, C.J., said: "As a question

In Davenport v. Tilton, 10 Met. (Mass.) 320. Shaw, C.J., said: "As a question of policy and expediency we are inclined to the opinion that when it becomes necessary to settle and close up the affairs of a debtor, whether at his decease or during his life, true equity

would require that all his property, which has not become appropriated and vested by his own act or the operation of law, should be applied to the payment of all his debts, and that an attachment on mesne process, being a sequestration of his property, and placing it provisionally in the custody of the law, should give way to the more general sequestration of all his property for the satisfaction of all his debts. In that case the creditor will receive the whole amount of his debt if there be assets, and his satisfaction pro rata if there be a deficit; and as between him and other creditors there seems no equitable ground on which he should have more. Such is the law in Massachusetts, in regard to the settlement of the estate of a deceased insolvent debtor. where the settlement and distribution of the estate must necessarily be final. Upon the appointment of an administrator who takes the property as trustee for all the creditors, all attachments on mesne process are dissolved." Parsons v. Merrill, 5 Metc. (Mass.) 359; Day v. Lamb, 6

Gray (Mass.), 523.

"The death of the defendant, pendente lite, of necessity works a loss of the lien created by the levy of the attachment on real estate. If he dies intestate, the lands descend immediately to his heirs; or, if he dies testate, they pass to his devisees. The personal representative takes no estate or interest in them, and a judgment against him will not bind them. No other than real actions, under our statutes, are capable of revivor for or against heirs or devisees. As the title resides in them, and they cannot be made parties, no judgment can be rendered by which they are to be divested of their estate, though the levy created a lien continuing during the life of the ancestor. This is the frailty and uncertainty of the lien, as the statutes have created it." Phillips v. Ash, 63 Ala. 414. In the same case the court held that the attachment lien on personal property was not lost by the death of the de-

them an attachment is held good in some States notwithstanding the death of the defendant.1

(c) BAIL.—The death of the principal after the return to a ca. sa. fixes definitely the liability of the bail, but a principal's death before

bail is legally fixed discharges their obligation.2

(d) JUDGMENT Nunc pro Tunc.—If the right of a party to a suit has been established by verdict, non-suit, report of referees, or the like, and for any reason the case is held sub judice, and during such time a party dies, judgment will be ordered nunc pro tunc, or such other

fendant. See also Lipscomb v. McClellan, 72 Ala. 151.

In Pennsylvania, the death of the defendant before judgment dissolves the attachment lien unless special bail shall have been entered. Fitch v. Ross, 4 Serg. & R. (Pa.) 557. See also Pancoast v. Corp. of Washington, 5 Cranch (U. S.) C. C. 507

In California the court was divided, but the decision rendered was that the attachment lien was lost upon the death of the defendant before judgment. Myers v. Mott, 29 Cal. 359; Hensley v. Morgan, 47 Cal. 622.

In South Carolina, the attachment abates upon the death of the defendant, but where the garnishees made default it was held that the death of the defendant after judgment against the garnishees did not abate the proceedings Kennedy v. Raguet, I against them. Bay (S. Car.), 484.

In Louisiana, the lien by attachment is lost upon the death of the defendant.

Colling v. Duffy, 7 La. Ann. 39.

1. All personal actions, which may be commenced by attachment, or in the course of which an ancillary attachment may issue (except actions for injuries to the person or reputation), survive for and against the personal representatives of the respective parties. Code of 1876, § The death of the defendant, after the levy of the attachment, causes a temporary suspension, or abatement of the suit, which must be cured by a revivor against his personal representative. The title 1) all personal property of a deceased person devolves, by operation of law, on his personal representative. Death works a change of the parties to the suit, but, of itself, does not dissolve the attachment, or impair its lien on personal prop-For, when the revivor is had against the personal representative, there is before the court the party having the title; and if judgment is rendered against him, it operates directly on the property; and a venditioni exponas, or a fieri facias, may be issued upon it. under which a sale may be made for the satisfaction of the judgment. But, if the estate of the defendant has been judicially declared insolvent, then the lien is lost. judicial ascertainment of the insolvency takes away all right to execution on the judgment, and transfers to the court as-certaining it exclusive jurisdiction to marshal and distribute the assets, and of all debts and claims chargeable upon them; and the statute intervenes, and declares the order in which debts and claims are to be paid. Phillips v. Ash, 63 Ala. 414. In this case it was also decided that the draft of the defendant does destroy the attachment lien on real property.

See also Norfolk v. Ingram, 53 Ala. v. Allen, 34 Iowa, 281; Ridlon v. Cressey, 65 Me. 128; Willard v. Whitney, 49 Me. 235; Bethel v. Judge of Sup. Ct., 57 Mich. 379; Lowenberg v. Tisoni, 62 Miss. 19; Abernathy v. Moore, 83 Mc. 65; Smith. v. Warden, 35 N. J. L. 346; Moore v. Thayer, 6 How Pr. (N. Y.) 47; Thacher v. Bancroft, 15 Abb. Pr. (N. Y.) 243; Perkins v. Nowell, 6 Humph. (Tenn.) 151; Boyd v. Roberts, 10 Heisk. (Tenn.) 474; Snell v. Allen, 1 Swan (Tenn.), 208; White v. Heavner, 7 W. Va. 324.

2. Pynes v. State, 45 Ala. 52; Champion v. Noyes, 2 Mass. 481; Bradford v. Earle, 4 Pick. (Mass.) 120; Wheeler v. Wheeler, 7 Mass. 169; Olcott v. Lilly, 4
Johns. (N. Y.) 407; White v. Blake, 22
Wend. (N. Y.) 612; Walsh v. Schulz, 67
How. Pr. (N. Y.) 173.

Where the bail on recognizance in a criminal case could not reasonably anticipate and prevent a default, and with proper diligence find and surrender his principal after default, before death intervened to prevent it, a proper case is made for the court, in its discretion, to relieve the surety, on petition. State v. Trap hagen, 45 N. J. 134; City v. Haslitt, 14 Phila. (Pa.) 138; Davidson v. Taylor, 12 Wheat. (U. S.) 604; Taney v. Berry, 2 Ld. Raym. 1452; s. c., 2 Strange, 717; Glyer v. Yates, 2 Strange, 517; Richardson v. Gransten. 6 Term R. 284; Petersdorff on Buil 339.

proceedings will be permitted as will secure the benefits and advantages of the verdict.¹

(e) STATUTE OF LIMITATIONS.—The death of debtor or creditor after an action has accrued, and the statute has commenced to run, does not impede the operation of the Statute of Limitations, un-

less otherwise provided in the statute itself.2

6. Effect on Contracts.—" Where a contract with a deceased person is of an executory nature, and the personal representative can fairly and sufficiently execute all that the deceased could have done, he may do so, and enforce the contract; but where the contract is of a strictly personal nature, the death of a party absolutely determines it." 3

1. The rule established by the general concurrence of the American and English courts is: that where the delay in rendering judgment or decree arises from the act of the court,-that is, when the delay has been for its convenience, or has been caused by the multiplicity or press of business or the intricacy of the question involved, or for any other cause not attributable to the laches of the parties, but within the control of the court. -the judgment may be entered retrospectively, as of a time when it should or might have been entered up. Mitchell v. Overman, 103 U. S. 62; Bank v. Weisiger, 2 Peters (U. S.), 481; Clay v. Smith, 3 Peters (U. S.), 411; Griswold v. Hill, 1 Paine (U. S.), 483; 411; Griswold v. Hill, I Pathe (U. S.), 483; Brown v. Wheeler, 18 Conn. 199; Lewis v. Soper, 44 Me. 72; Goddard v. Bolster, 6 Me. 427; Perry v. Wilson, 7 Mass. 393; Currier v. Lowell, 16 Pick. (Mass.) 170; Stickney v. Davis, 17 Pick. (Mass.) 169; Burnham v. Dalling, 16 N. J. Eq. 310; Kissam v. Hamilton, 20 How. Pr. (N. Y.) 369; Diefendorf v. House, 9 How. Pr. (N. Y.) 243; Ehle v. Moyer, 8 How. Pr. (N. Y.) 244; Ogden v. Lee, 3 How. Pr. (N. Y.) 153; Gurney v. Parks, 1 How. Pr. (N. Y.) 140; Spalding v. Congdon, 18 Wend. (N. Y.) 543; Ryghtmyre v. Raymond, 12 Wend. (N. Y.) 245; Burhaus v. Burhaus, 10 Wend. (N. Y.) 601; Bradstreet v. Clark, 18 Wend. (N. Y.) 620; Crawford v. Wilson, 4 Barb. (N. Y.) 504; Dial v. Holter, 6 Ohio St., 228.

2. Daniel v. Day, 51 Ala. 431; Johnson v. Wren, 3 Stew. (Ala.) 172; Pipkin v. Hewlett, 17 Ala. 291; Peoria Co. v. Gordon, 82 Ill. 435; Kistler v. Hereth, 75 Ind. 177; Baker v. Baker, 13 B. Mon. (Ky.) 406; Bearsephemy v. Mudd. 2 Bibb (Ky.) Brown v. Wheeler, 18 Conn. 199; Lewis

2. Daniel v. Day, 51 Ala. 431; Johnson v. Wren, 3 Stew. (Ala.) 172; Pipkin v. Hewlett, 17 Ala. 291; Peoria Co. v. Gordon, 82 Ill. 435; Kistler v. Hereth, 75 Ind. 177; Baker v. Baker, 13 B. Mon. (Ky.) 406; Bearschamp v. Mudd, 2 Bibb (Ky.), 537; Hull v. Deatley, 7 Bush (Ky.), 687; Young v. Mackall, 4 Md. 362; Stewart v. Spedden, 5 Md. 433; Richards v. Hutchinson, 18 Nev. 215; Sanford v. Sanford, 62 N. Y. 553; Granger v. Granger, 6 Ohio, 35; Brigg v. Sumner, I McMull. (S. Car.)

333; Jackson v. Hitt, 12 Vt. 285; Hayman v. Keally, 3 Cranch (U. S.) C. C. 325; Meeks v. Vassault, 3 Sawyer (U. S.), 206.

3. 1 Parsons on Contracts, 145.

Where a contract creates between the parties merely a personal relation, the death of either party dissolves that relation.

A written contract between a sewingmachine company and W. recited a sale by the former to the latter of 100 Howe sewing-machines, for the price of which W. had given a series of notes; the company stipulating to accept, on or before their maturity, the amount due thereon in notes of sub-purchasers drawn to the order of W. and guaranteed by him. The company was to ship to W. a specified number of the machines monthly, and W. agreed to sell them within a specified territory at the regular retail prices established by the company, and to deal only in its machines. After 15 machines (which had been paid for) were delivered, W. died. Held, that his undertaking was personal to himself, and the duty of further performance did not devolve on the administratrix of his estate. Howe S. M. Co. v. Rosensteel, 24 Fed. Repr. 583.

Where an executory contract is of a strictly personal nature, the death of a party by whom work is to be done before its completion, determines the contract, unless what remains to be executed can certainly be done to the same purpose by another; but where the personal representative can fairly and sufficiently execute all the deceased could have done, he may do so and enforce the contract; and e converso the personal representative is bound to complete such contract, and if he does not, may be made to pay damages out of the assets. Janin v. Browne,

59 Cal. 37.
"In I Chitty's Pleading, 19, it is said

that no action lies against the executor upon a covenant to be performed by the testator in person, and which consequently the executor cannot perform; and again, in Chitty on Contracts, 138, that death, though not in general a re-vocation of an agreement, may be such when the engagement is a personal one. to be performed by the deceased himself. and requiring personal skill or taste.

"In Pollock on Contracts, 4th Eng. Ed. 374, the principle is thus stated: 'All contracts for personal service, which can be performed only during the life of the contracting party, are subject to the implied condition that he shall live to perform them, and should he die, his executor is not liable to an action for the breach of contract occasioned by his

death.

"In such cases, it is held that the act of God furnishes an excuse sufficient. Accordingly in Bourt v. Firth, 4 Court of C. P., I, a plea to an action on an apprentice-bond, that the apprentice was prevented by sickness from performing the contract, was ruled to be a valid plea, and the defence a good one, the court saying that the incapacity, by reason of the intervention of an act of God, to perform personal service, is an excuse for its non-performance, notwithstanding an absolute and unconditional covenant to render the same; and again in Farrow v. Wilson, reported in the same volume at page 744, it was held that where one party covenanted to serve another as farmbailiff, the death of either party dissolved the contract-such being an implied condition, it was said, in every contract for personal services-and the same doctrine has been recognized in Robinson v. Davidson, 6 Court of Exchequer, 268; Taylor v. Caldwell, 113 E. C. L. Rep. 826; Dickey v. Linscott, 20 Me. 453. Siles v. Gray, 86 N. Car. 566.

A contract for the cutting of timber

which does not necessarily involve the personal skill or expert knowledge of the contractor, and which by its terms is extended to the heirs, executors, and administrators of the parties, and which can be completed within a reasonable time, survives the death of one or both the contracting parties. In such case the life tenant and the personal representatives of the deceased contractor are not chargeable as for waste by cutting timber, in continuing to fulfil such contract, according to its terms, after the death of the parties thereto. Billings' Appeal, 106

Pa. St. 558.

A contract, the duration of which is not fixed, to pay a reasonable compensation for the board, tuition, and clothing of a person whom the promisor is not bound to support, is terminated by the death of the promisor; and an action cannot be maintained against his executor for anything subsequently furnished, although the executor has not given notice of the death. Browne v. McDonald, 120 Mass.

The death of a mortgagor revokes a power in the mortgage authorizing a sale to reimburse the mortgagee. Miller v. McDonald, 72 Ga. 20.

An offer in writing to subscribe to the

capital stock of a railroad company, conditioned upon the construction of its line of road along a designated route, is revocable at the option of the party making such offer at any time before its delivery to and acceptance by such company; and his death before such delivery and acceptance works such revocation. Wallace v. Townsend, 43 Ohio St. 537; s. c., 25 Am. & Eng. R. R. Cas. 20.

The death of the drawer of a check before its presentation does not operate as a revocation of the check. Lewis v. Internat. Bank, 13 Mo. App. 202. See also Lawson v. Lawson, 1 P. Wms. 441; Rodick v. Landere, 12 Beav. 325; s. c., I De G., M. & G. 763; Billing v. Devaux, Man. & G. 571; Rolls v. Pierce, 5 Ch.

Ďiv. 730.

H., who held in his own name, but for the benefit of W., a second mortgage on an unfinished building, as collateral security for a large indebtedness of W. to him, at the request of the mortgagor and to enable him to raise money on the property to finish the building, released the mortgage and gave up the mortgage note, on the parol promise of the mortgagor when the building was finished to give him another mortgage of the same amount on it. W. had no knowledge of the transaction. The mortgagor never completed the building or gave a new mortgage, and was personally bankrupt. H. died soon after. In a suit of W. against his executors for an account of the security placed in his hands, it was held, that the claim on H. for the wrongful release of the security did not die with him, but was good against his estate. Whittemore v. Hamilton, 51 Conn. 153. "Contracts ordinarily bind the exec-

utors and administrators of the contracting parties. That is the usual rule in executory agreements. But in some few cases performance may be excused. as for instance when performance was prevented by act of law (Jones v. Judd. 4 N. Y. 412), or where rendered impossible by act of God, and without fault of contracting parties, such as sickness, or death, of the party contracting to render services, or the death of either of the contracting parties, where skilled, personal services are contemplated, as in Spalding v. Rosa, 71 N.Y. 40; People v. Globe Ins. Co., 91 N.Y. 174." Martin v.

Hunt, I Allen (Mass.), 418.

In contracts for ordinary hired labor the performance of the contract is excused only by the death of the party by whom alone the contract can be performed. If the servant dies, the further performance becomes impossible, and then his representative may recover for the services performed, full performance being excused. Lacy v. Getman, 35 Hun (N. Y.), 46. See also Wolfe v. Howes, 20 N. Y. 197; s. c., 24 Barb. 174; Clark v. Gilbert, 32 N. Y. 576 (reversing 26 N. Y. 279); Spalding v. Rosa, 71 N. Y. 40; Harrington v. Fall River Iron Works Co., 119 Mass. 82; Greene v. Linton, 7 Porter (Ala.), 133.

The death of a party revokes the appointment of his attorney. The attorney of the ancestor does not become the attorney of the heirs without a new appointment. Putnam v. Buren, 7 How. Pr.

(N. Y.) 31.

Agents.-The power of an agent, unless coupled with an interest, is revoked by the death of the principal, and an act done by the agent after his principal's death is yoid, though the fact was unknown to the agent at the time. Hunt v. Rousmaniere, 8 Wheat. (U.S.) 174; Galt v. Galloway, 4 Peters (U.S.), 332; Bank of Washington v. Peirson, 2 Cranch C. C. (U. S.) 389; Saltmarsh v. Smith, 32 Ala. 404; Scruggs v. Driver, 31 Ala. 274; Travers v. Crane, 15 Cal. 12; Ferris v. Irving, 28 Cal. 645; McGriff v. Porter, 5 Fla. 373; Johnson v. Wilcox, 25 Ind. 182; Lewis v. Kerr, 17 Iowa, 73; Shiff v. Lesseps, 22 La. Ann. 185; Mar-Merry v. Lynch, 68 Me. 94; Harper v. Little, 2 Me. 14; Clayton v. Merrett, 52 Miss. 353; Wilson v. Edmonds, 24 N. H. v. Watt, 2 Barb. Ch. (N. Y.) 371; Houghtaling v. Marvin, 7 Barb. (N. Y.) 412; Johnson v. Johnson, Wright (Ohio), 594; McDonald v. Black, 20 Ohio, 185; Easton v. Ellis, I Handy (Ohio), 70; Peries v. Aycinena, 3 Watts & S. (Pa.) 64; Wilson v. Stewart, 5 Pa. L. J. Rep. 450; Rigs v. Cage, 2 Humph. (Tenn.) 350; Primm v. Stewart, 7 Tex. 178; Cleveland v. Williams, 29 Tex. 204; Mich. Ins. Co. v. Leavensworth, co. V. Mich. Ins. Co. v. Leavensworth, 30 Vt. 11; Davis v. Windsor Savings Bank, 46 Vt. 728; Lepard v. Vernon, 2 Ves. &

Beam. 51; Watson v. King, 4 Camp. 272; Houston v. Robertson. 6 Taunt. 448. Compare Ish v. Crane, 8 Ohio St. 521; Dick v. Page, 17 Mo. 234; Carriger v. Whittington, 26 Mo. 311; Bank of N. Y. v. Vanderhorst, 32 N. Y. 553; Cassiday v. McKenzie, 4 W. & S. (Pa.) 282.

Where the agent's power is coupled with an interest, the death of the principal does not revoke the agent's authority. Hunt v. Rousmaniere, 8 Wheat. (U. S.) 174; Knapp v. Alvord, 10 Paige (N. Y.) 205; Marfield v. Douglass, 1 Sand. (N. Y.) 360; Raymond v. Squire, 11 Johns. (N. Y.) 47; Franklin v. Osgood, 14 Johns. (N. Y.) 527; Jackson v. Burtis, 14 Johns. (N. Y.) 391; Smith v. Craig, 3 Watts & S. (Pa.) 14; Bonney v. Smith, 17 Ill. 531.

The death of the agent revokes the contract of agency. Merrick's Estate, 8 Watts & S. (Pa.) 402; Gage v. Allison, r Brevard (S. Car.), 495; City Council v. Duncan, 3 Brevard (S. Car.), 386; Jackson Ins. Co. v. Partee, 9 Heisk. (Tenn.)

206.

A contract constituting a certain person an agent to sell machines manufactured by the other party, provided that all machines not sold by a certain date might be returned; if not returned by a specified date, they were treated as sold to the agent. It also provided that the contract might be cancelled by the manufacturer whenever he should become dissatisfied with the agent, and that the manufacturer might then retake possession of machines remaining in the agent's possession. Held, that this meant dissatisfaction with the agent's services as agent; and that the agent's death meanwhile terminated the contract and the services, and gave the manufacturer the right to resume possession of such ma-chines as were left undisposed of, and he could replevy them from the agent's administrator. Adriance v. Rutherford, 57 Mich. 170.

An agent acted under a letter of attorney which contained a power of substitution, and substituted his son to act for him. Held, that the death of the father revoked the power of the son to act in his stead. Lehigh Coal, etc., Co. v. Mohr, 83 Pa. St. 228. See also Peries v. Aycinena, 3 Watts & S. (Pa.) 64.

The death of an agent does not affect the power of a sub-agent appointed by him where the authority of the sub-agent is derived from the principal. Smith v.

White, 5 Dana (Ky.), 376.

A commission vested, without words of survivorship, two persons with certain powers. One of the persons died. *Held*, that, by the common law, an act done

under a commission given to two or more persons will bind the principal only when all unite in'doing it, unless the principal shall subsequently recognize the survivor as his agent. Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180.

Partnership. - A firm is dissolved by the death of a partner. Jenness v. Carleton, 40 Mich. 343; Jenness v. Detroit Bank, 40 Mich. 347; Smith's Estate, 11 Phila. (Pa.) Rep. 131.

"Although by the general rule of law every partnership is dissolved by the death of one of the partners, where the articles of copartnership do not stipulate otherwise, yet either one may, by his will, provide for the continuance of the partnership after his death; and in making this provision he may bind his whole estate or only that portion of it already embarked in the partnership. But it will require the most clear and unambiguous language, demonstrating in the most positive manner that the testator intended to make his general assets liable for all debts contracted in the continued trade after his death, to justify the court in arriving at such a conclusion." Burwell v. Mandeville, 2 How. (U. S.) 560; Schole-field v. Eichelberger, 7 Pet. (U. S.) 586; Knapp v. McBride, 7 Ala. 19; Powell z. Hopson, 13 La. Ann. 626; Gratz v. Bayard, 11 Serg. & R. (Pa.) 41; Davis v. Christian, 15 Gratt. (Va.) 11. Compare Butler v. Am. Toy Co. 46 Conn. 136.

A simple provision in the articles for the continuance of the partnership for a fixed period is not such an agreement. Hoard v. Clum, 31 Minn. 186; Goodburn v. Stevens. 5 Gill (Md.), 1.

A special partnership, formed under the provisions of the Revised Statutes. is dissolved by the death of the special partner. It is, like a general partnership, a personal contract, expiring with the death of any of the parties. Ames v. Downing, I Bradf. (N. Y.) 321.

A partnership may, after the death of

a partner, be continued by a court of equity on behalf of the infant children of the deceased partner if the surviving partners consent. Powell v. North, 3 Ind.

Whether the death of some of the members of a partnership works a dis-solution thereof, depends on the erms and effect of the contract of formation. and the character of the organization. Walker v. Wait, 50 Vt. 658.

It is well established that in mining partnerships there is usually no delectus personæ, and as a consequence that such a partnership is not dissolved by the death of a partner, or a sale of an interest by a

Taylor v. Castle. partner to a stranger. 42 Cal. 367.

Sureties. - The death of the principal in a recognizance occurring after the forfeiture of the recognizance, but before judgment thereon, exonerates the parties. State v. Cone, 32 Ga. 663; Mather v. People, 12 Ill. o.

It is a rule of the common law too long settled to be disturbed, that if a joint obligor dying be a surety, not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged both at law and in equity, the survivor only being liable. Davis v. Van Buren. 72 N. Y. 587. See also Wood v. Fisk, 63 N. Y. 245; s. c., 20 Am. Rep. 125; Richter v. Pappenhausen, 42 N. Y. 373; Bradley v. Burwell, 3 Denio (N. Y.), 61; Pickersgill v. Lahens, 15 Wall. (U. S.) 140; Towers v. Moore, 2 Vern. 29.

Upon the death of one of the makers of a joint promissory note, who signed as surety only and who was not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged both in law and in equity. Getty v. Binsse, 49 N. Y. 385; Carpenter v. Provost, 2 Sandf. (N.Y.) Sup. Ct. 537; Risley v. Brown, 67 N. Y. 160; U. S. v. Price, 9 How. (U. S.) 83; Jones v. Beach, 2 De Gex, M. & G. 886.

The estate of a surety upon a guardian's bond is liable for a default of the guard. ian which occurred subsequent to the

death of the surety. Voris v. State, 47
Ind. 345; Moore v. Wallis, 18 Ala. 458.
The U. S. S. Co., a corporation organized in this State, of which one W. was one of the principal promoters and organizers, and a large stockholder, proposed to the citizens of Sandusky, Ohio, that it would erect a rolling-mill at that place, if they would donate the real estate and loan to it \$150,000 upon its bonds, secured by the guaranty of W. and other stockholders. The proposition was accepted and complied with, and W., with the other designated stockholders, executed a joint guaranty of the payment of the bonds. The company and the guarantors, including W., thereafter became insolvent, and the latter executed a general assignment for the benefit of creditors, and subsequently died before the bonds fell due. In an action brought to compel an accounting on the part of the assignees of W., and a distribution of the fund in their hands, held, that the liability upon the guaranty was not extinguished by his death; that the guarantors did not act as mere sureties, but secured an individual benefit, and were under a moral obligation to pay; and so that there

7. Proof of Death.—" Death may be proved by the continuous and abiding general reputation of the community to which the party belongs, as well as by general family belief." So also evidence of the proceedings of the probate court is admissible in proof of death.2

DEBAUCH. DEBAUCHED.—The word "debauched." which in our ordinary dictionaries is defined "enticed, led astray, vitiated, or corrupted," has, especially when used as a legal word, a more extended signification. The verb "to debauch" is a word of French origin, compounded of the preposition "de," from, and "bauche," an old Armorican word in use in Brittany, meaning shop, and signi-

was a just foundation for a court of equity to intervene and save the obligation of the guaranty, and, therefore, that the holders of the bonds were entitled to share pro rata with the other creditors in the assigned estate.

The death of a joint obligor only discharges his obligation in a case where it appears that he was a mere surety, who received no benefit whatever from the joint obligation. Richardson v. Draper,

87 N. Y. 337.

The obligation of the surety in a bond given by a party to procure his appointment as an agent of an insurance company, conditioned for the faithful discharge of his duties as agent, and the payment of all moneys of the principal coming to his hands, and the delivery of all property of his principal he may have when his agency ceases, is not terminated by the death of the surety as to any moneys or property that may come into the hands of such agent after such death, but may be enforced against the personal representative of the surety's estate. Rapp v. Phœnix Ins. Co., 113 Ill. 390; s. c., 55 Am. Rep. 427.

A covenant made by a decedent in his lifetime, by which he bound himself "to be responsible for, and guarantee the payment of," the interest on a mortgage until the mortgaged premises should be so improved as to constitute adequate security for the mortgaged debt, survives the death of the covenantor, and can be enforced against his personal representatives, so as to recover interest accruing thereafter. Quain's Appeal, 10 Harris, 510; explained Hunt's App. 105 Pa. St.

Where a bond stipulated that the surety bound himself, his "heirs, executors and administrators," it was held, that his diability for his principal was not terminated by his own death, but extended to his heirs and legal representatives. Royal Ins. Co. v. Davies, 40 Iowa, 469.

The common-law rule whereby the death of a surety, bound jointly with his principal upon a note or other written contract, discharged his estate from all liability thereon, has never existed in Indiana. Hudleson v. Armstrong, 70 Ind. 99. Nor in South Carolina. Susong v. Vaiden, 10 S. Car. 247.

1. Whart. Crim. Ev. § 245; Anderson v. Parker, 6 Cal. 197; Tisdale v. Conn. Ins. 6 Shep. (Me.) 39; Lancaster v. Washington Life Ins. Co., 62 Mo. 121; Eastman v. Martin, 19 N. H. 152; Mason v. Fuller, 45 Vt. 29; Shrewsbury Peerage Case, 7 H. of L. Cas. 1.

The fact that one has died, and that certain others are his widow and heirs at law, cannot be shown by proof of the general repute among the neighbors of the person alleged to be dead. Such evidence is mere hearsay, and incompetent to establish the title of the alleged widow and heirs to the real estate of the alleged decedent. Ross v. Loomis, 64 Iowa, 432. See also Blaisdell v. Bickum, 130 Mass.

The rule that death may be proved by general reputation among the kindred must be relaxed of necessity where the deceased left no known kindred. Ring-

house v. Keever, 49 Ill, 470.

2. It has been repeatedly declared that the grant of letters testamentary is in general prima facie evidence of the death general prima jacze evidence of the testato of the testator or intestate. Hurlburt v. Van Wormer, 14 Fed. Rep. 700; Com-stock v. Crawford, 3 Wall. (U. S.) 396; Welch v. N. Y. C. R. Co., 53 N. Y. 610; Belden v. Meeker, 47 N. Y. 307; Carroll v. Carroll, 2 Hun (N. Y.), 600; S. c., 19 Am. Rep. 144; Jeffers v. Radcliff, 10 N. H. 242; Thompson v. Donaldson, 3 Esp. 63.

A suggestion in the record of plaintiff's death, and an order of court making his devisees parties, show prima facie his death. Stebbins v. Duncan, 108 U. S. 32.

fying, in its compound sense, to entice, or draw one away from his work, employment, or duty. It is in this sense of enticing and corrupting that it came into use in our language, as will be found by a reference to one of the earliest authorities for the meaning of English words, Phillips's New World of Words, 1696, where it is defined "to corrupt one's manners, to make lewd, to mar or spoil," -a sense in which it had been previously used by Ben Jonson and by Shakespeare. Bailey, in his Dictionary, some twenty years after, adds further, "to seduce and vitiate a woman." As applied to a woman, the word as thus defined meant merely seduction. But in the folio edition of Bailey by Scott, 1755, the meaning of the word was extended to seduce and violate a woman. It is in this twofold sense that it is used in the law form—which it has now fully acquired as a general word. Mackenzie, in his English Synonyms, London, 1854, defines it "to ravish, deflower, violate;" and it is used in Worcester's Dictionary, Boston, 1847, as an appropriate definition for the word "constuprate," from the Latin constupro, meaning to violate.1

DEBENTURE.—In English law, a deed-poll, charging certain property with the repayment at a time fixed of money lent by a person therein named, at a given interest. It is frequently resorted to by public companies to raise money for the prosecution of their undertakings.2

1. Koenig v. Nott, 8 Abb. Pr. (N. Y.) 389; 2 Hilt. (N. Y.) 329, where it was held upon demurrer that a complaint in an action by a female alleging "that the defendant, with force and arms, ill-treated and made an assault upon her, and then and there debauched and carnally knew her," was a sufficient averment of an assault and battery.

In an action by a husband for damages for seducing and debauching his wife the gravamen of the action is criminal conversation, without proof of which he cannot recover. Wood v. Mathews, 47 Iowa, 409. "Appellee insists, however, that the allegation in the petition that desendant debauched plaintiff's wife imports that he led her astray, corrupted her, corrupted her affections, her conscience, her judgment, and that by reason of that the plaintiff was injured; and that a wife may be debauched, and yet the crime of adultery be not committed. Such is not the sense in which the term 'debauch' is employed in law, nor is such its usual and ordinary acceptation. The term is employed in our statute in con-, nection with the crime of seduction. . . . Can a person be sent to the penitentiary five years for corrupting the affections, the conscience, and the judgment of an unmarried woman of previously chaste character? That such conduct would be

very reprehensible in foro conscientiæ, no one can doubt; but it belongs to a domain into which penal statutes have not yet entered, and to one in which it is doubtful if they ever can profitably enter. Besides, if the word 'debauch' here defines a wrong distinct from that of having carnal knowledge, the plaintiff has violated the rules of pleading by blending two distinct causes of action in one count."

An act of carnal intercourse with an unmarried woman, to which her assent was obtained by a promise of marriage made at the time, and to which without such promise she would not have yielded, constitutes the offence of "seducing and debauching" under a statute. People v. Millspaugh. 11 Mich. 278.

Debauched Habits.—Evidence that a widow with a family of small children

had taken into her house a profligate man who had abandoned his wife and children, and that she was living with him as his wife, and had had two illegitimate children by him, is sufficient to show that she was a woman of "de-bauched habits." Wickwire's Appeal, 30 Conn. 86. 2. Whar. Law. Lex.

A memorandum by a company charging its whole undertaking, property, and effects to secure the repayment to certain persons of a sum of money and interest. and containing a covenant to pay such sum to such persons pari passu, is a de-benture within the meaning of the Bills of Sale Act, 1882. Edmonds v. Blaina Furnaces Co., 56 L. J. R. Ch. D. 815. Chitty, J., says: "With respect to the point on the 17th section of the act of 1882, I have to say that, so far as I am aware, the term 'debenture' has never received any precise legal definition. It is, comparatively speaking, a new term. I do not mean a new term in the English language, because there is a passage in Swift, which has been mentioned to me, where the term 'debenture' is used. The passage was quoted from Latham's Dictionary. But although the term 'de-benture' is not a term with any legal definition, yet it is a term which has been used by lawyers frequently with reference to instruments under acts of Parliament, although such instruments, when you turn to the acts of Parliament themselves, are not so described. The 'debentures of a railway company are frequently spoken of; but the Companies' Clauses Act of 1845 speaks of bonds and mortgages,' and not 'debentures.' In the same way the instruments of a company incorporated under the act of 1862, of which a register must be kept, are commonly called 'debentures,' but the terms in the act are 'mortgages' and 'charges.' That is the opinion of Mr. Justice Grove and of Lord Justice Lindley, as expressed in the case of The British Indian Steam Navigation Company v. The Commissioners of Inland Revenue. The term itself imports a debt-an acknowledgment of a debt; and speaking of the numerous and various forms of instruments which have been called 'debentures,' without any one being able to say the term is incorrectly used, I find that generally, if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day accompanied by some charge or security; so that there are debentures which are secured, and debentures which are not secured. This distinction shown on the face of the 17th section, which speaks of 'debentures' issued by an incorporated company, and secured upon its capital, stock, and chattels. Now ought I to put any narrow, restricted interpretation upon the term 'debenture' in this section? I see no reason why I should. . . . In determining what is or is not a debenture within the section, I am not bound to hold that an instrument is a debenture because it is called

a debenture by the company issuing it. nor to hold it is not a debenture because it is not so called by the company. I must look at the substance of the instrument itself, and, without the assistance of any precise legal definition, from the best opinion I can, whether the instrument does or does not fall within the exception of the section. The argument of counsel for the plaintiffs with regard to the document in question suggested an excellent test. If you strike out from it those parts which relate to bringing into the security the debentures which had been previously issued, the document is almost verbatim in the same form as the debentures which had been previously issued, and which unquestionably ought to be considered as debentures within the meaning of the section. . . . I have seen debentures of various kinds and classes. and it is a mistake to say that to be debentures the instruments must be issued and numbered seriatim. I have even seen a single debenture issued to one There is nothing in the section requiring that more than one instrument should be issued. In this case the security is given to each one, so that each shares pari passu with the other, doubt, as a rule, the instruments called debentures are so issued, that each person gets his own document and can deal with it separately. . . . I do not see why a single debenture should not be given to half a dozen persons, and still be a good debenture within the Act."

In British India Steam Navigation Co. v. Commissioners of Inland Revenue, 72 B. D. 165; s. c., 44 L. T. N. S. 378, Grove, J., says: "The word 'debenture,' which has somehow crept into the English language, does not appear to admit of any accurate definition. In the several dictionaries which we are in the habit of consulting no satisfactory in-formation is given, and neither of the learned counsel has been able to afford us any. I do not remember the term being used otherwise than in an acknowledgment of indebtedness by a corporate body having power by act of Parliament or otherwise to increase its capital by borrowing money. The difficulty arises thus: In the Stamp Act of 1870, 'debenture' occurs in the schedule of duties to be charged upon certain instruments in two ways-' Debentures for securing the payment or repayment of money, or the transfer or retransfer of stock, and 'Debenture or certificate for entitling any person to receive any drawback;' a certain duty being payable in respect of each of these. It is used also in another

In American Law, a custom-house certificate given by the collector of the port to the exporter or importer of goods, entitling him, under certain circumstances, to a drawback of duties paid on exported or imported goods.1

DEBT—DEBTOR (Definitions).—(See also DEBT (IN CONTRACTS); DEBT (ACTION OF); DEBTS OF DECEDENTS; DEBTOR AND CRED-ITOR.)—The term "debt" has been differently defined, owing to the subject-matter of the statutes in which it has been used. Ordinarily, it imports a sum of money arising upon a contract express or implied. In its more general sense it is defined to be that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay or perform to another.2 The term "debts," as used in the statutes relating to the

part of the act, 'mortgage, bond, debenture, covenant, warrant of attorney, and foreign security of any kind,' upon which certain duties are charged. But there is no definition of debenture in the act; and, as I have already said, no accurate definition can be found. . . . Now it seems to me that all this does make a real difference between what the company here themselves call a 'debenture' and a promissory note. The statute contemplates in debentures something different from a promissory note, because it imposes upon them a higher rate of duty, not that the thing is not, in some sense of the word, a promissory note; but it is a promissory note and something more. It is a promissory note with mat-ters attached to it having a purpose in them; and, although the attaching these coupons to the instrument may not make it more or less a promissory note, it gives a reason why the legislature may have thought fit to impose a greater duty upon these documents than it does upon a promissory note."

Lindley, J., says: "Now, what the correct meaning of 'debenture' is, I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures, which are charges of some kind on property. You may have debentures which are bonds: and, if this instrument were under seal, it would be a debenture of that kind. You may have a debenture which is nothing more than an acknowledgment of indebtedness. And you may have a thing like this, which is something more: it is a statement by two directors that the company will pay a certain sum of money on a given day, and will also pay interest half-yearly at certain times and at a certain place, upon production of certain coupons by the holder of the instrument. I think any of these things which I have referred to may be debentures within the

"All my debentures," in a bequest, does not pass debenture stock acquired after the date of the will by the exercise of an option by the testator to convert the debentures into such stock. In re

Lane, 14 Ch. Div. 856.

1. Rapalje & L. Law Dict.

2. "The legal acceptation of a debt is a sum of money due by certain and express agreement." Jacobs' Law Dict.; 3 Bl. Com. 154; Denny v. Mfg. Co., 2 Hill, 233. It is also said by Jacobs, under "Debt," that "whatever the laws order any one to pay that becomes instantly a debt, which he hath beforehand contracted to discharge." Andrews v. Murray, 9 Abb. Pr. (N. Y.) 14, where it was decided that a judgment for costs against a corporation was a "debt" within the provisions of an act rendering trustees of manufacturing corporations liable, in certain cases, to debts of the corporation.

"'The word "debt," says Burrill, in his Law Dictionary, 'is of large import, including not only debts of record or judgment, and debts by speciatey, but also obligations arising under simple contract, to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation or promise.'
And Sir Edward Coke, in commenting on the word debitum in the statute of Merton, chap. 5, says: 'Debitum signifieth not only debt, for which an action of debt doth lie, but here in this ancient act of parliament, it signifieth generally any duty to be yielded or paid.' The same extent of meaning is ascribed to this term by Chief Justice Tilghman in Frazer 2. Tunis, 1 Binney's Rep. 254; and the judg-

ment in the recent case of Bide v. Harrison, L. R. 17 Eq. 76, is to the same effect, it being there held that a bequest of 'all and every sum or sums of money due to me at my decease' included damages recovered in an action by the executor for a breach of covenant committed in the lifetime of the testator. The following are likewise pertinent authorities: Ram on Assets (2d Ed.), 3, 4, 5; Toller on Executors, 282; Wentworth on Executors, 284; 2 Williams on Executors, 915. It follows, then, that the words in question, in their largest sense, are comprehensive of the remedy claimed in the present suit [an action for the breach of a covenant against incumbrances]. of a covenital against inclinible actions of the land of the appellants between the terms 'debt' or 'indebtedness' and 'liability,' and it is asserted as too plain for discussion that this contract creates no debt or obligation in the nature of a debt 'in prasenti,' and that 'no indebtedness or even liability on the part of the city to pay for this water arises until the hydrants have been supplied, and the water furnished to them for a given month.' us inquire what is the proper signification of the term 'indebtedness' as used in the restriction section of the charter. ster defines 'indebtedness' as 'the state of being indebted or placed in debt, or under an obligation, or held for payment or requital.' This remits us to the proper meaning of the term 'debt.' Bouvier defines a debt to be a sum of money due by a certain and express agreement. I Bouv. Law Dict. 436. One of the latest law lexicographers defines debt as follows: 'In the strict sense of the word a debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor). Hence debt is properly opposed (I) to unliquidated damages; (2) to liability, when used in the sense of an inchoate or contingent debt; and (3) to cértain obligations not enforceable by ordinary process. Debts denote, not only the obligation of the debtor to pay, but also the rights of the creditor to receive and enforce payment.' I Rap. & L. Law Dict. 351. Blackstone, in his Commentaries, defines the word as follows: 'The legal acceptance of "debt" is a sum of money due by certain and express agreement; as by a bond for a determinate sum, bill, or note; a special bargain; or a rent reserved on a lease, where the quantity is fixed and specific and does not depend upon any subsequent valuation to settle it.' 3 Bl. Com. 154; 2 Cooley's Bl. 101. So much for the lexicographers

and text-writers; but what say the courts? In the case of Gray v. Bennett, in 1842. the supreme court of Massachusetts say: 'The word "debt" is of large import, including not only debts of record or judgments, and debts by specialty, but also obligations arising under simple contract to a very wide extent; and, in its popular sense, includes all that is due to a man under any form of obligation or promise. Gray v. Bennett, 3 Metc. 526. . . . The prohibition is against becoming indebted that is, voluntarily incurring a legal liability to pay 'in any manner, or for any purpose,' when a given covenant of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. is clear and precise, and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service, or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs, the liability is absolute-the debt exists-and it differs from a present unqualified promise to pay only in the manner by which the indebtedness was incurred." Davenport v. Kleinschmidt (Mont.), 13 Pac. Rep. 257-8, 261-2.

See, to the same effect, Milliken v. Sloat, I Nev. 589, 590, in which after citing Bouvier and Burrill as authorities, the court says: "These are the technical and correct definitions of debt. Both authors show that in a popular sense and under some circumstances the word debt may be more, but never less, comprehensive. A promise, then, to pay a certain or definite sum in United States gold coin is a debt; for nobody disputes the fact that gold coin is money. . . The obligation to pay gold is a debt; the judgment on that obligation is also a debt." And on page 600: "The word 'debt' has two meanings; one is technical and limited in its application. In this sense it is generally understood by lawyers. It has a rather less technical and more extended signification as used among non-professional men."

"A debt is a sum of money due from one person or party to another." Anthony v. Savage (Utah), 3 Pac. Rep. 548.

A debt is a sum of money due by express agreement, either in writing or by parol, where the quantity is fixed, and does not depend on future calculation; the non-payment or non performance is an injury for which an action of debt may be brought." Respub. v. Le Caze, I Yeates (Pa.), 69, 70. And see to this effect U. S. v. Colt, I Pet. C. Ct. (U. S.)

145, 146.

"A debt imports a sum of money arising upon a contract express or implied (3 Bl. Com. 154), and not a mere claim for damages." Zinn v. Ritterman, 2 Abb. Pr. N. S. (N. Y.) 262, 263.

"What is a debt? In strict law lan-

guage it is a precise sum due by express agreement, and does not depend upon. any after-calculation to ascertain it. The remedy for recovery of it is by action of debt, and frequently by action of indebitatus assumpsit. But is this the only case within the mischief intended to be remedied by this law? Surely an inhabitant of Pennsylvania is not less injured by the want of a remedy to recover what is due to him by a foreigner, upon a sale of property, where no price was stip-ulated, than he would be if a fixed price had been agreed on. In the latter case the defendant is indebted to the plaintiff in a precise sum; and in the former, a sum equal to the value of the property sold, not then, it is true, liquidated, but depending upon the value to be fixed at The uncertainty of the sum the trial. due does not, in the common under-standing of mankind, render it less a debt. A promise, whether express or implied, to pay as much as certain goods or labor are worth, or as much as the same kind of goods may sell for on a certain day, or at a certain market; or to pay the difference between the value of one kind of goods and another, creates, in common parlance, a debt; and the person entitled to performance does not speak of his claim, as for damages, but for a debt, to the amount which he considers himself entitled to. But it is not every claim that, upon a fair construction of this law, or even in common parlance, can be denominated a debt. For, in the first place, the demand must arise out of a contract without which no debt can be created; and the measure of the damages must be such as the plaintiff can aver by affidavit to be due; without which special bail (which the defendant, by giving. may dissolve the attachment) cannot regularly be demanded. It follows from this, that a foreign attachment will not lie for demands which arise ex delicto, or where special bill could not be regularly required." Fisher v. Consequa. 2 Wash. C. Ct. (U. S.) 385, 386, a case arising

under the foreign attachment law of Pennsylvania

"A debt means a fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future." Appeal of City of Erie, or Pa. St. 402, in which it was decided that the provision in the Constitution declaring that the 'debt of any county, etc.. shall never exceed 7 per cent upon the assessed value of the property therein,' includes not only a bonded indebtedness but a floating debt.

"Upon the breach of the warranty, if established, did a debt, within the meaning of the statute, accrue against the corporation which a stockholder might be held liable to pay? Section 22, on page 293, Wagner's Statutes, on which the plaintiffs rely, provides that 'If any company formed under this act dissolve, leaving debts unpaid, suits may be brought against any person, or persons, who were stockholders at the time of such dissolution, without joining the company in such suit. Defendant refers to the decisions in Cable v. McCune, 26 Mo. 371, as showing that the liability here involved [upon breach of warranty] was not such a debt as the statute intends. In that case the statute required corporations to give notice annually of the amount of all their 'existing debts;' failing which, the stockholders should be jointly and severally liable 'for all debts of the company,' etc. The demand The demand against the corporation was for damage sustained in the loss of a steamboat. through the negligence and misfeasance liability not to be a 'debt' within the meaning of the law. That may be good authority against an application of the word 'debt' to liabilities 'substantially founded on tort;' but it furnishes no aid against such an application to the demand here being considered, where tort is out of the question. Some diversity of interpretations has followed the use of the word in different statutes, much depending on the strict construction proper for a penal, or the more liberal one for a remedial, statute. The strict definition of the term, adopted from Blackstone, is: 'A sum of money due by certain and express agreement.' Yet the same author, in treating of the implied original contract to submit to the rules of the community whereof we are members, says that 'whatever the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge.' 3 Bl. Com. 158. This may serve to show that in the analytical mind estates of deceased persons, is not limited to such as are strictly legal debts, but manifestly comprehends every claim and demand by a creditor, whether recoverable at law or in equity. In other words, it includes equitable as well as legal debts. In the acts of

of the great writer the force of the word 'debt' was confined, not so much to express in contradistinction to implied contracts, as to liabilities arising purely out of contract, and unmixed with any considerations of tort or malfeasance. By some authorities it seems to be considered that any cause of action which may be assigned, or which will survive for or against the legal representatives after death, is properly called a debt, in whatever connection referred to. popular use the term has a much larger import, comprehending dues and liabilities of infinite variety. Comparing together all the sources of light on this question, and giving to the statute a strict construction, which will exclude the broad, popular signification suggested, we find no difficulty in applying the word and the statute to the plaintiff's ground of action here, as clearly within the meaning intended by the law."

Dryden v. Kellogg, 2 Mo. App. 93, 94.

"A debt is a sum of money due by contract, express or implied. . . . The term debt, it is true, is popularly used in a far more comprehensive sense, as embracing not merely money due by contract, but whatever one is bound to render to another, whether from con-tract or the requirements of the law. But the legal technical meaning of the term, as used in statutes and in the constitution both of the United States and of this State, is as we have defined it (Const. U. S. art. 1, secs. 8, 10; art. 6; Const. of Cal. art. 8)." Perry v. Wash-

burn, 20 Cal. 350, 351. In Smith v. Omans, 17 Wis. 395, where the question was whether the homestead of a judgment debtor was liable to forced sale on execution where the judgment was rendered in an action of tort, the court said: "We are fully satisfied that it is not, but that the spirit and object, as well as the letter, of our constitutional and statutory provisions on the subject, exempt the homestead from sale on a judgment in any civil action. The principal argument to the contrary is based upon the use of the words debt,' 'debtor,' and 'contracted' in the constitution and the statute. The latter provides that the homestead shall not be liable to forced sale 'for any debt or liability contracted after the first day of January in the year one thousand eight hundred and forty-

nine.' It is said that the word 'debt' includes only that which is owed upon an agreement, and that if there were any doubt about that, the use of the word 'contracted' removes it, and shows that the intention of the legislature was to include only debts founded upon contract! But this is giving to those words a much narrower sense than that in which they were obviously used. For the word 'liability used in conjunction with the word 'debt' is broad enough to include all claims, whether founded upon tort or con-And although there may be a technical distinction between 'debt' and 'damages,' still the word 'debt' itself is commonly and generally used to describe all obligations to pay money, whether arising from contract, or imposed by law. as a compensation for injuries. And in this general sense the word was evidently used in this statute, and the word 'contracted' does not mean founded upon a contract, but it was used in its more general sense as equivalent to 'incurred.' This seems very obvious, for the reason that wherever the legislature intends to express the idea which the respondent claims they intended here, they use different language, clearly appropriate to that end. Thus, in the constitution itself, sec. 16, art. 1, it is provided that 'no person shall be imprisoned for debt arising out of or founded upon contract, express or implied.' This clearly implies that there may be debts 'not founded upon contract,' yet there are none, according to the argument of the respondents, and this provision would have had no greater effect than it now has, if it had simply said that no person should be imprisoned for debt. So in the attachment laws the plaintiff is required to make affidavit not only that the defendant is 'indebted' but also that the same is 'due upon contract express or implied,' etc. These instances show clearly the language which is used to describe the particular class of debts founded upon contract, and as clearly imply that the word 'debt,' its general sense, is not applied to that class alone."

1. Babcock v. Lillis, 4 Bradf. (N. Y.) 219-20; s c., 4 Abb. Pr. (N. Y.) 272. In Frazer v. Tunis, 1 Binn. (Pa.) 254, where it was held that a claim against an intestate's estate for damages on account of the breach of articles of agreement under Congress making certain treasury notes of the United States a legal tender in payment of "debts," the term seems to import any obligation by contract, express or implied, which may be discharged by money through the voluntary action of the party bound. Wherever he may be at liberty to perform his obligation by the payment of a specific sum of money, the party owing the obligation is subject to what, in these statutes, is termed debt; 1

seal, was a 'debt by specialty' within the meaning of a statute, Tilghman, C. J., says: "There is no doubt but the word 'debt' is frequently understood as a sum of money reduced to a certainty, and distinguished for a claim from uncertain damages; and in this sense it has been taken in the construction of the British statutes authorizing a set off, where there are mutual 'debts' between plaintiff and defendant. But the question is whether it has not been used in a more extensive sense, and if so, whether it will not best answer the intent of the act of assembly to construe it in its more enlarged signification. When the legislature undertook to lay down a rule for the direction of executors and administrators in the payment of assets, it must be supposed that it was their intent to direct them in all cases, and not to leave a number of important claims totally unprovided for. It was well known that demands frequently occur both of the nature of specialty and simple contract, which are not debts, in the sense contended for by the plaintiff's counsel, and yet there is no description of claim in the act, other than a debt. It must likewise be supposed that the legislature turned their attention towards those works and those courts in England, which treat and take cognizance of the payment of debts due from de-ceased persons. The order of payment of those debts is not directed by statute, but probably derived from the civil law, and adopted by the ecclesiastical courts. The cases cited . . . prove incontestably that a claim for unliquidated damages, founded on a specialty, ranks equally with a debt on bond. . . . The order of payment of debts in *England* is not regulated by statute; the point to be inquired of therefore is, whether approved writers on the ecclesiastical law do not speak of this kind of claim as a debt. The words of Godolphin, which have been adopted by subsequent authors, are, 'between a debt by obligation, and a debt for damages upon a covenant broken, there is no priority.' If we are to have recourse to the origin (the Latin word debitum, a thing that is due or owing), I see no reason why a compensation for breach of contract may not be due, although not reduced to a certain sum. But it is needless to examine whether this extensive meaning is so strictly proper as that in which it is generally taken in the common law. It appears sufficiently that the legislature had authority for using the word in that enlarged sense which manifestly best serves their intent; for to construe it otherwise would leave a numerous class of creditors unprovided for, and consequently postponed without reason to all others."

The word "debts" as used in the New York Code of Civil Procedure, relating to the sale of a decedent's lands for the payment of his "debts," includes any claim or demand upon which a judgment for a sum of money, or directing the payment of money, can be recovered in an action, and the word "creditor" includes any person having such a claim or demand. Estate of Wilcox, II N. Y. Civ. Proc. Rep. 115.

In the provision in the Mississippi Code, that the lands, tenements and hereditaments of a decedent shall also stand chargeable for the "debts" over and above what the personal estate may be sufficient to pay, the term "debts" does not embrace commissions and compensation to the administrator for his trouble in administering the estate. Hollman v. Bennett, 44 Miss. 322.

1. Kimpton v. Bronson, 45 Barb. (N. Y.) 625. "We may then safely decline either to limit the word 'debts' to existing dues, or to extend its meaning so as to embrace all dues of whatever origin and description. What then is its true sense? The most obvious and, as it seems to us, the most rational answer to this question is, that Congress must have had in contemplation debts originating in contract or demands carried into judgment, and only debts of this charac-This is the commonest and most natural use of the word. Some strain is felt upon the understanding when an attempt is made to extend it so as to include taxes imposed by legislative authority, and there should be no such strain in the interpretation of a law like this." Lane County v. Oregon, 7 Wall. (U.S.) 79. but the word does not include an express contract to pay in coined money: 1 nor "taxes" imposed by legislative authority. 2

The fare of a passenger on a railroad payable in advance is such a "debt,"-Lewis v. N. Y. Cent. R. Co., 49 Barb. (N. Y.) 330,—and payment cannot be exacted in gold or silver coin. "The word 'debts' in the act of 1862 is undoubtedly used in no narrow or restricted sense, but rather in a broad and general sense. Τt was essential that it should be, since the object of the law was to give as much support and vitality to these notes as possible. Let us see then what signification Webster should be applied to the word. defines debt: 'That which is due from one person to another, whether money, goods, or services: that which one person is bound to pay or perform to another. The Encyc. Met., as 'anything had or held of or from another, his property or right, his due; that which is owed to him, which ought at some time to be delivered or paid to him.' Bouv. Law Dic.: a still more enlarged sense it denotes any kind of a just demand.' See also Newell See also Newell v. The People, 7 N. Y. Rep. 124. ing in view, then, that a contract exists by which the defendant was bound to carry the plaintiff, upon his tendering the legal fare, such fare must be deemed a debt; that which one person is bound to pay to another to secure a right; that which is due, or owed, to the defendant, which ought at some time to be paid as a consideration for the passage; a just demand on the part of the defendant, if the plaintiff is, or is to be carried. As we have seen, it makes no difference in the character of the obligation, whether the fare is paid before or after starting, or at the end of the route. The obligation to carry is always the same; the right of refusal never exists, provided payment is made when demanded."

A voluntary payment is also a "debt." Under these adjudications, it is useless to contend that the legal-tender acts apply only to "debt" in the strict technical sense of that term, and do not apply to a voluntary or optional payment as in the present case." Longworth v. Mitchell,

26 Ohio St. 343.

The provision applies to debts contracted before as well as after the enactment. Hepburn v. Griswold, 8 Wall. (U. S.) 603.

1. Bronson v. Rodes, 7 Wall. (U. S.)
229; Butler v. Horwitz, 7 Wall. (U. S.)
258; McGovern v. Shirk, 54 Ill. 408; Dutton v. Palaret, 52 Pa. St. 109. See, contra,
Wilson v. Morgan, 4 Robt. (N. Y.) 58;
Milliken v. Sloat, 1 Nev. 573, quoted in

note on p. 63; Wilson v. Morgan, 1 Abb. Pr. N. S. (N. Y.) 174.
2. Lane County v. Oregon, 7 Wall. (U. S.) 79, quoted note 1, p. 66.

In Perry v. Washburn, 20 Cal. 350, 351. (quoted also in note on p. 65), the court savs: "The act does not, in our judgment, have any reference to taxes levied under the laws of the State. It only speaks of taxes due to the *United States* and distinguished between them and debts. . . . When it refers to obligations other than those to the *United States*, it only uses the term 'debts;' the notes it declares shall be 'a legal tender in payment of all debts, public and private. Taxes are not debts within the meaning of this provision. A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relation of debtor and creditor between the tax-paver and State; it does not draw interest; it is not the subject of attachment; and it is not liable to set-off. It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the tax-payer. It operates in invitum. . . No one would pretend that an act providing for the collection of debts would include, by force merely of the term debts, the collection of taxes also." to the same effect, City of Camden v. Allen, 26 N. J. L. 398; Shaw v. Pickett, 26 Vt. 482; Pierce v. City of Boston, 3. Metc. (Mass.) 520; Hinchman v. Morris

(W. Va.), 26 Am. Law Reg. 608.
In Hibbard v. Clark, 56 N. H. 155, taxes are held not to come within the meaning of the words "debts or demands" in a statute regulating set-off. These words "debt and demand" are often used as synonymous. The former is the more specific and the latter the more general term. Either would include a claim for money alleged to be due, and either is broad enough to allow a judgment recovered by the trustee against the principal defendant to be set off against the sum found due the latter from the former in the process of foreign attachment. It is not important to examine more closely, for the purposes of this case, the distinction, if any, in these terms. The counsel for the town claims that taxes are in the nature of a judgment, so that they can be thus set off by the trustee against the principal. . . . I has been held not to include a liability in tort; nor costs in a

think this position cannot be maintained. Judgments are the judicial sentences of courts rendered in causes within their jurisdiction. Taxes are the proportional and reasonable assessments and duties imposed by authority of law upon the inhabitants of the State. They do not partake of the nature of judgments."

In Green v. Gruber, 26 La. Ann. 697, it is said: "Taxes are not debts in the ordinary sense of that word, but forced contributions for the support of the body politic, and it is competent for the sovereign to provide how these contributions shall be collected, and to say whether this right of preference shall exist, and

for what length of time."

However, in Savings Bank v. U. S., 19 Wall. (U. S.) 227, it was held that an action of debt lay to recover certain internal revenue taxes due to the government, the court remarking: "By the internal revenue law, the *United States* are not prohibited from adopting any remedies for the recovery of a debt due to them which are known to the laws of *Pennsylvania*."

In U. S. v. Pacific R., 4 Dill. (U. S.) 66, where a bill in equity was brought by the United States to recover the amount of certain taxes, and the defendant claimed a set off for a sum exceeding this amount, it is said: "A good deal of argument on both sides has been presented to us upon the question whether an action to recover taxes is an action of debt, and whether an obligation to pay taxes to the government is a debt. There is considerable conflict of authority on that subject. Not only is there such conflict in the courts other than those of the United States, but the supreme court of the United States, in at least two cases, has given what might appear to be conflicting decisions upon the subject. [After citing Lane County v. Oregon, 7 Wall. (U. S.) 79, quoted note 1, p. 66.] On the other hand, in a later case, found in 19 Wallace, 227, coming from Pennsylvania, where the United States brought an action at law for some internal revenue taxes, a recovery was stoutly resisted on the ground that a tax was not a debt, and as it was not a debt within the commonlaw meaning of the phrase, that it could not be so collected. In this case the supreme court held that, for the purposes of that collection, and in some senses, it was a debt; that the tax-which, I presume, was the same kind of a tax as this is-could be so collected. Whenever the proper officers themselves ascer-

tained their earnings for that particular year, the law applied and made the assessment; it could be neither more nor less than that amount, and no assessment by the officers of the government was necessary to ascertain the amount: therefore it is a debt collectible by suit. state these things merely to show the difference of opinion that has existed upon the subject, as also to show that the supreme court has, under one set of circumstances, recognized that a tax is a debt, while under another that it was not a debt. In the view that all of us here take, I think, however, that this discussion is immaterial. It is immaterial what you call the obligation of a citizen to pay his taxes; it is very clearly an obligation which may be enforced by the courts."

The set-off was not allowed in this case, as not growing out of the contract.

1. In Zinn v. Ritterman, 2 Abb. Pr. N. S. (N. Y.) the court said: "In respect to a large part of the claim now sought to be recovered as damages, there was no election to affirm the contract, and therefore, as to that part, the discharge does not operate, unless it was a 'debt' within the meaning of the statute. I am not aware of any case where it has been held that an unliquidated claim for damages, arising out of a tortious act, was a debt, was to be embraced within the provision of the insolvent debtors' act. In all the cases to which I was referred by the defendant's counsel, the claim for damages had gone into judgment previous to the discharge being obtained; and they held, and very properly, that the amount recovered and merged in the judgment was a debt within the statute. A debt imports a sum of money arising upon a contract express or implied (3 Bl. Com, 154), and express or implied (3 Bl. Com, 154), and statute does not extend to actions for statute does not extend to actions for torts or to actions where damages are unliquidated, is decided, I think, in a large number of cases (see Frost v. Carter, 1 Johns. Cas. 73; Mechanics', etc., Bank v. Carter, 15 Johns. 467; Strong v. White, 9 Johns. 161; Kennedy v. Strong, 10 Johns. 489; s. c.. 14 Johns. 162; Haddres v. Chase 2 Wend 248) 128; Hodges v. Chase, 2 Wend. 248). Kennedy v. Strong was an action of trover, and Hodges v. Chase was trespass, and it was held in each case that there was not a debt, and that the insolvent's discharge did not operate."

A judgment for the payment of an allowance for the maintenance of a bastard child, and a judgment for damages for seduction, were held not "debts" within the meaning of the Bankrupt Act. In re Cotton, 2 N. Y. Leg. Obs. 370. Nor within the meaning of the statute abolishing imprisonment for "debt." See note I, p. 72. But In re Comstock, 22 Vt. 642, it is said: "There is no distinction under the bankrupt law between a judgment in an action arising ex delicto, and a judgment in an action arising ex contractu. They are both debts within the meaning of the law, and both provable against the estate of the bankrupt." And see, to the same effect, In re Book, 2 McLegn (II S.) 217.

3 McLean (U. S.), 317.

The defendant's liability for a tort is not affected by his discharge under the bankrupt law, unless, before the petition in bankruptcy was presented, the demand had become a debt by being converted into judgment. Crouch v. Gridley, 6

Hill (N. Y.), 250.

"A cause of action in trespass is not a debt within the contemplation of the Bankrupt Act, and is not affected by a bankrupt discharge. The fact that a verdict had been rendered does not alter the case. Until judgment rendered there is no debt which is reached by the discharge." Kellogg v. Schuyler, 2 Den. (N. Y.) 74.

A claim arising out of the official neglect of the clerk of a county court in Virginia, against him when non-resident in Virginia, at the time the claim is asserted, was held not a claim for debt for which a foreign attachment in chancery lay, Dunlop v. Keith, I Leigh (Va.), 430. "His case is that of a mere tort feasor."

The homestead is exempt from an execution issued upon a judgment rendered in an action sounding in tort, commenced before the right accrued, the judgment being rendered after. Parker v. Savage, 6 Lea (Tenn.), 406. "It does not follow 6 Lea (Tenn.), 406. "It does not follow that because, under the statute cited, the complainant may be considered a creditor, his claim was before judgment, in the sense of the constitution, a debt. Debt is defined to be a sum of money due by certain and express agreement. Bouv. L. D. 450. In construing statutes, and equally in the construction of the constitution, the words are presumed to be used in their natural and ordinary sense, and if a technical word is employed, it must be presumed to have been used in its technical signification. Debt, then, cannot be regarded as a synonym of tort.

An act rendering the trustees of a manufacturing corporation personally liable, in certain cases, for all debts of the corporation, does not render them liable for torts committed by the corpora-

tion. Esmond v. Bullard, 16 Hun (N. Y.), 65. "A liability for a tort is not a debt under a statute which is to be construed strictly. It is not contracted, for it does not grow out of contract."

A good cause of action for breach of promise of marriage is not a debt under the Homestead Exemption Act-judg. ment having been recovered subsequently to the filing of notice by defendant under the act, the promise and breach having occurred previously thereto. 8 How, Pr. (N. Y.) 523. "Is such a cause of action a debt within the meaning of that provision? It seems to me clearly that it is. not. Although the action is founded on contract, it is substantially an action of tort. It is purely a personal wrong, as much so as an action for assault and battery or slander. The damages are not assessed as damages growing out of a loss of property, but rather as a compensation for a personal wrong. They are frequently vindictive as well as compensatory. In fine, in every particular, except in the mere form of pleading, it follows the analogy of an action of tort."

But the liability of a person who obtained money from another by means of false and fraudulent representations in the sale of a patent right was held a "debt" within the meaning of that word as used in the Homestead Exemption Warner v. Cammack, 37 Iowa, "We hold that it was a debt. And this because the plaintiff in that action might have waived the tort, and brought his action for money paid to the use of the defendant therein. Wherever a party has derived a pecuniary advantage from a wrong done by him, and it is competent for the person suing thereon to waive the tort, and maintain his action upon the promise implied by the law, there the obligation to pay is a debt, and this regardless of the form of action in which that obligation is sought to be enforced. . . The converse of the proposition

just stated must also be true, that wherever a wrong is done resulting in no pecuniary advantage to the wrongdoer, and where the action must be in tort, and sound only in damages, there the obligation to pay is not a debt until ascertained by judgment" (citing authorities).

A demand against a corporation for

A demand against a corporation for damages for the loss of a steamboat through the negligence of its agents is not a debt of the corporation within the meaning of an act making the stockholders liable for all the "existing debts" of the corporation. Cable v. McCune, 26 Mo. 371. Affirmed in Cable v. Gaty,

34 Mo. 573. The court said. "The onestion, however, here is. What class of demands is embraced within the words 'debts contracted'? Our legislature did not go to the length which others have in fixing the liabilities of the stockholders of these manufacturing corporations. They did not enact as in many other States it is enacted, that the stockholders should be responsible for every liability established against the corporation, and which its assets turned out insufficient to meet. Such statutes as these, creating a certain and determined liability not dependent on circumstances, becoming as it were a part of the very essence of the charter, may reasonably admit of a very different construction from a law which seems to recognize the general principle of individual responsibility subject to a very limited exception, and only ventures to hold out such responsibility for a failure on the part of its managers to perform certain acts directed in the law, and supposed to furnish some advantages to the public. The statute which Judge Story construed in Carver v. Braintree Man. Co., 2 Story, 432, was of this remedial character. That act declared that every member of the manufacturing company named should be liable in his individual capacity for all debts contracted whilst he was a member. There was no penalty for an omission or a commission; it was simply a recognition of the individual-liability principle on the face of the charter. Called upon to construe such a charter, Judge Story held it to be remedial, not penal; and so viewing it, he gave the word 'debt,' which was the term used, a very liberal and extensive signification, to forward the manifest purposes of the law and the interest of society. Had our legislature taken the same step and boldly inserted such a provision in all their charters of this class of corporations, Judge Story's views, forcible and reasonable as they are, ought to have great weight in determining the construction of such a statute. Judge Story concedes that the interpretation he gives to the word 'debts' is a very loose one, and in short is making it synonymous with 'demands.' He substituted for the words 'debts contracted' the phrase 'dues owing' or 'liabilities incurred,' regarding them as essentially equivalent expressions. result was, that a demand founded on a tort was equally within the meaning of the act with a debt liquidated or unliquidated. We do not feel ourselves authorized, upon well-settled and long-established principles, to take this liberal view of the word 'debts' when used in our statute. Although the language is the same in the two statutes, ours is manifestly highly penal in its nature, while the Massachusetts act was considered by Judge Story as a remedial one. The demand sought to be enforced in the present action is certainly not a debt in the legal acceptation of the term, and it is, to say the least, doubtful whether it could be so regarded in its popular acceptation. The defendants are entitled to the benefit of such doubts. The popular meaning of a term may very properly be resorted to in ascertaining its construction in a purely remedial statute. and the plain objects of such laws ought not to be defeated by a narrow and technical definition. Unfortunately there are some words—and this word 'debt' is perhaps one of them-the popular meaning of which is unsettled and fluctuating. and hard to be ascertained. Where there is room for doubt and the statute is penal, the safer rule is to adhere to that limited and definite sense to which longestablished legal usage has restricted it. The liability of the St. Louis Marine Railway and Dock Company to the plaintiffs was not a debt within the legal acceptation of that term as declared by Blackstone and other writers of established authority. It was not a 'sum of money due by certain and express agree-... But the real gist of the action in that case [Heacock v. Sherman, 14 Wend. (N. Y.) 58], as in this, was a tort; namely, the negligence and misfeasance of the corporation's agents, and the insufficiency of the bridge in the one case and of the dock in the other, by which the damage complained of was sustained. Such damages can hardly, in popular acceptation, be regarded as debts. Certainly it is by no means clear that the legislature meant to embrace such demands. We regret that in the examination of this subject we have been without any precedent to guide us. only case directly in point is the one cited from Massachusetts (21 Pick. 455); and that is undoubtedly against the conclusion to which we have arrived. . . . The question here considered was entirely a subordinate one, and its decision either way probably had no material influence upon the result. . . . The question under which this statute arose seems also to have differed from ours in the use of the word 'contracts' as well as 'debts; although the court did not, so far as I can perceive, attach any particular importance to this word. Under these circumstances. the case, as a mere precedent, does not

criminal case: 1 nor a fine.2

appear entitled to great weight, notwithstanding the respectability of the court which decided it." And see Dryden v. Kellogg, 2 Mo. App. 93, note on p. 65 (1st col.).

In Mill Dam Foundry v. Hovev. 21 Pick. (Mass.) 455, commented on in the above case, it was held that an unliquidated claim for damages against a manufacturing corporation was a debt within the meaning of a statute making individual members liable for the "debts" of the corporation. "Though a question was made whether such a claim for unliquidated damages is a debt within the meaning of the statute, we do not think it admits of a reasonable doubt that all such claims for damages were intended to be included in the term 'debts.'" The claim in this case, however, appears to have been rather ex contractu, than in tort.

In Heacock v. Sherman, 14 Wend. (N. Y.) 58, it was held that the stockholders of an incorporated company were not responsible for damages occasioned by a bridge being out of repair, under a statute making them responsible for any "The demand against the corporation. "The term 'demand' is undoubtedly broad enough, if it stood alone, to embrace the claim of the plaintiff. It is a word of the most extensive signification that can be used in a release, and operates to discharge the releasee from every cause of action existing at the time in favor of the party executing it. We must, however, look at the whole section, and the connection in which it stands, in order to fix its meaning in this case. The stockholders, in the first place, are made jointly and severally holden for the payment of all debts contracted by the corporation or by their agents. The liability is here declared; it is new, and unknown to the common law; and is in terms limited to demands ex contractu. . . . But the proviso to the section is conclusive upon the Any person having a demand against the corporation is authorized to sue any stockholder, in any court, etc., provided that no stockholder shall be obliged to pay more, in the whole, than the amount of the stock he may hold in said company at the time the debt accrued;' thereby clearly qualifying the enlarged meaning of the word 'demand,' and showing, satisfactorily, that it was used by the legislature to denote a demand arising upon contract. Damage arising upon tort is not a debt accrued, within any reasonable construction of that term."

Where a corporation was required by statute to publish annually a true statement "of the amount of all the existing debts of the corporation," the "debts referred to are debts arising upon contract, express or implied, and not damages for torts. Doolittle v. Marsh, o N. W. Rep. (Neb.) 54.

A disputed claim for damage sounding in tort is not a "debt" before it has been prosecuted to judgment. Hill v. Bowman, 35 Mich. 191; Detroit, etc., Co. v.

Reilly, 46 Mich. 459.

An act prohibiting the arrest of soldiers for any debt under the sum of twenty dollars contracted before enlistment, or for any debt contracted after enlistment. does not extend to a soldier committed. by an alderman for want of security to appear at the mayor's court on a charge of having deserted his wife and family. and left them a charge on the guardians of the poor. Com. v. Keeper, 4 S. & R. (Pa.) 505. "The meaning of this provision appear to be confined to debts. taken in their common acceptation, created by contract between the soldier and any other individual. . . . But it never could have been intended to prevent arrests in all cases of debt. Suppose, for instance, a soldier should forfeit a re-cognizance entered into for keeping the peace, or for his appearance in court to answer a charge of felony. That would be a debt, and yet it cannot be supposed that Congress meant to protect him. Neither could it have been intended to protect him against execution on judgments, in actions founded on trespass or tort. Yet these judgments are debts." See also Fisher v. Consequa, 2 Wash. C. Ct. (U. S.) 385, quoted note, p. 64.

1. Morgan v. State, 47 Ala. 34, a de-

cision on the meaning of the word in the provision of the constitution abolishing imprisonment for "debt." "In criminal cases the cost is no more a debt than the fine, and, accurately speaking, not as much so, for the fine is a sum certain in numero, and the cost is not."

To the same effect is Caldwell v. State. 55 Ala. 133. Compare cases cited therein, and see, contra, Thompson v. State, 16 Ind. 516, where it was held that the costs in a criminal case were matters of private right, and constituted a "debt," for which, in the absence of fraud, a defendant could not be imprisoned. And see I Bish. Crim. Law, §§ 910, 911.

Costs adjudged in a civil suit constitute a "debt" within the provisions of an act "to regulate property exempted from sale for payment of debts." Clingman v. Kemp. 57 Ala. 195.

2. Spalding v. People, 7 Hill (N. Y.),

See the notes, as to the meaning of the word in bankruptcy and insolvency acts: 1

301, on appeal from 10 Paige (N. Y.), 284, where it is said: "This summary mode of punishment is the one that has been resorted to in the instance before us; and upon a conviction, the propriety and justice of which is not in question, a fine of \$3000, together with the costs, has been imposed—a penalty, as we have seen, for a strictly criminal offence, and inflicted under a strictly criminal proceed-The very statement of the case is therefore enough to show that there is no color for the ground taken, viz., that the fine is a debt within the bankrupt law. It is no more a debt than if it had been imposed after conviction on an indictment, or for any other of the numerous minor offences within the calendar of crimes." It was accordingly held that the fine was not affected by the discharge. Affirmed, 4 How. (U. S.) 21. To the same effect is *In re* Sutherland, 3 Bankr. Reg. 314, where, after giving the definitions of debt in 3 Bl. Com. 154, and 3 Metc. (Mass.) 562, the court says: "To ascertain, then, whether the word 'debt' is here used in the legal or popular sense. recourse must be had to the subjectmatter and the context. . . . From all the provisions of the section it is apparent that the word 'debt' is used in the legal or limited sense. If it were used in the popular sense it would not have been necessary to have specially provided that 'demands for goods wrongfully taken, etc., may be proved and allowed In the popular sense such demands are debts, and would have been included in the preceding clause providing for the proving 'all debts.' . . . Looking at the letter of the act or the nature of the subject, either separately or conjunctively, it appears to me that a judgment for a fine, imposed as a punishment for a crime, is not a debt provable against the estate of the bankrupt."

Nor is a fine a "debt" within the meaning of the constitutional provision against imprisonment for "debt." 'State v. Mace, 5 Md. 337, where it is said: "The court of common pleas have decided in this case that a fine imposed by a justice of the peace for a violation of the act of 1854, chapter 138, is a debt within the constitutional meaning of the term. In this view we do not concur. We think that the constitution ought to have a common-sense interpretation, by which we mean the sense in which it was understood by those who adopted it, and if it receive such a construction in judg-

ment the term 'debt' is to be understood as an obligation, arising otherwise than from the sentence of a court for the breach of the public peace or commission of a crime. . . . They [the Constitutional Convention] used the term 'debt' in its popular sense, and the people evidently so understood it. They regarded it, as it was intended, a protection to the unfortunate, and not an immunity to the criminal "See, likewise, Dixon v. Texas, 2 Tex. 481; U. S. v. Walsh, I Abb. (U.

S.) 71-2, quoted note 1, p. 73.

A fine or penalty, incurred by the breach of a by-law, is a debt, and recoverable as such. Ex parte Reed, 4 Cranch C. Ct. (U. S.) 582. And see I Bish. Crim. Proc. § 1304, where it is stated: "Very generally in this country, by statutes or under the common law, the fine is thus treated as a sort of judgment

debt."

1. The word "debt" in the National Bankrupt Act held to be synonymous with "claim," and to embrace claims arising from debts created by fraud. Stokes v. Mason, 10 R. I. 261; s. c., 12

Bank. Reg. 498.
The qualified liability of a member of a manufacturing corporation for the debts of the corporation is not a "debt" that can be proved against the estate of an insolvent debtor. Kelton v. Phillips, 3

Metc. (Mass.) 61.
The word "debts" in an insolvent statute was contended by counsel "not to be understood in its strict technical sense, but to be understood in its popular meaning, as extending to all legal demands actually due, and which may be ascertained without the intervention of a jury," and this construction was apparently admitted by the court to be correct in Atlas Bank 7'. Nahant Bank, 3 Metc. (Mass.) 582.

If a defendant, after verdict against him in an action of tort and before judgment, is adjudicated a bankrupt, the claim is not provable. "A claim for damages in an action of tort does not become a debt by verdict before judgment." Zimmer v.

Schleehauf, 115 Mass. 52.

"The word 'debts' in the [insolvent] statute is used in its broadest latitude, and it not only includes all accruing interest on contracts carrying interest on the face of them, but the interest which by law is allowed on all other claims and demands which are due and unpaid." Brown v. Lamb, 6 Metc. (Mass.) 210.

An order having been made for the

in statutes abolishing imprisonment for debt:1

attachment of the surplus of a bankrupt's estate against the official assignee of the court of bankruptcy as garnishee, under the Common Law Procedure Act, 1854. it was held that such order was invalid, there being no "debt" that could be attached within the meaning of the act. "There is no 'debt' here; the garnishee has no doubt certain sums of money vested in him, which may or may not be payable to the bankrupt in the event; but which can only be so payable by means of an order of the court of bankruptcy." Re Greensill, L. R. 8 C. P. 24. See Thomson v. Harding, 3 C. B. (N. S.) 254, as to an order against the shareholder in a bank.

A judgment of a court in a civil action between individuals existing against a bankrupt at the time the petition in bankruptcy is filed, is a debt provable against his estate, whether the cause of action on which such judgment was founded arose out of a tort or on a contract. How-

land v. Carson, 28 Ohio St. 625.

Future weekly or monthly payments of alimony, payable by a husband by virtue of an order of the divorce court, are not a "debt or liability" within the meaning of the Bankruptcy Act, 1883. "A liability within that section must be something the value of which is capable of being estimated in some way or other. The value of these future payments is certainly not capable of being estimated." Linton v. Linton, 15 L. R. Q. B. D. 239. See also cases cited in note I, p. 68, and

note 1, p. 80.

1. "The word 'debt' is of very general use, and has many shades of meaning. Looking to the origin and progress of the change in public opinion which finally led to the abolition of imprisonment for debt, it is reasonable to presume that this provision in the State constitution was intended to prevent the useless and often cruel imprisonment of persons who, having honestly become indebted to others, are unable to pay as they undertook and promised. In this view of the matter the clause in question should be construed as if it read: 'There shall be no imprisonment for debt arising upon contract express or implied, except, etc. Such is substantially the language employed in the legislative acts of most of the States abolishing imprisonment for debt; and there can be but little doubt that this was the end which the framers of the constitution had in view, as well as the popular understanding of the clause, when the instrument was

adopted at the polls." U. S. v. Walsh. I Abb. (U. S.) 71, where it was held that the obligation of one who had manufactured or sold goods in violation of a revenue law requiring him to pay a duty thereon, to pay a penalty, was not a "debt," or else came within the exception, under an act prohibiting imprisonment for debt, except in cases of fraud, the court adding: "It may be admitted that a penalty given by statute is technically a debt; it does not, however, arise upon contract, but by operation of law; it is imposed as a quasi punishment for the violation of law or the neglect or refusal to perform some duty to the public or individuals, enjoined by law. Penalties are imposed in furtherance of some public policy, and as a means of securing obedience to law. Persons who incur them are either in morals or law wrongdoers, and not simply unfortunate debtors unable to perform their pecuniary obligations. I do not think the constitutional provision prohibiting imprisonment for debt was intended to apply to or include such cases.'

An executor who refuses to perform an order of the probate court directing him to pay monthly sums for the maintenance of the testator's widow and children may be imprisoned therefor.

"The executor is not ordered to pay a

debt, but to perform an administrative act respecting the assets of the estate to which they are subjected by law. order upon him to pay this allowance no more creates a debt against him than does the customary order made by the court to pay the claims allowed by commissioners." Leach v. Peabody, 58 Vt. 485.

The charge against the father of a bastard for its maintenance and education is not such a debt. In re Wheeler, 34 Kan. 96. "There are many forms of liability that do not constitute a debt, in the technical and legal sense of that term. Imprisonment for debt, as here used, has a well-defined meaning, and as has been frequently decided, applies only to liabilities arising upon contracts" (citing numerous authorities). To the same effect is Musser v. Stewart, 21 Ohio St. 353. See In re Cotton, 2 N. Y. Leg. Obs. 370, quoted note, p. 69.

A judgment for damages for the wrongful and fraudulent misapplication and conversion of school-land certificates. deposited as security for a loan, is not a "debt arising out of or founded on a contract, expressed or implied," for which a person is entitled to exemption from imin wills: 1 and in various other instances.2

prisonment. In re Mowry, 12 Wis. 52. 'The language of the constitution, taken in its broad and popular sense, indicates a right accruing—a sum of money or other thing due or deliverable, by virtue of a contract expressed between the parties, or implied from their acts and circumstances, or on account of a breach of it in respect to some matter provided for or contemplated by them when it was made; something springing out of the contract, and for the enforcement of which resort must be had to it; and seems not to include damages for those wrongful acts which either party may possibly do, and which when done are remotely connected with it, but were not anticipated by them at the time of making of it.

"The question of liability to arrest seems to me to depend entirely, in such cases, upon the one whether the party is liable to an action of trover or tort. If he is, then all the incidents to and results of such an action would seem necessarily to follow." Cotton v. Sharp-

stein, 14 Wis. 228.

In a statute prohibiting the imprisonment of a person for "debts" without a mittimus, the word "debts" "still remains to be satisfied with a fair and reasonable construction. . . Suppose the language to be, that in an action for debt no person shall be imprisoned without a mittimus. This would comprehend all actions of debt, in a proper and technical sense; of course it would comprehend the claim in the action under consideration. But this, I apprehend, is too narrow a construction. The true meaning is such as to include all actions by attachment, by which any debt or damage is sought to be recovered, and which, by legal process, may be reduced into debt or damage." Palmer v. Allen, 5 Day (Conn.), 198.

Under an act "for the discharge of

Under an act "for the discharge of debtors in execution for small debts from imprisonment in certain cases," a sum ordered to be paid in a suit for subtraction of tithes is not a "debt." Ex parte Kaye, I B. & Ad. 652. "The sum decreed to be paid in this case is not, strictly speaking, a debt. The act contemplates cases where there might be proceedings against the property of the debtor. Here there could be no proceedings against the property of the party

liable to pay the tithe."

1. Under a bequest of "whatever debts might be due to him [the testator]," a bill of exchange at a banker's, not yet payable, and likewise a cash balance due the testator on his banker's account, were held to pass. Carr v. Carr, 1 Meriv.

54I, n.

Under a bequest of "all debts due and owing to the testator at the time of his death," a bond conditioned for replacing a sum of stock sold by the testator after the date of the will, and lent by him to the obligor, was held to pass. Essington 2. Vashon, 3 Meriv. 434.

Where a testator directs that a "debt due" from a legatee shall be discharged, what comes under this denomination is to be determined by the meaning which he saw fit to attach to the word, if that can be ascertained; whether a particular sum is technically a debt or not, and whether an action can be maintained by the executors to recover it, are not necessarily decisive of the question. Bradlee

v. Andrews, 137 Mass. 59.

A devise of real and personal estate for the payment of "debts" or "just debts" does not revive a debt barred by the Statute of Limitations or discharged by a certificate of bankruptcy. Roosevelt v. Mark, 6 Johns. Ch. (N. Y.) 266; Burke v. Jones, 2 Ves. & Bea. 275; Peck v Botsford, 7 Conn. 172; Rogers v. Rogers, 3 Wend. (N. Y.) 517; Smith v. Porter, 1 Binn. (Pa.) 200.

A testatrix being entitled to her son's residuary estate (the amount of which was unascertained at her death) bequeathed as follows: "If any debts dueme at my decease, I request my executors will collect and pay into the hands of my children." Held, that the son's residue passed by the bequest. Bainbridge v. Bainbridge, 9 Sim. 16.

Authority given to executors to sell real estate to pay debts, held to apply as well to a bond debt, which the testator assumed as surety for another. Berg v. Radcliff, 6 Johns. Ch. (N. Y.) 310. "The testator is supposed to mean all his sub-

sisting legal debts."

2. The issue of bonds by a city for the purpose of raising money to erect improvements, from which it is expected it will derive a revenue, is an indebtedness within the meaning of a constitutional clause limiting the amount of municipal indebtedness. "A debt is created when one person binds himself to pay money to another. A party becomes indebted when he enters into an obligation to pay. Webst. Dict., title *Indebted*. A debtor is one who owes a debt; he who may be constrained to pay what he owes. It Bouv. Law Dict. 380. . . . Men do not

often incur debts without receiving in return what they consider of equal value. nor unless they expect to profit by the transaction. But the fact that the property for which a debt is contracted is valuable, and a source of profit or revenue, does not remove or change the character of the indebtedness. The purchaser having become bound to pay, has incurred an indebtedness which he may be compelled to pay. Being thus bound, he is in debt, no matter what amount of property he may have received in consideration for his obligation." Scott v. City of Davenport, 34 Iowa, 213.

Under a clause in the constitution that "no debt shall be created by the mayor and city council," an ordinance providing for the raising of a sum of money by the hypothecation of a number of railroad shares owned by the city, and the investing the same in bonds, to be secured by mortgage, is null and void. City of Baltimore v. Gill, 31 Md. 375.

"A debt is money due upon a contract without reference to the question of the remedy for its collection. It is not essential to the creation of a debt that the borrower should be liable to be sucd therefor. No suit can be maintained against the State by one of its citizens, and yet debts are created by the State which it is bound in good faith to pay. If money be borrowed by the mayor and city council which by the contract is to be repaid, it is immaterial to inquire whether the city is liable to be sued therefor, or its payment be secured by the pledge or hypothecation of specific property held by the city: it would be in our judgment equally the creation of a debt, within the meaning of the constitution, in one case as in the other. The constitution is not to have a narrow or technical construction, but must be understood and enforced according to the plain and common-sense meaning of its terms."

Certificates of deposit in a bank were held its "debts" within the meaning of a statute restricting the amount of its debts, in Hargroves v. Chambers, 30 Ga. 580. "But whether these certificates be considered as special or general deposits, they are, nevertheless, debts, and debts of the bank, and they (the certificates) afford the evidence of the debts. They are the securities for the debts, as a note, bill, or bond is the security of a debt between the parties when the debt is evidenced in that way. Therefore they are debts in the meaning of the fourth rule of the sixth section."

Under a contract between plaintiff and

a corporation, that the former should de-

liver and the latter receive and pay for personal property at a future day, it was held that a "debt." within the meaning of the statute rendering stockholders liable for the "debts" of corporations, did not arise until the delivery of the property. Garrison v. Howe, 17 N. Y. 458.

"Debts" for which the trustees of a manufacturing corporation are made liable do not, it seems, include unliquidated claims for breaches of contracts and causes of action incidentally arising or resulting therefrom, which the company might meet and defeat by some sufficient defence. Victory Webb Co. v. Beecher, 26 Hun (N. Y.), 48.

A provision in a statute that the detached portions of a county shall be liable for its pro rata share of the "debts" of the county from which it was taken, does not subject them to a proportionate liability for "contingent liabilities arising out of a breach of duty." Askew v. Hale

County, 54 Ala. 639.
The "debt" for which the trustee of a manufacturing corporation may become liable is "the original debt contracted by the corporation, and not the judgment which the creditor may have recovered against the corporation." McHarg v. Eastman, 35 How. Pr. (N. Y.) 207.
In State v. Blackmo, 8 Blackf. (Ind.)

249-50, it is said with regard to damages assessed for injuries done to real estate; "It will not be disputed that when they are so assessed they become a 'debt' in the constitutional sense of the word, and being so, the constitution of the United States restrains the State from enforcing their payment in anything but gold and

Damages to which a landowner is entitled for the taking of his land for the alteration of a highway are not a "debt' for which he is taxable under the denomination "other debts due the person to be taxed more than they are indebted or pay interest for." Lowell v. Street Commrs. of Boston, 106 Mass. 540. "The claim for compensation for land damages, upon which this tax was laid, was uncertain in amount. It is to be submitted to a jury, which may increase or diminish the amount awarded by the city; and for this reason, as well as from its special character, it is not a debt technically, or in the sense of that term as used in pleading and in legal proceedings,"

The liability of sureties on an official bond is not a "debt" for which, under the attachment law, a receiver is authorized to sue in his own name. State v.

Gambs, 68 Mo. 280.

An action on a judgment held a claim "in the nature of a debt" under Common Law Procedure Act. Hodsoll v.

Baxter, El. Bl. & El. 884.
"Debts" in an assignment for the benefit of creditors was held to mean credits." "The directions to pay 'the debts' of the creditors of the assignor is in equivocal terms. The debts of a person may be such as are due to him. although the more usual signification is those owing by him. It is not a palpable violation of the literal meaning of the words to apply them to the debts due to the persons designated, and we are therefore authorized to look to the scope of the entire instrument for their interpretation. The manifest design is to pay the debts to the creditors, and that must control the construction of the doubtful phrase." Pine v. Rikert, 21 Barb. (N. Y.) 475.

A superannuation allowance awarded to a retired civil servant, is not a "debt" attachable under the Common Law Procedure Act, 1854. "It is not a debt at all, but a mere gratuity." Innes v. East India Co., 17 C. B. 351.

In a statute providing for the return by assessors of "debts due to non-residents," the term "debts" "is to be understood in its usual legal sense, and means nothing more nor less than sums of money due from inhabitants of the State to the non-residents mentioned, by certain and express agreements or judicial sentence, and for the purchase of real estate. Primarily it looks to the relation of vendor and purchaser, by contract valid in law, and to no other relation. mere assignee of a contract is in no legal sense the debtor to the vendor, unless he has expressly undertaken to pay the debt by some valid instrument or promise. In the latter case he may, legally speaking, be regarded as the debtor of the vendor for the purchase of real estate. . . . Debts barred by the Statute of Limitations would not fall within the statute, nor would mere equitable claims, where no legal relation of debtor and How. Pr. (N. Y.) 504; s. c., 53 Barb. (N. Y.) 547. Affirmed, 37 N. Y. 344.

All Debts.—A clause beginning a will,

" First, I will and direct that all my legal debts, legacies, and funeral expenses shall be fully paid," is not sufficient alone to charge legacies on real estate specifically devised. Kightly v. Kightley, 2

Ves. 328.

Where parties submitted to arbitration "all debts, dues, and demands heretofore subsisting between them," and on

the same one gave to the other a promissory note, it was held that the note was not within the terms of the submission. it being by intendment of law given after the execution of the bond, I Wheel.

Am. Com. Law, 431.

Debt Contracted .- In a statute relating to the individual liabilities of members of manufacturing corporations, the term "debts contracted" is not confined to "debts" in the strict sense of the word. "If. on the other hand, we should construe the statute broadly as a remedial statute, and give to the word 'debts' a meaning not unusual, as equivalent to 'dues,' and to the word 'contracted' a meaning which, though more remote, is still legitimate, as equivalent to 'incur-red,' so that the phrase 'debts contracted' in this sense would be equivalent to 'dues owing' or 'liabilities incurred. the statute would attain all the objects. for which it seems designed. . . . It seems clear that in common parlance, as well as in law, the term ['debt'] is in an enlarged sense sometimes used to denote any kind of a just demand. And in the Roman law it had sometimes the like enlarged signification. Sed utrum ex-delicto an ex contractu Debitor sit, nihit refert, says the Digest." Carver v. Braintree Mfg. Co., 2 Story (U. S.), 432,

The indebtedness of a corporation upon a judgment in a scire facias, it having been factorized in a suit brought against its creditors, is not a "debt contracted" within the meaning of a personal liability statute. "There cannot be a 'debt contracted' without two or more contracting parties, one of whom in this case must be the corporation. phrase therefore necessarily implies some act on the part of the corporation with some party dealing with it, whereby an obligation is incurred, the company receiving and the other party giving credit on the faith of their solvency and proper organization as a corporation. Armstrong v. Cowles, 44 Conn. 44.

Calls made on a shareholder in 1862 to pay money in respect of debts of a jointstock company for which he had previously, in 1849, incurred liability, do not themselves constitute "debts contracted after the passing of the act of 1861," but amount merely to an enforcement of the liability incurred when he became a shareholder. Williams v. Harding, L. R. I Eng. & Ir. App. 9.

Where a manufacturing corporation appointed a general agent and attorney, agreeing to pay him an annual salary, but no time was fixed when the salary was to become due and payable, though the beginning of the year was fixed, held, there was no "debt, existing or contracted." "The statute speaks of 'debts' existing, or contracted, not of liabilities which may ultimately ripen into debts."

Oviatt v. Hughes, 41 Barb. (N. Y.) 541.

See also Smith v. Omans, 17 Wis. 395, quoted note, p. 65; Com. v. Keeper, 4 S. & R. (Pa.) 505, quoted note, p. 71 (2d col.); Heacock v. Sherman, 14 Wend. (N. Y.) 58, quoted note, p. 71.

Debt. Contract.—A statute rendering stockholders liable for "all debts and contracts" of the corporation "cannot be restricted to debts or liquidated claims." Haynes v. Brown, 36 N. H. 566.

A judgment for a penalty provided by statute for running by a toll gate to avoid paying toll is not a "debt growing out of or founded upon a contract, express or implied," under the exemption laws. Keller v. McMahan, 77 Ind. 62. See also In re Mowry, 12 Wis. 52, quoted note, 1, p. 73; Smith v. Omans, 17 Wis. 305, quoted note, p. 65.

Debt or Damages.—An execution to

enforce a decree for alimony is not for "debt or damages," in the sense of the Gen. Sts. c. 124, 125. Chase v. Ingalls,

97 Mass. 524. The "debt or damages demanded" in a statute regulating the jurisdiction of municipal courts in civil actions is the ad damnum in the writ, without regard to the amount claimed in the declaration or proved at the trial, Clay v. Barlow, 123 Mass. 378.

A party in execution for the costs of an ejectment is not a person in execution upon a judgment for "debt or damages" so as to be entitled to be discharged from custody after twelve months' confinement. "The object of a party instituting such a proceeding is to recover the possession of land, and not any debt or damages." 10 B. & C. 481.

Debt, Demand .- "It is clear that the term 'demand' is of much broader import than 'debt,' and would embrace rights of action belonging to the debtor beyond those which could appropriately be called *debts*. In this respect the term 'demand' is one of very extensive import —among the most so indeed of any that are known to the law." In re Denny, 2 Hill (N. Y.), 223. See also Hibbard v. Clark, 56 N. H. 155, quoted note 1, p. 67; Heacock v. Sherman, 14 Wend. (N. Y.) quoted note p. 71.

The words "any debt or demand"

"are sufficiently comprehensive to include every species of action, whether founded on contract or tort." White v.

Hunt, 6 N. J. L. 418.

A weekly sum ordered to be paid by the overseers of a parish for the maintenance of an insane person is a "debt, claim, or demand" due under 22 & 23 Vict. c. 49, s. 1. "—— endeavored to argue that this must be applied only to words 'claim or demand' would cover everything." Reg. v. Stepney Union, L. R. 9 Q. B. 383.

Debts Due.—A provision in the articles

of a banking association that the shares of its stock shall not be transferable until the shareholder shall discharge "all debts due" by him to the association, includes liabilities of the shareholder which have not matured. Leggett v. Bk, of Sing Sing, 24 N. Y. 283, on appeal from 25 Barb. (N. Y.) 326. In the dissenting opinion (agreeing, however, in this point with the opinion of the court) Allen, J., says: "A reasonable acceptation of the term 'debts due,' and that which in ordinary usage would be given it, would carry out the intent of the associates, and include within the benefits of this section all debts actually contracted and existing, whether due or yet to become due. Neither is there any such technical and restricted meaning given to the words by lexicographers or jurists as to confine them to debts actually due and payable. The legal acceptation of 'debt' is a sum of money due by certain or express agreement. 3 Bl. Com. 154. A debt, in ordinary parlance, means any claim for money; and a debt is properly said to be due, in the sense of owing, when it has been contracted, and the liability of the debtor is fixed. Burr. L. Dict.; Bouv. L. Dict. 'Debt' and 'due' are both derived from the same verb; the former is a substantive, and in this instance the latter is used as an adjective. 'Debt' also means that which is due from one person to another, and the word 'due' does not necessarily vary the meaning, as that means, in one sense, simply owed. It may, when used with that intent, mean a debt actually payable, the time for the payment of which has arrived. The context and the circumstances under which it is used must determine in what sense it is used. 'Due,' when used as a noun, is synonymous with 'debt.' 'Due,' applied to 'debts' preferred by an act of Congress, is equivalent to 'owed' or 'owing,' and includes all debts, although payable in future. United States v. State Bank of North Carolina, 6 Pet. 29."
"Debts due" in the Bankruptcy Act,

1869, § 15, held not to be confined to debts presently payable, but, on the presently payable, but, on the other hand, not to include debts which

were only contingent at the commencement of the bankruptcy. Ex parte Kemp, L. R. 9 Ch. App. 383. "Now, the words 'debts due to him' are certainly words which are capable of a wide or a narrow construction. I think that prima facie, and if there be nothing in the context to give them a different construction, they would include all sums certain which any person is legally liable to pay, whether such sums had become actually payable or not. On the other hand, there can be no doubt that the word 'due' is constantly used in the sense of 'payable,' and if it is used in that sense. then no debts which had not actually become payable when the act of bankruptcy was committed would be included. Lastly, the expression 'debts due' is sometimes used in bankruptcy proceedings to in-clude all demands which can be proved against a bankrupt's estate, although some of them may not be strictly debts at all [citing illustrations]. . . . If I were to hold that debts which have been earned, and which are, in what I consider the proper sense of the word, due to the bankrupt, although they have not yet become payable, were taken out of the order and disposition clause, I cannot help thinking that I should defeat the object which the legislature had in view in enacting that debts due to a bankrupt in the course of his trade or business should still be kept within the clause. On the other hand, I think that I have no right to extend the meaning of the words 'debts due' so as to include demands which are not properly debts. Until a sum certain has become due, and is to be paid in all events, there is, in my opinion, no debt due.

In an assignment of "all debts now due" to the assignor, held, that all debts due and payable to the donor at the date of the deed passed, but not such debts as, though contracted, had not become payable at the date of the deed. there would be a doubt whether the words 'all my debts due' would include debts not payable though contracted. debita in præsenti, solvenda in futuro, the donor has guarded against that doubt by inserting the word 'now.' All his debts now due. in common parlance, must be understood to mean debts then payable, not debts payable at a future day." Collins v. Collins v. Janey, 3 Leigh (Va.), 389.

A judgment debt, with execution limited to the separate property of a married woman under the Married Women's Property Act, is not a "debt due" under which she can be imprisoned under the Debtors' Act. Scott v. Morley, 57 L. J.

R. Q. B. D. 43. "It would be straining language to hold that a debt payable out of a woman's separate property is a 'debt due from her.' It is only due from her sub modo."

The value of stock in a national bank. owned by a tax-payer, is a part of the "debts due or to become due him" from which he is entitled under a statute to deduct the amount of his bona fide and unconditional indebtedness in listing his property for taxation. Ruggles v. City of Fond du Lac, 53 Wis. 436.

A "debt due or accruing" to a judg-

ment debtor capable of being attached by a garnishee order under Rules of Ct., 1875, Order XLV. r. 3, must be an absolute, and not merely a conditional Howell v. Metrop. Dist. R. Co.,

L. R. 19 Ch. D. 508.

Taxes and funeral charges are not "debts due from the deceased," on the insufficiency of assets to pay which the debts due the United States are preferred. The expenses of last illness are such "debts." U. S. v. Eggleston, 4 Sawy. (U. S.) 199.

The indorsement of a note does not render it a "debt due and pavable from. the bankrupt" until the liability of the indorser by reason of it becomes absolute or fixed. In re Morse, 17 Blatch.

(U. S.) 75.

Where under a bankruptcy commission "debts due to the bankrupt" are assignable by the commissioners, "in the term 'debts' is included any judgment recovered by the bankrupt remaining unsatisfied." Sullivan v. Bridge, I Mass. 514. See also cases cited, note 1, p. 74; People v. Halsey, 36 How. Pr. (N. Y.) 504, quoted note, p. 76.

Debts, Dues, Demands.—In the condition of a bond, the words "all lawful debts, dues, demands, and claims now due, or to grow due hereafter" from an estate, held to include legal costs and charges against the estate afterwards incurred in the settlement thereof. Springsteen v. Samson, 32 N. Y. 703.

A discharge of "all debts, dues, and

demands" held to cut off a special promise to pay the interest upon an assigned Howel v. Seaman, I Root (Conn.), note.

Debt, Duty .- A debt is a legal liability to pay a specific sum of money; a duty is a legal obligation to perform some act. Allen v. Dickson, I Minor (Ala.),

Debt, Liability.—"The words 'debt' and 'liability' are not synonymous, and they are not commonly so understood. As applied to the pecuniary relations of

parties, 'liability' is a term of broader significance than 'debt.' The legal acceptation of debt is a sum of money due by certain and express agreement. 3 Bl. Com. 154. Liability is responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts either express or implied, or in consequence of torts committed. Bouv. Law. Dict. If A owes B \$1000, he is indebted and liable to B for that sum. But if A has spoken slanderous words of B, whereby a right of action has accrued, he has become liable, and it is only after judgment has been obtained that this liability assumes the character of a debt. The legislature recognized this distinction, or they were guilty of tautology in the first branch of this clause in using two words understood to be synonymous to express the same idea, and of inaccuracy in the second branch in giving to the word 'debt' a broader signification than properly belongs to it. . . . If the distinction between a debt and a liability is maintained, the construction becomes easy. The husband is discharged from liability for the 'debts' or 'liabilities' incurred by the wife before marriage. He is also, except under particular circumstances, not liable for the cebts of the wife contracted after marriage. as he was liable at common law for the torts of the wife committed after marriage, and the statute exempts him from liability for her 'debts' only, it follows that his liability for such torts continues as at common law." McElfresh v.

Kirkendall, 36 Iowa, 226, 227.

The word "debts" in § 5234 of the N. Y. Rev. Stat. includes the "contracts, debts, and engagements" mentioned in § 5151, and the word "liabilities" imports no broader meaning. Stanton

v. Wilkeson, 8 Ben. (U. S.) 357.

The enactment of sec. 10 of the Judicature Act, 1875, which provides that in the winding-up of companies the same rules shall prevail and be observed as to "debts and liabilities provable" as may be in force for the time being under the law of bankruptcy, does not comprise among such "debts and liabilities" the obligations of a company in liquidation under covenants in a lease to pay rent and not to assign without consent, no breach having taken place. In re Westbourne Co., L. R. 5 Ch. D. 248.

A new debt is incurred by the giving of a new bill in renewal of an old one, and such new debt is a "debt or liability," within the meaning of the sub-section of the Debtors' Act, 1860, with regard to the "false pretences by means of which the prisoner incurred a 'debt or liability.'" Reg. v. Pierce, 56 L. J. R. M. C. 85. See also Davenport v. Kleinschmidt, 13 Pac. Rep. 257 (Mont.), and Smith v. Omans, 17 Wis. 395, note 1,

supra.

Debt of Record.—"A debt of record is a sum of money which appears to be due by the evidence of a court of record. Thus where a specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature." Davies v. Pettit, 6 Eng. (Ark.) 355, quoting 2 Bl. Com. 465; Carver v. Braintree Mfg. Co., 2 Story (U. S.), 450; Kimball v. Whitney, 15 Ind. 282.

The disbursements of a partner for his personal expenses cannot, with any propriety, be considered a "debt or engagement" for which he had covenanted to be liable to the firm. Withers v. Withers,

8 Pet. (U. S.) 358.

Debts Owing .- "Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds: solvendum in præsenti and solvendum in futuro. Whether a claim or demand is a debt or not, is in no respect determined by a reference to the time of payment. A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened." People v. Arguello, 37 Cal. 525, where the word "debts" in the revenue laws was given this liberal construction.

So in Ex parte Tower, I N. Y. Leg. Obs. 9, it is said, "A debt is not the less 'owing' because it is not yet 'due."

"When the words 'accruing' or 'owing' are used, as they plainly are, to designate two classes of debts, they can receive each a distinct meaning only by taking one as denoting debts which are not yet payable, and the other as denoting those which are. The phrase debitum in præsenti, solvendum in futuro, is one well known and understood in our law." Dresser v. Johns, 6 C. B. (N. S.) 435, in which it was held that a verdict in an action of contract for unliquidated damages

A debtor is one who owes another anything, or who is under any obligations, arising from express agreement, implication of law, or from the principles of natural justice, to render and pay a sum of money to another.¹

was not a "debt owing or accruing," so as to be attachable under the Com. Law Proced. Act. See also Jones v. Thompson, El. Bl. & El. 63. But rent is attachable under above act as a "debt owing" from the garnishee to the judgment debtor. Mitchell v. Lee, 8 B. & S. 92.

Where an agent was required by law to return "all debts owing," but returned "all debts owing which are liable to taxation," this was held an evasion of the statute. People v. Halsey, 37 N. Y.

346.

A claim on a fire policy for unliquidated damages is not a debt "owing or accruing," attachable under a garnishee order. Randall v. Lithgow, 12 Q. B. D

525.

State Debt.—"A prominent point of difference arises from the different interpretations of the word 'debt,' as applied Those who contend that the act does not create a debt seem in some degree to confound individual and governmental liabilities, or at least to disregard occasionally the plain distinction between them. Thus Mr. Webster says, in his opinion, 'To contract a debt is, in the general sense of the phrase, to incur a liability for the payment of money' (Senate Documents of 1851, No. 69). . . . When we speak of State debts, we do not refer to obligations which can be enforced by legal process, either in a court of 'law' or 'equity,' for in this sense a State is never indebted. A sovereign cannot be coerced by judgment and execution. . . While, therefore, we say of an individual that he is indebted, when he is bound to pay money for an obligation which can be enforced by legal process, we can only predicate this of a State when there is a claim for money which, in justice, the State ought to pay or cause to be paid. . . . A State debt never contained in its definition any other obligation than the moral one of good faith in calling forth and applying the resources of the State to meet its engagements. In the ordinary sense, as between man and man, there is no legal obligation upon the State which can be enforced against the will of the debtor. A State debt always meant, as it still means, a moral duty on the part of the proper organs of the government to faithfully administer and call forth so much of the resources of the State as may be necessary to comply with its undertakings." Rodman v. Munson, 13 Barb. (N. Y.) 188 and 63, where it was held that an act authorizing a loan to the State, and a pledge of certain canal revenues for its reimbursement, was a State debt, and unconstitutional and void. To the same effect is Newell v. The People, 7 N. Y. 9.

In People v. Flagg, 46 N. Y. 406, State debts are defined as "debts against the State as such, and not town, county, or city debts." See also Accrue; ALL; BANKRUPTCY; DUE; EXIST; FRAUDS STATUTE OF; IMPRISONMENT FOR DEBT; INSOLVENCY; LAWFUL: LEGAL; MUTUAL:

Public

1. Stanly v. Ogden, 2 Root (Conn.), 262. "In this liberal and extensive sense the terms 'creditor' and 'debtor' were undoubtedly meant and intended to be understood by the statute; for the expressions are, any creditor may bring his action against his absent or absconding debtor, to recover his dues, where no property can be come at so as to be attached; at the same time the distinction is ever to be kept up between the causes of action, viz., those which arise from breach of contract, express or implied, and those which arise from a tort; this is necessary, for the sake of both form and substance; yet this can have no effect to narrow the construction given to the terms in the statute. . The terms 'creditor' and 'debtor' in the statute mean any person who has a legal demand upon another, and any one who is liable to such demand." This judgment was reversed in the supreme court, they saving: "It is not every demand. which one man makes upon another in a. court of law that can be called a debt;; nor do the parties in every suit stand in the correlative situation of debtor and creditor; they certainly do not, for instance, in trover, trespass, slander, or in any action grounded on tort, or in any action which founds merely in dam-Debt, in common speech, involves the idea of a sum certain and definite, as a sum due by bond, note, book, etc., or that can be made certain and definite by data arising out of the transaction itself -as where the sum arises on delivery of goods to account, etc.; nor is this action [foreign attachment to recover damages.

for a vexatious suit] grounded on debt, as the term is technically understood; nor, indeed, do the common and technical uses of the word differ much, if at all."

Under the statute with regard to foreign attachment which provides that any creditor may avail himself of the process against his debtor, a person having a claim against another for unliquidated damages growing out of the breach of a contract is to be regarded as a creditor, and the other party as a debtor, within the meaning of the statute. New Haven Steam Saw-Mill Co. v. Fowler, 28 Conn. 103. "What, then, is the meaning of the words 'creditor' and 'debtor,' as used in this statute? They are undoubtedly words having different meanings, depending upon the connection in which they are used; so that nothing very satisfactory can result from resorting to mere definitions of the words themselves, or to cases in which they have been restricted in meaning to a narrow and strictly technical sense, or in which they have been held to be used in a more popular sense. Lawvers often speak of a debt as that for which an action of debt will lie, meaning by it a sum of money due by certain and express agreement; but in a less technical sense, says Bouvier, it means any claim for money. And, in a still more enlarged sense, it denotes any kind of a just demand. It is, therefore, equally proper to say of one who is under obligation to discharge some duty. or to pay damages for its non-performance, that he is a debtor, as it is to say the same of one who is under obligation by bond to pay a sum of money. . . . In what sense, then, did the legislature use the words 'debtor' and 'creditor' in the statute respecting foreign attachments? Now this point seems to us to have been substantially decided in Knox v. The Protection Insurance Co., o Conn. 430. It was there held that an unadjusted claim for damages, for a loss on a policy of insurance, might be attached by this process, in a suit against the holder of the policy, under the clause of the statute authorizing debts due from any person to an absent or absconding debtor to be attached. In that decision the word 'debts' was held to include the unliquidated claim for a loss on a policy of insurance; and if that decision is correct, it seems hardly credible that the legislature could have used the words 'creditor' and 'debtor' in the same statute in a more restricted sense."

A claim arising out of the official neglect of the clerk of a county court in Vir-

ginia, against the officer, a non-resident of Virginia at the time the claim is asserted, does not constitute the officer a "debtor," against whom a foreign attachment in chancery will lie. Dunlop v. Keith, I Leigh (Va.), 432. "Although the term 'debtor' should, in the construction of this statute, be taken in its largest sense, as embracing every person against whom another has a claim for breach of contract, even where the compensation sounds in damages; yet . . . cannot be embraced by it, since his case is that of a mere tortfeasor."

A factor having in his possession goods consigned to him for sale is not liable to be garnished as a "debtor" of the owner. Pratt v. Scott, 19 Mo. 625 and cases

cited.

The words "debtor" and "creditor" in a statute as to the admissibility of parties as witnesses are "intended as a designatio personarum merely, and not as indicating a present existing relation between the parties. They are meant to signify the parties to the original contract alleged to be usurious, or 'the original debtor and creditor." Gifford v. Whitcomb, o Cush. (Mass.) 482.

A surety in a note who executes a mortgage to the payee for securing payment of the note, is a "debtor" entitled to have the value of the mortgage deducted from the whole debt. Lanckton v. Wolcott, 6 Metc. (Mass.) 305. "If the term 'debtor,' in this sentence, is necessarily to be limited to the insolvent debtor whose estate is in the progress of settlement, . . . then this case is not within the letter of it, because the mortgage was not made by . . . the insolvent. But it is equally consistent with the manifest equity and policy of the statute to construe it to mean any person liable for the debt."

A surety upon an official bond, as well as his principal, is a "debtor," within the meaning of a statute which provides that judgments on bonds payable to the State "shall bind the real estate of the debtor from the commencement of the action." Shane v. Francis, 30 Ind. 92.

The liability of the sureties in the official bond of an officer for a failure on his part to pay over money collected by him under an execution, is not such a liability as will constitute them "debtors" of the plaintiff in such execution, so as to subject them to garnishment process as his "debtors." Eddy v. Heath's Garnishees, 31 Mo. 141. "We do not maintain that the securities are not liable to an action on the bond, and will not be compelled to satisfy any judgment that may

DEBT (in Contracts).

I. Active, 163. 8. Hypothecary, 165. Hypothecary, 16
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 Specialty, 165. 2. Ancestral, 163 3. Antecedent, 163. 4. Debt Due, 164. 5. Doubtful, 164. 6. Escape, 164. 13. Statutory, 165. 7. Fraudulent, 165.

KINDS OF DEBTS.*—1. Active.—One due to a person. the civil law 1

2. Ancestral.—An ancestral debt is a debt of an ancestor which

the law compels the heir to pay.2

At common law the heir was not liable to the simple contract debts of the ancestor or testator, nor was the heir bound even by specialty unless he was expressly named.³ But the rule now generally prevails that the heir is liable for the debts of the ancestor to the value of the lands descended or devised to him.4

3. Antecedent.—An antecedent debt is one which was created and existed between the parties prior to the creation of the contract or controversy in which the same is brought in question. is usually considered in discussing what constitutes a valuable consideration, so as to protect bona fide purchasers.

It is now generally held that one who takes a note or bill in payment of an antecedent debt is a holder for value. Some

courts, however, hold to the contrary.

be obtained against them; but we do maintain that an illegal act of the marshal, causing an injury to another, does not render his sureties debtors to the injured person in the sense in which that word is ordinarily used in the law, nor in that sense in which it is employed in the statute concerning attachments.

* Under this head it is not intended to give an extended definition or exemplification of the different subjects, as they will all be fully treated under their own designation or other proper places in

this work.

1. Bouv. Law Dict.

2. An estate by descent renders the heir liable for the debts of his ancestor to the value of the property descended, and he holds the lands subject to the payment of the ancestor's debts. 4 Kent Com. 420; Watkins v. Holman, 16 Pet. (U. S.) 25; Wilson v. Wilson, 13 Barb. (N. Y.) 252; Vansycle v. Richardson, 13 Ill. 171.

3. 4 Kent Com. 420, citing 3 Bl. Com. 435; Co. Litt. 209, a.
4. 4 Kent Com. 421, 422.

The heir-at-law also represents his ancestor upon such personal covenants as relate to the freehold and affect the value of the inheritance. Addison on Cont.,

§ 440. citing Campbell v. Ware, 27 Ark, 65; Perkins v. Simonds, 28 Wis. 90, Wheeler v. Clutterbuck, 52 N. Y. 67 Willey v. Haley, 60 Me. 176; Austin v. Wight, 38 Conn. 405; Botsford v. O'Con nor, 57 Ill. 72.

Where a personal judgment is rendered against heirs for the debt of an ancestor, the Statute of Limitations begins to run from the time of judgment. Norton v. Marksburry (Ky. Ct. App., 1887), 5 S. W. Rep. 482.

5. See, ante, Vol. II. Am. & Eng. Encyc. of Law, p. 392, and authorities there cited; 3 Kent Com. 81-86.

There is considerable conflict in the authorities as to how far an antecedent debt will constitute a valuable consideration so as to divest a vendor's lien. Work v. Brayton, 5 Ind. 396; Baily v. Greenleaf, 7 Wheat. (U. S.) 46; Richeson v. Richeson, 2 Gratt. (Va.) 497; Gann v. Chester, 5 Yerg. (Tenn.) 205; Wood v. Bank, 5 Mon. (Ky.) 194; Hallock v. Smith, 3 Barb. (N. Y.) 267; Johnson v. Graves, 27 Ark. 557.

The rule concerning the transfer of commercial paper has been settled, avowedly in the interest of commerce and mercantile business. These reasons do not apply to the purchase of land and

But this rule only applies to negotiable paper, and not to other personal property; and the purchaser is not protected where he takes the article in payment of an antecedent debt, 1 or as collateral security for an antecedent debt.2

Trust moneys paid by a trustee to his creditor in discharge of an antecedent debt, but without notice of the trust, cannot be fol-

lowed by the beneficiary.3

- 4. Debt Due.—A debt is properly said to be due, in the sense of owing, when it has been contracted, and the liability of the debtor fixed 4
- 5. Doubtful Debt is one of which the payment is uncertain. Clef des Lois Romaines.5
- 6. Escape.—A debt by escape is where a jailer or person in charge of a debtor in prison for debt permits the debtor to escape.6

chattels and non-negotiable securities.

2 Pom. Eq. Jur. p. 207, n.

"Whether an antecedent debt can ever be a valuable consideration has been denied by able courts; but this general subject has been further complicated by the various modes in which the debt may be dealt with-secured, discharged, postponed, and the like-and the various questions thence arising, which have caused the greatest conflict of judicial opinion. In very many, and perhaps the majority, of the States, it is settled that the transferee of negotiable paper as security for an antecedent debt may be a bona fide holder by the law mer-chant; but this rule cannot be a precedent in determining the meaning of valuable considerations within the equitable doctrine of bona fide purchase." 2 Pom. Eq. Jur. § 748.

1. Butlers v. Haughwout, 42 Ill. 18; Shufelt v. Pease, 16 Wis. 659; Gibson v. Moore, 7 B. Mon. (Ky.) 92; Soule v. Shotwell, 52 Miss. 236; Stone v. Welling, 14 Mich. 514; Crane v. Drake, 2 Vern. 616; Weaver v. Barden, 49 N. Y. 286; Downs v. Belden, 46 Vt. 674; Abbott v. Marshall, 48 Me. 44; George v. Kimball, 24 Pick. (Mass.) 234; Rhea v. Allison, 3 Head (Tenn.), 176; Pancoast v. Duvalt, 6 N. L. E.

26 N. J. Eq. 445.

2. Spurlock v. Sullivan, 36 Tex. 511; Alexander v. Caldwell, 55 Ala. 517; Alexander v. Caldwell, 55 Ala. 517; Smith v. Osborn, 33 Mich. 410; Wood v. Robinson, 22 N. Y. 554; Mingus v. Condit, 23 N. J. Eq. 313; Cary v. White. 52 N. Y. 138; Perkins v. Swank, 43 Miss. 349. See art. in 12 Cen. Law J. 26.

A conveyance of real or personal property as security for an antecedent debt does not upon principle render the transferee a bona fide purchaser, since the creditor parts with no value, surrenders no right, and places himself in no worse

legal position than before. The rule has been settled, therefore, in many of the States, that such a transfer is not made upon a valuable consideration, within the meaning of the doctrine of bona fide purchase. 2 Pom. Eq. Jur. § 749, and authorities there cited.

3. Holden v. N. Y. & E. Bank. 72 N., Y. 286; Dotterer v. Pike, 60 Ga. 29; Musham v. Musham, 87 Ill. 80; Phelps v. Jackson, 31 Ark. 272; Dey v. Dey, 26 N. J. Eq. 182; Mercier v. Hemme, 50 Cal. 606; Planters' Bank v. Prater, 64 Ga. 609; Burnett v. Gustafson, 54 Iowa, 86. 4. Leggett v. Bank of Sing Sing, 24

N. Y. 200.

Indeed it may be affirmed that every debt, whether payable now or at a future time, may be termed a debt due. This is implied by the word "debt" itself.. Both are derived from the same Latin verb (debeo), the one directly from it, the other through the French du. But in the commercial and popular acceptation of the word "due," when employed participi-ally or adjectively after "debt," without adding some verb or participle denoting at the present time. Leggett v. Bank of Sing Sing, 25 Barb. (N. Y.) 322.

Debts now due must be understood tomean debts then payable, not debts payable at a future day. Collins v. Janey, 3.

Leigh (Va.), 391.

5. Bouv. Law Dict.

6. But if after judgment a jailer or sheriff permits a debtor to escape who is charged in execution for a certain sum, the debt immediately becomes his own, and he is compelled by action of debt, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand. 3 Bl. Com. 165. Imprisonment for debt being generally abolished, this kind of debt is rarely met with.

7. Fraudulent.—A debt created by fraud implies confidence and deception. It implies that it arose out of a contract, express or implied, and that fraudulent practices were employed by the debtor, by which the creditor was defrauded.1

8. Hypothecary Debt is one which is a lien upon an estate.2

9. Judgment.—A judgment debt is one which is evidenced by matter of record.3

10. Liquid.—A liquid debt is defined as one which is immedi-

ately and unconditionally due.4

11. Privileged.—A privileged debt is one which is to be paid before others in case the debtor is insolvent, or which from other circumstances has a preference in its order of payment.⁵

12. Specialty.—A debt by specialty is such whereby a sum of money becomes or is acknowledged to be due by deed or instru-

ment under seal.6

13. Statutory.—A statutory debt is one created by statute.

DEBT (Action of).

- 1. Definition, 165.
- 2. When Action Lies, 166.

- (a) Simple Contracts, 166.
 (b) Specialties, 168.
 (c) Judgments and Records, 169.
 (d) Statutes, 170.
- 3. When Action Does Not Lie, 170.

(a) Plaintiff, 171.

- 4. Parties to Action, 171.
- 1. **Definition**.—Debt is a form of action which lies to recover a sum certain.8 whether it have been rendered certain by contract between the parties, or by judgment, or by statute, as when this remedy is given by statute for a penalty, or for the escape of a judgment debtor. It lies wherever the sum due is certain or
- 1. Howland v. Carson, 28 Ohio St. 628; Reid v. Martin, 11 Sup. Ct. (N. Y.) 590; I Story Eq. Jur. sec. 186; Sturtevant v. Tuttle, 22 Ohio St. 111; Broadnax v. Bradford & Co., 50 Ala. 270; Lord v. Goddard, 13 How. 198; Chandelor v.
 Lopus, 1 Smith L. C. 283. See FRAUD,
 in art. CONTRACTS, ante, Vol. III., p. 870.
 2. Bouv. Law Dict. See Mortgage;

PLEDGE, etc.

3. Bouv. Law Dict.

"A debt of record is a sum of money which appears to be due by the evidence of a court of record." Kimball v. Whitney, 15 Ind. 282; 2 Story, 450; 11 Ark. 355. See JUDGMENTS. 355. See JUDGMENTS.
4. Bouv. Law Dict. 436.

5. Bouv. Law Dic.

The privilege may result from the character of the creditor, as where a debt is due from the United States, or from the nature of the debt, as funeral expenses, etc. See DEBTOR AND CREDITOR; PREFERENCE; PRIVILEGE; LIEN; PRIV-

ITY, etc. Art. in 9 Am. Law Reg. O

6. Probate Court v. Child, 51 Vt. 86. See 15 Ind. 282; 2 Bl. Com. 465. See ante, Vol. III., pp. 825-827, etc., Deeds; Contract under Seal; Seal, etc. 7. See Bonds, 2 Am. & Eng. Encyc. of Law, 448; Constitutional Law, 34

Am. & Eng. Encyc. of Law, 67; MUNICIPAL AID BONDS; TAXATION.

(b) Defendant, 172.

(a) Declaration, 174. (b) Plea, 175. (c) Replication, 176. 6. Election of Actions, 176.

5. Pleadings, 173.

7. Variance, 176. 8. Judgment, 177.

8. I Bouv. Law Dic., citing 2 Greenl. Ev. § 279. In a breach of contract under seal the form of action must be debt or covenant, excepting when the terms are so far altered by parol as to constitute substantially a new contract. Hamilton Appeal (Pa. 1885), I Atl. Rep. 254. The distinguishing feature is that it lies for the recovery of a sum certain or reducible to a certainty, without regard to the manner in which the obligation is incurred or evidenced. Baum v. Tomkin (Pa. S. Ct. 1885), 1 Atl. Rep. 535. 9. 2 Greenl. Ev. § 279; Knowles v. ascertained in such manner as to be readily reduced to a certainty. without regard to the manner in which the obligation is incurred or is evidenced. It is used for the recovery of a debt eo nomine and in numero, though damages, which are in most instances merely nominal, are usually awarded for the detention.2

2. When Action Lies.—(a) Simple Contracts.—On simple contracts and legal liabilities debt lies to recover money lent, paid, had and received, and due on account stated;3 for interest due on loan of money, 4 for work and labor, 5 for fees, 6 for goods sold, 7 and for use and occupation. In the common counts in assumpsit the word

Eagham, 11 Cush. (Mass.) 429; Portland Dry Dock Co. v. Portland, 12 B. Mon.

(Ky.) 77. 1. Bouv. Law Dic., citing Crockett v. Moore, 3 Sneed (Tenn.), 145; Flanagan v. The Camden Mut. Ins. Co., 1 Dutch. v. The Camden Mut. Ins. Co., I Butch. (N. J.) 506; Lee v. Gardiner, 26 Miss. 521; Home v. Semple, 3 McLean (C. C.), 150; Pollard v. Yoder, 2 A. K. Marsh. (Ky.) 264; Bullard v. Bell, 1 Mason (C. C.). 243.

2. 1 Chitty on Pl. 121. For ancient law in reference to this action, see I Reeves Hist. of English Law, 158; 2 Reeves Hist. of English Law, 252, 262, 329, 333; 3 Reeves Hist. of English Law, 58, 65; Hoffman v. Walker, 26 Gratt. (Va.) 314

Debt lies where a party claims the recovery of a debt, i.e., a liquidated or certain sum of money alleged to be due him. Stephen on Plead. (Tyler's Ed.) 46.

Debt is one of the old common-law actions, and in its pure form exists in none or but few of the courts of this country. In many of the States it has been abolished, and in the others much

modified by statute.

The States of Arkansas, Connecticut, California, Colorado, Iowa, Indiana, Georgia, Kansas, Louisiana, Minnesota, Mis-souri, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Texas, Wisconsin, and the Territories of Arizona, Dakota, Idaho, Montana, Utah, Washington, and Wyoming have adopted code pleadings; while the States of Alabama, Delaware, Florida, Illinois, Maine, Mas-sachusetts, Michigan, Mississippi, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Tennessee, Vermont, Vir-ginia, West Virginia, The District of Columbia, the United States Courts, and the Territory of New Mexico still adhere to the common-law form of pleading, although in many instances very much modified by statute.

Florida adopted a code in 1870, but . repealed it in 1873; and South Carolina has adopted a code, but by other laws

and usages has drifted back to the old

form in many respects.

"The action of debt is generally abolished in those States which have adopted new codes of practice, and in the other States it is a form of remedy not often resorted to." Wait's Act. and Def. vol. ii., 482.

3. Comyn's Dig. Debt (A); Speake v. Richards, Hob. 207; I Roll. Abr. 503, pl. 25; Young v. Hawkins, 4 Yerg. (Tenn.) 171.

Debt is in some respects a more extensive remedy for the recovery of moneythan assumpsit or covenant; for assumpsit is not sustainable on a specialty, and covenant does not lie upon a contract not under seal, whereas debt lies to recover money

due on all liabilities. I Chitty on Pl. 121.

The action of debt is founded on the contract, and assumpsit on the promise. Simonton v. Barrell, 21 Wend. (N.Y.) 362.

A petition on debt can be sustained only in cases for the direct payment of money. Burton v. Brooks, 25 Ark, 215.
4. Herris v. Jamison, 5 T. R. 553.

To recover interest due on a bond payable before the bond is due. Sparks v.

Garigues, 1 Binn. (Pa.) 152.

To recover back money paid as usurious interest. Houghton v. Stowell, 28

Me. 215.
5. Comyn's Dig Debt, 83; McVicker v. Beedy, 31 Me. 314; Thompson v. Trench, 10 Yerg. (Tenn.) 452.

Where one party has entered into a special contract to perform work for another and furnish materials, and the work is done and the materials are furnished, but not in the manner stipulated in the contract, yet if the work and materials are of any value and benefit to the other party, debt will lie for the amount whereby he is benefited. Norris v. School Dist., 12 Me. (Fair) 293.

6. Bacon's Abr. Debt (A); I Roll. Abr. 598; Comyn's Dig. Pl. 2 W. 11.
7. Emery v. Fell, 2 T. R. 28; Dilling-

ham v. Skein, I Hempst. (U. S.) 181.

8. Eglen v. Marsden, 5 Taunt. 25;
Wilkins v. Wingate, 6 T. R. 62.

Simple Contracts.

"promised" is used, in debt it is not; this is the distinguishing characteristic as to those when used in debt and in assumpsit.1

Debt lies for rent for an agreed sum, whether the demise be by deed, or parol, or written contract; against an executor to recover a legacy; 3 on an open account for goods sold and delivered, as well as an action of assumpsit; 4 on a bond conditioned for the performance of covenants;5 on a sealed instrument where an unliquidated demand, which can be readily reduced to a certainty, is sought to be recovered.6

It will lie on a recognizance to the State in criminal proceedings, on a replevin bond, on a quantum meruit, on a promissory note. 10 on a bill of exchange, 11 and on a promissory note even though it is not shown to have been drawn for value received. 12

It is sustainable for any debt or duty created by common law or custom. And it lies on an award to pay money; 14 also on bylaws, 15 town ordinances, 16 for fines and amercements, 17 and against a corporation for the recovery of a debt in those cases in which assumpsit may be maintained against them: 18 the action will lie to recover a sum of money decreed as alimony, 19 to recover the purchase-money of lands sold under articles of agreement, 20 to re-

1. McGinnity v. Laguerenne, 5 Gilm.

1. McGinnity v. Laguerenne, 5 Gilm. (Ill.) 101; Cruikshank v. Brown, 5 Gilm. (Ill.) 75; Smith v. Webb, 16 Ill. 105.
2. Trapnall v. Merrick, 21 Ark. 503; McEwen v. Joy, 7 Rich. (S. Car.) 33; McKeon v. Whitney, 3 Denio (N.Y.), 452.
3. Pettigrew v. Pettigrew, 1 Stew. (Ala.) 580; Knapp v. Hanford, 6 Conn. 170; Storer v. Storer 6 Mass 200

170; Storer v. Storer, 6 Mass. 390.
4. Dillingham v. Skein, 1 Hempst.

(U. S.) 181.

5. Meakings v. Ochiltree, 5 Post (Ala.),

6. Wetumpka R.Co. v. Hill, 7 Ala. 772. 7. State v. Folsom, 26 Me. 209; Green

v. Dana, 13 Mass. 493; Com. v. Green, 12 Mass. 1.

8. Manning v. Pierce, 3 III. 4; Salter v. Richardson, 3 T. B. Mon. (Ky.) 204; Darling v. Peck, 15 Ohio, 65; Early v. Owen, 6 Munf. (Va.) 319.

9. Van Deusen v. Blum, 18 Pick. (Mass.) 229; Norris v. Windsor, 12 Me.

"It has been doubted whether debt lies upon a quantum meruit." I Chitty on

Pl. 122 (16th Ed., note).

10. Bentley v. Dickson, I Ark. 165; Wilborn v. Greer, 6 Ark. 255; Evans v. Landon, 3 Ill. 53; Phillips v. Runnels, 1 Landon, 3 III. 53: Phillips v. Runnels, I Morris (Iowa), 391; Hartman v. Wells, I B. Mon. (Ky.) 242; Casey v. Barcruft, 5 Mo. 128; Nelson v. Bank of Mo., 7 Mo. 219; Crawford v. Daigh, 2 Va. Cass. 521; Dunlap v. Buckingham, 16 Ill. 109; Loose v. Loose, 36 Pa. St. 538; Nashville Bank v. Henderson, 5 Yerg. (Tenn.) 104; Gift

v. Hall, I Humph. (Tenn.) 480; Crockett v. Moore, 3 Sneed. (Tenn.) 145. Compare Lindo v. Gardner, 1 Cranch (U. S.), 343;

Carroll v. Meeks, 3 Porter (Ala.), 226; Howell v. Hallett, Minor (Ala.), 102. 11. Hollingsworth v. Milton, 8 Leigh (Va.), 50; Sharpe v. Towlkes, 7 Humph.

(Tenn.) 512.

12. Lyons v. Cohen, 3 Dowl. 243; Willmarth v. Crawford, 10 Wend. (N.Y.) 341; Evans v. Langdon, 3 Ill. 53; Wilburn v. Greer, 6 Ark. 255; Carroll v. Meeks, 3 Porter (Ala.), 226.

13. I Chitty on Pl. 123.

14. Stanley v. Chappel, 8 Cow. (N.Y.) 235; Ex parte Wallis, 7 Cow. (N. Y.) 522. 15. Company of Feltmakers v. Davis,

I B. & P. 98.

16. Israel v. Jacksonville, 2 Ill. 290;

Head (Tenn.) Meaher v. Chattanooga, I Head. (Tenn.)

74.
17. Poulters Co. v. Phillips, 6 Bing. (N. Car.) 314; Earl of Lincoln v. Frysher, Cro. Eliz. 581; Speake v. Richards, I Hob. 206.

18. I Chitty's Pl. 123, 119.
 19. Howard v. Howard, 15 Mass. 196.
 20. Huleer v. Burke, 11 S. & R. (Pa.)

But where the vendee of land sued his vendor for the part of purchase-money paid, alleging that the vendor could not convey on account of incumbrances, held, that the action should have been covenant. Debt lies for a sum certain or that may by computation be rendered certain. Haynes v. Lucas, 50 Ill. 436.

cover of a turnpike corporation for damages assessed for lands taken.1

(b) Specialties.—Debt will lie to recover money due on any specialty, or contract under seal to pay money, as on single bonds, on charter-parties, on policies of insurance under seal, 5 and bonds conditioned for the payment of money; 6 on leases for rents or penalties, as for ploughing up meadow, etc.; on annuity

and mortgage deeds.

It lies upon an injunction bond, on a replevin bond, on a bond conditioned for the performance of covenants. 10 by the lessor against the assignee of his lessee for rent in arrear under a sealed lease. 11 and to recover the purchase-money of lands sold under articles of agreement. 12 In *Illinois*, it will lie against a sheriff for an escape on a writ of capias ad satisfaciendum. 13 It will lie on a bond for the payment of a specified sum "in specie or its equivalent" if the plaintiff seeks to recover only the amount of the bond as specified. 14 It will lie against a sheriff or his assignees on his bail bond, 15 and it will lie against the heir of an obligor if he be expressly named in the deed, or against a devisee having legal assets. 16 An impression of the seal of a railroad corporation, made upon the

1. Rice v. Barry Turnpike, 4 Pick. (Mass.) 130; Jeffrey v. Blue Hill Tp., 10 Mass. 368; Blanchard v. M. & L. Turnpike, 1 Dana (Ky.), 86.

2. Hooper v. Shepherd, 2 Stra. 1089;

White v. Parkins, 12 East, 583.

Thus debt lies on an absolute covenant by A to pay a sum certain on a certain Jones, 5 M. & W. 205; Randall v. Rigby, 4 M. & W. 130; Harrison v. Matthews, 10 M. & W. 768; I Chit. on Pl. 124.

The action will not lie upon an obligation for a certain sum payable in county orders, such an obligation not being for money. Mix v. Nettleton, 29 Ill. 245.

Debt may be maintained upon an in-

strument under seal, for a sum certain, payable to a specified person and at a certain time, though it states the consideration for which it was given, without alleging or proving such consideration. Such statement does not change the character of the instrument. Nash v. Nash, 16 Ill. 79.

Where a party covenants to pay a specific sum of money annually, on a specific day in each year, debt is the proper remedy, notwithstanding the agreement contains other covenants, the performance of which is precedent to the payment of the money. Hay v. Hay, 44

3. Ingram v. Hull, Mart. N. S. (La.) 1; Hooper v. Shepherd, 2 Stra. 1089.

4. Atty v. Parrish, I New Rep. 104; Hooper v. Shepherd, 2 Stra. 1089.

5. Ellicott v. U. S. Ins. Co., 8 Gill & J. (Md.) 166; Marine Ins. Co. v. Young, 1 Cranch (U. S.), 332.

Upon a policy of insurance renewed by

parol indorsement. People's Ins. Co. v. Spencer, 53 Pa. St. 353.

6. Rhyne v. Wacaser, 63 N. Car. 36; Spark v. Garrigues, 1 Binn. (Pa.)

7. Com. Dig. Debt, A. 5, B.; 3 Bl. Com. 231; Atty v. Parish, I New R. 104,

8. Casey v. Giles, 7 Dev. & B. (N. Car.) L. I. Even though a summary remedy is given by statute.

9. Darling v. Peck, 15 Ohio, 65; Salter v. Richardson, 3 T. B. Mon. (Ky.) 204;

Manning v. Peirce, 3 Ill. 4.
Where in an action of debt upon a replevin bond, the breach alleged in the declaration was, the plaintiff in replevin did not prosecute the suit to effect nor make a return of the property as awarded on trial, it was held bad. Goelz v. Joerg, 64 Ill. 114.

10. Meakings v. Ochiltree, 5 Port. (Ala.)

11. McKeon v. Whitney, 3 Denio (N. Y.), 452; Allen v. Bryan, 5 B. & C.

12. Huber v. Burke, 11 S. & R. (Pa.) 238.

Plumbigh v. Cook, 13 Ill. 669.
 Rhyne v. Wacaser, 63 N. Car. 36.

15. 4 Anne, c. 16, s. 20.
16. Wilson v. Knobly, 7 East, 128; Bac. Abr. Heir.

paper of instruments issued by them as bonds, and purporting to be under seal, is a sufficient seal to make the instruments special-

ties upon which debt may be maintained.1

(c) Judgments or Records.—An action of debt lies also upon records; as, for instance, upon the judgment of a superior or inferior court of record, and it seems in a judgment of an inferior court, not of record. Although the judgment was erroneous, it will lie until it has been reversed.4 It will lie upon a judgment or decree of a foreign court.5

Debt is often brought on a recognizance of bail, 6 and the remedy by scire facias is also frequently adopted.7 Debt lies upon statute merchant, though not upon statute staple, because the seal is not affixed to the latter: but it lies on a recognizance in the nature of a statute staple to which the seal of the conusor is affixed.8 But it is held that in order to sustain the action upon a judgment, or upon any matter of record, the obligation must result from the record itself, and must be shown by the record without requiring averments of additional matter. The record must show a still subsisting obligation, perfect in its inception and still unsatisfied.9

Debt on a judgment will lie where an execution has been levied irregularly and without producing notification. 10 And it will lie as well on a decree of a court of chancery in another State as on a judgment of a court whose proceedings are according to the course

of the common law.11

1. Allen v. Sullivan R. Co., 32 N. H.

446. 2. McIntire v. Caruth, 3 Brev. S. S.

395.
"It is one of the first principles we learn in relation to an action of debt, that it may be sustained on a record of a judgment, and when the judgment is obtained and the record is made up the right of action is complete. It may be brought not only on the judgment of our own courts, but those of our sister States. The right to issue execution on a judgment is a remedy cumulatory only, and I know of no law which would deny to the party a right of action on a judgment if party a right or action on a judgment it he choose that remedy, because he could issue an execution." Wood, J., in Headly v. Roby, 6 Ohio, 521; St. Louis, etc., R. Co. v. Miller, 43 Ill. 199.

3. Jones v. Jones, 5 M. & W. 523. See Hale v. Angel, 20 Johns. (N. Y.) 342; Bennett v. Moody, 2 Hall (N. Y.), 471.

4. Harry v. Doniel 2 Lea (Tenn.) 161.

Bennett v. Moody, 2 Hall (N. V.), 471.
4. Harsy v. Daniel, 2 Lea (Tenn.), 161;
Prince v. Nicholson, 5 Taunt. 667.
5. Letson v. Wadsworth, 2 Speers
(S. Car.), 277; McKim v. Odom, 12 Me.
94; Williams v. Preston, 3 J. J. Marsh.
(Ky.) 600; Drakesly v. Roots, 2 Root
(Conn.), 138; Moore v. Adie, 18 Ohio,
430; Jordan v. Robinson, 15 Me. 167;
Warren v. McCarthy, 25 Ill. 95; Stanfield
v. Felters, 7 Blackf. (Ind.) 558; Headly

v. Roby, 6 Ohio, 521; Carter v. Crews, 2
Porter (Ala.), 81; Thrall v. Waller, 13 Vt.
231; James v. Henry, 16 Johns. (N. Y.)
233. But see Van Buskirk v. Mulock, 18
N. J. 184.
6. Dowlin v. Standifer, 1 Hempst. (U.

S.) 290; Com. v. Green, 12 Mass. 1; Green v. Dana, 13 Mass. 493; State v.

Folsom, 26 Me. 200.

An action of debt may be brought on a recognizance executed in open court, in an attachment suit, though it is not signed by the parties. Eimer v. Richards, 25 Ill. 289.

That provision of the Illinois statute which authorizes a surety to surrender his principal in discharge of the recognizance, does not exclude the commonlaw remedy by action of debt. Pate v. People, 15 Ill. 221. 7. 1 Chitty's Pl. 125.

It will not lie on a statute bond in Massachusetts. Niles v. Drake, 17 Pick. (Mass.) 516.

8. 2 Saunders, 60, 70, in notes;

Comyn's Dig. Debt, A. 3.

9. Dimick v. Brooks, 21 Vt. 569. 10. Fish v. Sawyer, 11 Conn. 545. 11. Moore v. Adie, 18 Ohio, 430; Letson v. Wadsworth, 2 Speers (S. Car.), 277; Green v. Folley, 2 Stew. & P (Ala.) 441; Drakesly v. Roots, 2 Root (Conn.), 138; Warren v. McCarthy, 25 Ill. 95.

(d) Statutes.—Debt is frequently the remedy on statutes, either at the suit of the party grieved, or of a common informer. It is the remedy upon statutes: first, when action is given by statute: and second, when the statute provides for the payment of a sum of money, or gives a penalty or forfeiture on the doing of the forbidden act, but does not mention the mode of recovering it.2

Where a penal statute expressly gives the whole or a part of a penalty to a common informer, and enables him generally to sue for the same, debt is sustainable, and he need not declare qui tam. unless where a penalty is given for a contempt; 4 but if there be no express provision enabling an informer to sue, debt cannot be supported in his name for the recovery of the penalty.5 It will lie to recover a penalty imposed by statute, where only the maximum and minimum of the penalty is fixed by the statute, 6 and where forfeitures or penalties are imposed, and no form of action is given.7

Likewise where a certain sum is declared by statute to be paid

as a tax, and on which a penalty is imposed by statute.8

Debt lies for the collection of a tax, notwithstanding a remedy

is given by distress.9

3. When Action Does Not Lie. - The action will not lie upon a promise to pay a debt in a particular kind of "money," 10 "funds," or "currency;" to recover for the loan of scrip, 11 on a writing to pay for a horse at the value of £30; 12 on a note to pay \$100 in leather, or other property of its value; 13 upon acknowledging the person signing it has borrowed a watch of the value of \$20; 14 upon a mortgage in the common form, containing no covenant to pay the debt; 15 upon a bond unless conditioned for the payment of

1. Comyns' Dig. Action on Statute, E; Bacon's Abr. Debt, (A), 3.
2. Van Hook v. Whitlock, 3 Paige

2. Van Hook v. Whitlock, 3 Paige (N. J.), 409; Blackburn v. Baker, 7 Port. (Ala.) 284; Rice v. Barre Turnpike, 4 Pick. (Mass.) 130; Adams v. Woods, 2 Cranch (U. S.), 336; Kelly v. Davis, 1 Head (Tenn.), 71; The Nashville, 4 Biss. (C. C.) 188; St. Lous, etc., R. Co. v. Miller, 43 Ill. 199; Vaughan v. Thompson, 15 Ill. 39; Nealy v. Brown, 1 Gilm. (Ill.) 10; Jacksonville v. Block 36 Ill. 109; (Ill.) 10; Jacksonville v. Block, 36 Ill. 507.

3. Comyns' Dig. Action Debt, (E), I, 2. 4. 2 Saund. 374, notes (1), (2); 1 Saund.

136. note (1).

5. Fleming v. Bailey, 5 East, 313; Rex v. Malland, 2 Stra. 828; Bacon's Abr. Action Qui Tam (A).

Action Qui Yam (A).

6. Rockwell v. State, II Ohio 130.

7. Vaughan v. Thompson, 15 Ill. 39.

8. Portland Dry Dock & Ins. Co. v.
Trustees of Portland, 12 B. Mon. (Ky.)

77. See Stockwell v. U. S., 13 Wall. (U. S.)

531; Chaffee v. U. S., 18 Wall. (U. S.)

516; U. S. v. Willett, 7 Ben. (U. S.) 220,

U. S. v. Morin, 4 Biss. (U. S.) 93; U. S.

v. Ebener, 4 Biss. (U. S.) 117. v. Ebener, 4 Biss. (U. S.) 117.

9. Geneva v. Cole, 61 Ill. 397; Ryan v. Gallatin Co., 14 Ill. 78; Glancy v. Elliott, 14 Ill. 456.

Elliott, 14 III. 456.

10. Young v. Scott, 5 Ala. 475; Hudspeth v. Gray, 5 Ark. 157; Wilson v. Hickson, 1 Blackf. (Ind.) 230; Scott v. Conover, 6 N. J. 222; Campbell v. Weister, 1 Litt. (Ky.) 30; January v. Henry, 2 T. B. Mon. (Ky.) 58; Deberry v. Darnell, 5 Yerg. (Tenn.) 451.

11. Farrar v. Barber, Ga. Dec. Part ii.

25.
12. Watson v. McNairy, I Bibb (Ky.),
356. But it has been held that the action will lie for a stipulated sum in property. Snell v. Kirby, 3 Mo. 21; Henry v. Gamble, Minor (Ala.), 15; Cranford v. Daigh, 2 Va. Cas. 521.

13. Bruner v. Kelsoe, I Bibb (Ky.),487; Mattox v. Craig, 2 Bibb (Ky.), 584. But see Bradford v. Stewart, Minor (Ala.), 44; Ballinger v. Thurston, 4 Const. Ct. 447.

14. Thayer v. Campbell, 2 Bibb (Ky.), 472-478; Larmon v. Carpenter, 70 Ill.

15. Barrell v. Glover, 2 Gill (Md.), 171.

money; 1 for the non-performance of a contract under seal where the damages are unliquidated; 2 when the action grows out of a tort, and not a contract; on a contract of indemnity against unliquidated or unascertained damages; 4 upon a collateral promise to pay the debt of another. It will not lie against the acceptor of a bill of exchange, or on a sealed instrument to secure the payment of money by instalments, before all the instalments have become due; or against heirs upon the bond of an ancestor, in which they are not expressly bound; sor against an administrator in one State, on a judgment obtained against a different administrator of the same intestate appointed under the authority of another State.9 An action of debt will not lie upon articles of agreement to pay a certain sum of money in bank-notes. 10 Neither a joint nor a several action of debt on a sealed instrument will lie against a party on a sealed lease, who bound himself as surety for the rent by a writing not under seal. 11 The general doctrine is laid down, that an action of debt will not lie on a decree in chancery.12 An action of debt will not lie on a mortgage which, although it recites an indebtedness, does not contain an express covenant to pay.13

4. Parties to Actions.—(a) Plaintiff.—The general rule of pleading is, that the action should be brought in the name of the party

1. Carle v. Pettus, 6 Mo. 497.

2. Little v. Mercer, 2 Mo. 218.

The action can only be maintained for a sum certain, or which may be rendered certain by computation. For a refusal to convey shares in a building according to the terms of a contract under seal, when the contract fixes no value to the shares, debt will not lie. Fox River Mfg. Co. v. Reeves, 68 Ill. 403.

3. Chamberlain v. Cox, 2 N. J. 333;

Eads v. Pitkins, 3 Iowa, 77.

4. Flanagan v. Camden, etc., 25 N. J. 506.

5. But where a party enters into a new, original, and immediate contract with the plaintiff, although it be a security for a collateral debt, an action can be supported. Sissen v. Kielman, I Dowl. N. S. 493; Sissen v. Kielman, I Dowl. N. S. 493; Gregory v. Thompson, 31 N. J. 166; Tappen v. Campbell, 9 Yerg. (Tenn.) 436. But debt was held to lie upon a guaranty in these words: "I guarantee the payment of the within note to A for value received." Brown v. Bussy, 7 Humph. 536, 573.

6. Smith v. Segar, 3 Hen. & M. (Va.) 394; Stovall v. Woodson, 2 Munf. (Va.)

In Lewin v. Edward, 1 Dowl. N. S. 639, Parke, B., said he knew of no authority in favor of debt lying against the drawer by the holder of a banker's checks payable to bearer.

7. Fourtaine v. Aresta, 2 McLean (C. C.). 127. But where the sum payable is not an instalment of a larger sum, but a. distinct debt, the action lies. Thus it lies to recover rent payable periodically, or to recover two sums payable on different days. Wm. Saunds. 303, n.

8. Taylor v. Grace, 2 Murph. (N. Car.) 66.
9. Stacy v. Thrasher, 6 How. 44;
Paine v. McIntire, 32 Me. 131; Brodie v. Bickley, 2 Rawle (Pa.), 431.

v. Bickley, 2 Rawle (Pa.), 431.

10. Scott v. Conover, 6 N. J. 222; Wilson v. Hickson, 1 Blackf. (Ind.) 230; Feemster v. Ringo, 5 T. B. Mon. (Ky.) 336; Brown v. Durbin, 5 J. J. Marsh. (Ky.) 170; Kennedy v. Vanwinkle, 6 T. B. Mon. (Ky.) 398.

11. Turney v. Penn, 16 Ill. 485. And debt is not sustainable for the arrears of an annuity or yearly rent devised, pay-able out of lands to A during the life of B, to whom the lands are devised for life, B paying the same thereout so long as the estate of freehold continues. Webb v. Jiggs, 4 M. & Sel. 113; 2 Saund. 304, note; Randall v. Rigby, 4 M. & W.

12. Elliot v. Ray, 2 Blackf. (Ind.) 31; Van Buskirk v. Mulock, 18 N. J. 184; Eichelberger v. Smyser, 8 Watts (Pa.), 181. But see Thrall v. Waller, 13 Vt. 231, and ante, JUDGMENTS.

13. Fidelity Ins. Co. v. Miller, 89 Pa.

St. 26.

whose legal right has been affected against the party who committed or caused the injury, or by or against his personal representatives. The rules which direct who are to be parties to an action in form ex contractu, whether as plaintiffs or defendants, are to be considered, first as between the original parties to the contract, and secondly, where there has been a change of parties, interest, or liability.2

Debt lies by the bearer against the maker of a promissory note, payable to bearer: 3 against the acceptor of a bill of exchange; 4 in favor of a holder of a dishonored bank-note, against a stockholder in the bank; by the payee or indorsee of a bill against the acceptor where the bill is expressed to be for value received. It will lie in favor of the United States against the importer of

goods,7 for duties due on the goods.

Wherever the statute imposes a legal obligation upon one person to pay another person money, the action may be maintained by

the party to whom it is pavable.8

Debt for rent reserved by indenture may be maintained by the assignee of the lessee; 9 it lies in the name of a late partnership on a bond assigned to trustees to pay off partnership debts; 10 in favor of a defendant in a previous action of book-account to recover the amount of a balance of accounts which the auditors have reported due to him from the plaintiff.¹¹ A person injured or defrauded by any fraudulent conveyance may maintain an action of debt against the parties privy thereto.12

(b) Defendants.—For general rule see PLAINTIFF.

Debt lies against a constable for mere neglect to return an execution. 13 Where the directors of a bank are made responsible for the debts of the bank by statute the action will lie against them.14

1. I Chitty's Pl. I.

2. I Chitty's Pl. 2.
In general, the action on the contract, whether by parol, or under seal, or of record, must be brought in the name of the party in whom the legal interest in such contract was vested.

The cases herein cited are those in which these general rules have been questioned, and for a general discussion of the principles of Parties to Action, and PLEADING, see those special subjects.

3. Carroll v. Meeks, 3 Port. (Ala.) 226. 4. Planters' Bank v. Galloway, 11

Humph. (Tenn.) 342.

5. Bullard v. Bell, 1 Mas. (U. S.) 243.
6. Raborg v. Peyton, 2 Wheat. (U. S.) 385; Kirkman v. Hamilton, 6 Pet. (U. S.) 20; Horne v. Semple, 3 McLean (C. C.), 150; Vowell v. Alexander, 1 Cranch (C. C.), 575; Hayes v. Bell, 1 Cranch (C. C.),

7. U. S. v. Lyman, 1 Mas. (U. S.) 482. 8. Van Hook v. Whitlock, 3 Paige (N. Y.), 409.

An action of debt founded upon a statutory liability is not barred in six years, the statute being in the nature of a specialty.

9. Howland v. Coffin, 12 Pick. (Mass.)

The lessor may maintain debt against the assignee of his lessee to recover rent in arrear under a sealed lease, and he may maintain debt for "use and occupa-tion" against the assignee of his lease under a demise in writing not under seal.

McKeon v. Whitney, 3 Denio (N.Y.), 452. 10. Kerr v. Hawthorne, 4 Yeates (Pa.),

11. McCall v. Crousillat, 3 S.& R.(Pa.) 7.

Miller v. Conway, 2 Mo. 213.
 Sloan v. Case, 10 Wend. (N. Y.)

14. Falconer v. Campbell, 2 McLean (C. C.), 195. The existence of the bank may be stated by way of recital, and it is sufficient if it appear from the declaration that the defendants became a body corporate and politic, though not specially Where two have incurred the forfeiture of a penalty under a statute, debt may be maintained against one only to recover the penalty. Where, by mistake, fraud, or accident, the tonnage and light duties payable by law are not paid by the owner of a vessel, an action of debt lies against him to recover them.² It lies against executors on a simple contract.³ It will lie against an heir having assets by descent in fee-simple, on an obligation of the ancestor, wherein the heir is expressly bound. A devisee was not liable either, at common law or in equity, to the payment of the testator's debts in respect to land devised.5

5. Pleading.—(a) Declaration.—Pleadings in debt must show a certain sum due with sufficient precision and consistency to enable

the court to render judgment final thereon on demurrer.6

Debt against an executor in general should be in detinet only, unless he has made himself personally responsible.7 The omission in an action of debt to allege a demand is one which is cured by verdict:8 neither is it a cause for demurrer that the declaration in debt on a simple contract demands, in the commencement, more than the aggregate of the several counts.9

Debt on a simple contract may be joined with debt in judgment. or on specialty. 10 In an action of debt, an omission of profert of

alleged; and it is not necessary to allege that the act of incorporation was passed by a constitutional majority.

Powers v. Spear, 3 N. H. 35.
 U. S. v. Hathaway, 3 Mass. (U. S.)

3. Childress v. Emory, 8 Wheat. (U.S.) 642; Pettigrew v. Pettigrew, I Stew. (Ala.)

580; i Chitty's Pl. 124, 128.
4. i Sel. N. P. 531; Barber v. Fox, i Wm. Saund, 136, n; Waller v. Ellis, 2 Munf. (Va.) 88. But the heir is liable to no greater extent than the value of the land descended, and as soon as he has paid his ancestor's debts to the value of paid his ancestor's debts to the value of the land he is entitled to hold the land discharged. Buckley v. Nightingale, I Str. 665; I Sel. N. P. 532; Watkins v. Holman, 16 Pet. (U. S.) 25; Wilson v. Wilson, 13 Barb. (N. Y.) 252; Vansyckle v. Richardson, 13 Ill. 171; 4 Kent Com. 420.

5. Plasket v. Beeby, 4 East, 485; Wil-

son v. Knobly, 7 East, 135.

6. McKenzie v. Connor, I Stew. (Ala.)

A declaration in debt on a simple contract is bad if it allege a "promise" to pay. The word "agreed" should be Metcalf v. Robinson, 2 McLean (C. C.), 363. Otherwise in debt on bond. State Bank v. Clark, 2 Ark. 375.

The statement of a specified sum is not necessary in the commencement of the declaration in debt, and if stated, may be regarded as superfluous; it cannot be objected, therefore, that it varies from the

proof. Williams v. Harper, 1 Ala. 502; Cozine v. Tousey, 5 Blackf. (Ind.) 46.

An action of debt on a judgment is sustainable without averring special facts as a reason for bringing it. Dennison v. Williams, 4 Conn. 402.

7. Childress v. Emory, 8 Wheat. (U.S.)

642.

In petition and summons by an administrator on a note bearing date subsequent to the date of the letters of administration, it is not necessary, as in an action at common law to aver that the note was incorrectly dated. Hamilton v. Stewart, 5 Mo. 256.

8. Lusk v. Cassell, 25 Ill. 209. 9. White v. Walker, I T. B. Mon. (Ky.)

A declaration in debt is not bad because it claims interest in the debt, though such amount is unusual and unnecessary. Dudley v. Lindsey, 9 B. Mon. (Ky.) 486.

Where, in an action of debt, two several sums are demanded as due and owing in two separate counts, the declaration should in the commencement demand the aggregate amount, the first count should demand the same, as parcel, etc., and the second count the same.

and the second count the same. People v. Van Eps, 4 Wend. (N. Y.) 387.

10. Union Cotton Manf. Co.v. Lobdell, 13 John. (N. Y.) 462; Mardis v. Terrell, 1 Miss. 327; Tillotson v. Stipp, 1 Blackf. (Ind.) 77; Flood v. Yandes, 1 Blackf. (Ind.) 102; Smith v. Proprietors, etc., 8 Bish (Mass.) 78

Pick. (Mass.) 178.

the writing on which the action is founded, the action having been defaulted, is fatal. But the declaration, in an action for goods sold and delivered, is good after verdict, although the words "at his special request and instance" are omitted.2

The declaration when the action is founded on a record or specialty need not aver a consideration.³ But when it is founded on a simple contract, the consideration must be averred.4 precisely

as in assumbsit.5

(b) Plea.—When the action is brought upon a parol contract or for an escape, or for a penalty given by statute, the general issue is nil debet; under which, as it is a traverse of the plaintiff's right to recover, he must prove every material fact alleged in the declaration.

But these causes of action cannot be included in the same count. Tillotson v. Stipp, I Blackf. (Ind.) 77.

Several notes or bonds may be set out in one petition in debt, and each will be considered a separate count. Jones v.

Cox, 7 Mo. 173.

A count in debt on a promissory note which alleges, in describing the contract, that the defendant promised, etc., is good and may be joined with other counts in debt. Mahan v. Sherman, 8 Blackf. (Ind.)

1. Scott v. Curd. Hard. (Ky.) 64. In an action of debt, the sum men-tioned in the *queritor*, not being the amount of the sums set out in the several counts, is no ground for error. Bovd v. .Sargent, 1 Mo. 437; Thompson v. Weaver, 7 Blackf. (Ind.) 552; Hampton v. Barr,

3 Dana (Ky.), 578.
2. Durrill v. Lawrence, 10 Vt. 517. Omission of the debet and detinet in a declaration in debt is bad on special demurrer. Adams v. Campbell, 4 Vt. 447. But not after verdict or upon general demurrer. Waller v. Ellis, 2 Munf. (Va.)

For other authorities upon the declarations in debt see Butler v. Limerick, Minor (Ala.), 115; Hanley v. Mooney, 8 Ark. 461; Magruder v. Slater, 12 Ark. 171; Donohoe v. Chappel, 4 Mo. 34; Goodrich v. Calvin, 6 Cow. (N. Y.) 397; Anderson v. Price, 4 Munf. (Va.) 307; Flanagan v. Gilchrist, 8 Ala. 620; Henrickson v. Rimback, 33 Ill. 299; State v. Harvey, 8 Blackf. (Ind.) 527; Laughun v. Harvey, 5 Blacks. (Ind.) 521, Lauguan 5. Lebarge, 6 Mo. 355; Garvey v. Dobyns, 8 Mo. 213; Nelson v. Bostwick, 5 Hill (N. Y.), 37; Vandevender v. Pittsford, 6 Blacks. (Ind.) 197.

3. State Bank v. Clark, 2 Ark, 375; 1

Chitty's Pl. 129.
4 2 Term R. 28, 30; Bouv. Law Dict.

5. 1 Chitty's Pl. 129, 510.

6. 2 Greenl. Ev. 271; Stephen on Pl. 177; I Chitty's Pl. 423-510; I Bouvier

Law Dict. 437.
Nil Debet.—This plea has been abolished in England, and that of non assumpsit and nunquam indebitatus substituted.

I Chitty's Pl. 511.

Nil debet cannot be pleaded to an action on a judgment. Wheaton v. Fellows, 23 Wend. (N. Y.) 375; Tappan v. Heath, 16 N. H. 34; Chipps v. Yancey, Breese (Ill.), 2*, 19; Knickerbocker Life Ins. Co. (III.), 2*, 19; Knickerbocker Life Ins. Co. v. Barker, 55 Ill. 241. Neither is it a good plea to an action founded on a judgment of another State. Mills v. Duryee, 7 Cranch (U. S.), 481; St. Albans v. Bush, 4 Vt. 58; Clark v. Day, 2 Leigh (Va.), 172; Chipps v. Yancey, I Ill. 2. Or where the action is founded on a deed. Hyatt v. Robinson, 15 Ohio, 372; Boynton v. Reynolds, 3 Mo. 79; Matthews v. Redwine, 23 Miss. 233; Bullis v. Giddins. 8 Johns. (N. Y.) 82. Or where a bond is the foundation of the plea. King v. Ramsey, 13 Ill. 619; Caldwell v. Richmond, 64 Ill. 30; Trimble v. State, 4 Blackf. (Ind.) 435; Crigler v. Quarles, 10 Mo. 324. Or where the action is on a recognizance of bail. White v. Converse, 20 Wend. (N. Y.) 266; Dyer v. Cleaveland, 18 Vt. 241.

Where one of the co-obligors in a bail bond, not served with the original summons, but brought in by an alias summons at a subsequent term, filed a plea simply denying his joint liability, intending thereby to present the question as to the effect of the judgment by default against those defendants originally served, in destroying the joint character of the indebtedness, it was held that the plea was but a departure from the form nil debet, which was not admissible in such an action, and could not properly question the effect of the judgment by default. Cleveland v. Skinner, 56 Ill. 500.

In an action on specialty or covenant, the plea of non est factum operates as a denial of the execution of the deed in point of fact only, and all other defences must be specially pleaded.1

To actions on records, when there is no record, or when there is a material variance in the statement of it. nul tiel record is the

proper plea.2

Where an action of debt lies on a statute, the general issue is

not guilty.3

In an action of debt a plea of non assumpsit is bad; 4 on a judgment, a plea that the right of action accrued more than twenty vears before the commencement of the suit is bad.

should be payment.5

(c) Replication.—In actions of debt on simple contract the replications have always been and are to be substantially the same as in the action of assumpsit. If to debt on a specialty fraud or duress be pleaded, the plaintiff may reply that it was duly and fairly obtained; or if infancy be pleaded, he denies the plea; or to a plea of usury, gaming, etc., traverses the illegality of the contract.9 Replications to a plea of tender resemble those in assumpsit: 10 and to a plea of a set-off to debt on bond, the replication may

It is the proper plea, for a penalty,—Stilson v. Tobey, 2 Mass. 521,—for rent. Dartmouth College v. Clough, 8 N. H.

1. I Chitty's Pl. 511; Stephen on Pl.

205

Non Est Factum. - Non est factum may be pleaded to a debt on a sealed note. Russell v. Hamilton, 3 Ill. 56. And it is the common plea denying the execution of the instrument. 2 Ld. Raym. 1500; I Bouvier Law Dict. 437. And it denies or puts in issue nothing else. Utter v. Vance, 7 Blackf. (Ind.) 514; Chambers v. Games, 2 Greene (Iowa), 320; People v. Rowland, 5 Barb. (N. Y.) 449.

A party to a deed, who traverses it, must plead non est factum. Stephen on

Pl. 204

In debt on an attachment bond the plea non est factum sworn to by sureties only puts in issue the execution of the bond; under it the question of the principle is not raised. Fitzsimmons v. Hall, 84 Ill. 538.

2. I Chitty's Pl. 512; Bennett v. Mor-

ley, 10 Ohio, 100; Green v. Ovington, 16 Johns. (N. Y.) 55; Hall v. Williams, 6

Pick. (Mass.) 232.

Nul Tiel Record .- This is the proper form of issue whenever the question arises as to what has judicially taken place in a superior court of record, for the law presumes that if it took place there will remain a record of the proceeding. But if the court be not of record, the issue should be directly upon the fact whether any such proceeding took place, and not upon the existence of any judicial memorial. Dyson v. Wood, 3 Barn. & Cres. 449.

Pleading-Plea: Replication.

On a judgment or recognizance, the defendant can plead no matter inconsistent with the record; but if the record be untruly stated in the declaration, he may plead nul tiel record. Giles v. Shaw, Breese (Ill.), 169; Green v. Ovington, 16 Johns. (N. Y.) 55. See Mervin v. Kumbel, 23 Wend. (N. Y.) 293. It cannot be taken advantage of by demurrer.

Giles v. Shaw, Breese (Ill.), 169.
3. I Chitty's Pl. 514; Burnham v. Webster, 5 Mass. 266; Stilson v. Tobey, 2 Mass. 521; Jones v. Williams, 4 M. & W. 375. 2 Graph For 275.

W. 375; 2 Greenl. Ev. 271.

4. Harlow v. Boswell, 15 Ill. 56; Smith v. Moore, I Ind. 228; Van Vechten v.

Cowell, I Hill (N. Y.), 203.

5. Henderson v. Henderson, 3 Denio 5. Henderson v. Henderson, 3 Denio (N. Y.), 314. See Gilchrist v. Dandridge, Minor (Ala.), 165; Lucas v. Copeland, 2 Stew. (Ala.) 151; Dickson v. Burk, 6 Ark. 412; State v. Leak, 7 Blackf. (Ind.) 462; James v. Walruth, 8 Johns. (N. Y.) 410; Ohio v. Daily, 14 Ohio, 91.

6. I Chitty's Pl. 610.

In debt a replication "that the defendant did undertake and promise" was held bad. Chenat v. Lafevre, 3 Gilm. (Ill.)

7. Comyns Dig. Pl., 2 W. 19, 20.

8. 2 Chitty's Pl. 408.

9. 2 Chitty's Pl. 395. 10. 2 Chitty's Pl. 471. either deny the subject-matter of the defendant's set-off or allege that more was due on the bond than the sum mentioned in the

plea.1 6. Election of Actions.—Debt or covenant is the appropriate action upon a written obligation.² Debt and not trespass is the proper remedy under the statute relating to the cutting of trees.3

Assumpsit and debt lie concurrently for remuneration of services

and for all usual money demands.4

Debt as well as assumpsit will lie for the recovery of a reward offered to be paid for the apprehension and conviction of the per-

petrator of a specified crime.5

Debt or trespass on the case lies for the escape of a prisoner in execution. 6 Debt and not assumpsit is the proper form of action for the recovery of money from a stakeholder of a bet on a trotting match, or against the stayer of an execution when the judgment is dormant, or on a justice's judgment in New York.

Debt is the only action which can be maintained on a sealed instrument. 10 In New Jersey, in courts for the trial of small causes, actions arising on simple contract must be brought as actions of

debt.11

- 7. Variance.—In an action of debt on judgment recovered by one as administrator, it is no variance to describe it in the declaration as recovered by him personally. 12 In debt on simple contract. a variance between the sum in the writ and that in the declaration is not a matter of demurrer, but of abatement. 13 If the declaration is against one as principal and the other as surety, and the evidence is a bond given by the two as sureties only, it is a variance equally fatal. 14
- 1. Simmons v. Knox, 3 T. R. 65; 2 Chitty's Pl. 462-465; Stephen on Pl. 94. 2. French v. Tunstall, I Humph.

(Tenn.) 204.

The action of debt is frequently preferable to assumpsit or covenant, because the judgment in debt by nil dicit, etc., is in general final, and execution can issue immediately, and it is better to proceed in debt on award than on the arbitration bond. I Chitty's Pl. 234. Either lies on a promissory note. Manterville v. Riddle, I Cranch (U. S.), 29; Martin v. Root, 17

3. Elder v. Hilzheim, 35 Miss. 231. Actions for penalty on timber act of New Jersey must be debt. Cato v. Gill, T. N. J. 11.

4. Mahaffey v. Petty, I Ga. 261; Smith v. First Cong. Soc. 8 Pick. (Mass.)

In Illinois the action of debt lies whenever assumpsit will lie, and is a concurrent remedy. Larmon v. Carpenter, 70 Ill. 549.

5. Furman v. Parke, 21 N. J. 310.

- 6. Rawson v. Dole, 2 Johns. (N. Y.) 454; Brown v. Genung, I Wend. (N. Y.)
- 7. McKeon v. Caherty, 3 Wend. (N. Y.)
- 494. 8. Humphreys v. Buie, 1 Dev. L. (N.

Car.) 378.

9. James v. Henry, 16 Johns. (N. Y.)

10. Where unattested by a subscribing witness. Ingram v. Hall, Mart. N. S.

(La.) 1. 11. Witherby v. Morgan, 2 N. J. 83;

Chattin v. Payday, 2 N. J. 138-238.

12. Allen v. Lyman, 27 Vt. 20.

13. White v. Walker, 1 T. B. Mon.

(Ky.) 34.

It is a general rule that the contract must be stated correctly, and if the evidence differs from the statement the whole foundation of the action fails, because the contract is entire in its nature and must be proved as laid. I Chitty's Pl. 312; Fisk v. Hicks, 31 N. H. 535.

14. Bean v. Parker, 17 Mass. 591.

An instrument by which three persons

It is not a material variance for the pleaders, in setting out a copy of the note sued on, to write correctly words that are wrongfully spelled in the original. In an action of debt on judgment, where the declaration alleges the recovery of a sum certain for costs in the former suit, and the original sum is left blank as to costs, the variance is fatal.2

8. Judgment.—The judgment in an action of debt must be responsive to the writ, and must therefore be either given for the whole sum demanded, or exhibit the cause why it is given for a less sum; this may appear by the pleadings, the finding of the jury, or a remittitur entered by the plaintiff.³ In debt, judgment cannot be rendered for damages.4 A general judgment for the aggregate of the principal and interest is erroneous. It should specify what part is principal and what is given as interest.5

The word "debt" used in a judgment does not necessarily make

it a judgment in debt.6

Final judgment may be rendered on demurrer, default, or nil

bound themselves to pay a sum of money, and which purported to be under their bonds and seals, was signed by one of the parties without a seal, and it was held, upon demurrer, that one action of debt might be brought against all the parties. Rankin v. Roler, 8 Gratt. (Va.) 63.

1. Dent v. Miles, 4 Mo. 419. 2. Summer v. Mantz, Ga. Dec. pt. ii.

A declaration on a judgment for \$834.41 damages and costs is not supported by a judgment for \$834.41 damages besides costs. Hight v. White, I Morris (Iowa),

An action for debt on judgment for \$14.95 and \$3.48 costs is not sustained when the only record given in evidence is the word "defaulted," in the handwriting of the justice on the back of the original writ, and the execution citing the judgment. Bunker v. Forsaith (Me. Sup.

Ct. 1886), 4 Atl. Rep. 557. In debt by "S. B., Junior" on a judgment the declaration set forth a judgment in favor of "S. B.," but on being produced it was in favor of "S. B., Junior." It was held to be a variance. Bryden v. Hastings, 17 Pick. (Mass.) 200.

A suit in a justice's court in Indiana was entitled "Allen Hamilton, Extr. of James Wilcox, v. Chas. W. Ewing. Debt. Demand, \$34," and a promissory note given by the defendant to James Wilcox for \$30 was filed as the cause of action. It was held insufficient. Hamilton v. Ewing, 6 Blackf. (Ind.) See Kemp v. Mundell, 9 Leigh (Va.), 12: Page v. Farmer, 2 Murph. (N. Car.) 288; Rockefeller v. Hoysradt, 2 Hill (N. Y.), 616; Gray v. Johnson, 14 N. H.

414; Webb v. Garner, 4 Mo. 10; Kellogg v. Union Co. 12 Conn. 7; Jacob v. U. S. 1 Brock. (U. S.) 520; U. S. v. Colt, Pet. (C. C.) 145.

3. Hughes v. Union Ins. Co., 8 Wheat.

(U. S.) 294.

An action of debt for £870 12s., founded on a decree in chancery, is not supported by a decree of £860 12s. 1d., with interest from a certain day to the day of rendering the decree. Thompson v. Jameson, I Cranch (U. S.), 283.

In a suit on an administrator's bond, the formal judgment in debt need not be for the full penalty of the bond. Pink-

staff v. People, 59 Ill. 148.

4. Guild v. Johnson, 2 Ill. 405; How ell v. Barrett, 3 Gilm. (Ill.) 433; Heyl v. Staff, 4 Ill. 95; Jones v. Lloyd, Breese (Ill.), 174; Chapman v. Wright, 20 Ill. 120; O'Conner v. Muller, 11 Ill. 57. See Fournier v. Faggott, 3 Scam. (Ill.) 347. The judgment must be for the debt and the damages. Austin v. People, 11 Ill. 452; Pulliam v. Pencenneau, 23 Ill. 93; Bowman v. Bartley, 21 Ill. 30; Ross v. Taylor, 63 Ill. 215; Caldwell v. Richmond, 64 Ill. 30; Lucas v. Farrington, 21 Ill. 31; March v. Wright, 14 Ill. 248; Mager v. Hutchinson, 2 Gilm. (Ill.) 266.

5. Mager v. Hutchinson, 7 III. 265; Bowman v. Bartley, 21 III. 30; Pulliam v. Pencenneau, 23 III. 93; Reed v. Pedan.

8 S. & R. (Pa.) 263.

When judgment in debt is entered up in the form of judgment in assumpsit, the error is not fatal. Davis v. Morford, I Morris (Iowa), 99; Sanford v. Richard-son, I Ala. 182; Crist v. Crist, 8 Blackf. (Ind.) 574.

6. Foster v. Jared, 12 Ill. 451.

dicit.1 In an action to recover penalty, the precise sum and no more can be recovered. Where the defendant files nil dehet and two special pleas, and there is a demurrer to the special pleas, which is sustained, judgment cannot be given for the defendant without disposing of the plea of *nil debet*. A verdict in an action of debt finding no special sum is bad.4

The action of debt still exists in perhaps nearly all of the States which have not adopted a Code of Procedure, and in the Federal courts, but seems to have been generally superseded by the action

of assumpsit.

In *Pennsylvania* and *Illinois* it is now more frequently used than in any other of the States. Much of the disuse of the action of debt has been caused by legislation upon sealed instruments, depriving them in a large degree of their peculiar common-law power.5

1. 7 Stew. (Ala.) 580

2. Sayre v. Sayre, 3 M.Y.J. (Ren.) 1046; Strobel v. Large, 3 McCord (S. Car.), 112. But see Deyo v. Rood, 3 Hill (N. Y.), 527, where the question was whether in an action of debt for selling spirituous liquors without license more than one penalty can be recovered in the same suit. The court say: "The act of 1813 provided that if any person should retail strong or spirituous liquors without license, or should sell any to be drank in his or her house, etc., he should for each offence forfeit the sum of \$25... The 18th section of the act of 1813 has not been re-enacted, and the peculiar phraseology of the 7th section has been changed. The provision of the present statute is that 'whoever shall sell any strong or spirituous liquors, etc., without having a license, etc., shall forfeit twenty-five dollars, —I R. S. 679, sec. 15, 2d Ed., thus leaving the remedy to the common law, which allows several penalties to be recovered in the same suit. Holland v. Bothmar, 4 T. R. 229; Young v. King, 3 T. R. 98; I Chitty Pl. 181; Cow. Tr. 561, 2d Ed."

In Boas v. Nagle, 3 S. & R. (Pa.) 250, it was decided that the provision of the act authorizing judgment by default in case the defendant does not make a statement or defence was confined to cases where the cause of action was a bond conditioned for the payment of money, and not a bond with a collateral condition, and therefore did not extend to a bail bond in an action of debt thereon, conditioned for the appearance in court of a third person at a certain time, to answer a matter in which the obligor had no concern. The court said: "We cannot, without straining the act of assembly, extend it to cases of this kind; and it ought not to be strained, because the plaintiff may very easily proceed in this suit in the

usual manner, by laying a rule to plead after the defendant has appeared. sides, the act of assembly has not been complied with, even if it extended to this case. The court did not give judgment for the sum which appeared to be due; on the contrary, the plaintiff entered his judgment for the whole penalty of the bail bond, which certainly was not the sum which appeared to be due. It is clear, therefore, that the judgment cannot be supported under the act of assembly.'

3. Merriweather v. Gregory, 3 Ill. 50. See Pleasants v. Bank of State, 8 Ark. 456; Crutcher v. William, 4 Humph. (Tenn.) 345; Peasley v. Bortwright, 2 Leigh (Va.), 195.

4. Schmertz v. Shreeve, 62 Pa. St. 457. 5. "It must not be supposed," as is said by Bliss on Code Pleading, § 6, "that the time usually spent in learning the distinctions indicated by them (the common-law forms of actions) has been in vain. The new formulas are of little present practical consequence; but, aside from the importance of knowing our legal history, including the history of the law of procedure, most of these names will be in constant requisition, as indicating the nature of the grievance, the evidence required, and the measure of relief. whole case often clusters around the name, and the action is just as much an action of trover or replevin, or of ejectment, as though so called in the pleading. When the statute says there shall be but one form of action, form, and not substance, is spoken of. Without classification there is no science. Such distinc-tions as exist in the nature of things must be recognized, and they are equally recognized whether a specific name be given to the suit or action, with a corresponding formula, or whether they arise from, and are known only by, the nature of the grievance and character of the relief.

DEBTOR AND CREDITOR. (See also ACCORD AND SATISFAC-TION; ALTERATION OF INSTRUMENTS; ASSIGNMENTS; ASSIGN-MENTS FOR THE BENEFIT OF CREDITORS; ATTACHMENTS: BANK-COMPOSITIONS WITH CREDITORS; CONTRIBUTION; CREDITORS' BILLS; DEBT; EXECUTORS AND ADMINISTRATORS: INSOLVENCY; JUDGMENTS; LIENS; MORTGAGES; MARSHALLING: MERGER; NOVATION; PAYMENT; PLEDGE; PRINCIPAL AND SURETY; RECEIVERS; RELEASE; SECURITIES; SET-OFF; STAT-UTE OF LIMITATIONS; SUBROGATION; and TENDER.)

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- 1. Definitions.—In a strict literal sense, a creditor is one who voluntarily trusts or gives credit to another for money or other property; but in a more general and extensive sense of the term, a creditor is one who has a right to recover money of another on any account whatever.² Conversely, a debtor is one who is under obligations to pay another a sum of money.3 Creditors are "simple contract," "specialty," "bond," or "judgment" creditors, according to the nature of the obligation. "Preferred" creditors are

1. Stanley v. Ogden, 2 Root (Conn.),

2. Stanley v. Ogden, 2 Root (Conn.), 261; Barstow v. Adams, 2 Day (Conn.), 7; N. J. Ins. Co. v. Meeker, 8 Vroom (N. J.), 300. See also New Haven Saw-mill Co. v. Fowler, 28 Conn. 103; Gifford v. Whitcomb, 9 Cush. (Mass.) 482; Bouv. L. Dict.

But it is said that a valid cause of action sounding in tort does not give rise to the relation of debtor and creditor before judgment, within the meaning of the statute against fraudulent convey-ances. Evans v. Lewis, 30 Ohio St. 11. 3. Stanley v. Ogden, 2 Root (Conn.),

4. Rapalye & Lawrence's Law Dict.

entitled to some special prerogative either in the manner of re-

covery or the order in which their claims are paid.1

2. Creation of the Relation.—The relation of debtor and creditor may arise by direct agreement or breach of duty between the parties.2 or by the acceptance by any one of an agreement made between other parties for his benefit. or by the assignment of an existing demand.4 But one cannot become the creditor of another, ordinarily, by performing labor for him without his consent, 6 or by paying his debt without request, and when not under any obligation to do so.7

3. Respective Rights of Debtor and Creditor in the Debtor's Property. —(a) Generally.—Every one may, within the limits prescribed by law, make any disposition of his property which does not interfere with the rights of others.8 His personal indebtedness or insolvency alone does not affect his right to manage, control, mortgage, pledge, transfer or change his property.9 A debtor, however, is

the quasi trustee of his property for his creditors. 10

(b) Judgment Creditors. (See also titles DECREES; JUDGMENT.) -Judgment creditors have special rights in the debtor's property,

a judgment properly docketed being a lien thereon. 11

(c) Fraudulent Conveyances.—The debtor's right of alienating his property is qualified by the principle, that he shall not dispose of it for the purpose of hindering, delaying, or defrauding his creditors.12

1. Bouy. Law Dict.

2. Cases cited ante, notes 1, 2, 3, p. 98. 3. A third party may sue directly on an agreement made by others for his benefit. Simon v. Brown, 68 N. Y. 355; Snell v. Ives, 85 Ill. 279; Helms v. Kearns, 40 Ind. 124; Johnson v. Knapp, 36 Iowa, 616; Bishop v. Stewart, 13 Nev. 25; Thompson v. Thompson, 4 Ohio St. 25; Inompson v. Inompson, 4 Ohio St. 333; Cooper v. Foss, 15 Neb. 515; Merriman v. Moore, 90 Pa. St. 78; Hendrick v. Lindsay, 93 U. S. 143; Morgan v. Overman, etc., Co., 37 Cal. 534. Compare Meech v. Ensign, 49 Conn. 91; Carr v. Bank, 107 Mass. 45; Halsted v. Francis. 31 Mich. 113; Owings v. Owings, 1 Har. & G. (Md.) 484. Poes v. Milos. I Har. & G. (Md.) 484; Ross v. Milne, 12 Leigh (Va.), 204. See full discussion, note to Shamp v. Meyer (Neb.), 24 Cent. L. Jour. 110.

See title Assignments.

5. Tenants in common and joint owners of property may be justified in expending money for each other. Wilton v. Tazewell, 86 Ill. 29.

6. Alton v. Mulledy, 21 Ill. 76; Watkins v. Trustees, 41 Mo. 302.
7. Williams v. Miller, 1 Wash. Ty. 105;

Durant v. Rogers, 71 III. 121.

8. Pope v. Wilson, 7 Ala. 690; Thomas v. Dougherty, 12 S. & R. (Pa.) 448; Sexton v. Wheaton, 8 Wheat. (U. S.) 229.

9. Barrow v. Bailey, 5 Fla. 9; Carter Barrow v. Bailey, 5 Fla. 9; Carter v. Neal, 24 Ga. 346; Miller v. Kirby, 74
 Ill. 242; Frank v. Peters, 9 Ind. 344; Pecot v. Armelin, 21 La. Ann. 667; Siegel v. Chidsey, 28 Pa. St. 279; Stanley v. Robbins, 36 Vt. 422; Davis v. Turner, 4 Gratt. (Va.) 422.
 Candee v. Lord, 2 N. Y. 269; Seymous v. Wilson, vo. N. Y. 488; France.

mour v. Wilson, 19 N. Y. 417; Epper v.

Randolph, 2 Call (Va.), 103.

11. Freeman on Judg (3d Ed.) chap.14.
12. Such transfers were voidable by creditors at common law. Notes to Twyne's Case, I Smith's Lead. Cas. 33; Cadogan v. Kennett, 2 Cowp. 432; Clements v. Moore, 6 Wall. (U. S.) 299. But as early as Edward III., a statute was passed making such property liable to execution. 50 Edw. III. v. 6. Notes to Smith's Lead. Cas. 33. See also statutes, 3 Hen. VII. c. 4; 2 R. II. c. 3; and statute, 13 Eliz. c. 5, which has either been substantially enacted or its principles prevail in all States of the Union. Bisph. Pr. Eq. (3d Ed.) sec. 241, and see statutes of States in appendix. Bump on Fraud. Convey. (3d Ed.).

Both law and equity have jurisdiction where the property is subject to execution. Swift v. Arents, 4 Cal. 390; Scott v. Wagon Works, 68 Ind. 75: Cook v. Johnson, I Beasl. (N. J.) 51; Hendricks.

It is the intent to defraud, hinder, or delay creditors that invalidates a conveyance. This intent may be either express or implied.² Though the conveyance be for a valuable and even adequate consideration, if the intent to defraud exists, the conveyance may be avoided by creditors.3

To be valid against existing creditors, a transfer must be in

v. Robinson, 2 Johns. Ch. (N. Y.) 283; Killard v. McKee, 4 Bibb (Ky.), 166; Sheafe v. Sheafe, 40 N. H. 516; Blenkinsopp v. Blenkinsopp, 1 De G. M. & G. 500.

But where the property cannot be reached by execution, equity will subject. it to the payment of the debtor's obligations. Botsford v. Beers, 11 Conn. 370; Weed v. Pierce, 9 Cow. (N. Y.) 722. Tr will set aside a fraudulent conveyance to a wife. Spackelford v. Collin, 6 Bush. (Ky.) 149; Lee v. Hollister, 5 Fed. Rep. 756; Skilton v. Tiffin, 6 How. (U. S.) 163; Massey v. Allen, 7 Q. B. 401. And follow money invested in improvements on the land of another with his consent. Athey v. Knotts, 6 B. Mon. (Ky.) 24; Lynde v. McGregor, 95 Mass. 182; Isham v. Schaffer, 60 Barb. (N. Y.) 317; Hoot v. Sorrell, 11 Ala. 386; Caswell v. Hill, 47 N. H. 407; Rose v. Brown, 11 W. Va. 122; Kirby v. Bruns, 45 Mo. 234. Compare Webster v. Hildreth, 33 Vt. 457; Campion v. Cotton, 17 Ves. 264. And see Dick v. Hamilton, 1 Deady (U. S.), 322; Mather v. Dobschuetz, 72 Ill. 438...

1. The intent to hinder and delay is

sufficient. Dunaway v. Robertson, 95 Ill. 419; Planters' Bank v. Willer Mills, 60 Ga. 168; Davenport v. Cummings, 15 Iowa, 219; Crow v. Beardsley, 68 Mo. 435; Pilling v. Otis, 13 Wis. 495. Without regard to the duration of the delay. Quarles v. Ken, 14 Gratt. (Va.) 48; Sutton v. Hanford, II Mich. 513. And though the debtor may intend to pay ultimately. Borland v. Mayor, 8 Ala. 104; Kimball v. Thompson, 58 Mass. 441; Stovall v. Farmers' Bank, 16 Miss. 305; McLean v. Lafayette Bank, 3 McLean (U. S.), 587.

2. Spirett v. Willows, 3 De G. J. &

Sm. 293.

A sale to an impecunious purchaser on credit is fraudulent as against creditors. Gregg v. Lee, 37 La. Ann. 628; McSween v. McCown, 23 S. Car. 342. See title FRAUD, for evidences or

badges of fraud.

3. Pulliam v. Newberry, 41 Ala. 168; Barrow v. Bailey, 5 Fla. 9; Chappel v. Clapp. 29 Iowa, 161; Harrison v. Jaquess, 29 Ind. 208; Prague v. Boyce, 6 J. J. Marsh. (Ky.) 70, Johnston v.

Dick, 27 Miss. 277; Johnson v. Sullivan, 23 Mo. 474; Clark v. Wentworth, 6 Me. 23 Mo. 474; Clark v. Wentworth, 6 Me. 259; Gebhart v. Merfield, 51 Md. 322; Savage v. Hazard, 17 Neb. 232; Smith v. Muirhead, 34 N. J. Eq. 4; Wickham v. Miller, 12 Johns. (N. Y.) 320; Woodley v. Hassell, 94 N. Car. 157; Robinson v. Holt, 39 N. H. 557; Brinks v. Heise, 84 Pa. St. 246; Trotter v. Watson, 6 Humph. (Tenn.) 509; Mosely v. Garner, 10 Tex. 393; Root v. Reynolds, 32 Vt. 139; Bowyer v. Martin, 27 W. Va. 442; Stein v. Hermann, 23 Wis. 132; Chandler v. Von Roeder, 24 How. (U. S.) 224; Twyne's Case, I Sm. Lead. Cas. 33.

A conveyance is not fraudulent merely because the purchaser has knowledge of the debtor's insolvency. Sisson v. Newton, 22 N. J. Eq. 58; Hughes v. Monty, 24 Iowa, 499; Durkee v. Chambers, 57 Mo. 575; Milner v. Davis, 65 Iowa, 265. Or of a threatened attachment. Fisher v. Hall, 44 Mich. 493; Lyon v. Rood, 12 Vt. 233. Or of a judg-ment. Waterbury v. Sturtevant, 18 Wend: (N. Y.) 353; Bunyard v. Seabrook,

1 F. & F. 321.

But it is sufficient that the circumstances be such as to put the purchaser on inquiry. Massie v. Eugart, 32 Ark. on induity. Massie v. Eugart, 32 Ark.
251; Nicol v. Crittenden, 55 Ga. 497;
Phillips v. Reitz, 16 Kas. 396; Bedford v. Penny, 58 Mich. 424; Peirce v. Merritt, 70 Mo. 275; Hooser v. Hunt, 65
Wis. 71. Or that he has the means of knowing by the use of ordinary diligence. Brown v. Foree, 7 B. Mon. (Ky.) 357; Farmers' Bank v. Douglas, 19 Miss. 469; Humphries v. Freeman, 22 Tex. 45.

Notice before the payment of the purchase-money or the maturity of a nonnegotiable note given in payment is suffi-Florence, etc., Co. v. Zeigler, 58 Ala. 221; Massie v. Engart, 32 Ark. 251; Nicol v. Crittenden, 55 Ga. 497; Matson v. Melchor, 42 Mich. 477; Arnholt v. Hartwig, 73 Mo. 485; Gottberg v. O Connor, 44 N. Y. Super. 554.

Their motives need not be the same and yet be fraudulent. Bump Fraud:

Convey. (3d Ed.) 203.

A purchase from the first vendee, both having knowledge of the fraud, is not protected. Kelly v. Simmons, 73 Ga. 716. good faith on the part of the grantee at least, and for a valuable consideration.2 But the consideration is valuable if there is a present moral obligation founded on an antecedent legal obligation.3

A gift or settlement will not be fraudulent as against creditors. if there is no actual fraud, and the "donor has at the time the pecuniary ability to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their prospects for payment." 4 But if the donor is insolvent. or largely indebted at the time, or by the donation

1. The debtor's fraud will not avoid a upheld against creditors. sale to a bona-fide purchaser. Shealy v. Brady, 91 N. Car. 265. Edwards, 78 Ala. 176; Triber v. Andrews, 31 Ark. 163; Morse v. Aldrich, 130 Mass. 578; Gordon v. Ritenour, 87 Mo. 54; Comey v. Pickering, 63 N. H. 126; Zoeller v. Riley, 100 N. Y. 102; s. c., 53 Am. Rep. 157; Lininger v. Herron, 18 Neb. 450; Jones v. Simpson, 116 U. S.

There must be no secret trusts for the debtor. Rice v. Cunningham, 116 the debtor. Rice v. Cunningham, 116 Mass. 466; Coolidge v. Melvin, 42 N. H. 510; Grant v. Lewis, 14 Wis. 487; Dewey v. Bayntun, 6 East, 257. As continued possession and use of the property. Lukins v. Aird, 6 Wall. (U. S.) 78; Mitchell v. Stetson, 64 Ga. 442; Bump Fraud, Convey. (3d Ed.) 217. But an interest reserved that is inconsiderable will not invalidate a convenience. will not invalidate a conveyance. Albee v. Webster, 16 N. H. 362; Bump Fraud. Convey. (3d Ed.) 215.

A conditional sale is not binding on creditors. Bump Fraud. Convey. (3d Ed.) 218; Shannon v. Commonwealth, 8 S. & R. (Pa.) 444. But a right to repurchase given after the conveyance will not avoid

strong and the conveyance with not strong it as to creditors. Danner, etc., Co. v. Stonewall Ins. Co., 77 Ala. 184.

2. McSween v. McCowen, 23 S. Car. 342; Brown v. Texas, etc., Co., 64 Tex. 306. Indorsements or future advancements are a good valuable consideration. ments are a good valuable consideration. Wood v. Franks, 67 Cal. 32; Smyth v. Ripley, 33 Conn. 306; Lawrence v. Tucker, 23 How. (U. S.) 14; Bump Fraud. Convey. (3d Ed.) 231. So is a binding promise to pay specific debts. Preston v. Jones, 50 Pa. St. 54; Ivancovich v. Stern, 14 Nev. 341; Fleischer v. Dignon, 53 Ia. 288.

A transfer in consideration of the future support of the debtor which hazards the payment of his debts is voidable as against creditors. Egery v. Johnson, 70 Me. 258; Woodyard v. Wyman, 53 Vt. 645; Bump Fraud. Convey. (3d Ed.) 218. But a transfer in consideration of the support of an invalid brother has been

Worthy v.

It is said that an innocent purchaser is protected to the amount of the payments: made before learning of the debtor's fraud. Bush v. Collins, 35 Kas. 535.

3. As a debt barred by the Statute of

Limitations, or discharged in bankruptcy. or due on a contract not enforceable under the Statute of Frauds. Stowell v. Hazlett, 57 N. Y. 635; Wilson v. Russell, 13 Md. 494; Sayre v. Fredericks, 16 N. J. Eq. 205; Bump Fraud. Convey. (3d Ed.) 223. But not a debt which has been released by the party. King v. Moore, 35 Mass. 376; Nightingale v. Harris, 6 R. I. 321.

4 Jenkyn v. Vaughan, 3 Drewry, 425; Kent v. Riley, L. R. 14 Eq. 190; 2 Kent Com. 441; Snell's Eq. 64; Carr v. Breese, 81 N. Y. 584; Taylor v. Heriot, 4 Des. (S. Car.) 227. der the Statute of Frauds. Stowell 7/.

(S. Car.) 227.

If the debtor has ample means left to pay his debts a voluntary conveyance is not fraudulent. McFadden v. Mitchell. 54 Cal. 628; Patrick v. Patrick, 77 Ill. 54 Cal. 628; Patrick v. Patrick, 77 III. 555; Holmes v. Elliott, 65 Ind. 78; French v. Holmes, 67 Me. 186; Chambers v. Sallie, 29 Ark. 407; Teed v. Valentine, 65 N. Y. 471; Thacher v. Phinney, 89 Mass. 146; Hamburger v. Peter, 8 Oreg. 18; Worthy v. Brady, 91 N. C. 265; Kelly's Appeal, 77 Pa. St. 232; Kipp v. Hanna, 2 Bland (Md.), 26; Hudnal v. Wilder, 4 McCord (S. Car.), 294; Dewey, Wilder, 4 McCord (S. Car.), 294; Dewey, v. Long, 25 Vt. 564; Dillard v. Dillard, 3 Humph. (Tenn.) 41; Lyne v. Bank, 5 J. J. Marsh. (Ky.) 545; Manders v. Manders, 4 Ir. Eq. 434. Compare Spencer v. Godwin, 30 Ala. 355; Swayze v. McCrossin, 21 Miss. 317; Kah. v. Martin, 26 N. J. Eq. 60; Johnston v. Gill, 27 Gratt. (Va.) 587; Lockhard v. Beckley, 10 W. Va.

5. Freeman v. Pope, L. R. 5 Ch. 538; Bump Fraud. Convey. (3d Ed.) 281; and cases cited.

6. Thompson v. Webster, 4 Drewry, 628; Cornish v. Clark, L. R. 14 Eq. 184; and cases cited.

renders himself unable to pay his debts. 1 the transfer is fraudulent. But a conveyance of exempt property is never fraudulent.2

As against subsequent creditors, a voluntary conveyance is good, unless made with the intent to defeat their claims:3 the circumstance of the voluntary alienation not being of itself sufficient evidence of fraud.4

In *England* a conveyance of property that could not be reached by execution was not fraudulent as against creditors; 5 but in America, property not subject to execution may be reached by a

creditor's bill,6 and the doctrine does not prevail.7

In America, property of all kinds is assets for the payment of debts, and the fraudulent conveyance thereof by a debtor may be impeached after his death by any contract creditor; but in England, only lien creditors could impeach the fraudulent conveyance of land after the debtor's death.9

(d) Nuptial Settlements.—An ante-nuptial settlement made without notice of fraud 10 by those who claim under it, and with reference to and in consideration of a specific 11 marriage, is not void as against creditors.12 A post-nuptial settlement made in pursuance of written ante-nuptial articles is not fraudulent as against creditors; 13 but one made in pursuance of a parol agreement without other consideration is, if it hinders or delays creditors. 14 A post-nuptial settlement in consideration of a portion or sum of money advanced by another, 15 or in consideration of property belonging to the wife, 16 is binding on creditors.

1. Smith v. Cherrill, L. R. 4 Eq. 390; and cases cited.

2. Erb v. Cole, 31 Ark. 554; McWilliams v. Rogers, 56 Ala. 87; Ketchum v. Allen, 46 Conn. 414; Cipperly v. Rhodes, 53 Ill. 346; Hixon v. George, 18 Kas. 53 III. 340; Fixon θ. George, 10 Kas.
 253; Dart υ. Woodhouse, 40 Mich. 399;
 Ferguson υ. Kumler, 27 Minn. 156;
 Smith υ. Schmitz, 10 Neb. 600; Crummen υ. Bennett, 68 N. Car. 494.
 3. Morrill υ. Kilner, 113 III. 318; Reeg

v. Burnham, 55 Mich. 39; Crawford v. Beard, 12 Oreg. 447; Walker v. Bollman, 22 S. Car. 512; Silverman v. Greaser, 27 W. Va. 550; Hausmann v.

Hope, 20 Mo. App. 193.
4. Taylor v. Eastman, 92 N. Car. 601;
Sexton v. Wheaton, 8 Wheat. 229; 4 Kent Com. 442; and cases cited.

5. 2 Kent Com. 442; Bisph. Pr. Eq. (3d Ed.) sec. 246.

6. Spader v. Davis, 2 Johns. Ch. (N. Y.) 280, is the leading case. See title CREDITORS' BILLS.

 Bisph. Pr. Eq. (3d Ed.) sec. 246.
 B. B.sph. Pr. Eq. (3d Ed.) 248.
 Bisph. Pr. Eq. (3d Ed.) 248, and cases cited.

10. Bump Fraud. Convey. (3d Ed.) 296; Prewitt v. Wilson, 103 U. S. 22.

11. Smith v. Allen, 87 Mass. 454; Weller v. Cole, 6 Gratt. (Va.) 645.

12. Andrews v. Jones, 10 Ala. 400; Bunnel v. Witherow, 29 Ind. 123; Frank's Appeal, 59 Pa. St. 190; Croft v. Arthur, 3 Des. (S. Car.) 223; Herring v. Wickham, 29 Gratt. (Va.) 628; Magniac v. Thompson, 7 Pet. (U. S.) 348.

A reasonable gift contemporaneous with marriage is binding on creditors. Bump Fraud. Convey. (3d Ed.) 297.

13. Magniac v. Thompson, 7 Pet. (U.

13. Magniac v. Thompson, 7 Pet. (U. S.) 348; Kinnard v. Daniel, 13 B. Mon. (Ky.) 496; Lockwood v. Nelson, 16 Ala. 294; Kirk v. Clark, Prec. in Ch. 489.

But such a settlement must be substantially in conformity with the articles. Bump Fraud. Convey. (3d Ed.) 302.

14. Dygert v. Remerschneider, 32 N.Y.

629; Murphy v. Abraham, 13 Ired. Eq. 629; Murphy v. Adranam, 13 11eu. Eq. (N. Car.) 371; Wood v. Savage, 2 Doug. (Mich.) 316; Warden v. Jones, 2 De G. & J. 76; s. c., 27 L. J. Ch. 190.

15. Brown v. Jones, 1 Atk. 188; Wheeler v. Caryl, Amb. 121; Nunn v. Wilsmore, 8 T. R. 521.

16. Kehr v. Smith, 20 Wall. (U. S.) 31; Duffy v. Insurance Co., 8 S. & R. (Pa.) 413; Bump Fraud. Convey. (3d Ed.) 306-314.

A settlement is not void as against subsequent creditors as a rule, unless made with the intent to defraud, hinder, or delay them; 1 but there are many authorities to the effect, that even as against subsequent creditors a settlement made by the husband upon the wife must be reasonable, in fair proportion to the amount of his property, and his condition and prospects in life.2

(e) Preferences. So long as the property of a debtor is not encumbered with liens, in the absence of statute,3 he may prefer one creditor over another by paying his debt in full or in part.⁴ No new consideration is necessary.⁵ This right is not affected by the character 6 of the debt, if it is legal, nor by the debtor's insolvency, nor by the creditor's knowledge of such insolvency, nor by the fact that others may lose the entire amount of their debts9 credited upon the faith of the debtor's ownership of the property. 10 It is not affected by the character of the person to whom given, 11 nor the manner of the transfer. 12 The secret motives of the

A voluntary post-nuptial settlement on the wife is fraudulent if it hinders or delays creditors. Core v. Cunningham, 27 W. Va. 206. But not if he retains enough N. Car. 601; Walsh v. Ketchum, 84 Mo. 427. Or if the property settled on her is exempt. Burdge v. Bolin, 106 Ind. 175;

exempt. Burdge v. Bolin, 106 Ind. 175; s. c., 55 Am. Rep. 724. 1. Boatman's Savings Bank v. Over-all, 16 Mo. App. 510; Wheeler, etc., Co. v. Monahan, 63 Wis. 198. 2. Simms v. Ricketts, 35 Ind. 181; Mellon v. Mulvey, 8 C. E. Green (N. J.), 198; Benedict v. Montgomery, 7 W. & I. (Pa.) 238; Croft v. Arthur, 3 Des. (S. Car.) 223; Ex parte McBurnie, 1 De G. M. & G. 441.

3. Such transfers in expectation of insolvency are forbidden by statute in some States. Black v. Richardson, 37 La. Ann. 594; State v. Morse, 27 Fed. Rep. 261. See titles BANKRUPTCY and ASSIGNMENT FOR BENEFIT OF CREDIT-

4. McWilliams v. Rodgers, 56 Ala. 87; Cox v. Fraley, 26 Ark. 20; Bates v. Coe, 10 Conn. 280; Heidingsfelder v. Slade, 60 Ga. 596; Frank v. Welch, 89 Ill. 38; Preusser v. Henshaw, 49 Iowa, 41; Young v. Stallings, 5 B. Mon. (Ky.) 307; Totten v. Brady, 54 Md. 170; Choteau v. Sherman, 11 Mo. 38; Green v. Tonner Sherman, 11 Mo. 385; Green v. Tanner, 49 Mass. 411; Hubbard v. Taylor, 5 Mich. 155; Osgood v. Thorne, 63 N. H. 375; Grimes v. Farrington, 19 Neb. 44; Kemp v. Walker, 16 Ohio, 118; Vose v. Stickney, 19 Minn. 367; Hutchinson v. McClure, 20 Pa. St. 63; Moseley v. Gainer, 10 Tex. 393; Hickman v. Quinn, 6 Yerg. (Tenn.) 96; Hendricks v. Robinson, 17 Johns. (N. Y.) 438; Maples v. Maples, Rice Ch. (S. Car.) 300; Hinde v.

Maples, Rice Ch. (S. Car.) 300; Hinde v. Vattier, 7 Pet. (U. S.) 252; Benton v. Thornhill, 7 Taunt. 149.

5. Bump Fraud. Convey. (3d Ed.) 179.

6. Grover v. Wakeman, 11 Wend. (N. Y.) 187; s. c., 4 Pai. 23; Bump Fraud. Convey. (3d Ed.) 181.

7. Williams v. Jones, 2 Ala. 314; Galloway v. People's Bank, 54 Ga. 441; Auburn Bank v. Fitch, 48 Barb. (N. Y.)

8. Hindman v. Dill, 11 Ala. 689; Hes-8. Hindman v. Dill, II Ala. 686; Hessing v. McClosky, 37 Ill. 341; Olmstead v. Mattison, 45 Mich. 617; Walsh v. Kelley, 42 Barb. (N. Y.) 98; s. c., 27 How. Pr. 359. But see Krippendorf v. Hyde, 28 Fed. Rep. 788.

9. Wheaton v. Neville, 19 Cal. 41; Francis v. Rankin, 84 Ill. 169; Giddings

v. Sears, 115 Mass. 505; Keen v. Kleckner, 42 Pa. St. 529; Stewart v. Dunham, 115 U. S. 61; Budlong v. Kent, 28 Fed.

Rep. 13. 10. Tomlinson v. Matthews, 98 Ill. 178; Brookville Nat. Bank v. Trimble, 76 Ind. 195; Syracuse, etc., Co. v. Wing, 85 N.

11. If in good faith. A corporation may prefer a director. Forster v. Mullanphy, etc., Co., 16 Mo. App. 150.

A debtor may prefer his wife, brother,

attorney, etc., where the Statute of Limitations even has run against the debt. Comer v. Allen, 72 Ga. 1; Kennedy v. Powell, 34 Kans. 22; Rudershausen v. Atwood, 19 Ill. App. (Bradw.) 58; Bank v. Tavenner, 130 Mass. 407; Savage v. Dowd, 54 Miss. 728; Hill v. Rogers, Rice Ch. (S. Car.) 7.

12. Carnall v. Duvall, 22 Ark. 136; Morse v. Slason, 13 Vt. 296; Meeker v. debtor, 1 or his intent to defeat an execution, 2 are immaterial, if the transfer is solely to prefer one creditor over another.3 But the amount of property must bear a fair proportion to the debt secured.4 and the conveyance must be free from all secret trusts.5 Such a conveyance is not fraudulent, because it may hinder or delay other creditors in the collection of their demands; 6 but such an intent on the part of the creditor preferred will avoid the transfer.7

(f) Assignment for Benefit of Creditors. (See also title As-SIGNMENT FOR BENEFIT OF CREDITORS.)—The rights of common creditors in a debtor's property are subject to his right to make an

assignment for the benefit of creditors.

4. Rights of the Creditor in the Debtor's Services.—A creditor cannot compel his debtor to labor for means to pay his demands;8 nor, as a general thing, prevent his giving his labor in good faith to whomsoever he chooses. The debtor's first duty is to provide for his family, 10 and he may lawfully contract to labor for another for their support. 11 But he cannot assign his future earnings to hinder, delay, or defraud his creditors, 12 He may act as the agent of the wife for a particular transaction, or generally for the control of her property and the investment of her funds, without compensation, and without thereby rendering her property liable for his debts. 13 Where the wife is authorized to carry on business as a feme sole, 14

Harris, 10 Cal. 278; Savings Bank z. Bates, 8 Conn. 505; Alexander v. Young, Ga. 616; Ensworth v. King, 50 Mo.
 Hump Fraud. Convey. (3d Ed.) 186.
 Bump Fraud. Convey. (3d Ed.) 189.
 Walden v. Murdock, 23. Cal. 540;

Shelley v. Boothe, 73 Mo. 74; Goodwin v. Hamill, 26 N. J. Eq. 24; Carpenter v. Cushman, 121 Mass. 265; Wood v. Dixie,

53 E. C. L. 892; s. c., 7 Q. B. 892.

8. Bump Fraud. Convey. (3d Ed.) 190.
But a conveyance for the benefit of the grantee and others amounts to an assignment for the benefit of creditors.

ment for the benefit of creditors. Brown v. Guthrie, 39 Hun (N. Y.), 29.

4. Taylor v. Wendling. 66 Iowa, 562; Dyer v. Rosenthal, 45 Mich. 588; Bailey v. Kennedy, 2 Del. Ch. 12; Shelton v. Church, 38 Conn. 416. But see Rankin v. Vandiver, 78 Ala. 562; Whittredge v. Edmunds, 63 N. H. 248.

5. Stratton v. Pubase 65 N. V.

5. Stratton v. Putney, 63 N. H. 577; Mitchell v. Sawyer, 115 Ill. 650; Earn-shaw v. Stewart, 64 Md. 513; Hickox v. Elliott, 27 Fed. Rep. 830; Bentz v. Riley, 69 Pa. St. 71. But see C., B. & Q. R. v.

Watson, 113 Ill. 195.

A creditor preferred in good faith may reconvey to the debtor's family without rendering the property liable to other creditors. Van Riswick v. Spalding, 117 U. S. 370; McPherson v. McPherson, 21 S. Car. 261; Bump Fraud. Convey. (3d Ed.) 193.

6. State v. Excelsior Distilling Co., 20

Mo. App. 21.
7. Billings v. Russell, 101 N. Y. 226.
8. Abbey v. Deyo, 44 N. Y. 343; King v. Voos, 26 Am. L. Reg. (N. S.) (Oreg.)

9. Abbey v. Deyo, 44 N. Y. 343. 10. King v. Voos, 26 Am. L. Reg. (Oreg.)

11. Hoot v. Sorrell, 11 Ala. 386; Wheedon v. Champlin, 59 Barb. (N. Y.) 61; Holdship v. Patterson, 7 Watts (Pa.),

12. Gragg v. Martin, 94 Mass. 498. 13. Wells v. Smith, 54 Ga. 262; Parker v. Bates, 29 Kan. 597; Edgerly v. Gregory, 17 Neb. 348; Woodworth v. Sweet, 51 N. Y. 8; Nat. Bank v. Gaylord, 66 Iowa, 582; Bongard v. Core, 82 Ill. 19; Wortman v. Price, 47 Ill. 22; Brownell v. Dixon, 37 Ill. 197; Aldridge v. Muirhead, 101 U. S. 397.

14. Where the wife has no statutory power to act as a sole trader, a business conducted by him in her name will be conducted by him in her name will be regarded generally as his. Wortman v. Price, 47 Ill. 22; Buckley v. Wells, 33 N. Y. 518; Gage v. Dauchy, 34 N. Y. 293; Freeman v. Orser, 5 Duer (N. Y.), 476; Alt v. Laforette, 6 Mo. App. 91; Pawley v. Vogel, 42 Mo. 291; Lyman v. Place, 26 N. J. Eq. 30; Nat. Bank v. Sprague, 20 N. J. Eq. 13; Bucher v. Ream, 68 Pa. St. 421. he may devote his time and skill to her business without other compensation than the support of himself and family. But in some States, if there are large profits due to his services, such profits are liable to his debts; while in others, if he donates his services to the wife in good faith, not even the largest profits due to his services will make the business liable for his debts.3

5. Collateral Securities.—(I.) NEGOTIABLE COLLATERAL SECU-(See also titles MARSHALLING; PLEDGES.)—(a) The Pledgee's Title.—The pledgee of negotiable promissory notes, bills of exchange, bonds, 4 coupons, 5 etc., in consideration of present 6 future advances or an antecedent debt. before maturi-

1. Lewis v. Johns, 24 Cal. 98; Coon v. Rigden, 4 Col. 275; Martinez v. Ward, v. Rigden, 4 Col. 275; Martinez v. Ward, 19 Fla. 175; Carn v. Royer, 55 Iowa, 650; Cubberly v. Scott, 98 Ill. 38; Bongard v. Core, 82 Ill. 19; Olsen v. Kern, 10 Ill. App. 578; Bellows v. Rosenthal, 31 Ind. 116; Shackleford v. Collier, 6 Bush (Ky.), 149; McIntyre v. Knowlton, 6 Allen (Mass.), 565; Rankin v. West, 25 Mich. 195; Hossfeldt v. Dill, 28 Minn. 469; Hamilton v. Booth, 55 Miss. 60; Ploss v. Thomas, 6 Mo. App. 157; Abbey v. Deyo, 44 N. Y. 343; Gage v. Dauchy, 34 N. Y. 293; Buckley v. Wells, 33 N. Y. 518; Rush v. Vought, 55 Pa. St. 437; Voorhies v. Bonesteel, 16 Wall. (U. S.) 16.

In some States the wife is forbidden by statute to employ the husband in her

by statute to employ the husband in her business as a trader. Youngworth v. Jewell, 15 Nev. 45; Porter v. Gamba, 43

Cal. 105.

2. Martinez v. Ward, 19 Fla. 175; Keller v. Mayer, 55 Ga. 406; Inidorts' Admr. v. Pergeaux, 18 N. J. Eq. 472; Nat. Bank v. Sprague, 20 N. J. Eq. 13; Commonwealth v. Fletcher, 6 Bush (Ky.), 171; Glidden v. Taylor, 16 Ohio St. 509. See also Keeney v. Good, 21 Pa. St.

In Illinois, both principal and profits

In Illinois, both principal and profits seem liable for his debts under such circumstances. Wilson v. Loomis, 55 Ill. 352; Wortman v. Price, 47 Ill. 22; Elijah v. Taylor, 37 Ill. 247. But see Langford v. Greirson, 5 Ill. App. (Bradw.) 362; Olsen v. Kern, 10 Ill. App. (Bradw.) 578.

3. Isham v. Schafer, 60 Barb. (N. Y.) 317; Gage v. Dauchy, 34 N. Y. 293; Kutcher v. Williams, 40 N. J. Eq. 436; Cooper v. Ham, 49 Ind. 393; Knapp v. Smith, 27 N. Y. 277; Hodges v. Cobb, 8 Rich. (S. Car.) 50; Webster v. Hildreth, 33 Vt. 457; Dayton v. Walsh, 47 Wis.

Rich. (S. Car.) 50; Webster v. Filteren, 33 Vt. 457; Dayton v. Walsh, 47 Wis. 113; Miller v. Peck, 18 W. Va. 75.

4. Brooklyn v. Ins. Co., 99 U. S. 362; Copper v. Jersey City, 44 N. J. L., 634; Arents v. Commonwealth, 18 Gratt. (Va.) 750; McElrath v. P. & O. R., 55

Pa. St. 189; Greenwall v. Hayden, 78.

Bonds void for lack of power in the corporation to issue them are void in the hands of an innocent pledgee. East Oakland v. Skinner, 94 U. S. 255.

The assignee as collateral security of registered bonds payable to a particular person or "assigns," and transferable on the books of the corporation only, acquires only an equitable title, till such transfer on the books has been made. DeVose v. Richmond, 18 Gratt, (Va.) 338; Cronin v. Patrick, 4 Hughes (U.S.),

5.24.
5. Evertson v. Natl. Bank, 66 N. Y. 14.
6. Lehman v. Tallahassee Mfg. Co.,
64 Ala. 567; Plotts v. Byers, 17 Iowa,
303; State Savings Assoc. v. Hurst, 17 Kan. 532; Logan v. Smith, 62 Mo. 455; Farwell v. Importers' Bank, 90 N. Y. 483; Brown v. Warren, 43 N. H. 430; Miller v. Pollock, 99 Pa. St. 202; Griswold v. Davis, 31 Vt. 390; Bowman v. Van Kuren, 29 Wis. 219.
7. Morris v. Preston, 93 Ill. 215; Da-

vis v. Randall, 115 Mass. 547; Calkins v. Lockwood, 16 Conn. 287; Merchants' Natl. Bank v. Hall, 83 N. Y. 338; Day-ton Natl. Bank v. Merchants' Natl. Bank, 37 Ohio St. 208; Walker v. Lee, 15 S. Car. 142. *Compare* Richardson v. Rice,

9 Baxter (Tenn.), 290.
8. Sackett v. Johnson, 54 Cal. 107;
Roberts v. Hall, 37 Conn. 205; Meadow v. Bird, 22 Ga. 246; McIntire v. Yates, 104 Ill. 491; Stranghan v. Fairchild, 80 Ind. 598; Grovanovich v. Citizens' Bank, 26 La. Ann. 15; Maitland v. Citizens', Natl. Bank, 40 Md. 540; Fisher v. Fisher, 90 Mass, 303; Amos v. M'Michael, 36 N. J. L. 92; Bank v. Carrington, 5 R. I. 515; Bank v. Chambers, 11 Rich (S. Car.) 657; Greeneaux v. Wheeler, 6 Tex. 515; 557, Greeneaux v. Wheeler, 6 1ex. 515, Alexandria, etc., R. v. Burke, 22 Gratt. (Va.) 254; Railroad Co. v. Natl. Bank, 102 U. S. 16; Bank v. Chamber, 11 Rich. (S. Car.) 657; Currie v. Misa, L. R. 10 Ex. 153; s. c., L. R., 1 App. Cas. 554.

ty¹ and without notice² of fraud or misappropriation, is a holder for value, and protected to the same extent as a bona fide purchaser.³ The pledgee of accommodation paper is even more fully protected than the pledgee of ordinary paper.⁴

Delivery is essential to the pledge. Delivery alone of negotiable paper payable to bearer or indorsed in blank is sufficient:6 but delivery without indorsement of paper negotiable by indorsement only, vests in the pledgee an equitable title subject to the prior equities of other parties.7

Compare Bertrand v. Barkman, 13 Ark. Compare Bertrand v. Barkman, 13 Ark. 150; Bank of Mobile v. Polintz, 61 Ala. 147; Union Natl. Bank v. Barber, 56 Iowa, 559; Greenwell v. Hayden, 78 Ky. 332. Nutler v. Stover, 48 Me. 163; Brooks v. Whitson, 7 S. & M. (Miss.) 513; Logan v. Smith, 62 Mo. 455; Fletcher v. Case, 16 N. H. 68; Fair v. Howard, 6 Nev. 304; Phœnix Ins. Co. v. Church, 81 N. Y. 222; Pitts v. Fogleson, 37 Ohio, 676; Maynard v. Bank, 98 Pa. St. 250; Liggett Spring, etc., Co.'s Appeal, 111 Pa. St. 291; Nichols v. Bate, 10 Yerg. (Tenn.) 429; Austin v. Curtis, 31 Vt. 64; Body v. Jewson, 33 Wis. 402. 1. Stern v. Germania Natl. Bank, 34

La. Ann 1119; McKim v. King, 58 Md. 502; Parsons v. Jackson, 99 U. S. 440.

2. If he has notice of fraud or misap-

propriation he is not an innocent holder. Collins v. Gilbert, 94 U. S. 753; Small v. Smith, I Den. (N. Y.) 583; Stoddard v. Kimball, 6 Cush. (Mass.) 469; Mynahan v. Hanford, 42 Mich. 329; In re Imperial Land Co., L. R. 11 Eq. 478.

A misappropriation by the party pledging the collateral security does not affect the title of a bona fide pledgee for value before maturity. Beadle v. Southern Bank, 57 Ga. 274; Fisher v. Fisher, 98 Mass. 303; Swift v.Tyson, 16 Pet.(U.S.) 1; Goodman v.Simonds, 20 How.(U.S.) 361.
3. City Bank v. Perkins, 29 N. Y. 554;

Hunt v. Nevers, 15 Pick. (Mass.) 500; Savings Assoc. v. Hunt, 17 Kan. 532; Logan v. Smith, 62 Mo. 455; Munn v. McDonald, 10 Watts (Pa.), 273: Railroad Co. v. National Bank, 102 U. S. 14; Oates v. National Bank, 100 U. S. 239. Compare Goss v. Emerson, 23 N. H. 38.

4. And even more so, for even in those States where a pledge of negotiable recurities for an antecedent debt is subject to equities, this exception does not prevail in favor of an accommodating party. Natl. Bank v. Townsend, 87 N. Y. 9; Miller v. Larned, 103 Ill. 562; Pitts v. Foglesong. 37 Ohio St. 676; Matthews v. Rutherford, 7 La. Ann. 225; Lord v. Ocean Bank, 20 Pa St. 384. Compare Cummings v. Bond, 83 Pa St. 372. See also Dunn v. Weston, 71 Me. 270.

But a transfer of negotiable accommodation securities which is a misappropriation is not binding when for an antecedent debt in those States where the transfer of ordinary paper for antecedent debts Penfield, 69 N. Y. 502; Royer v. Keystone Natl. Bank, 83 Pa. St. 248.

Accommodation paper may be pledged after maturity, and the pledgee takes not subject to equities between the original parties. Miller v. Larned, 103 Ill. 562; Robbins v. Richardson, 2 Bosw. (N. Y.)

Robbins v. Richardson, 2 Bosw. (N. Y.) 253; Dunn v. Weston, 71 Me. 270.

5. D'Meza's Succ., 26 La. Ann. 35; Casey v. Schneider, 96 U. S. 497.
But not if the pledgee has possession already. Brown v. Warren, 43 N. H. 430; Van Blarcom v. Broadway Bank, 37 N. Y. 540; Sanders v. Davis, 13 B. Mon. (Ky.) 432; Providence Thread Co. v. Aldrich, 12 R. I. 77; Portatis v. Tetley, L. R. 5 Eq. 140. And not, it has been L. R. 5 Eq. 140. And not, it has been held, where the negotiable paper is in the possession of third parties. In re Wiley, 4 Biss. (U. S.) 171.

Redelivering to pledgor for delivery or exchange only does not affect the pledexchange only does not affect the pied-gee's title. Stern v. National Bank, 34 La. Ann. 1119; Whipple v. Blackington, 97 Mass. 476; Pier v. Bullis, 48 Wis. 429; Clark v. Iselin, 21 Wall. (U. S.) 260. 6. Wheeler v. Guild, 20 Pick. (Mass.)

545; Maitland v. Citizens' Natl. Bank. 40 7545; Magee v. Badger, 34 N. Y. 247; Thompson v. Perrine, 106 U. S. 259; Smith v. Brainie, 16 Al. & El. (N. S.) 242.

So of bonds and detached coupons payable to bearer. Eagle v. Kohn, 84 Ill. 292; Johnson v. Stark County, 24 Ill. 75; Royal Bank v. Grand Junction R., 100 Mass. 444; Haven v. Railroad Co., 109 Mass. 88; National Bank v. Boyd, 44 Mass. 88; National Bank v. Boyd, 44. Md. 47; Morris, etc., Co. v. Lewis, 12. N. J. Eq. 322; Brainard v. N. Y., etc., R., 25 N. Y. 496; Beaver County v. Armstrong, 44 Pa. St. 63; Natl. Exch. Bank v. Hartford, etc., R., 8 R. I. 378; Ottawa v. National Bank, 105 U. S. 342; Gorgier v. Milville, 3 B. & C. 45.

7. Snow v. National Bank, 7 Robt. (N. Y.) 479; Atkinson v. Brooks, 26 Vt. 569; Allen v. King, 4 McLean (U. S.),

Collateral securities follow renewals of the principal debt. The fair exchange of such securities for others does not affect the pledgee's rights under the original contract or his interest in the latter securities.2

A banker has a general lien upon the funds and securities of his customer in his possession for the general balance of the customer; but the lien does not extend to money on deposit as against the appropriation thereof by check4 to third parties, nor does it extend to securities deposited with him for some purpose foreign to the relation of banker and customer.⁵ A banker may have a special lien by contract on collateral securities for a specific advance or discount. Such a special lien excludes any general lien for other debts after the specific debt is paid.6

The pledgee of a negotiable promissory note or bond, by delivery and indorsement when necessary, together with a mortgage given to secure its payment, takes the note with all the characteristics of commercial paper? and the further collateral security

of the property mortgaged.⁸
(b) The Pledgee's Duties.—It is the duty of the holder of negotiable collateral securities to present the same for payment at maturity, and upon non-payment to give the proper notices, to charge sureties and others. It has been held that he should sue on such

128; De La Chaumette v. Bank of England, 9 B. & C. 208. Compare Partee v. Corning, 9 La. Ann. 539; Casey v. Schneider, 95 U. S. 497.

1. Collins v. Dawle, 4 Col. 138; Wor-

cester Natl. Bank v. Cheeney, 87 Ill. 702; v. Clark, 49 Mich. 384; Savings Bank v. Gill, 16 N. H. 578; Dayton Natl. Bank v. Merchants' Natl. Bank, 37 Ohio St. 208; Shrewsbury Savings Inst. Appeal, 94 Pa. St. 309.

2. Greenwell v. Hayden, 78 Ky. 534; Sawyer v. Turpin, 91 U. S. 114; Cook v. Tullis, 18 Wall. (U. S.) 340. But if a pledgee takes less security from the makers of collateral paper he may be liable. Girard Ins. Co. v. Marr,

46 Pa. St. 504.

3. Muench v. Natl. Bank, 11 Mo. App. 144; Commercial Bank v. Hughes, 17 Wend. (N. Y.) 94; City Bank v. Armstrong, 4 Dev. (N. Car.) 59; Ford v. Thornton, 3 Leigh (Va.), 695; Scott v. Franklin, 15 East, 428; In re European Bank, L. R. 8 Ch. 41.

4. Fourth Natl. Bank v. City Natl. Bank, 68 Ill. 398; Russell v. Hadduck, 3 Cilm (Ill.) age

Gilm. (Ill.) 233.

6. Wyckoff v. Anthony, 90 N. Y. 442;
McVee v. Gorst, L. R. 4 Eq. 315.
7. If the note is pledged without in-

dorsement, where indorsement is neces-

sary to convey legal title, or after maturity, the pledgee takes both note and mortgage subject to equities between the original parties. McCrum v. Cosby, 11 Kan. 464; Smith v. Burgess, 133 Mass. 511; Foley v. Smith, 6 Wall. (U.S.) 493. So with notice of their invalid character Butler v. Slocum, 33 La. Ann. 170; Pierce

v. Kibbee, 51 Vt. 559.
8. Wright v. Ross, 36 Cal. 414; Zimpleman v. Veeder, 98 Ill. 613; Lewis v. Kirk, 28 Kan. 497; Rice v. Dillingham, 73 Me. 59; Smith v. Burgess, 133 Mass. 511; Bracken v. German Ins. Co., 43 511; Bracken v. German Ins. Co., 43 Md. 471; Bell v. Simpson, 75 Mo. 485; Gibson v. Martin, I Nev. 256; Potts v. Blackwell, 4 Jones Eq. (N. Car.) 58; Richardson v. Mann, 30 La. Ann. 1060; Whiting v. Paul, 13 R. I. 40; Walker v. Lee, 14 S. Car. 142; Wells v. Wells, 53 Vt. I; Swift v. Smith, 102 U. S. 442. National Banks may take notes and

National Banks may take notes and mortgages as collateral security and enforce the mortgage. National Bank v. Matthews, 98 U. S. 621. See title Mort-

9. If by his neglect indorsers or others are released, he is liable for any loss that may ensue. Pickens v. Yarborough, 26 Ala. 417; Rice v. Benedict, 19 Mich. 132; McLenore v. Hawkins, 46 Miss. 715; Cutting v. Malor, 78 N. Y. 454; Hunter v. Moul, 98 Pa. St. 13; Whiting v. Paul, 13 R. I. 40; Railroad Co. v. securities when a prudent man would so do: 1 but he need not do so if, in the exercise of good faith and sound judgment, such a course does not seem advisable for the protection of the pledgor's

In the collection of collateral securities, the pledgee is bound to only ordinary diligence.³ He should return uncollectible paper to

the pledgor.4

In the absence of special agreement with the pledgor, the pledgee should not accept less than the face of collateral securities. except in exceptional cases.⁵ He should apply money collected from such securities to the payment of his demand 6 when due.7 For any surplus he must account to the pledgor.8 On tender or payment of the principal debt the pledgee must return uncollected collateral securities, and he cannot retain them to secure other demands.10

(c) Enforcement of the Pledgee's Demand.—The pledgee's right to maintain an action upon the principal debt is not suspended by his continuing to hold collateral securities: 11 but he must be ready

Natl. Bank, 102 U. S. 14. But see City Savings Bank v. Hopson, 53 Conn. 453.

1. Slevin v. Morrow, 4 Ind. 425;
Lyon v. Huntingdon Bank, 12 S. & R.

(Pa.) 61.

2. Clark v. Young, I Cranch (U. S.), 181: Wood v. Matthews, 73 Mo. 479; Smith v. Felton, 85 Ind. 223. But see Lamberton v. Windom, 12 Minn. 232; Hayes ν. Ward, 4 Johns. Ch. (N. Y.) 123; Craig ν. Parkis, 40 N. Y. 181.

3. Diligence. - The pledgee must use ordinary and reasonable care and diligence in the collection of collateral securities, and if loss results from his failure to do this he must bear it. Reeves v. Plough, tinis ne must bear it. Keeves v. Plough, 41 Ind. 204; Lenore v. Hawkins, 46 Miss. 715; Lawrence v. McCalmont, 2 How. (U. S.) 426; Hanna v. Holton, 78 Pa. St. 334; Grove v. Roberts, 6 La. Ann. 210; Wells v. Wells, 53 Vt. 1; Steger v. Bush, S. & M. Ch. (Miss.) 172.

He is not liable for the negligence of an agent selected with due care. Commercial Bank v. Martin, 1 La. Ann. 344; Goodale v. Richardson, 14 N. H. 56. 4. Union Trust Co. v. Rigdon, 93 Ill.

4. Union Trust Co. v. Rigdon, 93 III. 458; Wood v. Matthews, 73 Mo. 477.

5. Stevens v. Hulbert Bank, 31 Conn. 147; Zimpleman v. Veeder, 98 Ill. 613; Depuy v. Clark, 12 Ind. 427; Wood v. Matthews, 73 Mo. 479; McLenore v. Hawkins, 46 Miss. 715; Hawks v. Hinch-cliffe, 17 Barb. (N. Y.) 492.

6. The application of money collected by the aladgee stays the running of the

by the pledgee stays the running of the Statute of Limitations. Whipple v. Black-ington, 97 Mass. 476. But see Harper v. Fairley, 53 N. Y. 443. 7. The rights of the pledgee as to

funds collected on short paper extend only to the detention of the proceeds till the maturity of his demand. Jones v.

Hawkins, 17 Ind. 550; Farwell v. Importers' Natl. Bank, 90 N. Y. 483.

8. In re Litchfield Bank, 28 Conn. 575; Hunt v. Nevers, 15 Pick. (Mass.) 500; King v. Van Vleck, 40 Hun (N. Y.),

9. But where the principal indebtedness is not paid, but only barred by the Statute of Limitations, the pledgee may Statute of Limitations, the pledgee may retain collateral securities. Chouteau v. Allen, 70 Mo. 290; Roots v. Mason City, etc., Co., 27 W. Va. 483; Whipple v. Blackington, 97 Mass. 476; Ocean Natl. Bank v. Fant, 50 N. Y. 474; Stuart v. Bigler, 98 Pa. St. 80; Bank of Portland v. Woodruff, 34 Vt. 89; Cass v. Higenbotam, 100 N. Y. 148.

Where bonds are pledged the identical bonds need not be returned. Levy v. Loeb, 85 N. Y. 365; Stuart v. Bigler, 98.

Pa. St. 80.

10. Chester v. Wheelright, 15 Conn. 562; Teutonia Natl. Bank v. Loeb, 27 La. Ann. 110; Hathaway v. Fall River Natl. Bank. 131 Mass. 14; Talmadge v. Third Natl. Bank, 91 N. Y. 531; James'

Appeal, 89 Pa. St. 54.
11. Sonoma Valley Bank v. Hill, 59. Cal. 107; Robinson v. Hurley, 11 Iowa, Cal. 107; Robinson & Hirley, II lowa, 410; Rich v. Boyce, 39 Md. 314; Am. Natl. Bank v. Harrison Wire Co., 11 Mo. App. 446; Winthrop Savings Bank v. Jackson, 67 Me. 570; Royal Bank v. Railroad, 100 Mass. 444; Munger v. Albany City Bank. 85 N. Y. 580; Farmers' Ins. Co. v. Wollkinson, 35 N. J. Eq. 160; Bank v. Wollkinson, 35 N. J. Eq. 160; Bank v. Woodruff, 34 Vt. 89.

to produce them in such action, or account for their non-production. Likewise in an action upon a collateral security he must be prepared to produce the evidence of the principal indebted-

The rights of the pledgee in collateral securities are not affected

by the merger of the principal debt in a judgment.4

The mere acceptance of collateral security does not suspend the

creditor's right to sue on the principal debt.5

In the absence of special agreement, and with due consideration of the rights of others of which he has notice, the creditor may proceed upon any or all collateral securities, or he may proceed upon the principal debt and the securities at the same time.7

The pledgee of a negotiable promissory note or bond and mortgage may foreclose the mortgage upon default in the payment8 of the principal debt, but the land is held as collateral security in place of the note and mortgage, unless reduced to cash by sale. 10

Where the principal debt is void for usury, the pledgee cannot enforce the collateral securities: 11 but where on account of usury. the principal debt is only voidable, persons liable on collateral securities cannot interpose that defence.12

(d) Transfer and Sub-pledge by Pledgee.—The pledgee with the

1. Lucas v. Harris, 20 Ill. 167; Stuart

v. Bigler, 98 Pa. St. 80.

2. Maxy v. Sharp, 49 Ala. 140; Houser v. Houser, 43 Ga. 415; Zimpleman v. Veeder, 98 Ill. 613; Reeves v. Plough, 41 Ind. 204; Williams v. Norton, 3 Kan. 295; Dix v. Tully, 14 La. Ann. 456; Androscoggin R. v. Auburn Bank, 48 Me. 335; Hancock v. Franklin Ins. Co., 114 Mass. 155; Jennison v. Parker, 7 Mich. 355; McLenon v. Hawkins, 46 Miss. 715; Farwell v. Importers' Natl. Bank, 90 N. Y. 483; Roberts v. Thompson, 10 Ohio St. 1; Hanna v. Holton, 78 Pa. St. 334; Tarbell v. Sturtevant, 26 Vt. 513; Union Natl. Bank v. Roberts, 45 Wis. 373.

The pledgee of negotiable coupon

bonds of corporation may foreclose the mortgage security on default in payment. Ackerson v. Lodi Branch R., 28 N. J. Eq. 542; McCurdy's Appeal, 65 Pa.

St. 290; Jessup v. Racine, 14 Wis. 331. If an innocent holder for value, he is entitled to the full face value of collateral securities. Tooke v. Newman, 75 Ill. 215; Jones v. Hicks, 52 Miss. 582; Thayer v. Mann, 19 Pick. (Mass.) 535.

But in some cases of fraud or equitable set-off against the pledgor the pledgee's recovery may be limited to the amount due him on the principal indebtedness. Fisher v. Fisher, 98 Mass. 303; Farwell v. Importers' Natl. Bank, 90 N. Y. 483; Garton v. Union City Natl. Bank, 34 Mich. 229.

3. Bergen v. Urbahn, 83 N. Y. 49; Matteson v. Matteson, 55 Wis. 452.

4. Chapman v. Lee, 64 Ala. 483; Sonoma Valley Bank v. Hill, 59 Cal. 107; Smith v. Trout, 63 Me. 205; Fisher v.

Smith v. Trout, 63 Me. 205; Fisher v. Fisher, 98 Mass. 303; Waldron v. Zacharie, 54 Tex. 503.

5. Darts v. Bates, 95 Ill. 512; Jaffrey v. Cornish, 10 N. H. 505; Tobey v. Barber, 5 Johns. (N. Y.) 68.

6. Com. Ex. Ins. Co. v. Babcock, 57 Barb. (N. Y.) 233; Royal Bank v. Grand Junction R., 100 Mass. 444; Chapman v. Log 64 Alg. 482 Lee, 64 Ala. 483.

7. And though entitled to but one satisfaction, he may recover costs in all. Planter's, etc., Co. v. Falvey, 20 Wis.

Brown v. Tyler, 8 Gray (Mass.), 135.
 Stevens v. Dedham Savings Inst.,
 Mass. 547; Rice v. Dillingham, 73
 Me. 59; Dalton v. Smith, 86 N. Y. 176.

10. Brown v. Tyler, 8 Gray (Mass.), 135.

11. Marks v. McGhee, 35 Ark. 217;
Corcoran v. Powers, 6 Ohio St. 19;
De Witt v. Brisbane, 16 N. Y. 651;
Coitheas v. Foregar, Parks v. 17. Gaithers v. Farmers' Bank, 1 Pet. (U.S.)

But the pledgor may so act as to estop himself pleading usury. Horn v. Coke, 51 N. H. 287; Wegh v. Boylan, 85 N. Y. 394; Ashton's Appeal, 73 Pa. St. 153.

But as to national banks see Oates v.

National Bank, 100 U. S. 239.
12. Williams v. Tilt, 36 N.Y.319; Gray v. Brown, 22 Ala. 273.

legal title may transfer his demand and the collateral securities with it, or in equity the transfer of the former will carry the pledgee's rights in the latter.2 The pledgee may sub-pledge collateral securities.3

The assignee or sub-pledgee of negotiable collateral securities before maturity, and without notice of fraud or misappropriation.

is a holder for value.4

(e) Sale by Pledgee.—Ordinarily, in the absence of special agreement, the pledgee has no authority to sell pledged bills and notes at public or private sale upon non-payment of the principal debt;5 but upon giving proper notice he may sell long-time government

and municipal bonds.6

(f) The Pledgor's Rights.—The pledgor of collateral securities. though negotiable, may pledge his equitable interest therein.7 He is entitled to any surplus upon the collection or lawful sale of the same; 8 and when not sold or collected, to a return of the securities upon payment or tender of the principal debt. 10 some cases he may maintain an action in equity to redeem collateral securities.11

(g) Rights of Sureties, etc.—A surety who has paid the debt of

1. Chapman v. Brooks, 31 N. Y. 75; Fennell v. McGowan, 58 Miss. 261; White Mountain R. v. Bay City Iron Co., 50 N. H. 57; Baldwin v. Ely, 9 How. (U. S.) 580.

2. Stearns v. Bates, 46 Conn. 313. 3. Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604; Ex parte Sergant, L.

R. 17 Eq. 279.

4. Gould v. Farmers', etc., Co., 23

Hun (N. Y.), 322.
5. In re Litchfield Bank, 28 Conn. 275; Zimpleman v. Veeder, 98 Ill. 613; Lamberton v. Windom, 12 Minn. 232; Morris Canal Co. v. Lewis, 12 N. J. Eq. 321; Fletcher v. Dickinson. 7 Allen (Mass.), 23; Nelson v. Edwards, 40 Barb. (N. Y.) 279; Whittaker v. Charleston Gas Co., 16 W. Va. 717.

In rare instances equity will decree the sale of promissory notes and bills of exchange held as collateral security. Donohoe v. Gamble, 38 Cal. 354; Smith v. Coale, 12 Phila. (Pa.) 177; Carter v. Wake, L. R. 4 Ch. D. 405; France v. Clark, L. R. 22 Ch. D. 405.

6. Hancock v. Franklin Ins. Co., 114 Mass. 155; Morris, etc., Co. v. Lewis, 12 N. J. Eq. 321; Newport Bridge Co. v. Douglass, 12 Bush (Ky.), 673; Duffield v. Miller, 92 Pa. St. 286; Alexandria R. v. Burke, 22 Gratt. (Va.) 254; Jerome v. McCarter, 94 U. S. 734. But see Joliet, etc., Co. v. Scioto, etc., Co., 82 Ill.

The sale should be generally at public Washburn v.

Pond, 2 Allen (Mass.), 474; Colebrooke Col. Securities, secs. 121, 122, 123.

But even when authorized to sell collateral securities, the pledgee cannot become a purchaser at such sale. Walker v. Castle, 97 Ill. 582; Strong v. Natl. Bank, 45 N. Y. 718; Bank v. Dubuque R., 8 Iowa, 277.

7. Sanders v. Davis, 13 B. Mon. (Ky.) 342; Whitaker v. Sumner, 20 Pick. (Mass.) 405; Fisher v. Bradford, 7 Greenl.

8. Overstreet v. Munn, 36 Ala. 666; Hauser v. Munn, 43 Ga. 415; Rohrle v. Stidger, 50 Cal. 207; Rice v. Benedict. 19 Mich. 132; Thayer v. Mann, 19 Pick. (Mass.) 535.

9. A tender must be kept good. Smith

v. Felton, 85 Ind. 223.

10. Whipple v. Blackington, 97 Mass. 476; Overlock v. Hills, 8 Me. 383; G. & S. R. v. Stahl, 103 Ill. 67; Stuart v. Bigler, 98 Pa. St. 80; Benon v. Paquin, 49 Vt. 199.

Tender must be kept good. Smith v. Felton, 85 Ind. 223. But see Fletcher v.

Dickinson, 7 Allen (Mass.), 23.

If the pledgee wrongfully converts collateral securities, the pledgor may sue in an action in tort, or waive the tort and sue on the implied promise. Fletcher v. Dickinson, 7 Allen (Mass.), 23; Hancock

v. Franklin Ins. Co., 114 Mass. 155.
11. Stokes v. Frazier, 72 Ill. 428;
Stephens v. Hartley, 2 Mont. 504. See Colebrooke Col. Sec. sec. 133, for con-

ditions.

his principal may be subrogated to the rights of the creditor in

collateral securities held by him.1

Where he has received collateral securities directly from his principal, and the contract is that the latter shall pay the principal debt on maturity, he may enforce the collateral securities upon default in payment by his principal, though he has not paid the debt; but if his agreement is for indemnity only, he is not entitled, ordinarily, to relief by enforcing the securities held by him until he is damnified.³

A surety holding collateral security from his principal is a *quasi* trustee thereof for his cosureties, and they are entitled to contribution in respect thereto.⁴ The loss or destruction of such securities by fraud or negligence is a defence *pro tanto* to an action by him against them for contribution.⁵

Upon discharge of his demand by the creditor, the surety must

surrender collateral securities held by him.6

If the principal creditor holding collateral securities to which the surety might be subrogated, by any positive act or fraud or gross negligence amounting to fraud, surrenders, destroys, or impairs them, the surety is thereby discharged to the extent of the loss suffered by him. But the mere failure of the creditor to enforce collateral securities, where there is no agreement to use diligence in so doing, does not discharge sureties or indorsers. S

The mere subsequent acceptance of collateral securities by a

creditor does not release sureties or indorsers.9

1. See title Subrogation.

2. Stout v. Folger, 34 Iowa, 71; Moore v. Topliff, 107 Ill. 241; Lathrop v. Attwood, 21 Conn. 117; Baven v. Haskins, 45 Miss. 186; Locke v. Homer, 131 Mass. 93; Butler v. Ladue, 12 Mich. 180; Irick v. Black, 17 N. J. Eq. 189; National Bank v. Bigler, 83 N. Y. 51; Norton v. Reid, 11 S. Car. 593; Warwick v. Richardson, 10 M. & W. 284.

3. Colebrooke Col. Sec. sec. 225;

3. Colebrooke Col. Sec. sec. 225; McLean v. Ragsdale, 31 Miss. 701; National Bank v. Bigler, 83 N. Y. 53.
4. Logan v. Talcott, 59 Cal. 652; Tay-

4. Logan v. Talcott, 59 Cal. 652; Taylor v. Morrison, 26 Ala. 728; Monson v. Drakely, 40 Conn. 552; Robertson v. Detherage, 82 Ill. 511; Paul v. Berry, 78 Ill. 158; McCune v. Belt, 45 Mo. 174; Hall v. Robinson, 8 Ired. L. (N. Car.) 56; McCrory v. Parks, 18 Ohio St. 1; Aldrich v. Hopgood, 39 Vt. 617; Steel v. Dixon, L. R. 17 Ch. D. 825.

5. Taylor v. Morrison, 26 Ala. 728; Morrison v. Poyntz, 7 Dana (Ky.), 307; Paulin v. Kaighn, 20 N. J. L. 480; Fielding v. Waterhouse, 40 N. Y. Supr. Ct. 414; Green v. Millbank, 56 How. (U. S.) 382.

6. Blackford v. Brown, 34 Mich. 4; Jewett v. Warren, 12 Mass. 300; Vest v. Green, 3 Mo. 219. But a surety will not be charged with the loss of collateral securities except for fraud or gross negligence. Wells v. Wells, 53 Vt. 1.

7. New London Bank v. Lee, 11 Conn.

7. New London Bank v. Lee, 11 Conn. 112; Pratt's Case, 16 La. Ann. 357; Kirkpatrick v. Howk, 80 Ill. 122; Stewart v. Davis, 18 Ind. 74; Guild v. Butler, 127 Mass. 388; Supervisor v. Otis, 62 N. Y. 88; N. H. Savings Bank v. Colcord, 15 N. H. 119; Priest v. Watson, 75 Mo. 315; Clopton v. Spratt, 52 Miss. 251; Nelson v. Munch, 28 Minn. 314; Dillon v. Russell, 5 Neb. 484; Clow v. Derby Coal Co., 08 Pa. St. 442.

sell, 5 Neb. 484; Clow v. Derby Coal Co., 98 Pa. St. 432.

8. Thompson v. Robinson, 34 Ark. 44; Gwin v. Moore, 79 Ind. 103; Villars v. Palmers, 67 Ill. 204; Bank v. Rollins, 13 Me. 205; Thompson v. Hall, 45 Barb. (N. Y.) 214; Winton v. Little, 94 Pa. St. 64; McNeilly v. Cooksey, 2 Lea (Tenn.), 39; McKenny v. Waller, 1 Leigh (Va.), 434; Ross v. Jones, 22 Wall. (U. S). 576.

9. Globe Ins. Co. v. Carson, 31 Mo. 218; Fireman's Ins. Co. v. Willignon, 35.

9. Globe Ins. Co. v. Carson, 31 Mo. 218; Fireman's Ins. Co. v. Wilkinson, 35. N. J. Eq. 160; Hayes v. Wells, 34 Md. 512; Thurston v. James, 6 R. I. 103; Austin v. Brooks, 31 Vt. 64; Twopenny v. Young, 3 B. & C. 208; Forbes v. Rowe, 48 Conn. 413.

(II.) QUASI-NEGOTIABLE COLLATERAL SECURITIES.—(a) Stock Certificates.—The pledge of stock certificates as collateral security for present or future advances1 or antecedent debts,2 by indorsement and power of attorney to transfer the stock on the books of the company, if without notice of fraud or misapplication on the part of the pledgee, is unimpeachable as between the immediate parties.4 In the absence of statutory or charter provisions it is generally binding on the corporation and third parties, 6 though no transfer of the stock has been made on the company's books. The pledgee may demand of the corporation a transfer of the stock on its books.

A pledge of stock certificates by mere delivery is subject to the

equities of the corporation and third parties.8

The rights of a pledgee with legal title to stock certificates are not affected by the pledgor's subsequent insolvency, bankruptcy, or assignment for the benefit of creditors.9

The pledgee is entitled to dividends on the stock, and may sue therefor. 10 Upon the transfer of the stock on the company's

1. Dayton Natl. Bank v. Merchants' Natl. Bank, 37 Ohio St. 208; Eichelberger v. Murdock, 10 Md. 373; National Bank v. Hall, 18 Hun (N. Y.), 176.

2. In those States where the pledgee of

negotiable collateral securities for an antecedent debt holds them subject to the equities of third parties, the same rule applies to the pledge of stocks. Moodie v. Seventh Natl. Bank, 11 Phila. (Pa.) 366; Weaver v. Barden, 49 N. Y. 286; Cleveland v. State Bank, 16 Ohio St.

Cleveland v. State Bank, 16 Ohio St. 236; Cherry v. Frost, 7 Lea (Tenn.), 1. Compare Ex parte Barry, L. R. 17 Eq. 113.

3. Dovey's Appeal, 97 Pa. St. 53; Bosland v. Clark, 26 Kan. 349; First Natl. Bank v. Hartford Ins. Co., 45 Conn. 22; Otis v. Gardner, 105 Ill. 436; Baldwin v. Canfield, 26 Minn. 43; Fraser v. Charleston, 11 S. Car. 486; Cheever v. Meyer, 52 Vt. 66; Ex parte Sargeant, L. R. 17 Eq. 273; Johnston v. Laflin, 103 U. S. 800; Jandon v. Natl. City Bank, 8 Blatchf. (U. S.) 430. Otherwise where there has been a forgery. Telegraph Co. v. Davenport, 97 U. S. 369; Pollock v. National Bank, 7 N. Y. 274. A pledgee who takes stock as col-

lateral security, which shows on its face that it is held in trust, takes it subject to the trust. Shaw v. Spencer, 100 Mass. 382; Crocker v. Crocker, 31 N. Y. 507; Gaston v. Am. Ex. Natl. Bank, 29 N. J.

Eq. 98. 4. Merchants' Natl. Bank v. sichards, 6 Mo. App. 454; Finney's Appeal, 59 Pa. St. 398; National Bank v. Watsontown Bank, 105 U. S. 217.

5. Where statutory or charter pro-

visions make transfer on the company's books necessary to title, before such transfer the pledgee gets only an equitable title, subject to the equities of the corporation and third parties, against the pledgor, tion and third parties, against the pledgor. Fisher v. Essex Bank, 5 Gray (Mass.), 373; Shipman v. Ætna Ins. Co., 29 Conn. 245; Winter v. Belmont Mining Co., 53 Cal. 431; Union Bank v. Laird, 2 Wheat. (U. S.) 390.

6. Holbrook v. N. J. Zinc Co., 57 N. Y. 623; Cushman v. Thayer Mfg. Co., 76 N. Y. 365; Hermann v. Maxwell, 15 Jones & S. (U. S.) 347. Compare Otis v. Gardner, 105 Ill. 436; Bank of America v. McNeil, 10 Bush (Kv.) 54: Cherry v.

v. McNeil, 10 Bush (Ky.), 54; Cherry v. Frost, 7 Lea (Tenn.), 1; Mount Holly Turnpike Co., 17 N. J. Eq. 117.
7. Dickenson v. Central Natl. Bank,

129 Mass. 279; Rich v. Noble. 39 Md. 314; Simm v. Anglo-American Tel. Co., L. R. 5 Q. B. D. 188; Case v. Bank, 100 U. S. 446; Campbell v. Morgan, 4 Ill.

App. (Bradw.) 100.

8. State Fire Ins. Co. v. Olmstead, 33 Conn. 480; Platt v. Hawkins, 43 Conn. 139; Newton v. Fay, 10 Allen (Mass.), 505; Shropshire Union R. v. Queen, L.

R. 7 H. L. 496.

9. Cutting v. Damierel, 88 N. Y. 410; City Fire Ins. Co. v. Olmstead, 33 Conn. 480; Bank of Louisville v. State Bank, 10 Bush (Ky.), 367; Dayton Natl. Bank v. Merchants' Natl. Bank, 37 Ohio St. 208; Jerome v. McCarter, 94 U. S. 734.

10. Merchants' Natl. Bank v. Richards. 6 Mo. App. 454; Kellog v. Stockwell, 75 Ill. 71; March v. Railroad Co., 43 N. H. 520; Hill v. Newickhawanick Co., 48 books the pledgee becomes a stockholder with all the rights and liabilities thereto pertaining, unless the rule is changed by statute.1 He may maintain an action to prevent the corporate property

from being lost or impaired.2

The pledgee by indorsement and power of attorney to transfer the stock may sub-pledge it for an amount not exceeding his demand against the pledgor; and a sub-pledgee for a greater amount without notice will be protected to the full amount of his claim.4 On demand and default in the payment of his demand, such a pledgee or sub-pledgee may sell the stock certificates at public sale on due notice. Ordinarily he cannot be a purchaser at his own sale.6

On payment of the debt or tender thereof, with proper expenses. the pledgor is entitled to the return of the property, but not necessarily to the return of the identical certificates.8

The stock-broker holding stocks, margins, and securities of his

customer is generally a pledgee as to them.⁹
(b) Bills of Lading.—The pledge of bills of lading by indorse. ment or delivery vests in the pledgee the legal title to the property and the right of possession. 10

(c) Warehouse Receipts.—The pledge of warehouse receipts by indorsement and delivery, or by delivery only, when payable to

How. Pr. (N. Y.) 429. He takes them to the pledgor's use. Gaty v. Holliday,

8 Mo. App. 118.
1. Wheelock v. Kost, 77 Ill. 296; Vail v. Hamilton, 85 N. Y. 453; Brewster v. Sime, 42 Cal. 139; Magruder v. Colston, 44 Md. 349; Aultman's Appeal, 98 Pa. St. 516; National Bank v. Watsontown Bank, 105 U. S. 217.

2. Baldwin v. Canfield, 26 Minn. 43;

2. Baldwin v. Canfield, 26 Minn. 43; Vail v. Hamilton, 85 N. Y. 453.
3. Jarvis v. Rogers, 13 Mass. 389; Goss v. Emerson, 23 N. H. 38; France v. Clark, L. R. 22 Ch. D. 830. Compare Fay v. Fay, 124 Mass. 500; Lawrence v. Maxwell, 53 N. Y. 19.
4. McNeil v. Tenth National Bank, 46 N. Y. 325; Merchants' Bank v. Livingston, 74 N. Y. 223; Prall v. Tilt, 28 N. J. Eq. 493; Wood v. Smith. 92 Pa. St. 379; Thompson v. Tolland, 48 Cal. 112; Gass v. Hampton, 16 Nev. 185.
5. Nahring v. Bank of Mobile, 58 Ala. 204; Stevens v. Hurlburt Bank, 31 Conn.

204; Stevens v. Hurlburt Bank, 31 Conn. 146; Denton v. Jackson, 106 Ill. 433; Langton v. Waite, L. R. 6 Eq. 165. A stock-broker or commission merchant on failure of his customer to advance margins may sell. Weed v. Adams, 37 Conn. 378; Howard v. Davis, 40 Mich. 546; Dandos' Appeal, 94 Pa. St. 76; Hubbell v. Drexel, 11 Fed. Rep. 115. But he is not obliged to sell, and is not liable for any loss that may ensue from not doing

so. Colquitt v. Stultz, 65 Ga. 305; How-

ard v. Brigham, 98 Mass. 133.

6. Bryan v. Baldwin, 52 N. Y. 232; Wright v. Ross, 36 Cal. 414; Stokes v. Frazier, 72 Ill. 428; Parsons v. Martin, 11 Gray (Mass.), 111; Kimber v. Barber, L. R. 8 Ch. 56. But he may when sold under decree in equity. Newport Bridge

7. McCalla v. Clark, 55 Ga, 53; Talmadge v. National Bank, 91 N. Y. 531.

The rule applies, of course, to all collateral securities. Munn v. McDonald, 10 Watts (Pa.), 273; Wilson v. Little, 2 N. Y. 448; Felton v. Brooks, 4 Cush. (Mass.) 203.

(Mass.) 203.
8. Atkins v. Gamble, 42 Cal. 86; Thompson v. Tolland, 48 Cal. 99; Chamberlain v. Greenleaf, 4 Abb. N. C. (N. Y.) 178; Worthington v. Tormey, 34 Md. 182.
9. Baker v. Drake, 53 N. Y. 211; Child v. Hogg, 41 Cal. 519; Hatch v. Douglass, 48 Conn. 116; Md. Fire Ins. Co. v. Dalrymple, 25 Md. 242; Esser v. Linderman, 71 Pa. St. 76. As to margins, compare Wood v. Hayes, 15 Gray (Mass.) 275

(Mass.), 375.

10. Farmers' Bank v. Logan, 74 N. Y. 568; Forbes v. B. & L. R., 133 Mass. 154; Emery v. Irving Nat. Bank, 25 Ohio St. 360; Holmes v. German Security Bank, 87 Pa. St. 525; Glyn v. E. & W. I. Docks Co., L. R. 7 App. 591.

See title Bill of Lading, Vol. II., ante.

"holder" or "on return of this receipt," vests the legal title in the pledgee without notice of fraud. as fully as a sale of the same.2

III. NON-NEGOTIABLE COLLATERAL SECURITIES.—Non-negotiable choses in action, as insurance policies, 3 savings-bank books. leases, etc., may be pledged as collateral security; but the pledgee takes the security subject to all equities and defences existing between the parties at the time arising from the subject-matter of the pledge.4 The pledgee for value of a non-negotiable bond

and mortgage takes them free from secret equities.

It is the duty of the pledgee to use reasonable care and diligence in collecting such securities, but he is liable for loss when inexcusably negligent only.⁶ He should apply the proceeds to the payment of his demand on maturity,⁷ and pay over any surplus to the pledgor.⁸ On demand and default in the payment of the principal debt, he may sell generally non-negotiable collateral securities at public sale on giving proper notice.9 On payment of the principal debt, or tender thereof, and the pledgee's refusal to deliver the collateral securities, the pledgor may sue for them or their conversion. 10

6. Change of Joint and Separate Debts.-It is of course competent for the parties to make a joint liability separate, or a separate liability joint. 11 At common law the death of one of two parties

1. Merchants' Bank v. Colt, 15 Barb. (N. Y.) 484.

2. Allen v. Maury, 66 Ala, 10; Davis v. Russell, 52 Cal. 611; Fourth Nat. Bank v. Compress Co., 11 Mo. App. 333; Cartwright v. Wilmerding, 24 N. Y. 521; Nat. Bank v. Walbridge, 19 Ohio St. 424; Stewart v. Phœnix Ins. Co., 9 Lea (Tenn.), 104; Rice v. Cutter, 17 Wis. 351; Insurance Co. v. Kiger, 103 U. S. 353.

The owner may be estopped to claim the property where a third person has been entrusted with the indicia of title and pledged the same. Fourth Nat. Bank v. Compress Co., 11 Mo. App. 333; Davis v. Russell, 52 Cal. 611. And a warehouseman who has issued receipt for goods may be estopped to deny possession thereof. Whitlock v. Hay, 58 N. Y. 484; First Nat. Bank v. Bates, I Fed. Rep. 702. See title Warehouse Re-

3. Clauses in insurance policies forbidding assignment thereof do not hinder their being pledged. Ellis v. Kreutzinger, 27 Mo. 311; Merrill v. N. Eng. Ins. Co.,

103 Mass. 252.

An insurance policy may be pledged without any formal assignment by mere delivery. Collins v. Dawley, 4 Col. 138; Stout v. Yaeger Milling Co., 4 McCrary (U. S.), 486. Compare Soule v. Union Bank, 30 How. Pr. 105; Latham v. Chartered Bank, L. R. 17 Eq. 205.

4. Burtiss v. Cook, 16 Iowa, 194; People v. Johnson, 100 Ill. 537; Bush v. Lathrop, 22 N. Y. 535; Taft v. Bowker, 132 Mass. 277; Jasper County v. Tavis, 76 Mo. 13; Cowdry v. Vandenbrough, 101 U. S. 522; Harter v. Coleman, L. R. 19 Ch. D. 630.

5. Ferdon v. Miller, 34 N. J. Eq. 10;
Jacobson v. Dodd, 32 N. J. Eq. 403.
6. Runals v. Harding, 83 Ill. 75; Wood

v. Morgan, 5 Sneed (Tenn.), 79; Burrows v. Bangs, 34 Mich. 304.
7. Whittaker v. Charleston Gas Co., 16

W. Va. 717; Dewey v. Bowman, 8 Cal. 145. He is entitled to deduct the reasonable expenses of collection. Crossman

v. Whitall, 16 Neb. 592.

8. Talbott v. Frere, L. R. 9 Ch. D.
568; Bulkley v. Garrett, 60 Pa. St. 333.

9. Dewey v. Bowman, 8 Cal. 145;
Robinson v. Hurley, 11 Iowa, 410. For sales under special contract, see

Robinson v. Hurley, 11 Iowa, 410.
10. White v. British Empire Ins. Co., L.

R. 7 Eq. 374; Haskins v. Kelly, I Robt. (N. Y.) 160. But it is said that no action will lie for the wrongful sale of collateral securities until tender has been made. Talty v. Freedman's, etc., Co., 93 U. S. 321; Donald v. Suckling, L. R. I Q. B.

11. Lyth v. Ault, 7 Exch. 669; s. c., 21 L. J. Exch. 217; Ex parte Lane, 16 L. J. Bank. 4.

jointly bound cast the entire burden upon the survivor: 1 but the creditor may now proceed against the survivor, or the estate of the decedent.2 and the right of contribution will arise between the survivor and the estate.3 The survivor of joint obligees must sue

alone on the joint demand.4

7. Suspension of the Right to Sue.—An agreement without consideration not to sue on a demand when due is nudum pactum. 5 An agreement not to sue upon the payment of interest in advance,6 or an increase in the rate," or the passing of any other valuable consideration,8 is binding upon the parties so far as damages for breach of contract are concerned, but it is not a bar to an action before the expiration of the time. 10 although under seal. 11 taking a security of a higher nature for one of a lower, or the acceptance of a promissory note or bill of exchange for a demand. suspends the remedy till the security, note, or bill is due. 12 submission to arbitration suspends the remedy. 13 So may the nonpayment of costs in a former action which has been discontinued.¹⁴ Where a creditor has been appointed the executor of the debtor and has received assets, his right to sue is suspended. 15

8. Application of Payments.—(a) By Debtor.—If a debtor owes. money on distinct accounts, he may direct the application of a payment to any debt due at the time. 16 This intention must be

Knowledge of a dissolution of partnership does not alone indicate an assent to treating a demand as not binding on a retiring partner. Kirwan v. Kirwan, 4

Tyr. 491; s. c., 2 S. & M. 617.

1. 1 Pars. Cont. *30.

2. Fogarty v. Cullen, 49 N. Y. S. C. 397; Ralston v. Moore, 105 Ind. 243.

3. See title Contribution.

4. Anderson v. Martindale, I East, 497; Stowell's Admr. v. Drake, 3 Zabr. (N. J.) 310. See title CORPORATIONS, for

ilabilities of stockholders.
Parmelee v. Thompson, 45 N. Y.
Bates v. Starr, 2 Vt. 536; Wilson v.

Powers, 130 Mass. 127.

6. Williams v. Scott, 83 Ind. 405; Wright v. Bartlett, 43 N. H. 548.

7. Beckner v. Carey, 44 Ind. 89; Smith v. Graham, 34 Mich. 302; Clarkson v. Creely, 35 Mo. 95; Knapp v. Mills, 20

Tex. 123.

8. Miller v. Gardner, 49 Iowa, 234; Smith v. School District, 17 Kan. 313.

9. Williams v. Scott, 83 Ind. 405.

9. Williams v. Scott, 83 ind. 405.
10. Allen v. Kimball, 23 Pick. (Mass.)
473; Walker v. Russell, 17 Pick. (Mass.)
280; Mills v. Todd, 83 Ind. 25; Chandler
v. Herrick, 19 Johns. (N. Y.) 129. Compare Leslie v. Conway, 59 Cal. 442.

11. Mendenhall v. Lenwell, 5 Blackf.

(Ind.) 125; s. c., 33 Am. Dec. 458; Thimbleby v. Barron, 3 M. & W. 210; Dow v. Tuttle, 4 Mass. 414. Compare

Copper v. Union Bank, 7 Har. & I.

Copper v. Chilon Bank, 7 Hai. & J. (Md.) 92.

12. Huse v. McDaniel, 33 Iowa, 406; Happy v. Mosher, 48 N. Y. 313; Wilbur v. Jermegan, 11 R. I. 113; McCrary v. Carrington, 35 Ala. 698; Black v. Zacharie, 3 How. (U. S.) 433; James v. Williams, 13 M. & W. 828; Belshaw v. Bush, 11 C. B. 191; s. c., 22 L. J. C. P. 24.

13 Sectitle Arbitration and Award.

13. See title Arbitration and Award. A creditor's bill by one creditor for himself and others who may choose to proceed under it, does not suspend the right ' of another creditor to sue. Bank v. Hubbard, 70 Ga. 411.

14. Langston v. Marks, 68 Ga. 435. See title Costs.

15. Lowe v. Perkett, 16 C. B. 507: s.c..

24 L. J. C. P. 196 16. Levystein v. Whitman, 59 Ala. 345; McDonell v. Montgomery, 20 Ala. 313; Selleck v. Turnpike Co., 13 Conn. 453; Killorin v. Bacon, 57 Ga. 497; King v. Andrews, 30 Ind. 429; Fargo v. Buell, 21 Iowa, 292; Bonnell v. Wilder, 67 Ind. 327; Irvin v. Paulett, 1 Kan. 418; Bosley v. Porter, 4 J. J. Marsh. (Ky.) 621; Lee v. Early, 44 Md. 80; Allston v. Contee, 4 Har. & J. (Md.) 351; Crisler v. McCoy. 33 Miss. 445; Champenois v. Frost, 45 Miss. 355; Solomon v. Dreschler, 4 Minn. 278; Plummer v. Erskine, 58 Me. 59; Reed v. Boardman. 20 Pick. (Mass.) 441; Brady v. Hill, 1 Mo. 315; Bennett. manifested to the creditor 1 at the time of the payment,2 though it need not be expressly declared. But the debtor's right to direct the application of any payment is limited to voluntary 4 payments of the whole 5 amount of any debt. Some authorities maintain that the debtor has no right to direct the application to the principal of any indebtedness, leaving the interest unpaid.6

(b) By the Creditor.—If the debtor makes no application of a voluntary payment, the creditor may apply it to any 8 liquidat-

v. Austin, 81 N. Y. 308; Caldwell v. Wentworth, 14 N. H. 431; Gaston v. Barney, 11 Ohio St. 506; Trullinger v. Kofoed, 7 Oreg. 228; Birky v. McMakin; 64 Pa. St. 343; White v. Trumbull, 3 Green (N. J.), 314; Ordinary v. McCollum, 3 Strobh. (S. Car.) 494; Matossy v. Frosh, 9 Tex. 610; Howard v. McCall, 21 Gratt. (Va.) 205; Jones v. Williams, 39 Wis. 300; Boutell v. Mason, 12 Vt. 608; Cremer v. Higginson, I Mason (U. S.), 323; Croft v. Lumley, 27 L. J. Q. B. 321; Pinnell's Case, 5 Rep. 117; Peters v. Anderson, 5 Taunt. 596. Compare Nichols v. Knowles, 3 McCrary (U. S.)

The debtor may direct the application to an illegal claim. Treadwell v. Moore.

34 Me. 112.

1. Terhune v. Colton, I Beasl. (N. J.) 232; Heilbron v. Bissell, I Bailey Eq. (S. Car.) 430; Hill v. Southerland, I Wash. (Va.) 128; Manning v. Westerne, 2 Vern. 607.

2. Aderholt v. Embry, 78 Ala. 185; Carpenter v. Goin, 19 N. H. 479; Long v. Miller, 93 N. C. 233; White v. Trumbull, 3 Green (N. J.), 314; Boutwell v. Mason, 12 Vt. 608; Peters v. Anderson, 5 Taunt.

596.

3. Pickett v. Memphis' Bank, 32 Ark. 346; Snell v. Cottingham, 72 Ill. 124; Mitchell v. Dall, 4 Gill & J. (Md.) 361; Seymour v. Van Slyck, 8 Wend. (N. Y.) 403; Lanten v. Rowan, 59 N. H. 215; Terhune v. Colton, 1 Beasl. (N. J.) 232; West Branch Bank v. Moorhead, 5 W. & O. (Pa.) 542; Roakes v. Bailey, 55 Vt. 542; Taylor v. Sandiford, 7 Wheat. (U. S.) 13.

The expression of a wish is enough. Hansen v. Rounsavell, 74 Ill. 238. Or the taking of a receipt for a particular debt. Stewart v. Keith, 12 Pa. St. 238. Or paying the exact amount of a certain Taylor v. Sandiford, 7 Wheat. (U. S.) 13; Robert v. Garnie, 3 Cai. (N.

Y.) 14.

A creditor will be presumed to direct the payment of an undisputed debt. Armistead v. Brooke, 18 Ark. 521. And a personal debt in preference to one due

in a representative capacity. Sawyer v.

Tappan, 14 N. H. 352.

Taking a receipt "in full of all demands" indicates an application to debts not barred by the Statute of Limitations.

Berrian v. Mayor, 4 Rob. (N. V.) 538.

A payment of partnership funds will be presumed to have been intended to apply on a partnership debt. Fairchild v. Holly, 10 Conn. 175; Johnson v. Boone, 2 Harr. (Del.) 172; Sneed v. Wiester, 2 A. K. Marsh. (Ky.) 277; Thompson v. Brown, Moody & M. 40, Contra, of funds paid generally. Miles v. Ogden, 54 Wis. 573.
4. Commercial Bank v. Cunningham,

24 Pick. (Mass.) 237; Larrabee v. Lambert, 32 Me. 97. Compare Adams v. Crimager, 1 McMullan (S. Car.) 309.

5. Stone v. Seymour, 15 Wend. (N.Y.)

But see Runyon v. Latham, 5 Ired.

19. But see Kunyon v. Latham, 5 free. L. (N. Car.) 551.

6. Union Bank v. Kendrick, 10 Rob. (La.) 51; Dean v. Williams, 17 Mass. 417; Norwood v. Manning, 2 Nott & McC. (S. Car.) 395. Compare Howard v. McCall. 21 Gratt. (Va.) 205; Pindall v. Bank of Marietta, 10 Leigh (Va.), 481.

7. Neither debtor nor creditor can direct the application of an involuntary payment. Blackstone Bank v. Hill, 10 Pick. (Mass.) 129; Merrimack Co. v. Brown, 12 N. H. 320.

8. Johnson v. Anderson, 30 Ark. 745; Selleck v. Sugar, etc., Co., 13 Conn. 453; Greer v. Burnam, 71 Ga. 31; Plain v. Roth, 107 Ill. 588; Davis v. Buckles, 89 Ill. 237; Fargo v. Buell, 21 Iowa, 292; Nutall v. Brannin, 5 Bush (Ky.), 11; King v. Andrews, 30 Ind. 429; Champenois v. Frost, 45 Miss. 355; Solomon v. Dreschler, 4 Minn. 278; Plummer v. Erskine, 58 Me. 59; Waterman v. Younger, 49 Mo. 413; Harding v. Tifft, 75 N. 464; Harvillon v. Bendury. 75 N. Y. 461; Hamilton v. Benbury, 2 Hayw. (N. Car.) 385; Bean v. Brown, 54 N. H. 395; Wilson v. Allen, 11 Oreg. 154; M. H. 395; Wilson v. Alien, Ti Clega 2, 4, Gaston v. Barney, II Ohio, 506; Logan v. Mason, 6 W. & S. (Pa.) 9; Matossy v. Frosh, 9 Tex. 610; Pierce v. Knight, 31 Vt. 701; Chapman v. Commonwealth, 25; Gratt. (Va.) 721; Jones v. Williams, 39 Wis. ed 1 demand due and payable 2 and not illegal, 3 even though barred by the Statute of Limitations.⁴ According to some authorities, the creditor must make the application at the time of payment: 5 according to others, within a reasonable time; 6 and, according to

300; Bell v. Bell, 20 S. Car. 34; Jones v. Kilgore, 2 Rich. Eq. (S. Car.) 63; Commonwealth Bank v. Mechanics' Bank, 94 U. S. 437; Hutchinson v. Bell, I Taunt. 558; Nash v. Hodgson, 31 Eng. L. & Eq. 555. See also West Coal Co.

v. Kilderhouse, 87 N. Y. 430.

To a prior equitable debt rather than to a legal debt, if he so chooses. sanquet v. Wray, 6 Taunt. 597. simple contract indebtedness rather than to a judgment. State Bank v. Armstrong, 4 Dev. (N. Car.) 519. But a creditor should apply a payment to the personal debt of the debtor rather than to a debt due in a representative capacity. Goddard v. Cox, 2 Stra. 1194. See Sawyer v. Tappan, 14 N. H. 352; Fowke v. Bowie, 4 H. & J. (Md.) 566.

Where after the death of a partner the business continues and new debts are contracted by a previous debtor, payments should apply to the old debts, Coleman v. Lansing, 65 Barb. 54; Boyd v. Webster, 59 N. H. 89; Hooper v. Keay, I Q. B. D. 178. See Dawson v. Wilson,

55 Ind. 216.

Generally payments should be applied to continuous accounts in the order of priority of the items. Sprague v. Hazen-winkle, 53 Ill. 419; Hill v. Robbins, 22 Mich. 475; Crompton v. Pratt, 105 Mass. 255; Trustees v. Heise, 44 Md. 453; Jackson v. Johnson, 74 N. Y. 607.

1. Not to a demand in dispute. Stone

v. Talbot, 4 Wis. 442. Or contingent. Early v. Flannery, 47 Vt. 253; Niagara Bank v. Rosevelt, 9 Cow. (N. Y.) 409; Compare McLendon v. Frost, 57 Ga. 448.

The creditor may apply the payment to a simple contract debt, or one due on specialty. Heintz v. Cahn, 29 Ill. 308; Pierce v. Knight, 31 Vt. 701; Alexandria v. Patten, 4 Cranch (U. S.), 317; Peters

v. Anderson, 5 Taunt. 596.
2. The debt must be due to which the application is made. Gates v. Burkett, 44 Ark. 90; Bobe v. Stickney, 36 Ala. 482; Stamford Bank v. Benedict, 15 482; Stamtord Bank v. Deneuici, 13 Conn. 437; Heintz v. Cahn, 29 III. 308; Richardson v. Coddington, 49 Mich. I; Effinger v. Henderson, 33 Miss. 449; Sturges v. Robbins, 7 Mass. 301; Bacon v. Brown, I Bibb (Ky.), 334; Cloney v. Richardson, 34 Mo. 370; Parks v. Richardson, 34 Mo. 370; Parks v. Ingram, 2 Fost. (N. H.) 283; Baker v. Stackpole, 9 Cow. (N. Y.) 420; Stone v.

Seymour, 15 Wend. (N. Y.) 19; Law v. Sutherland, 5 Gratt. (Va.) 357; McDowell v. Canal Co., 5 Mason (U.S.), II.

3. The creditor must not apply a payment to an illegal debt where there are legal debts. Duncan v. Helms, 22 La. Ann. 418; McAlister v. Jerman, 32 Miss. 142; Rohan v. Hanson, 11 Cush. (Mass.) 44; Caldwell v. Wentworth, 14 N. H. 431; Bancroft v. Dumas, 21 Vt. 456; Gill v. Rice, 13 Wis. 549; Adams v. Mahnken, 41 N. J. Eq. 332.

But he may apply a payment to a debt not enforceable, if it is not illegal. Murphy v. Webber, 61 Me. 478; Mueller v. Wiefracht, 47 Mo. 468; Graham v. Cooper, 17 Ohio, 605; Haynes v. Nice, 100 Mass. 327; Biggs v. Dwight, 1 Man. & Ry. 308; Arnold v. Poole, 4 Man. & Gr. 860. See Riddle v. Rosenfield, 103

Ill. 600.

4. Hill v, Robbins, 22 Mich. 475; Brown v. Burns, 67 Me. 535; Phillips v. Moses, 65 Me. 70; Armistead v. Brooke, 18 Ark. 521; Crisler v. McCoy., 33 Miss. 445; Mills v. Fowkes, 5 Bing. N. C. 455; Williams v. Griffiths, 5 M. & W. 300.

A payment so applied by a creditor will not revive a debt, though it will ex-Foster, 132 Mass. 30; Ramsey v. Warner, 97 Mass. 8; Pond v. Williams, 1 Gray (Mass.), 630; Nass v. Hodgson, 31 Eng.

L. & Eq. 555.

5. Stone v. Seymour, 15 Wend. (N. Y.) 19; U. S. v. Bradbury, Davies (U. S.) 146; Smith v. Wigley, 3 Moore & Scott, 174. Compare Wagner's Appeal, 103 Pa.

St. 185.

6. White v. Trumbull, 3 Green (N. J.), 314; Allen v. Culver, 3 Denio (N. Y.), 284; Harker v. Conrad, 12 S. & R. 301; Briggs v. Williams, 2 Vt. 283; Hill v. Sutherland, 1 Wash. (Va.) 128; Mills v. Fowkes, 5 Bing. (N. C.) 455. See also Millikin v. Tufts, 31 Me. 497; Terhune v. Colton, 1 Beasl. Ch. (N. J.) 312; Robinson v. Doolittle, 12 Vt. 246.

"It is thought to be the better rule and the one sustained by the weight of authority, that the creditor may make the application at any time as between himself and the debtor, but if the rights of third persons are concerned and affected by the time of application, the creditor should make it in a reasonable time." Gaston, v. Barney, 11 Ohio St. 506.

vet others, at any time. 1 even after suit has been brought. 2 The application need not be expressly declared.3 Ordinarily, if the creditor has two demands, each exceeding the payment in amount, he must apply the whole of it to one demand; 4 but cases arise where it is his duty to apply it ratably.5 The creditor must not exercise the right of application in a manner to jeopardize the interests of the debtor.

(c) Effect of.—After either party has made an application or acquiesced in an application made by the other, he is bound by the

action taken.7

(d) By Law.—If neither party applies a payment, the law will apply it as justice and the equity of the case may require.8

1. Plummer v. Erskine, 58 Me. 59; Hill 1. Plummer v. Erskine, 58 Me. 59; Hill v. Brady, 1 Mo. 315; California Bank v. Webb., 94 N. Y. 467; Pattison v. Hull, 9 Cow. (N. Y.) 747; Howard v. McCall, 21 Gratt. (Va.) 205; Alexandria v. Patten, 4 Cranch (U. S.), 317; Phillpott v. Jones, 2 Ald. & Ell. 47; City Disc. Co. v. McLean, 9 Law Rep. C. P. 692. Before account settled. Wilkinson v. Sterne, 9 Mod. 427.

2. Heilbron v. Bissell, I Bailey Eq. (S. Car.) 430; Campbell v. Dent, 2 Moore's P. C. C. 292. Compare Callahan v. Boazman, 21 Ala. 246; Fraser v. Locie, 10 Grant Ch. (Can.) 207; White v. Trumbull, 3 Green (N. J.), 314; Moss v. Adams, 4 Ired. Eq. (N. Car.) 42; Huffstater v. Hayes, 64 Barb. (N. Y.) 573; Richards v. Columbia, 55 N. H. 96; Harker v. Conrad, 12 S. & R. 301; Whether v. Conrad, 12 S. & R. 301; Whethe more v. Murdock, 3 Wood. & M. (U.S.) 390: Howard & Dolman's Case, 1 Hem. & Mil. 433.

3. Snell v. Cottingham, 72 Ill. 124; Howland v. Reuch, 7 Blackf. 236; Fowke v. Bowie, 4 Har. & J. (Md.) 566; Allen v. Culver, 3 Denio (N. Y.), 284. An entry in the creditor's books, if

uncontradicted, is evidence of an application by him. Cole v. Trull, 9 Pick. (Mass.) 325; Van Rensselaer's Exrs. v. Roberts, 5 Denio (N. Y.), 470. See Bird v. Davis, I McCarter (N. J.), 467. But it is said that the entry must be made known to the debtor before it can have the effect. Craig v. Miller. 103 III. 605; Sawyer v. Tappan, 14 N. H. 352; Simson v. Ingham, 2 B. & C. 65. And a receipt given the debtor controls an entry in books. Fraser v. Birch, 3 Knapp, 380.

Giving a receipt for a particular debt is evidence of an application. Smith v. Wood, Saxton (N. J.), 74; Otto v. Klauber, 23 Wis. 471. So is an action brought on another demand. Havnes v. Waite, 14 Cal. 446; Bobe v. Stickney, 36 Ala. 482; Allen v. Kimball, 23 Pick. (Mass.) 473.

4. Blackman v. Leonard, 15 La. Ann. 59; Ayer v. Hawkins, 19 Vt. 26; Wheeler v. House, I Williams, 735. See also Washington Bank v. Prescott, 20 Pick.

(Mass.) 339.

5. In re Browne, 3 Denio (N. Y.), 255; Ely v. Bush, 89 N. Car. 358; Webster v. Mitchell, 22 Fed. Rep. 860. As where he holds two notes, one due himself personally and the other as trustee. Colby v. Copp, 35 N. H. 434. Or one demand is due him in his own right and another as agent. Wendt v. Ross, 33 Cal. 650. See, further, Stone v. Seymour, 15 Wend. (N. Y.) 19.

6. Taylor v. Coleman, 20 Tex. 772; Dawe v. Holdsworth, Peake's N. P. 64.

Dawe v. Holdsworth, Peake's N. P. 64.
7. Harrison v. Johnson, 27 Ala. 445;
Wendt v. Ross, 33 Cal. 650; Tomlinson v. Kinsella, 31 Conn. 268; Johnson v. Johnson, 30 Ga. 857; Hubbell v. Flint, 15 Gray (Mass.), 550; Treadwell v. Moore, 34 Me. 112; Feldman v Gamble, 26 N. J. Eq. 494; Wright v. Wright, 72 N. Y. 149; Caldwell v. Wentworth, 14 N. H. 431; Selfridge v. Northampton, 8 W. & O. (Pa.) 320; Gleason v. Hobart, 16 Vt. 472; Alexandria v. Patten, 4 Cranch (U. S.), 317; Simson v. Ingham, 10 vt. 4/2; Alexandria v. 1 atten, 4 Cranch (U. S.), 317; Simson v. Ingham, 2 B. & C. 65; Kendall v. Vanderlip, 2 Mackey (D. C.), 105.

By mutual consent, the application may be changed. Plummer v. Erskine, 58 Me. 59; Smith v. Wood, Saxton (N. J.), 74. But not to the injury of third parties. Hargroves v. Cook, 15 Ga. 321; Thayer v. Denton, 4 Mich. 192; Terhune v. Colton, I Beasl. Ch. (N. J.) 232; Berghaus v. Alter, 9 Watts (Pa.), 386; Chancellor v. Schott, 23 Pa. St. 68.

An application fraudulently made has been set aside. Livermore v. Claridge, 33 Me. 428. So in rare cases has the application of payments to illegal interest. Haven v. Hudson, 12 La. Ann. 660; Gill

v. Rice, 13 Wis. 549.
8. Robinson v. Allison, 36 Ala. 525;
Chester v. Wheelright, 15 Conn. 562;

doing so where there is one continuous account, the first payment will be applied to the first item, discharging the several items in the order of their priority. Interest will be extinguished in preference to principal; 2 an interest-bearing debt before one bearing no interest; 3 the debt having the more precarious security in preference to another; 4 a legal demand rather than one not enforceable at law: 5 a demand due and payable before one not

King v. Andrews, 30 Ind. 429; Hammer v. Rochester, 2 J. J. Marsh. (Ky.) 144; Solomon v. Dreschler, 4 Minn. 278; Calvert v. Carter, 18 Md. 73; Stone v. Seymour, 15 Wend. (N. Y.) 19; Caldwell v. Wentworth, 14 N. H. 431; Johnson's Appeal, 37 Pa. St. 268; Matossy v. Frosh, 9 Tex. 610; Pierce v. Knight, 31 Vt. 701; Buster v. Holland, 27 W. Va. 510; Gordon v. Hobart, 2 Story (U. S.),

Third parties, as sureties, etc., have no voice in making an application. Stamvoice in making an application. Stamford Bank v. Benedict, 15 Conn. 437; Hansen v. Rounsavell, 74 Ill. 238; Stone v. Seymour, 15 Wend. (N. Y.) 19; Gaston v. Barney, 11 Ohio St. 506; Sager v. Warley, Rice's Eq. (S. Car.) 26; Gordon v. Hobart, 2 Story (U. S.), 264; Williams v. Rawlinson, 10 J. B. Moore, 362. Compare White v. Trumbull, 3 Green (N. J.), 214. Hayker v. Contrad 12 S v R (Pa) 314; Harker v. Conrad, 12 S. & R. (Pa.)

1. Johnson v. Anderson, 30 Ark. 745; Harrison v. Johnson, 27 Ala. 445; Fair-child v. Holly, 10 Conn. 175; Mackey v. Fullerton, 7 Col. 556; Killorin v. Bacon, 57 Ga. 497; Sprague v. Hazenwinkle, 53 Ill. 419; Worthley v. Emerson, 116 Mass. 374; Allston v. Contee, 4 Har. & J. (Md.) 374; Aliston v. Contee, 4 Har. & J. (Md.)
351; Cushing v. Wyman, 44 Me. 121;
Hill v. Robbins, 22 Mich. 475; Bancroft
v. Holton, 59 N. H. 141; Dows v. Morewood, 10 Barb. (N. Y.) 183; State v.
Chadwick, 10 Ore. 423; Johnson's Appeal, 37 Pa. St. 268; Shedd v. Wilson, 27
Vt. 478. In re Browne, 2 Grant Ch.
(Can) 150; II S. w. Kirkpotrick a When-(Can.) 590; U. S. v. Kirkpatrick, 9 Wheat. 720; Jones v. U. S., 7 How. (U. S.) 681; Simson v. Cook, 1 Bing. 452; Bodenham v. Purchas, 2 B. & Ald. 39.

The principle has been carried beyond cases of account. Cushing v. Wyman, 44 Me. 121; Miller v. Leflore, 32 Miss. 634; Helm v. Commonwealth, 79 Ky. 67; Bean v. Brown, 54 N. H. 395: Frost v. Mixsell, 38 N. J. Eq. 586; Hollister v. Davis, 54 Pa. St. 508; Chapman v. Com-Davis, 54 Pa. 51. 500, Chapman ...
monwealth, 25 Gratt. (Va.) 721; Whipple
Brieve 20 Vt. 111; Whitmore v. v. Briggs, 30 Vt. 111; Whitmore v. Murdock, 3 W. & M. (U. S.) 380. For exceptions, see Livermore v. Rand, 6 Fost. (N. H.) 85; Peters v. Anderson, 5

Taunt. 596.

2. Backus v. Minor, 3 Cal. 231; Hart v. Dorman, 2 Fla. 445; McFadden v. Fortior, 20 Ill. 509; Smith v. Coopers, 9 Iowa, 376; Stewart v. Stebbins, 30 Miss. 66; Gwinn v Whitaker, I Har. & J. (Md.) 754; Steele v. Taylor, 4 Dana (Ky.), (Md.) 754, Steele v. 123101, 4 Dana (Ky.), 445; Johnson v. Robbins, 20 La. Ann. 569; Lash v. Edgerton, 13 Minn. 210; Mills v. Saunders, 4 Nebr. 190; Jencks v. Alexander, 11 Pai. (N. Y.) 619; Peebles w. Gee, I Dev. (N. Car.) 341; Norwood w. Manning, 2 Nott & McC. (S. Car.) 395; Jones w. Ward, 10 Yerg. (Tenn.) 160; Hampton v. Dean, 4 Tex. 455; Moore v. Kiff, 78 Pa. St. 96; Fultz v. Davis, 26 Gratt. (Va.) 903; Story v. Livingston, 13 Pet. (U. S.) 359.

For method of casting interest on partial payments, see 2 Pars. Cont. *635.

11 payments, see 2 Pars. Cont. *035.

3. Scott v. Cleveland, 33 Miss. 447;
Blanton v. Rice, 5 Mon. (Ky.) 253;
Bussey v. Grant, 10 Humph. (Tenn.) 238;
Heyward v. Lomax, 1 Vern. 24. But see Smith v. Lloyd, 11 Leigh (Va.), 512;
Parchman v. McKinney, 12 S. & M. (Miss.) 631.

4. Stamford v. Benedict, 16 Conn. 437; Hargroves v. Cook, 15 Ga. 321; Blanton v. Rice, 5 Mon. (Ky.) 253; Natl. Mahaiwe v. Rice, 5 Mon. (Ry.) 253; Natl. Manaiwe Bank v. Peck, 127 Mass. 298; Poulson v. Collier, 18 Mo. App. 583; Hanford v. Robinson, 47 Mich. 100; State v. Thomas, 11 Ired. L. (N. Car.) 251; Bean v. Brown, 54 N. H. 395; Terhune v. Colton, 1 Beasl. Ch. (N. J.) 232; Thomas v. Kelsey, 30 Barb. (N. Y.) 268; Gaston v. Rayney, 11 Ohio St. 566; Johnson's A. Sey, 30 Barb. (N. 1.) 200; Gaston v. Barney, 11 Ohio St. 506; Johnson's Appeal, 37 Pa. St. 268; Sager v. Warley, Rice's Eq. (S. Car.) 26; Langdon v. Bowen, 46 Vt. 512; Field v. Holland, 6 Cranch (U. S.), 8; Peters v. Anderson, 5 Taunt. 596. Compare Neal v. Allison, 50 Miss. 175; Fridley v. Bowen, 103 Ill. 633; Miller v. Trabue, 16 La. Ann. 375; Dorsey v. Gassaway, 2 Har. & J. (Md.) 402; Baine v. Williams, 10 S. & M. (Miss.) 113; McLaughlin v. Green, 48 Miss. 175; Bussey v. Grant, 10 Humph. (Tenn.) 238. See also Fitchburg v. Davis, 121 Mass. 121; Harding v. Tifft, 75 N. Y. 461; Griswold v. Onondaga, etc., Bank, 93 N. Y. 301; Lindsey v. Stevens, 5 Dana (Ky.), 104. 5. Treadwell v. Moore, 34 Me. 112; vet due: 1 a definite conceded demand rather than one disputed or indefinite; 2 and a claim against a party directly in preference to one against him secondarily.3 When the money given in payment arises from some property or fund, the court will apply it to discharge or reduce an indebtedness resting against such prop-

9. Discharge of Debt or Debtor.—(a) Set-off. (See also titles SET-OFF: COUNTERCLAIM.)—When two parties owe each other distinct debts, they may be balanced in many cases by setting off one against the other in law or equity.⁵ Demands arising on judgments or contracts, capable of being sued in indebitatus assumbsit, debt, or covenant, may ordinarily be set off against each other.6 But they must be for sums certain or capable of being made certain by mere calculation.7 Demands which can be enforced in actions ex delicto or equity only, are not capable, generally, of setoff.8 To be set off, the claims must be mutual-between the same parties in the same right.9 In an action at law a demand cannot be set off unless due when the action was commenced. 10 Courts of equity extend the doctrine of set-off beyond the law in some cases.11

Solomon v. Dreschler, 4 Minn. 278; Albert v. Lindan, 46 Md. 334; Wilhelm v. Schmidt, 84 Ill. 183; Burrows v. Cook, Schmidt, 84 Ill. 183; Burrows v. Cook, 17 Iowa, 436; Hall v. Clement, 41 N. H. 166; Dunbar v. Garrity, 58 N. H. 575; Stanley v. Westrop, 16 Tex. 200; Bancroft v. Dumas, 21 Vt. 456; Green v. Tyler, 39 Pa. St. 361; Gill v. Rice, 13 Wis. 549; Wright v. Laing, 3 B. & C. 165. See McKelvey v. Jarvis, 87 Pa. St.

1. Early v. Flannery, 47 Vt. 253; Hunt-

er v. Osterhoudt, 11 Barb. (N. Y.) 33. 2. Ramsour v. Thomas, 10 Ired. L. (N. Car.) 165; Blinn v. Chester, 5 Day (Conn.), 166.

3. Merrimack Co. Bank v. Brown, 12 N. H. 320; Newman v. Meek, I S. & M. Ch. (Miss.) 331. But see Perris v. Roberts, 1 Vern. 34.

4. Allston v. Contee, 4 Har. & J. (Md.) 754; Sanders v. Knox, 57 Ala. 80; Hicks v. Bingham, 11 Mass. 300; Stoveldel v. Eade, 4 Bing. 154; Knight v. Bowyer, 4 De G. & J. 619.

Application of payments take effect as of the time of payment. Ramsey v.

Warner, 97 Mass. 8.

5. The right of set off did not exist originally at common law. Ex parte Stephens, 11 Ves. 27; Green v. Farmer, 4 Burr. 2220; Freeman v. Lomas, 9 Hare, 116.

6. Dowsland v. Thompson, 2 W. Bl.

910; 2 Pars. on Cont. *734.

Courts in their discretion may direct that judgments be set off against each other. Gould v. Parlin, 7 Greenl. (Me.) 82; Barrett v. Barrett, 8 Pick. (Mass.) 342; Hutchins v. Riddle, 12 N. H. 464; Wright v. Cobleigh, 3 Fost. (N. H.) 32; Burns v. Thornburgh, 3 Watts (Pa.), 78; Barker v. Braham, 3 Wilson, 396. Though one of the judgments was obtained in Man. & G. 648; Ewen v. Needham, 7
Man. & G. 648; Ewen v. Terry, 8 Cow.
(N. Y.) 126. See also George v. Tate, 102
U. S. 564.
7. Grimes v. Reese, 30 Ga. 330; Corey

v. James. 15 Gray (Mass.), 543; Taft v. Larkin, 123 Mass. 598; Bell v. Ward, 10 R. I. 503; Nedriffe v. Hogan, 2 Burr. 1024. But see De Forest v. Oder, 42 Ill.

8. 2 Pars. Cont. *735; Dean v. Allen, 8 Johns. (N. Y) 390; Gilchrist v. Leonard, 2 Bailey (S. Car.), 135; Huddersfield Canal Co. v. Buckley, 7 T. R. 45.

A tort cannot be set off against a tort.

Hart v. Davis, 21 Tex. 411.

9. 2 Pars. Cont. *737; Borchsenius v. Canutson, 100 Ill. 82; Burrough v. Moss, 10 B. & C. 558. But the indorsee of a note after maturity takes it subject to a set off against the payee. Robinson v. Perry, 73 Me. 168.

Joint debts cannot be set off against several, or vice versa. 2 Pars. Cont. *739; Emerson v. Baylies, 19 Pick. (Mass.) 59; McDowell v. Tyson, 14 S. & R. (Pa.) 300. See, further, Engs v. Matson, 11 Ill. App. (Bradw.) 639; Harris v. Pearce, 5 Ill. App.

(Bradw.) 622.

10. Henry v. Butler, 32 Conn. 140; Lee υ. Lee, 31 Ga. 26.
11. Lee υ. Lee, 31 Ga. 26; Doan υ.

(b) Payment. (See also title PAYMENT.)—The payment of a debt to the creditor, or one authorized to receive payment, is a discharge.1 Payment of part of a debt or liquidated damages is only a discharge pro tanto, unless in pursuance of a fair and wellunderstood compromise; but payment of part of a debt in a way more favorable than the creditor could lawfully demand may dis-

charge the whole debt.4

(c) Satisfaction by Gift or Legacy.—Where a person under some legal obligation to another makes a gift that operates as an exact fulfilment thereof, a presumption arises that the gift was intended to be in satisfaction of the obligation.⁵ Nearly all cases arise under wills. The presumption that a legacy was intended to be in discharge of a creditor's claim arises only where the amount of the legacy is equal to or greater than the debt, and its nature is the same.6 The presumption may be rebutted by evidence to the contrary of the express intention of the testator, or by evidence from surrounding circumstances.7

There is no presumption in law or equity, that a legacy from a

creditor to a debtor is meant as a forgiveness of the debt.8

(d) Release. (See also title RELEASE.)—A release either by the creditor or by operation of law discharges the debtor.9 No particular form of words is necessary, if the intention is clearly expressed.10 It was a maxim that an obligor could not be released

Walker, 101 Ill. 628; Jeffries v. Evans, 6 B. Mon. (Ky.) 119; Gay v. Gay, 10 Paige (N. Y.), 369; Ferris v. Barton, 1 Vt. 439; Russell v. Miller, 4 P. F. Smith (Pa.), 154. See REDUCTION; RECOUPMENT.

1. A payment to the general agent of a corporation is good. Swett v. Southworth, 125 Mass. 417; Howe Machine Co. v. Ballmeg, 89 Ill. 319. Before notice of the revocation of authority. Packer v. Hinckley Locomotive Works, 122 Mass. 484; Rice v. Barnard, 127 Mass. 241; Ulrich v. McCormick, 66 Ind. 243; Braswell v. Am. Ins. Co., 75 N. Car. 8; Meyer v. Hehner, 96 Ill. 400; Insurance Co. v. McCain, 96 U. S. 84. Payment to a selling agent held not good. Clark v. Smith, 88 Ill. 298. Compare Putnam v. French, 53 Vt. 402. Payment to a broker not having possession of the goods is not a discharge. Whiton v. Spring, 74 N. Y. 169; Irwine v. Watson, 5 Q. B. 102, 414.

Principal must repudiate the unauthor-

ized receipt of payment by his agent at once. Harris v. Simmerman, 81 Ill. 413;

Aultman v. Lee; 43 Iowa, 404.

A payment to a supposed principal is sometimes a discharge. Peel v. Shepherd, 58 Ga. 365; Eclipse Windmill Co. v. Thorson, 46 Iowa, 181. Payment to one partner or joint creditor is a discharge. Morrow v. Starke, 4 J. J. Marsh. (Ky.) 367; Shepard v. Ward, 8 Wend. (N. Y.) 542; King v. Smith, 4 C. & P. 108.

2. Though receipt in full be given. Ryan v. Ward, 48 N. Y. 204. But acceptance as full payment of a part of an unliquidated demand is a discharge. Hilliquidated v. Noyes, 58 N. H. 312.
3. Paddleford v. Thacher, 48 Vt. 574.

See Accord and Satisfaction and Com-

POSITION WITH CREDITORS.

4. As payment before due. Brooks v. White, 2 Met. (Mass.) 283. Or the costs and expenses of an action and part of the demand before judgment. Mitchell v. Wheaton, 46 Conn. 315.

Part payment by a stranger is a consideration for a full discharge. Sanders v. Bank, 13 Ala. 353; Boyd v. Hitchcock, 20 Johns. (N. Y.) 76; Steinman v. Mag-

nus, 11 East, 390.

5. Bisph. Pr. Eq. (4th Ed.) sec. 538.

6. Spence Eq. 605.
7. Parker v. Coburn, 10 Allen (Mass.),
82; Homer's Exr. v. McGaughy, 12 P.
F. Smith (Pa.), 189; Van Riper v. Van
Riper, 1 Green Ch. (N. J.) 1; Dey v.
Williams, 2 Dev. & Bat. Eq. (N. Car.) 66; Clark v. Sewall, 3 Atk. 96; Wathen v. Smith, 4 Mad. 325; Strong v. Williams, 12 Mass. 391; Chauncey's Case, 1 P. Wms. 408.

8. Story's Eq. Juris. sec. 1123; Bisph. Pr. Eq. (3d Ed.) sec. 538.
9. 2 Pars. Cont. *715.

10. Rich v. Lord, 18 Pick. (Mass.) 325; 2 Pars. Cont. *713.

by an instrument of less force than that which bound him: but the rigor of the rule has much abated.² The release of one joint debtor releases all.³ The extension of a note without the consent of the surety releases him.4 The intermarriage of debtor and creditor, 5 and formerly the appointment of a debtor by the creditor as his executor, operated as a release of the debtor's obligation.

(e) Alteration of Instruments. (See also title ALTERATION OF INSTRUMENTS.)—The wilful and material alteration by the creditor of a written instrument which is the foundation of a debtor's obli-

gation may discharge him.

(f) Accord and Satisfaction. (See also title ACCORD AND SATIS-FACTION.)—Where a debtor and creditor agree to substitute a new obligation for an existing one, the performance of the latter operates to discharge the debtor from both; or the new promise itself. if such is the intention, is a satisfaction of the former liability.7

(g) Composition with Creditors. (See also title COMPOSITION WITH CREDITORS.)—Where two or more of a debtor's creditors mutually agree to accept a part of the debt due them in satisfaction of the whole, the payment of such part to any creditor under

the agreement is a full discharge of his demand.8

(h) Novation—Delegation. (See also title NOVATION.)—The obligation of a debtor may be extinguished by novation—that is, by the complete substitution of a new obligation for the old one.

The novation may be by delegation, which is the full acceptance by the creditor of a new debtor in place of the old one, thereby releasing the obligation of the latter. 10

1. First Bank v. Marshall, 73 Me. 79.

2. White v. Walker, 31 Ill. 422. A release under seal will discharge a

judgment. Barker v. St. Quintin, 12 M. & W. 441.

3. 1 Pars. Cont. *28, 29; Millikin v. Browne, I Rawle (Pa.), 391; Brown v. Marsh, 7 Vt. 320. A covenant not to one of joint debtors does not release the others. Tuckerman v. Newhall, 17 Mass. 581; Ward v. Johnson, 6 Munf. (Va.) 6; Lacy v. Kynaston, 12 Mod. 548.
4. Crossman v. Wohlleben, 90 Ill. 537.

5. Cage v. Acton, I Ld. Raym. 515; Cannell v. Buckle, 2 P. Wms. 242. Not, of course, a bond given in contemplation of marriage. Millbourn v. Ewart, 5 T.

6. 2 Pars. Cont. *715. Compare Winship v. Bass, 12 Mass. 199; Pusey v. Clemson, 9 S. & R. (Pa.) 204.
7. Simmons v. Clark, 56 Ill. 96; 2

Pars. Cont. *681-688.

8. Denny v. Merrifield, 128 Mass. 228; Pierce v. Gilkey, 124 Mass. 300. A notice of readiness to pay at a reasonable time and place will take the place of a formal tender. Home Bank v. Carpenter, 129 Mass. 1; Edwards v. Coombe..

1. R. 7 C. P. 519.

9. Clark v. Billings, 59 Ind. 509; Hosack v. Rogers, 8 Paige (N. Y.), 238; Bronson v. Fitzhugh, I Hill (N. Y.), 186; Tatlock v. Harris, 3 T. R. 174; I Pars. Cont. *217-222.

The old obligation must be completely extinguished. Baker v. Frellsen, 32 La. Ann. 822; Caswell v. Fellows, 110 Mass. 52; Butterfield v. Hartshorn, 7 N. H. 345. But the performance of the new contract is immaterial.

10. See Adams v. Powers, 48 Miss.

Where a mortgagor conveys mortgaged property, and his grantee agrees to assume the mortgage debt, the assent of the mortgagee to the arrangement will make it a novation. Campbell v. Smith, 71 N. Y. 26; Calvo v. Davies, 73 N. Y. 211; Merriman v. Moore, 90 Pa. St. 78.

When a new firm assumes the debts of an old one with the assent of creditors, a novation takes place. Shaw v. Gregory, 105 Mass. 96; Silverman v. Chase, 90 Ill.

An assignment is the transfer of an old

The novation must have the complete assent of all parties.1

The novation may take place by the acceptance of a new obligation in extinguishment of the old one by the original debtor and

creditor, 2 sometimes called merger.

(i) Merger. (See also title MERGER.)—A right or debt becomes extinguished by merger when for any reason the person who is bound to pay becomes also entitled to receive. A decree or judge. ment is said to merge the cause of action.4 The taking of a higher security for a lower is also said to merge the latter.5

(i) Bankruptcy. (See also title BANKRUPTCY.)—A valid discharge in bankruptcy releases a debtor from all obligations provable under the bankruptcy proceedings; but demands not provable are not discharged. A foreign discharge in bankruptcy is of no effect as against non-residents of the country where granted or demands arising in another jurisdiction.7

(k) Statute of Limitations. (See also title STATUTE OF LIMITA-TIONS.)—A demand may be barred by the Statute of Limita-

tions.

10. Relative Rights where there are Several Debtors or Creditors.-(a) Priority.—The United States exacts a priority in the payment of claims due it when, 1st, the debtor dies insolvent; 2d, or being insolvent, makes an assignment; 3d, or commits an act of legal bankruptcy; 4th, or absconds or conceals his property.8 This priority is not a lien, and is subject to conveyances and liens taking effect before the debtor's death, assignment, etc.9

The creditors of a partnership have a priority over the creditors of the individual partners in subjecting the partnership property to

the payment of their demands.16

obligation; novation is the substitution of a new contract. I Pars. Cont. *218,

1. Boston Ice Co. v. Patter, 123 Mass. 28; Leabo v. Goode, 67 Mo. 126; Murphy v. Hanrahan, 50 Wis. 485.

2. Bouv. L. Dict. (Novation). See also Wright v. Brosseau, 73 Ill. 381; Bilborough v. Holmes, 5 Ch. D. 255; Bennett v. Caldwell, 70 Pa. St. 253.

3. Bouv. L. Dict.; Clift v. White, 15

Barb. 75.

4. Freeman on Judg. (3d Ed.) 215.
5. The acceptance of a note in payment of a debt due on simple contract merges the original cause of action. Kapper v. Geo. E. White Co., I Ill. App. (Bradw.) 280; Bragg v. Geddes, 93 Ill.

6. Judgments entered subsequently to filing the petition in bankruptcy have been held not discharged by the decree. Roden v. Jaco, 17 Ala. 344; Uran v. Houdlette, 36 Me. 15; Bradford v. Rice, 102 Mass. 472; Kellog v. Schuyler, 2 Den. (N. Y.) 73. But if the claim could have been proved under the proceedings, many authorities hold that a judgment obtained before decree is discharged. Imlay v. Carpenter, 14 Cal. 173; Rogers v. Ins. Co., i La. Ann. 161; McDonald v. Ingraham, 30 Miss. 389; Betts v. Bagley, 12 Pick. (Mass.) 572; Fox v. Woodbury, 9 Barb. (N. Y.) 498; Stratton v. Perry, 2 Tenn. Ch. 633; Harrington v. McNaughton, 20 Vt. 293; Blanford v.

Foote, I Cowp. 138.
7. Smith v. Smith, 2 Johns. (N. Y.) 235; s. c., 3 Am. Dec. 410; White v. Canfield, 7 Johns. 117; s. c., 5 Am. Dec. 249; Kelly v. Crapo, 45 N. Y. 90; Mitchell v. McMillan, 3 Mart. (La.) 676; s.

c., 6 Am. Dec. 690.

8. Walker's Am. Law, sec. 74; I Kent Com. *247.

9. U. S. v. Canal Bank, 3 Story (U. S.), 79; Brent v. Bank of Washington, 10 Peters (U. S.), 596.

10. I Pars. on Cont. *204 et seq. See

title PARTNERSHIP.

Among lien creditors the oldest lien has priority. Among other

creditors there is no priority, unless given by statute.2

(b) Contribution. (See also title CONTRIBUTION.)—Where one of several parties who are equally liable for a common debt or obligation discharges it for the benefit of all, he is entitled to enforce contribution from them—that is, he is entitled to recover from each of his co-debtors his proportionate share of the common

- (c) Exoneration.—The right of exoneration arises where two or more persons are successively liable for the same debt or obligation. and one not primarily liable discharges it. He is entitled to reimbursement from any of those who were liable before himself.4 Originally this right could be enforced in equity only. 5 but a legal remedy now exists by virtue of an implied promise to indemnify.6 Or at any time after the debt has become due, one not personally liable may file a bill in equity to compel payment by one who is, though he has not himself discharged the obligation nor been sued thereon.7
- (d) Subrogation. (See also title SUBROGATION.)—Where one also secondarily liable for a debt has paid the same, he may be so put in the place of the creditor as to entitle him to use all the securities and remedies possessed by the creditor to enforce his claim by contribution against those equally liable, or for exoneration against those primarily liable.8

(e) Marshalling. (See also title MARSHALLING.)—Where one creditor has two or more funds from which to satisfy his demands. and another creditor can resort to but one fund, equity will marshal the assets in a proper case—that is, it will either compel the paramount creditor to exhaust first the fund to which the junior creditor cannot resort, or it will subrogate the junior creditor to the

rights of the other in such fund.9

1. See title LIENS.

2. For priority of payment from the estates of decedents, see EXECUTORS AND Administrators.

3. Bisph. Pr. Eq. (3d Ed.) secs. 328-

330.

4. A principal must exonerate his surety. Moore v. Young, 1 Dana (Ky.), 516; Baxter v. Moore, 5 Leigh (Va.), 219; Wesley Church v. Moore, 10 Barr (Pa.),

A subsequent surety liable only on default of principal and prior surety may call on either. Harris v. Warner, 13 Wend. (N. Y.) 400; Thompson v. Saunders, 4 Dev. & Bat. (N. Car.) 404.

The better doctrine is that a surety may recover both costs and principal. Wynn v. Brooke, 5 Rawle (Pa.), 106; Hayden v. Cabot, 17 Mass. 169.

The principle has been applied to a mortgage on the wife's separate property

for her husband's debts. Savage v. Winchester, 15 Gray (Mass.), 453; Neimcewicz v. Gahn, 3 Paige (N. Y.), 614; s. c., 11 Wend, 312; Aguilar v. Aguilar, 5 Mad.

5. Bisph. Pr. Eq. (3d Ed.) sec. 331. 6. Bisph. Pr. Eq. (3d Ed.) sec, 331.

7. Beaver v. Beaver, 23 Pa. St. 167; Bisph. Pr. Eq. (3d Ed.) sec. 331.

8. Bisph. Pr. Eq. (3d Ed.) 335.

9. Bisph. Pr. Eq. (3d Ed.) sec. 341.

Authorities for Debtor and Creditor.

Ellis on Debtor and Creditor (Eng.), 1822; Holcombe on Debtor and Creditor (Eng.), 1856; Trower on Debtor and Creditor (Eng.), 1861, are little used in this country. See Munger on the Application of Payments: Bump on Fraudulent Convey-ances (3d Ed.); Colebrooke on Collateral Securities; the various works on contracts, and the authorities given under the various sub-titles elsewhere.

DEBTS OF DECEDENTS.—(See also EXECUTORS AND ADMINIS-TRATORS: MARSHALLING AND JUDICIAL SALES.)

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1. Determination of Claims.—(a) Notice to Present.—If an executor or administrator pleads the Statutes of Non-claim, he will be held to strict proof of the fact that he advertised to creditors to bring in their claims as required by the terms of the statute. Unless a particular form of notice is prescribed by the statute, a notice of appointment as administrator is good, although it consists merely of a demand signed officially by the administrator that all persons indebted to the estate must come forward and make payment, and all persons having claims are notified to present them.2 The exact time fixed by law as the period within which claims should

1. Gillian v. Willey, I Jones Eq. (N.

'Car.) 128.

N. C. Rev. Stat., ch. 26, § 17, in relation to notices given by administrators to creditors, was intended for the ease and security of the administrator, and a strict performance on his part is required in order to entitle him to its protection. Lee v. Patrick, 9 Ired. L. (N. Car.) 135.

If the publication of notice to creditors, required by the statute of Missouri, be not commenced within 30 days from the grant of letters of administration, debts against the estate are not barred after the lapse of three years. Hawkins v. Ridenhour, 13 Mo. 125. See also Stewart v. Carr, 6 Gill (Md.), 430.

The short limitation provided by 2 N. Y. Stat. 89, § 38, in the case of a claim disputed or rejected and not referred, is only applicable where the presentment and rejection take place after publication

of notice to creditors. Tucker v. Tucker, 4 Abb. App. Dec. (N. Y.) 428.

The statute of *Tennessee* of 1789, providing that all claims against the estate of a deceased person shall be presented to an executor or administrator within two years, and if not, that they shall be barred, requires an executor or administrator to advertise to all creditors to bring in their demands. *Held*, that the requirement to advertise was directory merely, and that the period of limitation of the time for presenting demands was not affected by the want of such advertisement. Hooper v. Bryant, 3 Yerg. (Tenn.) I.

2. Gilbert v. Tittle, 2 Ohio St. 156. The statute of Indiana (Acts 1883, p. 160, §§ 23, 26) governing the settlement of decedents' estates, provides that notice be presented need not be stated. It is sufficient if the notice calls

for a presentation "within the time prescribed by law." 1

(b) Necessity of Presentation.—In almost all the States there are Statutes of Non-claim which bar a claim not presented to the administrator or filed in the probate court within a specified time. 2

The exhibition of the claim to the administrator arrests the Statute

must be given by the executors or administrators of the time fixed for hearing the report for final settlement "to all persons interested in the estate," but does not provide for the signing of such notice by any particular person. *Held*, that a notice to the "heirs, legatees, and creditors," signed by the clerk, is sufficient. Roberts v. Spencer (Ind.), 13 N. E. Rep.

1. May v. Vann, 15 Fla. 553.

To entitle an executor or administrator to the benefit of the six months' limitation prescribed by 2 N. Y. Rev. Stat. 80. § 38, for the commencement of an action upon a claim presented to and disputed or rejected by him, and which has not been referred, the notice required to be given by section 34 need not be published in more than one newspaper, unless the surrogate directs a publication also in some other paper or papers. The surrogate's order that notice be published in a specified paper in the county, without referring to a publication in any other, is evidence that he did not deem that publication in other newspapers would be Dolbeer v. Casey, 19 Barb. of service. (N. Y.) 140.

A tableau of distribution must not only be filed, but its filing published, so that all creditors may have an opportunity to present their claims; and when an estate is insolvent, and a preference claimed by the administrator, a loose admission at the trial will not be taken as proof of the publication and formalities to precede his discharge, or the payment of funds under the tableau. Succession of Harkins, 2

La. Ann. 925.

A tableau of distribution should declare the nature of the claims of the creditors, and their names and residences should be mentioned. Succession of Gautier, 8

La. Ann. 451.

As to what circumstances will give rise to a presumption that the administrator did not give notice of his appointment, or that claims allowed were presented to commissioners, see Aiken v. Morse, 104 Mass. 277.

2. The *Iowa* statute (Miller's Rev. Code, 1884, sec. 2421) provides that all claims not filed and proved within twelvemonths of the giving of notice aforesaid are forever barred, unless the claim is

pending in the district or supreme court, unless peculiar circumstances entitle the claimant to equitable relief. See also, as to construction of section, Wile v. Wright, 32 Iowa, 451; Davis v. Shawhan, 34 Iowa, 71; Allen v. Moer, 16 Iowa, 307; Wilcox v. Jackson, 51 Iowa, 296; Lacey v. Loughbridge, 51 Iowa, 629. As to when equitable relief will be granted, see Farral v. Irvine, 12 Iowa, 52; Johnston v. Johnston, 36 Iowa, 608; McCormack v. Cook, 11 Iowa, 267; Brewster v. Kendick, 17 Iowa, 479; Shorno v. Bissell, 20 Iowa, 68; Preston v.Day, 19 Iowa, 127.

In Brewster v. Kendrick, 17 Iowa, 479, it was said that when a claim otherwise barred by sec. 2405 (of the revision from which sec. 2421, Code of 1884, differs only in that the limitation is shortened by six months) is allowed upon the ground of peculiar equitable circumstances, the class in which it shall be paid should also be determined from such cir-

cumstances.

Claims filed within six months after the notice given by the administrator of his appointment are payable by him before those filed after that time, although not admitted by the administrator nor passed upon by the court until after the six months. Chandler v. Hockett, 12 Iowa, 260.

As to construction of *Maine* Pub. Laws of 1872, ch. 85, §§ 13-16, prescribing the period of presentment of claims against estates and the remedy against the heirs, see Sampson v. Sampson, 63

Me. 328.

Under Revised Stat. Maine, c. 87, § 12, one having a claim against a deceased party may maintain an action thereon against the administrator if commenced within two years and six months after notice of the appointment of the administrator is given, without presenting his claim in writing to the administrator, and demand of payment within two years after such notice. Gould v. Whitmore (Me.), 10 Atl. Rep. 60.

Requisites of allegation, proof, practice, and proceedings against executors and administrators under the Alabama Statute of Non-claim, Rev. Code, § 2243. Mitchell v. Lea, 57 Ala. 46; Owens v. Corbett, 57 Ala. 92; Waddill v. John, 57 Ala. 93; Smith v. Fellows, 58 Ala. 467.

of Non-claim. After judgment of revival upon a scire facias no presentation of a claim to the administrator is necessary.² In the absence of proof of the time when a claim was presented, and of any objection of the probate court to its allowance upon the ground of non-presentation within the time limited, the presumption is that it was presented in due time.3 The statute runs against nonresidents as well as residents.4

A claim against an insolvent estate not duly filed within nine months after the declaration of insolvency (Alabama Rev. Code, § 2196) is forever barred and de-Istroved as a subsisting debt, and the owner of such claim cannot be subrogated in equity to the rights of a surety under a mortgage given for his indemnity by the debtor. Watson v. Rose, 51 Ala. 292.

In Illinois, all claims against a decedent's estate must be presented to and allowed in the probate court before they can be paid out of the assets. Reitzell

v. Miller, 25 Ill. 67.

A creditor failing to exhibit his claim within two years from the granting of letters of administration cannot satisfy his claim from that portion of the estate inventoried or accounted for during that period, but must be satisfied with that subsequently discovered. If the administrator does not fill the inventory within two years, a creditor may share in the proceeds thereof. Sloo v. Pool, 15 Ill. 47. See also Russell v. Hubbard, 59 Ill. 335; Shepard v. Nat. Bank, 67 Ill. 292. Though by Georgia statute of 1792 an

executor is not personally liable for nonpayment of debts not claimed within twelve months, he is yet bound to pay them whenever claimed, so far as he has assets in his hands not actually paid over to the legatees. Yerby v. Matthews,

26 Ga. 549.

As to necessity of presenting claim to commissioners under Minnesota statute, see Bank v. State, 21 Minn. 172; Same v. Same, 21 Minn. 174.

The provision of the probate law requiring claims to be presented to the executor or administrator within twelve months after the qualification of the executor, in default of which the claim to be postponed, is not a "Statute of Limitations" in the sense in which the term is used in Texas Const., art. 12, § 43. Standifer v. Hubbard, 39 Tex. 417.

Nor is the time limited by law in which suit shall be brought on claims presented for allowance to an executor or administrator of an estate, and by him disallowed, a Statute of Limitations suspended by the Texas Code of 1869. Such a statute is a regulation of probate law, which imposes the loss of the claim if the party fails to sue on it within the time prescribed. Stanfield v. Neill, 36 Tex. 688.

1. Randolph v. Ward, 20 Ark, 238. In Arkansas, the law does not limit the time of presentment to the probate court for classification. Randolph v. Ward, 29 Ark. 238.

Where the claim was filed but not proved within the statutory period because of the case being continued for the purpose of perfecting service, and retrial ordered at a subsequent term, the claim was held not barred. Wile v. Wright. 32 Iowa, 451.

In Iowa, a claim against an estate is not barred by a Statute of Non-claim requiring claims of that class to be filed and proved within one year and a half from the giving of notice of the administrator's appointment, if it be filed within the time prescribed, though not sworn to until after. The provisions of the statute respecting the oath being directory, it may be administered after the filing. Wile v. Wright, 32 lowa, 451.

The absence of an administrator from the State will not prevent the bar of the Alabama Statute of Non-claim after it has commenced running. Branch Bank at Decatur v. Donelson, 12 Ala. 741; Towe

v. Jones, 15 Ala. 545.

Creditors of a decedent's estate are not cut off from enforcing their claims so long as no commissioners are appointed upon the estate, and no time or place appointed for the allowance of claims. Pratt v. Houghtaling, 45 Mich. 457. 2. Eddins v. Graddy, 28 Ark. 500.

Where a suit is revived against the administrator of the original defendant, who has deceased, and abated, on the insolvency of the estate of the deceased appearing, this is sufficient to take the claim out of the Statute of Non-claim of Alabama. Garrow v. Carpenter, 1 Port. (Ala.) 359.

The service of the scire facias is a presentment, and the judgment of revival an allowance against the estate. Eddins v.

Graddy, 28 Ark. 500.

3. Rakes v. Buckley, 49 Wis. 592. 4. Erwin v. Turner, 6 Ark. 14. Under the amendment of the Statute

Presentment can only be made by a party who has an interest in the claim, and a legal or equitable right to enforce it. 1 The pendency of an action based upon a claim against an estate at the time of granting administration is to be regarded as a compliance with the statute.² Mere knowledge on the part of the personal representative of the existence of a claim does not dispense with the necessity of presentment to avoid the bar of the Statute of Non-claim.3 As the Statutes of Non-claim were enacted from public policy, their provisions cannot be waived.⁴ A promise by an administrator to pay a debt which had not been presented within the statutory period will not take the claim out of the statute.⁵ If, however, the omission to file the claim is caused by

of California regulating the settlement of estates of deceased persons, it is provided that a claim against the estate may be presented at any time before distribution, when it appears upon affidavit to the satisfaction of the executor or administrator and probate judge that the claimant had no notice by reason of absence from the State. Held, that an affidavit showing such want of notice, to the satisfaction of a reasonable, fair, and impartial mind. was sufficient. Cullerton v. Mead. 22

Cal. 95.

1. McDowell v. Jones, 58 Ala. 25.

2. Pendency of the suit also avoids the necessity of proving it before the probate court. O'Donnell v. Hermann,

42 Iowa, 60.

A statute which provides that any person having a claim against an insolvent estate must file the same, duly verified, in the office of the judge of probate, within a specified time, does not apply to a case where suit has been commenced against the estate in the circuit court before the insolvency of the estate was declared. The only reason of the statute is to secure notice to the administrator, and the pendency of the suit effects that.

v. McGuire, 44 Ala. 499.
The statutes requiring demands to be verified by affidavit are applicable to a claimant who has commenced his action, but has not recovered judgment before

the death of his debtor.

When the action is revived against the administrator, and he obtains a rule requiring the plaintiff to verify the demand by affidavit, who refuses to do so, it is proper to dismiss the cause without prejudice. Matthews v. Jones, 2 Metc.

(Ky.) 254.
Where, in Arkansas, a judgment is obtained against a party, he appeals to the supreme court, the judgment is affirmed, but, pending the appeal, the defendant dies, and afterwards the judgment is revived against his administrator, and cer-

tified to the probate court for classification and allowance, the affidavit pre-scribed by the Digest, ch. 4, § 88, is not a prerequisite to the allowance in the probate court, but it is a case of an action pending at the death of the party within the meaning of § 86; and the revivor against the administrator is an allow-ance of the claim. Goodrich v. Fritz, 9 Ark. 440

3. McDowell v. Jones, 58 Ala. 25.

Executors and administrators in Kentucky are bound to take notice of debts due by their testator or intestate, as administrator or guardian, where the qualification in that character was in the same county with their administrator. The Commonwealth v. Barston, 3 B. Mon. (Ky.) 290. 4. Spaulding v. Suss, 4 Mo. App. 541;

Utter v. Kinsworthy, 30 Ark. 756.

Where an administrator appears and contests a claim in the probate court, the objection that the claim has not been presented to him for allowance before suit is waived. Lake v. Sutherland, 25 Ark. 219.
5. Ewin v. Branch Bank, 14 Ala. 307;

Branch Bank at Decatur v. Hawkins, 14

Ala. 755.

In Vermont a promise to pay a debt of the intestate made by the administrator is good whether the debt be presented to the commissioners or not. Willard v. Brewster, Brayt. (Vt.) 104.

Such promise must be in writing, or it will be void under the Statute of Frauds. Harrington v. Railroad Co., 6 Vt. 666.

Promise by executor to pay a barred claim does not take the claim out of the Statute of Limitations. Henderson v. Mar. (Miss.) 9; Sanders v. Robinson, 23 Miss. 391; Waul v. Kirkman, 25 Miss. 620; Bingamen v. Robertson, 25 Miss. 501; Thompson v. Peter & John's Adm'rs, 12 Wheat. (U. S.) 565; Peck v. Botsford, 7 Conn. 172; s.c., 18 Am. Dec. 92; Fritz the executor's promise to pay it and statement to the claimant that no filing is necessary, equity will grant the claimant relief.1 The formal direction in a will "to pay the debts of the testator" cannot relieve a creditor from the consequences of what would otherwise be fatal laches in omitting timely presentment and prosecution of his demand.2

There is some diversity in the different States as to what claims are within the statute.³ An administrator who has claims against

v. Thomas, 1 Whart. (Pa.) 66; s.c., 29 Am. Dec. 39; Ciples v. Alexander, 3 that all claims against the estate of a de-Brev. 558; Clark v. Clark, 35 Am. Dec. 676; s.c., 8 Paige Ch. (N. Y.) 152; Briggs be registered in the court in which the v. Starke, 2 Mill (S. Car.), III; s.c., 12 Am. Dec. 659, and note.

1. Burroughs v. McLain, 37 Iowa, 189. See also Baldwin v. Dougerty, 39 Iowa, 50; Howard v. Lavell, 10 Bush (Ky.),

481.

The administrator, when requested by the creditor to have his claim settled, said, "Hold on; your claims are good." Held, not to be a special request to delay the suit, sufficient to stop the running of the Statute of Limitations. Chesnutt v.

McBride, I Heisk. (Tenn.) 389.

As to Effect of Recognition.—Where an executor has contracted for an extension of time of payment of a note executed by his testator, the creditor is not guilty of laches in not exhibiting and making application for the allowance of his claim against the estate within the term to which the payment has been extended. North v. Walker, 66 Mo. 453.

Where a claim is filed in time, but is withdrawn because of the administrator's false representations of the estate's solvency, this is no abandonment, and the claim should be allowed if refiled before distribution of assets. Stamps v.

Bell, 58 Tenn. 170.

A creditor of an estate, who had neither filed his claim with the executors nor established it by an action at law, but whose claim had been recognized by the executors, by making payment thereon, filed a bill in equity, after the period for the presentation of claims had expired, alleging that the executors had a large amount of assets on hand, out of which he was entitled to be paid, and that they were disposing of them in fraud of his claim, and prayed for an injunction, and a preliminary injunction was granted. Held, the preliminary injunction would not be dissolved on motion for want of equity, but would wait the final hearing of the bill. Emson v. Ivins (N. J.), 10 Atl. Rep. 877.

2. Collamore v. Wilder, 19 Kan. 67.

3. Mississippi Code, § 2028, provides letters of administration were granted, within one year after the first publication of notice to creditors to present their claims; otherwise the same shall be barred, and no suit shall be maintained thereon in any court.

Plaintiffs garnisheed money in the hand of one Peters, who died, and administration was granted on the estate, which appeared to be insolvent. Pending the garnishment proceedings plaintiffs prayed that the proceedings in insolvency might be stayed until the issue upon the garnishment was determined, so that they might share in the distribution of the estate; which prayer was denied and the plaintiffs' claim rejected, on the ground that it was not registered as required by Mississippi Code, § 2028. Held, that plaintiffs' claim being for a garnishment of the assets, and not yet sanctioned by a judgment, did not come within the purview of this section. Harris v. Hutche-

son (Miss.), 3 So. Rep. 341.

In the *California* "act to regulate the estate of deceased persons," "claimants," who must present their "claims" to the administrator before suit, are creditors, having legal demands. Gray v. Palmer,

9 Cal. 616.

Under the Arkansas act, claims and demands, which must be exhibited to an executor or administrator within two years from the granting of letters, are all claims that could be asserted in a court of law or equity, existing at the time of the death of the deceased, or coming into existence at any time after his death, and before the expiration of the two years, including claims running to certain maturity, although not yet pay-Inchoate and contingent claims, able. such as dormant warrantees and the like. are not included; they may be enforced against the heir or distributee, but not against the executor or administrator.

Walker v. Byers, 14 Ark. 246. Under the law of Vermont, all claims not presented to the commissioners of his intestate is not bound to present them within the time allowed by other creditors where he retains the assets beyond such time.¹ Taxes and preferred claims are not within the act.² Contingent and immature claims and unliquidated demands are within the statute, and must be presented.³ Claims purely equitable need not

an estate are barred by the statute. Section 17 of the general statutes excepts only those cases where the administrator brings a suit against a creditor of the estate before the commissioners have acted. In that case only the creditor's right of set-off is preserved. Soule v. Benton, 44 Vt. 309.

In *Indiana*, where another person is a necessary defendant with the executor or administrator, the claim need not be filed against the estate, but an ordinary action may be brought against the administrator and such other person. Stan-

ford v. Stanford, 42 Ind. 485.

A claim for family expenses incurred under a will between the death and distribution, is not such a "debt against the estate" as, under the Alabama Rev. Code, § 2064, must be filed within twelve months after a decree of insolvency, nor is it entitled to share in the assets when distributed under such decree. Prince v. Prince, 47 Ala. 283.

The liability of a surety on a guardian's bond accrues immediately on the death of the ward, and, on the failure of the guardian thereupon to settle his account, it becomes an accrued claim within the operation of Alabama Code, 1876, § 2597, providing that all claims against the estate of a deceased person shall be barred unless presented within eighteen months after the grant of letters of administration.

A claim against the estate of a surety on a guardian's bond is not taken out of the operation of the statute limiting the time for the presentment of claims (Alabama Code, 1876, § 2597) by the fact that no letters of administration on the estate of the ward have been granted. Glass v. Woolf's Admr. (Ala.), 3 Southern Rep. II.

As to what will rebut the presumption of payment in South Carolina, see Mc-Kinlay v. Gaddy, 2 S. E. Rep. 497.

1. Sanderson v. Sanderson, 17 Fla. 820.

2. People v. Olvera, 43 Cal. 492.

A preferred debt, though not presented for payment within a year from the death of the debtor, is entitled to be paid in full out of assets in the hands of the administrator of an insolvent. Greenough's App., 9 Pa. St. 18. See also Bulfinch v. Benner, 64 Me. 404.

3. Sec. 2413 of the *Iowa* statute says: Demands, though not yet due, may be presented, proved, and allowed as other claims. Sec. 2414: Contingent liabilities must also be presented and proved, or the executor shall be under no obligation to make any provision for satisfying them when they may afterwards accrue.

But the filing of a claim by a creditor against the estate of the principal debtor obviates the necessity of filing the same as a contingent claim. Brought v. Griffin,

16 Iowa, 26.

The New York statute does not limit the claims to be presented to executors to such as are due. Whether due or not, if there is an intention to make a claim against the estate, notice of that claim, should be presented, and, if it be not due, section 74 of the statute (2 New York Rev. Stat. 96) points out the course to be pursued upon the accounting. Hoyte v. Bennett, 58 Barb. (N. Y.) 529, See also Whitlock's Est., I Tuck. (N.Y. Surr.) 491; Comes v. Wilkin, 21 N. Y. 428.

A promissory note which matures more than two years after the giving of bond by the executor of the will of the deceased maker is a debt for which provision is made by Massachusetts Gen. Stat., ch. 97, § 8, and if the holder does not present his claim to the probate court under that section, he cannot maintain an action thereon against the legatees of the deceased, under Gen. St., ch. 101, § 31. Pratt v. Lamson, 128 Mass. 528.

A person who, not being excused by any statutory disability, neglects to file his claim against a decedent's estate before final settlement, although it may not then be due, is barred of any right of action against the heirs of such estate, although they have inherited property from the decedent. Richmond & Ft. Wayne R. Co. v. Heaston, 43 Ind. 172.

Where one presenting a claim against an estate gives credit for property received by him from the widow of the deceased, and takes judgment for the balance only, and the administrator afterwards recovers from him the value of the property so received, he may prove the sum so credited afterwards against the estate, it being within the statute relating to contingent claims.

The county court has jurisdiction of

be presented. A claim founded on a suit against an executor or administrator requires neither presentation to, nor approval by, the executor or administrator, and the judgment of the court is an allowance of the claim. The better opinion would appear to be,

claims which, by reason of their contingency, cannot be allowed by the commissioners. Hall v. Wilson, 6 Wis. 433.

A claim against the estate of a deceased person which was contingent at the time of his death, but became absolute before the expiration of the time limited for creditors to present their claims for allowance by commissioners, could not, after it became absolute, and while the commission remained open, be properly presented to the probate court for allowance as a contingent claim, but must be presented to the commissioners for allowance on an absolute debt. Lytte v. Bond's Estate, 30 Vt. 388.

Sec. 130 of California statute, 1851,

Sec. 130 of California statute, 1851, concerning the estate of deceased persons, confers no authority for the presentation of a contingent claim; but when such a claim has become an absolute liability, or has reached maturity, it must be presented to the executor within the time fixed by the statute.

So also, if the claim, while still contingent and immature, was actually presented within the statutory period, a fresh presentation accompanied by the affidavit is necessary after its maturity. Pico v. De La Guerra, 18 Cal. 422.

The Texas statute, requiring the presentation of claims against the estates of deceased persons to the administrator before suits can be brought upon them, is not applicable to a contract to convey land, or for the recovery of damages on the breach of such contract. Bullion v. Campbell, 27 Tex. 653.

A guaranty by a locator, to the obligee, of a dollar per acre for land if he will accept of a certain selection, is a claim for unliquidated damages, being the amount which the value of the land falls short of that price; and such claim need not be presented to an administrator before suit. Evans v. Hardeman, 15 Tex. 480. Acceptable.

1. Gunter v. Jones, 9 Cal. 646.

A suit by the vendee to enforce the specific performance of vendor's contract to convey community land need not be presented under the *Texas* statute. IT Tex. 385; 62 Am. Dec. 480.

Claim to be subrogated to rights of administrator against innocent purchaser of land held in trust by the deceased, but sold by the administrator on credit, is not a claim required to be presented to the administrator for allowance. Vandever's Admrs. v. Freeman, 20 Tex. 333; s. c., 70 Am. Dec. 301.

Claims purely of an equitable character cannot be allowed and adjusted by commissioners on the estate of a deceased person. Brown v. Sumner, 31 Vt. 671.

A party seeking to enforce a trust against an administrator or executor must seek relief in a court of equity, and is not bound to present his claim to the executor. The claimant of specific property cannot properly be called a creditor within the meaning of the probate law. Gunter v. Jones, 9 Cal. 643.

Upon a trustee's death he ceases to be a trustee, and as to him the trust no longer continues. His indebtedness to the trust becomes a demand against his estate, to be authenticated, allowed, classed, and paid out of the assets of his estate as other demands. Hill v.

State, 23 Ark. 604.

Claim against Deceased Partner.—The statute of 1828 of Florida, requiring all claims against deceased persons to be presented to their representatives within two years or they be held barred, was held to include a claim against a deceased partner for a partnership debt; the form of presentation is immaterial if notice of the demand be given. Fillyan v. Laverty, 2 Fla 72.

An administrator is not bound to pay over money to a creditor of the deceased partner of the person on whose estate he administers, nor could he set up such payment in a suit by the representatives of the deceased. Barnes v. Ryder, 3 McLean.

The acting partners of a firm must all join in making probate of a demand against a deceased person, but dormant or retired partners, or partners perma-

nently absent from the country, need not join. Rogers v. Bailey, 4 Harr. (Del.) 256.

Where a firm in *Delaware* has a distinct branch in another country, probate in *Delaware* of a demand against a deceased person, on a contract made in that State, may be made by the partners of the house in that State. Gregory v. Bailey, 4 Harr. (Del.) 256.

2. Clark v. Shelton. 16 Ark. 474.
The *Tennessee* act of 1789 is limited to demands accruing against deceased persons in their lifetime, and does not apply

that a judgment against the decedent is not such a claim as must be presented to the executor or administrator, and rejected before suit can be brought on it, particularly where the judgment has been kept alive and its lien preserved. It would also appear to be the better opinion that a creditor may rely upon a mortgage or other specific lien, although the claim secured by it has not been presented, but in such case he has no claim upon the general assets in the hands of the administrator. Presentation of a claim, in

to any demands arising by contract, express or implied, with the executor or administrator. Such claims are affected by the common Statute of Limitations. Brown v. Porter, 7 Humph. (Tenn.) 373.

The fact that a judgment obtained in

The fact that a judgment obtained in the district court against the administrator of an estate was not filed as a claim against the estate, cannot be urged by a fraudulent purchaser of land in a proceeding to subject it to the payment of such judgment. Harlin v. Stevenson, 30

Iowa, 371.

Land held by the intestate in trust was sold by his administrators to bona fide purchasers. A suit brought in such a case by the cestuis que trust against the administrator and purchaser, in which it is claimed to have the money due from such purchaser paid to the plaintiff, can be maintained without any previous presentation of the claim to the administrator. Vandever v. Freeman, 20 Tex. 333.

1. Cole v. Robertson, 55 Am. Dec. 784;

s.c., 6 Tex. 356.

In Missouri, a judgment against a person in his lifetime need not be allowed as a demand against his estate. It is sufficient to file a transcript in the probate court. City of Carondelet v. Desnoyer,

27 Mo. 36.

In presenting a judgment for allowance against a decedent's estate, the same notice is required as in the presentation of other demands. Ewing v. Taylor, 70 Mo. 394. See also Bryan v. Mundy, 14 Mo. 458; Birdwell v. Kauffman, 25 Tex. 180.

Judgments against deceased persons, in *Texas*, cannot be enforced by execution, but must be certified to the county court and paid in due course of administration. Ansley v. Baker, 14 Tex. 607;

s. c., 65 Am. Dec. 136.

In scire facias to revive judgment against executor, brought more than five years after the death of the decedent, it is necessary that the plaintiff should show by his declaration that some proceedings have been had on the judgment within five years, and that those proceedings have been unavailing, at least in part, in order to prevent the bar of the statute;

and it is not requisite that the defendant, in a plea of the Statute of Limitations, state that no proceedings have been had upon the judgment within five years. Union Bank v. Powell's Heirs, 3 Fla. 175;

s. c., 52 Am, Dec. 367.

The Arizona statute barring all claims against an estate, if not presented within ten months, does not bar an action to subject said property to a judgment. O'Doherty v. Toole (Ariz.), 15 Pac. Rep.

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2. Putnam v. Russell, 42 Am. Dec. 478; s. c., 17 Vt. 54; Fallon v. Butler, 21 Cal. 24; s. c., 81 Am. Dec. 40; Richardson v. Hickman, 32 Ark. 443; Mut. Ben. L. Ins. Co. v. Howell, 32 N. J. Eq. 142.

It is not necessary for a mortgage creditor to authenticate his claim against the estate of a deceased debtor before filing a bill to foreclose the mortgage. Simms v. Richardson, 32 Ark. 297. See also McClure v. Owens, 32 Ark. 443.

Failure of holder of promissory note secured by mortgage to present the same for allowance to the commissioners of the deceased maker's estate does not preclude them from afterwards enforcing the mortgage security; they are only precluded from claiming any portion of the assets of the estate in the hands of the administrator. Grafton Bank v. Doe, 47 Am. Dec. 697; s. c., 19 Vt. 463. Compare Graham v. Vining, 2 Tex. 453, and remarks thereon in Cole v. Robertson, 6 Tex. 356; s. c., 55 Am. Dec. 784.

If the payee and legal owner of an unassigned note and mortgage does not present the same for allowance to the payor's administrator, as required by the California Code, § 1493, the claim is barred, even if the equitable owner resided out of the State, and did not know of the death of the payor. Marsh v. Dooley,

52 Cal. 232.

In California a mortgage given by the deceased upon property which, after his death, becomes general assets of the estate, must be presented for allowance to the executor or administrator and probate judge, within the time fixed for the presentation of claims against the estate, and if not so presented cannot be en-

due form as prescribed by the local statute, is essential to entitle the creditor to maintain an action against the estate; and unless so presented he also loses his remedy against the heirs and legatees. 2 A failure to present the claim within the prescribed period

forced in equity, even if no claim is made against the estate for a deficiency. v. Shipley, 46 Cal. 154; Harp v. Calahan, 46 Cal. 222. See also Myers v. Farquharson, 46 Cal. 190; Willis v. Farley, 24 Cal. 490. Compare Fallon v. Butler, 21 Cal. 24; s. c., 81 Am. Dec. 40.

In a bill to foreclose a mortgage in California, averment of presentation and rejection is essential. Ellissin v. Halleck,

6 Cal. 386.

Amendments of 1874 to California Code, §§ 1493, 1500, repealing the provision authorizing suits upon mortgages to be maintained against the property of a deceased person subject thereto, without presentation to the executor or administrator, is not retroactive. Hibernia Sav. Soc. v. Hayes, 56 Cal. 297.

Claims secured by mortgage or otherwise are no exceptions to the rule under the Michigan statute, that all personal demands against estates are required to be presented and proved within a time allowed by the court for that purpose, and that all not proved are barred. Clark v.

Davis, 32 Mich. 154.

A died in 1844, having mortgaged a part of his land to B to secure a debt due to him. C was appointed administrator in 1844, and B did not present his claim until 1847, and then, having failed in a suit against C, he sued the heirs of A. Held, that by the probate law of 1840, in Texas, the administrator was bound to administer on all the realty as well as personalty; that all claims against the estate of a decedent must be presented within one year after letters of administration have been granted; that a mortgage was a moneyed claim under this statute, and therefore to be presented within one year after grant of administration, and as B had not presented his claim within that time, it was forever barred, not only against the administration, but against the heirs and all other creditors of the decedent's estate. Graham v. Vinny, 2 Tex. 433.

In some States an executor or administrator is as much bound to take notice of a claim recited in a mortgage made by the deceased, and recorded in his lifetime, as if the claim were formally presented to him. Trustees of Jeff. Col. v. Dickson, I Freem. Ch. (Miss.) 474. Compare Miller v. Helm, IC Miss. (2 Smed. & M.) 687, Miller v. Jeff. Col., 13 Miss. (5 Smed. & M.) 651; Baldwin v. Tuttle, 23 Iowa,

The failure of the holder of a vendor's lien upon land to present his claim to the administrator within the time prescribed by statute does not destroy the lien. It only bars his right of action against the Mahone v. Haddock, 44 administrator. See also Watt v. White, 46 Ala. 92. Tex. 338.

A proceeding against the administrator and heirs of a deceased party, to foreclose a vendor's lien that was reserved in the deed, is not an action against the personal representative to have satisfaction out of the personal assets, and in such a proceeding it is not necessary to probate the claim before suit. Allen v. Smith, 20

1. Eustace v. Johns, 38 Cal. 3. also Ratcliff v. Lennig, 30 Ind. 289.

In Arkansas, a creditor of the estate of a deceased person cannot present his claim to the probate court to be allowed and classed until he has presented it to the administrator for allowance, upon whose refusal application must be made to the probate court, of which notice must be given to the administrator. Hudson

v. Breeding, 7 Ark. 445.
A court of equity will not assume jurisdiction of a claim against an estate until the claimant shall have exhibited it and had it allowed in the county court; but if any reasons that may be deemed sufficient can be assigned why that court cannot afford the requisite relief, equity will assist, but not otherwise. Blanchard v. Williamson, 70 Ill. 647; Walker v. Diehl,

79 Ill. 473.

A creditor of an estate cannot proceed to remove encumbrances from the property thereof, and subject it to the payment of his debt, until he has first presented it to the administrator and had it allowed and classed. Williamson v. Farbush, 31

Ark. 539.
In *Illinois*, creditor not exhibiting claim in statutory time is entitled to judgment to be satisfied out of future assets, under the Illinois statute, upon due proof of such claim. Judy v. Kelley, 50 Am.

Dec. 455; s. c., 11 Ill. 211.
2. Miller v. Mitchell, 1 Bailey Ch. (S. Car.) 437; Pratt v. Lawson, 128 Mass. 528; Richmond & Wagner R. Co., v. Hieston, does not, as a rule, work an extinguishment or forfeiture, but merely affords the administrator ground of defence.1 In some States a failure to plead the statute operates as a waiver; in others the administrator is bound to plead the statute for the benefit of parties in interest. In the former the objection that a claim was not first presented to the administrator cannot be heard for the first time after a decree.3

(c) Time of Presentation.—The time within which claims must be presented to executors or administrators is fixed by the law in force when the publication is made. A claim filed after an estate is reported insolvent, but before the final declaration in insolvency. is in season for adjudication.⁵ The time for proving claims begins

43 Ind. 172: Ticknor v. Harris, 40 Am. Dec. 186; s. c., 14 N. H. 272.

One who has never filed his claim against the estate, nor has any such record thereof as is necessary to charge the administrator with constructive notice of its existence, the administrator having no actual knowledge of the claim prior to his final settlement, has no such interest in the estate as will entitle him to have the settlement set aside for fraud, under 2

Ind. Rev. St. 1876, § 116, p. 537. Spice w. Heckman, 72 Ind. 120.

The provision of the Kentucky Civil Code, § 473, which requires a demand of the debt claimed before an action is brought against a personal representative, is restricted to actions against personal representatives, and a failure to make such demand is not an available ground for dismissing an action against the heirs or devisees of a decedent. Johnson v.

Belt, 4 Bush (Ky.), 405.

1. Such is the case in California. Whitmore v. San Francisco Sav. Union, 50

Cal. 145.

Under the *Iowa* Code, § 2421, requiring claims against decedents' estates to be proved within twelve months from the administrator's notice of appointment, it is not necessary that the statute should be pleaded in bar by the administrator. Brownell v. Williams, 54 Iowa,

Demand against a decedent's estate must be exhibited in two years from the grant of administration, under the Illinois statute, to be enforceable against the estate already inventoried and accounted for, and a plea that it was not so exhibited in an action thereon is good. If the creditor claims that he exhibited his demand in proper time, or that being under a legal disability, he exhibited such demand within two years after removal of the disability, these facts must be specially replied. Judy v. Kelley, 50 Am. Dec. 455; s. c., 11 Ill. 211.

2. Page's Est., Myrick's Probate (Cal.), Drake v. Foster, 52 Cal. 225; Shurbun v. Hooper, 40 Mich. 503.

Under the statutes of Massachusetts which declare that no executor or administrator shall be compelled or held to answer to any suit not commenced within four years from the time of his giving public notice that he accepted that trust, it is held that the administrator is obliged to plead the statutes for the pro-tection of heirs, devisees, legatees, and purchasers of the estate. Dawes v. Shedd, 15 Mass. 6; s. c., 8 Am. Dec. 8o.

Administrators and executors bound to plead the statute of Tennessee of 1780, ch. 23, limiting the time in which creditors must present their claims against the estate of deceased persons, but no other Statute of Limitations are they bound at their peril to plead. Brown v. Porter, 7 Humph. (Tenn.) 373.

3. Estate of Cook, 14 Cal. 129.

Under the California statute the objection that a claim has not been presented within the statutory period must be raised by the executor in the district court, and a failure to do so operates as a waiver. Page's Est., Myrick's Probate (Cal.), 61.

Such an objection comes too late if made for the first instance in the appellate court. Drake v. Foster, 52 Cal. 225; Rinchocloe v. German, 29 Miss. 421.

In Michigan the objection that a claim is barred should be raised before commissioners on an appeal; it cannot properly be considered in an action. Shurbun v. Hooper, 40 Mich. 503.

4. Robertson v. Demoss, 23 Miss. 298. It is hardly necessary to state that the exact time for presentation is regulated by local statutes, which differ widely in the several States.

5. Shelton v. Paulson, 60 Ala. 578.

Where a claim against a decedent's estate is not presented before the making and filing of the commissioner's report,

to run from the date of publication of notice, and not from the date of letters of administration.1 The time limited by an order

its allowance afterwards, unless upon special proceedings to revive the commission, is error, whether in the probate court or on appeal to the circuit court. All v. Atkinson (Mich.), 33 N. W. Rep.

No one connected with a decedent's estate is injured and can complain because the commissioners who allowed the claim made their return earlier than they should when an appeal is taken from the

allowance of said claim. John Estate (Mich.), 33 N. W. Rep. 413. Johnson's

The provision of the Indiana statute (Acts 1883, p. 153, § 5) requiring claims to be filed "at least thirty days before final settlement of the estate," means thirty days before the filing of the account for final settlement by the executor or administrator, where one year has expired from giving notice of his appointment, and not thirty days before the confirmation of such report by the court. Roberts v. Spencer (Ind.), 13 N. E. Rep.

The term "final settlement" as applied to the administration of estates is usually understood to refer to the order of court approving the account which closes the business of the estate and discharges the executor or administrator; but as used in § 2310, Rev. St. Ind. 1881, providing that claims not filed at least thirty days before the final settlement shall be barred, it means rather the presentation of the account for final settlement at the time fixed by law, and claims not filed thirty days before that time will be barred. Roberts v. Spencer (Ind.), 13 N. E. Rep.

When the answer to a claim filed against a decedent's estate alleges that it was filed after the time limited by law, a reply alleging that the cause of action was concealed by the personal representatives until shortly before the time fixed by statute had expired; that, at the instance of the attorneys for the estate, the attorneys for the claimant agreed to visit the personal representatives for the purpose of seeking an amicable adjustment. and thus postponed the filing of the claim; that, at the time of making such agreement, the claimant's attornevs were otherwise professionally engaged, and so continued for several weeks, and that in the mean time they received notice of the filing of the account for final settlement, and at once proceeded to file the ' claim-is bad on demurrer. Roberts 71. Spencer (Ind.), 13 N. E. Rep. 129.

1. Spaulding v. Suss. 4 Mo. App. 541. If a claim is presented to an executor within eighteen months after publication of notice from which must be deducted the sixty days required by law for continuing such publication, it is sufficient to take the case out of the special Statute of Limitations prescribing eighteen months. Henderson v. Ilsley, 19 Miss. (1 Smed. & Mar.) 9.

The allowance of further time to settle an intestate estate does not withdraw the case from the limitation of four years. provided by section 103 of the adminis-The statute begins to run tration law. against creditors on the giving of the bond and publishing of notice, except when assets come to the hands of the administrator, or the cause of action subsequently accrues. Gilbert v. Little, 2 Ohio St. 156.

Under the Arkansas statute the limitation of time within which a claim against a deceased debtor must be presented to his representative dates from the accrual of the cause of action. Allen v. Byers. 12 Ark. 593.

Under the California statute claims against an estate may be presented before the publication of notice by the executor. Ricketson v. Richardson, 10 Cal. 330.

The statute fixing a limitation of ten months for the presentation of claims against an estate does not commence running until a claim becomes absolute. Gleason v. White, 34 Cal. 258.

Under Illinois Rev. Stat., creditors who labor under none of the disabilities named in ch. 109, § 115, and who fail to exhibit their claims against the estate of the deceased within two years after the grant of letters of administration, are precluded from all participation in the estate accounted for during that period, and must rely for the satisfaction of their debts on estate subsequently discovered. time within which claims must be presented is to be computed from the date of the letters of administration, and not from the date of the notice to creditors to exhibit them, as the omission of the administrators to give notice does not affect the necessity of presenting the claims. Nor is it an avoidance of the statute that there has been no administrator for a part of the two years to whom claims might be presented, as it is a sufficient presentation to file them with the probate court, and the creditors, having the legal right to administer on the estate, cannot complain for failing to exercise it. People v. White, 11 Ill. 341.

of the court of probate within which the claims of creditors are to be exhibited is to be computed from the making of the order, and not from the time of publication. If application be made before final decree a lien creditor is not excluded from a fund raised by the sale of real estate by an administrator by reason of neglecting to present his claim to the auditor before the report is filed.2

(d) Sufficiency of Presentation.—Presentation of a claim need not be in any particular form, provided it be sufficiently definite to notify the administrator of its character and amount and enable him to make provision for its payment.³ The notice to the ad-

Under the probate law of Texas, of February 5th, 1840, all claims against a succession which were not presented to an executor or administrator within twelve months from the date of letters tes-tamentary or of administration are barred. Graham v. Vining, I Texas, 669; McDougald v. Hadley, I Texas, 490.

Vermont Statute 1845, Comp. Stat. 351, § 9, empowering the probate court to open a commission for the allowance of claims after the expiration of the two years allowed by the previous statute gives to the claimant a further opportunity to present his claim, but subject, however, to the defence of the six years' Statute of Limitations, and does not extend the suspension of the statute over the whole time from the death of the debtor until the last report of the commissioners is made. Briggs v. Thomas, 32 Vt. 176.

Where an application by a creditor of the estate of a deceased person to extend. the time for proving his claim is made more than six months after the period limited, the judge may extend the time, as provided in Wisconsin Rev. Stat. ch. 101, § 6, for the settlement of all claims against the estate. And where the order in such a case provides only for the examination of the petitioning creditor's claim, though irregular, it is not void for want of juris-diction. Where such order has not been appealed from, a subsequent order of distribution, which provides for a payment of a claim allowed in pursuance of such prior irregular order, will not be reversed on that ground. Hedway v. Allen, 20 Wis. 475.

If a creditor of a deceased person, whose executor has given bond, dies, the time within which his executor may bring an action against the executor of the debtor is not extended by the provisions of Massachusetts Gen. Stat. ch. 155, § 10.

Hill v. Mixter, 5 Allen (Mass.). 27.

1. Wooden v. Cowles, 11 Conn. 292.

A creditor of a decedent who presents his claim at any time before the decree of the orphans' court barring creditors'

claims is actually taken, is in time although the nine months' limiter in the order may have expired. Parker v. Combs, 34 N. J. Eq. 522. 2. Ross' Est., 9 Pa. St. 17.

The surety upon a note having died. held, that to make his estate liable it was not necessary for the holder to give the administrator notice of the liability within a year after his appointment. Goodwyn

v. Hightower, 30 Ga. 249.
A party who, with full notice of the appointment of an administrator, is negligent in proving his claim against the estate of the decedent, will not be entitled to relief under lowa Code of 1851,

3. Henderson v. Ilsley, 49 Am. Dec.

41; s. c., 11 Smedes & Mar. (Miss.) 9. Under the *Indiana* statute no formal complaint is necessary in prosecuting a claim against the estate of a decedent; a succinct statement of the nature and amount of the claim is all that is necessary. Grim v. Collins, 43 Ind. 271; Post

v. Pedrick, 52 Ind. 490.

The fact that a demand is made out against an intestate by name instead of his estate or administrator, will not justify the refusal of evidence in its support.

Coots v. Morgan, 24 Ind. 522.

Under the New Jersey statute, which provides that "claims shall be presented the amount writing, specifying claimed and the particulars of the claim, and shall be verified under oath." the filing of a bill in the chancery court for discovery of trust funds, and to follow them into certain lands mentioned in the bill, against the executor of an insolvent trustee, within the time limited for filing all claims in the orphans' court, is not a sufficient presentation of the claim to entitle complainant to receive a dividend with other creditors of the estate who filed their claims in the regular manner. Robins v. Arnold (N. J.), 8 Atl. Rep.

In Missouri, the notice to an administrator of a demand against the intestate's

ministrator must be actual and unmistakable. 1 and the claim should be described with such accuracy as to distinguish it from all similar claims.2 The claim ought to be presented to the administrator in writing, although not positively so required by the statute. Merely mentioning to him the approximate amount, and showing him a bill of items of a portion thereof, is flot a legal presentation. Where a claim is presented under oath to the executor and then assigned, it is not necessary for the assignee to present it again.⁴ The failure of an attorney's receipt for a note left with him for collection to specify its amount is no objection to its being filed as a claim against his insolvent estate, provided the amount be shown by proof. Where a promissory note is lost, a claim grounded upon it may be presented as a debt due by note.6

estate must state the nature of the claim, and whether the claimant claims in his own right or in that of another. Dorsey

v. Burns, 5 Mo. 334.

Where a non-negotiable note which has been assigned by indorsement is filed in the office of the probate judge as a claim against the estate of the deceased indorser (Alabama Rev. Code, § 2241), accompanied with an affidavit "that the above attached note and the indorsement thereof is correct," this is a sufficient presentation to prevent the bar of the Statute of Non-claim; and if the estate is afterwards declared insolvent, and the claim is subsequently filed against it in the same form and with the same affidavit only attached, the filing is sufficient (Rev. Code, § 2196), and the defects of the affidavit may be supplied at any time before the final decree. Walker v. Wigginton, 50 Ala, 579.

Where two claimants against the estate, with the assistance of the administrator, at a meeting between them state their claims in writing, and one of the claimants being asked "if that item was all he claimed," replied that "it was all they claimed," such presentation is sufficient for both where both demands grew out of the same transaction, and will avoid the Statute of Non-claim. Pollard v. Scears's Adm., 28 Ala. 484; s. c., 65

Am. Dec. 364.

In a proceeding by creditors against a decedent's estate under Bat. Rev. ch. 45, § 73 et seq., each complaint of the several creditors constitutes a distinct proceeding, to be proceeded in separately. Graham v. Tate, 77 N. Car. 120.

As to requisites to a valid presentation under the *Maine* Statute of 1872, c. 85, see Millett v. Millett, 72 Me. 117; Stevens v. Haskell, 72 Me. 244; Marshall v. Perkins, 72 Me. 343.

As to manner of statement of claims in

proceedings before surrogate in New York, see Van Vleek v. Burroughs, 6 York, see Van V Barb. (N. Y.) 341.

Sufficiency of the presentation of claims against an estate determined in cases depending on particular facts. Frazier v. Praytor, 36 Ala. 691; Raynor v. Robinson, 36 Barb. (N. Y.) 128; Thurston v. Holbrook, 31 Vt. 354.

A claim against an insolvent estate, and

its verification, delivered to the judge of probate, or to his acting clerk in his office, to be placed and kept on file, must be regarded as "filed" within the meaning of the statutes of Alabama. Merely placing it in the office, not with the proper file of papers belonging to the particular estate, and without bringing it to the notice of the judge or his clerk, would not be a filing within the spirit of the statutes. Beene v. Phillips, I Ala. Sel. Cas. 310.

Sec. 2391 of the Revised Code of Iowa which requires that claims against an estate shall be clearly stated, sworn to, and filed, does not apply where an action is brought in the district court to correct errors made in a settlement with the decedent. Linn v. Day, 16 Iowa, 158.

A claim never formally filed may be barred, although presented to the administrator. Phelps v. Thompson, 48 Iowa,

1. The doctrine of estoppel will not avail the claimant that he was misled by false statements of the administrator as to the terms of the law respecting notice.

Stubbs v. Beene, 1 Ala. Sel. Cas.
 Stubbs v. Beene, 1 Ala. Sel. Cas.

6. In such case the note may be described by date, amount, and time of payment, and accompanied by a stateIn some States, a notice to the administrator of the presentation of the demand at the county court containing a copy is sufficient.¹ A party who has properly presented a claim on a promissory note, and filed the note, does not abandon the claim by taking the note from the files to sue other joint makers. To produce that result the note must be withdrawn with the intent to abandon the claim.² Upon the same principle it has been held that a claim is not exhibited unless shown with a view to obtaining its allowance.³ An account exhibited for allowance against the estate of a deceased person must set forth each item distinctly.⁴ Where a debt is presented to an administrator, regularly qualified, another notice

ment of its loss. White v. Brown, 19 Conn. 577.

A notice of the non-payment of a promissory note personally served on the executor of the indorser of the note, or which is shown to have come to his hands, although it may come from a notary protesting the note, will be sufficient to withdraw the claim from the influence of the Statute of Non-claim in Alabama, if it describes the note with accuracy, and informs the personal representative who the holder is, and that he looks to him for payment. Hallett v. Branch Bank at Mobile, 12 Ala. 193, 671.

1. Phillips v. Russell, 24 Mo. 527.

1. Phillips v. Russell, 24 Mo. 527. Compare Baker v. Chittucks, 4 Greene (Iowa), 480; Lebbetts v. Tilton, 31 N.

H. (11 Hst.) 273.

The statement of a claim filed against a decedent's estate, consisting of a copy of a note given by the decedent to the claimant, and accompanied by an affidavit, held, sufficient under the Indiana statute. Pulley v. Perfect, 30 Ind. 379.

The right to a copy of a claim against an estate may be waived, and whether it has or not been so, is a question for the jury. Grimes v. Bush, 16 Ark. 647.

A creditor of an estate presented his account, consisting of one item only, to the administrator, who took it, kept it in his possession six weeks, and examined the books and papers of the deceased in reference to it. *Held*, that this was a waiver of a copy of the claim. Grimes 2. Booth, 19 Ark. 224.

2. Braught v. Griffith, 16 Iowa, 26.

When a claim has been filed in time, and the executor has notice of it, it is immaterial whether the clerk of the county court keeps it on the docket or not from term to term, so long as there is no order disposing of it; and it is not error to reinstate such claim, upon due notice, when it is being continued to wait the decision of another case between the parties. McCall v. Lee (Ill.), II N.E. Rep. 522.

A statute (Gen. Laws Col. §§ 2914, 2915, 2918) prescribed the manner of presenting claims against the estates of deceased persons, providing a summary method of establishing such claims upon notice at any term of the court subsequent to the issuing of letters testamentary or of administration. Plaintiffs filed their claims against the estate of the defendant's intestate, Nov. 17, 1879, on a cause of action which had accrued Jan. 20, 1887. Prior thereto, on Feb. 4, 1878, plaintiffs had filed the claim, but withdrew it March 30, 1878. Held, that the claim was barred by the Statute of Limitations, as not having been filed within two years after the cause of action accrued. The filing and withdrawal of the claim did not constitute the commencement of an action to prevent the Statute of Limitations from running. Morse v. Clark (Col.), 14 Pac. Rep. 327.

8. An exhibition in the course of negotiations for a compromise is not the exhibition contemplated, nor is a mere delivery of the demand sufficient, nothing being said, done, or written to show the intention to procure an allowance. Exhibiting a claim for classification is not presenting it for allowance. Pfeiffer v. Suss, 73 Mo. 245 See also Hicks v. Jam-

ison, 10 Mo. App. 35.

4. The mere fact that the transactions between the parties were of such a complicated nature as not to admit of a specification of particular items, is no excuse for failing to comply with the statute. Thurmond v. Sanders, 21 Ark.

On the death of a guardian, his wards should present their respective claims against the estate severally, and not jointly; but where a joint claim is presented, the probate court may sever the demand, and allow each claimant his share. Connelly v. Weatherby, 33 Ark. 658.

to one qualified many years afterwards is not required. Where a creditor has placed a claim on file against the estate of a deceased principal debtor, it is not necessary for sureties who have been subrogated to the rights of the creditor to file the claim again.² If the claim be not one that necessarily and on its face draws interest, a claim for interest as well as for principal must be presented before suit.3 It has been held that a statute requiring "all claims against the estate of a deceased person" to be presented within a certain time is complied with by the presentation of a copy.4

A motion made in time against an administrator to refund money which has been paid as security for the intestate, and an appearance and resistance by the administrator, has been held a sufficient presentation.⁵ Suggestion upon the record of the defendant's death and an order of revivor upon scire facias to his administrator, with service within the statutory period, is sufficient

to save a claim from the bar of the Statute of Non-claim.6

(e) Authentication of Claims.—As a general rule, all claims and demands against the estate of a decedent, that can be asserted against the executor or administrators, must be authenticated by the affidavit of the creditor before they can be allowed against the estate. It is the duty of the executor or administrator to object to all claims not properly authenticated, and if he fail to do so, he and his sureties will be held responsible for the omis-

 McHardy v. McHardy, 7 Fla. 301.
 Braught v. Griffith. 16 Iowa, 26, decided under § 2397, Revision 1860.
3. Aguirre v. Packard, 14 Cal. 171.

4. In Alabama, an abstract, or even notice given with the assertion of the liability of the estate, and that the executor or administrator is looked to for payment, is sufficient. Flinn v. Shackleford. 42 Ala. 202.

5. Smith v. Smith, 4 Miss. (3 How.) 216. A judgment obtained against one administrator by motion which is so irregular that it is afterwards set aside on his motion, is not evidence of a presentment of the claim to his personal representative in Alabama, so as to prevent the bar of the Statute of Non-claim. Boggs v. Branch Bank at Mobile, 10 Ala. 970.

Where an administrator has seen and examined a claim against the estate he represents, and is subsequently requested to allow it, which he refuses to do, such claim being present in the pocket of its owner, and the administrator so told, a formal presentation of the claim is not necessary, but may be presumed to be waived. Cheeseman v. Kyle, 15 Ohio

A payment on a claim made by the administrator after the lapse of eighteen months from the grant of letters of administration is a fact tending to establish its due presentation within eighteen months. Pharis v. Leachman, 20 Ala. 662.

6. Mahone v. Hundley, 52 Ala. 147; Ellison v. Allen, 8 Fla. 206; McCoy v.

Jackson, 21 Ark. 472.

On a nonsuit the plaintiff is not required to exhibit the demand again before bringing a new suit within one year. McCoy v. Jackson, 21 Ark. 472.

The commencement and continued prosecution of a suit, within eighteen months from the grant of letters testamentary, is a presentation of a claim against estate of the deceased, within the meaning of the *Alabama* statute. Hunley v. Shuford, 11 Ala. 203. But see Dilbone v. Moorer, 14 Ala. 426.

Section 2 of the Maryland act of 1823, ch. 131, which places creditors whose claims are known to the executor, but who fail to bring them on, in pursuance of notice given as required by the act of 1798, upon the same footing with those whose claims are unknown, was never designed to apply to cases where notice to the executor or administrator has been given through the medium of a lis pendens, or been in due time followed by it. Stewart v. Carr, 6 Gill (Md.) 430.

sion.¹ The affidavit prescribed by law is a prerequisite to the right of action against the administrator which he cannot waive; and its omission or insufficiency may be taken advantage of at any time before final judgment either by plea on motion, or by way of objection to admissibility of evidence, nor can an insufficient affidavit be cured by amendment.²

1. Walker v. Byers, 14 Ark. 246; Mc-Whorter v. Donald, 39 Miss. 779; s. c.,

80 Am. Dec. 97.

Before a judgment can be admitted under the *Kentucky* statutes, it must be verified. Curry v. Bryant, 7 Bush (Ky.),

301.

In South Carolina it is held that a judgment creditor need not establish his claim against the debtor's estate by affidavit, when he has made proof of his judgment. Crane ν . Moses, 13 S. Car.

561.

Under the Alabama Rev. Code, § 2196, all claims on an insolvent estate, not in suit at the time the same is reported and declared insolvent, must be filed in the office of the judge of probate, and verified whether or not in judgment, either against the deceased or the personal representative; otherwise they are forever barred. A judgment obtained before the report and declaration of insolvency, not being a claim in suit, is barred if not filed and verified within the time and in the manner prescribed in that section. Gambler v. Dunklin, 48 Ala. 425.

The provision of Gen. Stat. Kentucky,

c. 39, art. 2, §§ 35, 39, that no demand against a decedent's estate shall be allowed or paid by the personal representative unless it be verified, does not preclude in a suit to open an executor's account the allowance of an unverified demand allowed on the original settlement, thirteen years before; the executor and the testator having been partners, and the executor cognizant of the debt of the partnership, and having paid, in good faith, not only deceased's share, but his own; especially when the executor's deposition stating the fact is of record in the suit to open the account; such deposition being more satisfactory than an ex parte affidavit, and properly operating nunc pro tunc as such affidavit. Nor does the rule apply that a surviving partner cannot, by settling a claim against the partnership, bind the estate of the deceased partner. Terrill v. Rowland (Ky.), 4 S. W. Rep. 825.
The statute of *Texas*, Pasch. Dig. art.

The statute of *Texas*, Pasch. Dig. art. 1394, providing a special mode for the presentation of the claim of an executor or administrator against the estate of his testator or intestate, dispenses with the

necessity of the allowance of his own claim by the administrator, but not with the affidavit required by Pasch. Dig. art. 1309. Puckett v. McCall, 30 Tex. 457.

Filing a claim against an estate before the declaration in insolvency does not supersede the necessity of complying with Alabama Rev. Code, § 2106, by verifying the same within nine months after such declaration. Brewer v. Moseley, 49 Ala. 70.

Ala. 79.

It is only demands created by the decedent, not those created by the administrator, that must be verified by the claimant's oath under the statute. Berry

v. Graddy, 1 Metc. (Ky.) 553.

Though an administrator is not authorized to demand authentication of the debts of his decedent, when presented after notice given, yet creditors must present their claims, duly authenticated, or defend them before the auditor if assailed. Hahnlin's App., 45 Pa. St.

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Although it is against the policy of the statute to permit a stranger to pay unauthenticated claims against an estate, and on the testimony of the claimant get an account allowed thereon, against the objection of the administrator, such settlements by a widow of the decedent, acting in good faith and intending thereby to avoid the expense of administration, will be approved where no injustice is thereby done the estate. Brearly v. Norris, 23 Ark, 166.

An action by a surety on a note or bond, for money alleged to have been paid thereon by him for the benefit of his principal, is an action in account for the money so alleged to have been paid, and not an action on the note or bond itself; and where such action is brought against a personal representative, the affidavits required by law in such cases should be made to the account. Nutal v. Brannin, 5 Bush (Ky.), II.

Under the Texas act of 1848 (Pasch.

Under the *Texas* act of 1848 (Pasch. Dig. art. 1095), specifying the manner in which "claims for money," etc., against a testator or intestate shall be verified before presentation to the executor or administrator, a mortgage is not a "claim for money. Simpson v. Reiley,

31 Tex. 298.

2. Alter v. Kinsworthy, 30 Ark. 756.

Such an affidavit is filed too late after a suit in equity has been brought to establish the claim, and a motion made to dismiss the bill. The affidavit should be taken before a clerk of the court. commissioner appointed by the governor to take acknowledge. ments of deeds, or other authorized person,2 and may be made by the claimant or his agent, and in the latter case will not be invalid because it does not show such agency. An administrator knowing the affiant to be the agent of the owner may approve the claim.3 The precise words of the statute need not be used in the

See also Saunders v. Rudd, 21 Ark. 519; Zachary v. Chambers, I Ore. 321; Beirne v. Imboden, 14 Ark. 237; Ryan v. Leeman, 7 Ark. 78; Meeolita v. Packard, 14 Cal. 178; McWhorter v. Donald, 30 Miss. 779.

The affidavit prescribed by the Indiana act of February 20, 1855 (2 Gav. & H. 502), to be attached to a claim presented against an estate, is not a jurisdictional prerequisite, but only a condition to the recovery of any costs in a suit on the demand. And it need not aver in terms that there is no offset to the claim. Smith v. Denman, 48 Ind. 65.

In Alabama, if an exception is sustained to an affidavit, the court should permit a party to perfect the verification, if the proceedings for the adjustment of the estate are still in fieri. P. & M. Bank of Mobile v. Smith, 14 Ala. 416.

1. Green v. Brooks, 25 Ark. 318. In Alabama, an affidavit to a justice of a claim made after the qualification of the administrator is not irregular, though it be previously to the recognition by the orphans' court of the declaration of insolvency. P. & M. Bank of Mobile v. Smith, 14 Ala. 416.

A verification filed with the claim, made after the death, but before the estate was declared insolvent, is good under Code, § 1847. Norvill v. Williams, 35 Ala. 551. 2. Lafferty v. Lafferty, 10 Ark. 268; Greenwood v. Woodward, 18 Tex. 1;

Hailey v. McGee, 19 Tex. 107.
A commissioner of deeds for Arkansas, residing in another State, may take affidavits in that State to authenticate claims against the estate of a person deceased in Arkansas. Stone v. Kaufman, 25 Ark.

The omission of the affiant's signature on an affidavit to a claim against the estate of a deceased person is not a fatal informality if the jurat is properly authenticated. Mahan v.Owen, 23 Ark. 347.

3. Heath v. Garrett, 46 Tex. 23; Erwin v. McGuire, 44 Ala. 499. See also Mc-Intosh v. Greenwood, 15 Tex. 116; Hansell v. Gregg, 7 Tex. 223.

Verification of claims against the estate of a deceased person may, under the laws of Arkansas, be made not only by the claimant, but by his agent or attorney, or by any person cognizant of the Mason v. Bull, 26 Ark. 164. pare Beirne v. Imboden, 14 Ark. 237.

A factor, in order to preserve a lien held by him under Georgia Code, § 1977, whereof the maker is dead, and his priority in the distribution, may make the affidavit required by law for its enforcement within twelve months after the qualification of the representative of the estate, provided there be no levy thereon till after the twelve months' period of exemption from suit allowed executors and administrators. Moring v. Flanders, 49 Ga. 594.

Where creditors are called in to present their claims against the debtor's estate which is being administered, an attorney of one of them cannot prove a claim by swearing that he has it for collection, but must prove it in the name of the owner of the claim. Westfield v.

Westfield, 13 S. C. 482.

When a statute provides that any person having a claim against an insolvent estate must file the same, duly verified, in the office of the judge of probate within a specified time, it is sufficient if a copy verified on information and belief by the affidavit of the plaintiff's attorney is delivered to the clerk of the court within the time limited. Erwin v. Mc-Guire, 44 Ala. 499.

In California, the affidavit to a claim against an estate must be made by the claimant himself, and not by his attorney in fact. Macolita v. Packard, 14 Cal. 178

In Missouri, the affidavit in support of a claim against the estate of a deceased person can be made by an agent of the creditor only when he had the management and transaction of the business out of which the demand originated. Peter v. King, 13 Mo. 143. An affidavit of one joint claimant, by

the provisions of the statute, sufficiently authenticates a claim against the estate

affidavit. It is sufficient if the substance appears. If. however. the affidavit is wanting in the essential requisites prescribed by the statute, the allowance of the claim by the administrator or even its approval by the probate judge can give it no validity.2 An affidavit that the estate "has been given credit for all judgments and offsets to which it is entitled on the demand above subscribed, and the balance there claimed is justly due," is sufficient notwithstanding that it did not show that the claimant was not indebted to the estate on other accounts.³ When the statute requires that the affidavit shall state that "the claim is just, and that all legal offsets, payments, and credits have been allowed," an affidavit that the within account is "correct and just after allowing all proper credits," is insufficient because it omits offsets and payments, and employs no equivalent expression.4 It has been held that if a claimant states by a witness under oath the necessary facts required in an affidavit of claim under the statute, it will supply the absence of the affidavit.5

Where the objection to the authentication goes to the person making the affidavit, the administrator must put his objection upon that ground and note it in his memorandum of rejection, or it will afford him no justification for his rejection of the claim when sued. If his objection goes to the words or form of the affidavit

the rule does not apply.6

(f) Reference or Arbitration. (See also Arbitration.)—In many States administrators and executors have special statutory authority to submit doubtful claims against the estate to arbitration.7 The omission of the executor or administrator to refer a claim

of the deceased. Ashley v. Gunton, 15 Ark. 415. Contra, under Maryland Act.

Cecil v. Rose, 17 Md. 92.
1. Crosby v. McWillie, 11 Tex. 94.

2. Gillmore v. Dunson, 35 Tex. 435. 3. Merchants' Bank v. Ward, 45 Mo.

310. 4. Walters v. Prestidge, 30 Tex. 65. 5. Overby v. Overby, I Metc. (Ky.)

Å ''set-off" is not a ''discount," within Kentucky Rev. Stat. 340, and therefore the claimant must swear both that there is no set-off and no discount, or his claim is not well presented. An affidavit that the debt is just and due, and wholly unpaid, is not enough: he must swear that there is no "discount." Trabal v. Harrier, 1 Metc. (Ky.) 597.

An affidavit that the account is just and true, and that the affiants have not, nor any other person, to their knowledge, for them, received any security or satisfaction for the same, is not sufficient un-der the Maryland statute. Cecil v. Rose,

17 Mo. 92.

In Mississippi, the affidavit of creditors of intestate must not only state, to es

tablish his claim, that it is just and true, but also that it is not paid, and that no security or satisfaction has been received therefor. Whorter v. Donald, 39 Miss. 779; s. c., 80 Am. Dec. 97.

An affidavit by an officer of a corporation that he has made diligent inquiry and examination, and does verily believe that nothing has been paid, etc., and that the sum with which E. L. stands charged on the books of the bank amounts to, etc., is sufficient. Dig. Ch. 4, § 91; State v. Collins, 16 Ark. 32.

6. Shelton v. Berry, 19 Tex. 154; s. c., 70 Am. Dec. 326; Walters v. Prestidge, 30 506; Tex. 65. See Riggs v. Martin. 5 Ark. s. c., 41 Am. Dec. 403. As to sufficiency of affidavits generally, see notes to Exparte Bank of Monroe, 42 Am. Dec. 63; Wyatt v. Jeffries, 43 Tex. 155; Morris v. State, 2 Tex. App. 503.

7. Kendall v. Bates, 35 Me. 357; Childs v. Updyke, 9 Ohio St. 333.

Under the New York statute, where a

testator in his will gave to his widow as much as she would need for support, held, that an account against the estate for support furnished by a third person was not when presented is not necessarily an admission of it which precludes him from contesting it, and thus preventing its allowance by the surrogate on an accounting. The requirements of such statutes must be strictly complied with.² and where upon a motion to confirm a report the moving papers show incontrovertibly a claim of a nature not referable, the defendant may oppose the motion to confirm the report without making a case.3

(g) Allowance or Rejection.—The allowance of claims against a

referable. Godding v. Porter, 17 Abb. Pr. (N. Y.) 374. Only those claims against the estate of a deceased person are referable, under 2 Rev. Stat. 90, which accrued during his life, or would have accrued against him if he had lived. Godding v. Porter, 17 Abb. Pr. (N. Y.)

A claim against decedent's estate for a tort of the decedent,-e.g., the conversion of personal property—is referable. Brocket v. Bush, 18 Abb. Pr. (N. Y.) 337.

The reference provided by the statute is not applicable to claims made by the executor or administrator against other parties and in favor of the estate, except strictly in the way of set-off. Skelv v. Akely, 17 How. Pr. (N. Y.) 21.

The representatives of a decedent are bound to refuse to refer under a statute a claim which is essentially of an equitable nature, e.g., a claim to assets held by the decedent as executor for a third person; and they are not liable for costs by reason of such refusal. Sands v. Craft, 10 Abb. Pr. (N. Y.) 216; s. c., 18 How. Pr. 438.

The creditor is not entitled to costs of the reference where it does not appear that the agreement to refer was filed and the order entered. Comstock v. Olmstead, 6 How. Pr. (N. Y.) 77.

Under what circumstances the executor or administrator is entitled to costs see Munton v. Howell, 12 Abb. Pr. (N. Y.) 77; s.c., 20 How. Pr. 59; Radley v. Fisher 24 How Pr. 404; Van Sickler v. Graham, 7 How. Pr. (N. Y.) 208.

See, as to the right to refer, powers of See, as to the right to reter, powers of referees, and proper procedure under New York statutes, Gorham v Ripley, 16 How. Pr. (N. Y.) 313; Tracey v. Suydam, 30 Barb. (N. Y.) 110; Woodin v. Bayley, 13 Wend. (N. Y.) 453; Young v. Cuddy, 23 Hun (N. Y.), 249; Kellogg v. Werner, 13 N. Y. Supreme Ct. 452.

If, after the reference under a general rule of claims disallowed by the commissioners of an estate, the parties enter into a stipulation that the referee may adjust all claims of a stated description against the estate, the referee is authorized to adjust a claim coming within that description, but which did not accrue till after the death of the intestate. Daniels v. McDaniels, 40 Vt. 340.

Arbitrators appointed by the Probate court, under Mass. Rev. Stat. ch. 68, § 11, to determine the validity of a claim against a deceased insolvent's estate. which has been disallowed by the commissioners, have no power to award that the claimants are in fact indebted to the estate. Gilmore v. Hubbard, 12 Cush. (Mass.) 220.

The judge of probate has no authority, to allow the reference of any demand which an executor or administrator, as such, has against the estate of his testator or intestate; the statute extends to such demands only as he had in his own private capacity against the deceased in his lifetime. Daud v. Prescott, 1 Mass.

The right to refer, powers of referees, and proper proceedings in court, on the coming in of their report, determined, in cases depending upon peculiar facts. Green v. Creighton, 15 Miss. (7 Smed. & Green v. Creighton, 15 Miss. (7 Smed. & M.) 197; Reed v. Wiley, 13 Miss. (5 Smed. & M.) 394; Ryan v. Stone, 15 Miss. (7 Smed. & M.) 104; Stephenson v. Clark, 12 How. Pr. (N. Y.) 282; Linn v. Clow, 14 How. Pr. (N. Y.) 508; Sands v. Craft, 10 Abb. Pr. (N. Y.) 216; 18 How. Pr. 438; Anderson v. Baker, 15 Ohio St. 173; Baker v. Baker v. Baker v. 18 Wills v. 18 Parker v. Baker v. 18 Wills v. 18 Parker v. Baker v. 18 Wills v. 18 Parker v. Baker v. 18 Wills v. 18 Wi Barker v. Belknap, 39 Vt. 168; Wills v. Rand, 41 Ala. 198; Clark v. Bomford, 20

Ark. 440; Adarene v. Marlow, 33 Vt. 558.
Arbitration is not a proper mode to establish a rejected claim against an estate. Yarborough v. Leggett, 14 Tex.

1. Tucker v. Tucker, 4 Abb. App. Dec. (N. Y.) 428.

2. Comstock v. Christead, 6. How. Pr. (N. Y.) 77. In Bucklin v. Chapin, 53 Barb. (N. Y.) 488, it was held that a substantial compliance was sufficient.

An offer to refer an account need not be in writing: it is good by parol. Leaming v. Swarts, 9 How. Pr. (N. Y.) 434-3. Godding v. Porter, 17 Abb. Pr.

(N. Y.), 374.

decedent's estate is so peculiarly within the province of the probate court that another court will not disturb its action if the proceedings appear to be fair and regular.1 The approval and classifica-

1. Spiegelberg v. Mink, I New Mex.

308.

As to conclusiveness of proceedings in courts of probate, see Van Dyke v. Johns. 12 Am. Dec. 81; s. c., I Del. Ch. 93; Mc-Pherson v. Cunliff, 14 Am. Dec. 642, and note; s. c., 11 Ser. & R. (Pa.) 422; Kennedy v. Wochsmith, 14 Am. Dec. 676; s. c., 12 Ser. & R. (Pa.) 171; Roach v. Martin's Lessee, 27 Am. Dec. 746; s. c., 1 Harr. (Del.) 558; Bank of Muskingum v. Carpenter, 7 Ohio, pt. 1, 21; s. c., 28 Am. Dec. 616; Estate of Schroeder, 46 Cal. 310.

The probate courts of Missouri are courts of record, and their jurisdiction of the administration of the estates of deceased persons is general, exclusive. and original; and whilst any action on subjects not committed to their jurisdiction is of no force or validity, their action on these subjects is entitled to the same weight as that of any other court of record, and is conclusive in all collateral proceedings. Johnson v. Beasley, 65 Mo. 255.

In Georgia, the courts of ordinary are clothed with general jurisdiction over testate and intestate estates, and their judgments are conclusive and binding on every other court until reversed, and cannot be collaterally impeached, however irregular and erroneous. Tucker v. Harris, 13 Ga. 1; s. c., 58 Am. Dec. 488.

And in Delaware, the decree of the orphans' court as to every point necessary to be decided upon is conclusive. Roach v. Martin's Lessee, I Harr. (Del.) 548;

s. c., 27 Am. Dec. 746.

A leading case on the jurisdiction of surrogates' courts in New York is that of Roderigas v. East River Savings Institution, 63 N. Y. 460; s. c., 20 Am. Rep. 555. See also Rose v. Lewis, 3 Lans. 320. See also note to Tucker v. Harris, 58 Am. Dec. 503.

The probate court has nothing to do with the settlement of debts, except in passing on the administrators' accounts on settlement, and in cases of insolvent estates. Thornton v. Glover, 25 Miss. 132.

A collector appointed by the New York surrogate has no authority to pay debts or make any disposition of the funds except to pay his own expenses. Parish, 29 Barb. (N. Y.) 627

A judge of probate in Wisconsin has no right to decide that an estate is chargeable with a disputed claim against it. He can only direct the payment of a pro rata share of the assets of the estate in the hands of the administrator, upon a claim previously established to be valid, or which the administrator is by law bound to pay. Hool v. Lockwood, 3 Chand. (Wis.) 41.

Under what circumstances a decree by the surrogate ordering payment by executors of a claim against the estate is authorized. Mills v. Thursby, No. 7, 11

How. Pr. (N. Y.) 126.

In Maryland, the orphans' court has only prima facie jurisdiction as to claims against a decedent's estate, and its decisions thereon are not conclusive at law. Hence a reversal of its allowance of a claim by an appellate court does not bar a recovery thereof in a court of law. nor is its allowance of a debt necessary to the maintenance of an action to recover the same. State v. Reigart, 39 Am. Dec. 628; s. c., I Gill (Md.), I.

In Texas, a claim against an estate has no judicial standing in the probate court until it has been allowed and approved; and until it has been rejected, either by the administrator or the probate judge, it has no judicial standing in any other court.

The distinction between the jurisdiction of the district and probate courts in Texas is especially to be observed in the prosecution of claims secured by If such a claim be rejected by mortgage. the probate judge, it may not only be carried to judgment in the district court, but the property subject to the lien may be seized and sold by the sheriff, and the proceeds of such sale be applied to the satisfaction of the judgment, in contradistinction to the usual order that such judgment be paid in due course of administration. Dauzey v. Swinney, 7 Tex.

In Texas, the probate judge is required, when a claim is presented to him, to indorse thereon or annex thereto a memorandum in writing, signed by him, stating that he approves or disapproves of the allowance, etc.; now, leaving open the question whether such approval or disapproval might not in some cases be proved by evidence aliunde, yet, unless such approval be indorsed or annexed, the prima facie presumption, at least in a proceeding commenced since the act of 1846, is that it does not existeven, it seems, where the succession was

tion of a claim by the administrator is subject to the supervision of the probate court. and where there are two or more administrators the allowance of a claim against the estate by one is the act of all, and binding upon all.2 To proceedings before commissioners upon claims submitted for allowance all persons interested in the estate are parties, and all are bound by the award of the commissioners or of the appellate court on appeal.3

opened, and the claim presented to the administrator, under the act of 1840. Dauzey v. Swinney, 7 Tex. 617.

The proceeding provided by § 1142, Mississippi Code 1871, for contesting claims against estates relates to claims presented for allowance. Credits on notes payable to the decedent and held by the administrator are not the proper subjects of such proceedings. Bell v. Faison, 53 Miss. 354. See further, as to construction of this section, Boyd v. Lavry, 53 Miss.

To confer jurisdiction under the Indiana statute over the subject of the action, a claim against the estate of a decedent must be filed, placed upon the appearance docket, and if not allowed, must be transferred to the issue docket; and upon demurrer for want of jurisdiction, the record must show that such steps have been taken; but where another person is a necessary defendant with the administrator or executor, the claim need not be filed against the estate, but an ordinary action may be brought against the administrator and such other person. Stanford v. Stanford, 42 Ind. 485.

The county court has equitable jurisdiction in the allowance of claims against the estates of deceased persons for money due, and may adopt equitable proceedings in so far at least as to permit a claimant in such a case to proceed in his own name, even when he is an assignee. Dixon v. Buell, 21 Ill. 203. And see Mason v.

Blair, 33 III. 194. Compare Statelar's Adm'r v. Sample, 29 Ind. 315.

1. Ex parte Cheatham, 6 Ark. 437; Sumrall v. Sumrall, 24 Miss. 258; Tucker v. Yell, 25 Ark. 420.

2. Willis v. Farley, 24 Cal. 490.

3. State v. Ramsey Co. Pro. Ct., 25 Minn. 22.

An affidavit of the executor filed in the probate court, that there are no debts, does not affect the right of creditors to have a commission and to prove their claims and have them paid out of the estate. State v. Ramsey Co. Pro. Ct., 25 Minn. 22.

A claim against an insolvent estate of a decedent cannot be allowed by commissioners under the statute, unless it be

a present debt or duty, or a demand in præsenti, payable at all events in futuro. If its future payment rests upon a contingency, and it is uncertain whether any demand will accrue, it cannot be allowed.

A conditional bond before condition broken is not a present debt or demand provable against an intestate's estate. Jones v. Cooper, 16 Am. Dec. 678; s. c.,

2 Aikens, 54.

In Michigan, all claims for or against a decedent's estate must be passed upon by commissioners, and cannot be withdrawn for adjudication elsewhere. These commissioners are not a court in the constitutional sense; the word does not apply to a special tribunal for a particular exigency. Shurban v. Hooper, 40 Mich.

The probate court has no other authority over claims allowed by the commissioners than to order dividends from time to time among those whose claims are allowed until all are paid. Clark v. Davis.

32 Mich. 154.

The proceedings of commissioners on an estate are not affected by an appeal from the order appointing the administrator, though it may suspend the hearing and disposal of claims, unless there be a special administrator to represent the estate. Lothrop v. Conely, 30 Mich.

Where notice to the creditors of the allowance of claims has, in fact, been published, the commissioners on claims have jurisdiction to hear and allow claims. Their jurisdiction does not depend on proof of the publication being produced before them. Wilkinson (Mich.), 32 N. W. Rep. 841.

As to authority of commissioners under Vermont statute to allow a claim presented by way of set-off to a claim of a creditor of the estate, see Moore v. Bach-

elder, 51 Vt. 50.

As to application to probate court to renew commission and extend the time for presenting claims, see Sleeper v.

Gould, 53 Vt. 111.

In Vermont, commissioners in the settlement of intestate estates have jurisdiction of claims originating in equitable principles, where the right and extent

The owner of an unliquidated claim against an estate will not be permitted to obtain judgment by rule against the administrator. An indorsement may be allowed as a contingent claim against the estate of one deceased.2 Where a demand presented to an administrator does not claim interest, none can be allowed. unless the paper upon its face shows that interest results as a matter of course from the facts stated as constituting the claim.3 The allowance by the probate court of a claim against an estate in the hands of executors with power under the will to administer, is without jurisdiction, and void as against the estate.4 An administrator who has placed a claim on his account is a disinterested party in a subsequent contest between the claimant and creditors or heirs.5

A judgment upon a claim against a decedent's estate that the plaintiff do recover the "amount found by the jury of and from the assets of B., deceased," is equivalent to a formal order of allowance. Probate of a claim made before a justice of the peace of another State whose official character is not authenticated, is insufficient.7 Mere pendency of proceedings by the creditor against the estate of a deceased debtor in another State is not a bar to the allowance of his claim.8 A claim against an estate properly vouched is *prima facie* genuine, and the burden of proof is on

of recovery are readily ascertainable. Spaulding v. Warner, 52 Vt. 29.

A creditor of an estate who has duly presented his claim to the commissioners appointed by the probate court is justified in resting in the belief that it is allowed, unless they or the administrator have intimated to the contrary; and if, without his fault, they fail to report it to the probate court, it is the province of a court of equity to save him from loss, by holding the estate still bound to do what the law, but for their laches, would compel it to do. Dickey v. Corliss, 41 Vt. 127.

Minnesota Gen. St. ch. 53. § 8, giving power to probate courts, for good cause shown, to renew a commission, and allow further time for commissioners to ex-:amine claims, does not commit the power thus granted to the mere discretion of the probate courts, but is mandatory. Mass. Mut. Life Ins. Co. v. Elliott, 24 Minn.

Though commissioners on the estate of a deceased person are not a "court" in the constitutional sense, yet they act judicially in passing on claims. Clark v. Davis, 32 Mich. 157; Shurban v. Hooper,

.40 Mich 503.

And their judicial determinations cannot be impeached collaterally, except for fraud. Shoemaker v. Brown, 10 Kan. 383; State v. Ramsey Co. Probate Court, :25 Minn. 25.

1. His remedy is by action in ordinary form before the probate court. But when the claim is liquidated, he may proceed summarily by rule to enforce its payment. Dulrich v. Wildermuth, 3 La. Ann. 407. 2. Curly v. Hand, 53 Vt. 526.

3. Aguirre v. Packard, 14 Cal. 171; s.

, 73 Am. Dec. 645. 4. In such case, where all of them qualify, it is incompetent for two of them to allow a claim against the estate.

McLane v. Belvin, 47 Tex. 493.

5. Succession of Pettis, 11 La. Ann. 177.

6. Birol v. Simpson, 23 Ind. 393.

In the settlement of claims against the decedent's estate it is not to be presumed that less is demanded by creditors than their just dues, and therefore a judgment that confirms a distribution allowing to a creditor more than his original claim, cannot be sound. Searsby's App., 48 Pa. St. 531.
7. Alter v. Kinsworthy, 30 Ark. 756.
8. Goodall v. Marshall, 11 N. H. 88;

s. c., 35 Am. Dec. 472.
In New Hampshire, it is no valid objection to a decree of a judge of probate ordering the claims of creditors to an estate which has been administered in the insolvent course to be paid in full, that the judge was himself a creditor. Judge of Probate v. Tillotson, 6 N. H. 292.

those disputing it. The estate of a decedent is not concluded by the allowance of a claim against it without notice to the administration trator or executor.2

An order of the court to an administrator to pay a claim duly sworn to and filed is sufficient to indicate that the claim is approved by the court, even when it has not been formally proved up.3 Claims held by the executor should be presented to the probate judge for allowance, but need not be presented to the executor in the first instance.⁴ An administrator cannot legally pay a

1. Valentine v. Valentine, 4 Redf. (N. V.) 265.

2. Propst v. Meadows, 13 Ill. 157.

An allowance by the probate court of a demand against an estate, based on a certified transcript of a judgment rendered against the decedent in his lifetime. held to be void for want of notice to the administrator, or waiver thereof. Scroggs

v. Tutt. 20 Kan. 271.

Where neither creditors nor parties in interest are cited to oppose a tableau of debts, the homologation of such tableau is not binding upon them, and they cannot be called in by mere publication to establish or oppose it. Winn's Succession, 30 La. Ann. Part I. 702. See also, as to homologation by clerk of court of a tableau filed by administrator, Maraist v. Guilbeau, 30 La. Ann. Part II. 1089.

The admission of an administrator that a claim against an estate is just, or an order for its payment by the probate court, is a sufficient establishment of the claim under Ind. Rev. Stat. 1843.

v. Bowden, 3 Ind. 504.

After the allowance of a claim against an estate, the administrator's attorney moved to set the order of allowance aside, on his own affidavit, alleging that plaintiff's attorney, without affiant's knowledge, filed the claim for plaintiff, and served notice thereof on the administrator, and was notified by him to inform affiant of his claim, but failed to do so, and that the claim, without affiant's knowledge, was allowed; and that the plaintiff has no claim in law or equity against the estate. Held, that the main allegation of the affidavit was hearsay, and that it did not present a sufficient showing of a meritorious defence to justify the setting aside of the order of allowance. Dessaint v. Forster (Iowa), 34

N. W. Rep. 454. 3. Marlow v. Marlow, 48 Iowa, 639. 4. Est. of Taylor, 10 Cal. 482.

As to procedure in New York to establish an executor's or administrator's claim against the estate, see Kearney v. McKeon, 85 N. Y. 136; Re Rardner, 5 Redf. (N. Y.) 14; Burnett v. Noble, 5 Redf. (N. Y.) 69; Barras v. Barras, 4 Redf. (N. Y.) 263; Matter of Flood, 16. Abb. Pr. N. S. (N. Y.) 407; Smith v. Christopher, 3 Hun (N. Y.), 585; 6. Thomp. & C. (N. Y.) 288.

Executor cannot retain for debt due himself unless in addition to the usual proof he swears to the existence of the debt. after allowing all payments and offsets, if the debt be not admitted by the adverse rice dent be not admitted by the adverse party. Clark v. Clark, 35 Am. Dec. 676; 8 Paige's Chan. (N. Y.) 152; Williams v. Purdy, 6 Paige's Chan. (N. Y.) 166; Terry v. Dayton, 31 Barb. (N. Y.) 521; Keller v. Stuck, 4 Redf. (N. Y.) 296; Wood v. Rusco, 4 Redf. (N. Y.) 386.

Executor cannot retain for a debt dueto him which has been barred by the Statute of Limitations, notwithstanding a provision in the will for the payment of all just debts. Rogers v. Rogers, 20. Am. Dec. 716; s.c., 3 Wend. (N. Y.) 503. In Maryland it is held that the Statute

of Limitations does not run against anadministrator's claim against his intestate's estate, because he cannot sue himself. State v. Reigart, 39 Am. Dec. 628; s.c., I Gill (Md.), I. See also McLaugh-lin v. Newton, 53 N. H. 531.

An administrator who had a valid individual claim against the estate of his intestate presented the same to the probate judge in due season. The court, without appointing a person to defend the claim, as required by the laws of Missouri, passed upon and allowed the same. Four years afterwards, the error in the proceedings having been discovered, the claim was again presented and rejected as barred by the Statute of Lim-Held, that although the judgment of allowance was clearly irregular, and perhaps void, yet inasmuch as the record shows that the administrator acted in good faith, and that he brought his demand into court, he should be regarded as having exhibited his demand within the time prescribed by law, so as to prevent the bar of the Statute of Limitations... Williamson v. Anthony, 47 Mo. 299.

claim against his intestate's estate which was barred by the Statute of Limitations anterior to the granting of administration: 1 but the

The provisions of Indiana act of 1875. p. 50, \$ I, in relation to the settlement of decedents' estates, are applicable to any claim of an executor or administrator. Wright v. Wright, 72 Ind. 149. See also Hubbard v. Hubbard, 16 Ind. 25; Chidester v. Chidester, 42 Ind. 469.

The order of payment of claims against a decedent's estate cannot be determined by a court otherwise than as prescribed in 2 Ind. Rev. Stat. 534, § 109. In an action by the administrator personally against the estate, a judgment giving priority to his claim does not bind creditors who have no notice of the action.

A judgment of allowance of such administrator's claim as a general claim , precludes him from maintaining a subsequent action for preferment. Jenkins v.

lenkins, 63 Ind. 120.

As the law of California stood in 1850. an administrator the equitable owner of a judgment against his intestate might present his claim thereupon to the probate judge, without assignment or copy of the judgment, Crosby's Est., 55 Cal.

In Texas and Indiana, where an executor's claim against the estate is set down in the form of a suit on the issue docket, the defendants have a right to a trial by jury. Henderson v. Ayers, 23 Tex, 96; Hubbard v. Hubbard, 16 Ind.

In New Jersey, an administratrix may retain out of her husband's estate what was due her from money loaned to him, and money deposited with him from her separate estate. Personette v. Personette, 35 N. J. Eq. 472.
In South Carolina, an administrator

paying debts out of their legal order is liable to creditor and is not allowed to retain more than his proportion of the debts due himself. Lenoir v. Winn, 6 Am. Dec. 65; s. c., 4 De Saussure (S. Car.), 65.

An administrator not allowed to retain out of the assets of his intestate the amount of a note payable to himself, and on which his intestate was surety, when he has paid over to the maker of the note, who was insolvent, a claim against his intestate for a sum more than sufficient to have paid off and discharged the note. Redman v. Turner, 65 N. Car. 445.

When the administrator is unable to realize his debt out of the personal estate, and seeks to make the heir liable, the heir may seek to set up any defence that

the intestate could have set up if he was alive. The administrator goes into the court of equity, like any other creditor, for the purpose of making the debt out of the heir, and out of estate into which the administrator has no right or title. Payne v. Pusey, 8 Bush (Ky.), 564.

For further discussion of executors' right to retain, see EXECUTORS AND

ADMINISTRATORS.

1. Trotter v. Trotter, 40 Miss. 704; Bryd v. Wells, 40 Miss. 711; Patterson v. Cobb, 4 Fla. 481. But he may pay debts which became barred after qualification. Bryd v. Wells, 40 Miss. 711; Payne v. Pusey, 8 Bush (Ky.), 564. See Kennedy's App., 4 Pa. St. 149.

An executor who unreasonably delays to make objection to a claim against the testator's estate, which has been duly presented to him, is not thereby precluded from setting up the Statute of Limitations in bar of such claim. Bucklin

v. Chapin, 1 Lans. (N. Y.) 443.

A debt against the estate of a decedent is not barred by the Statute of Limitations where less than six years from the time it accrued had elapsed at the death of the debtor, but the six years expired before settlement and distribution of the estate was made. McClintock's App., 29 Pa. St. 360.

Out of the time necessary to constitute a bar under the Statute of Limitations must be deducted the time within which the statute forbids suits against executors. Henderson v. Ilsley, II Smedes & Mar.,

49 Am. Dec. 41.

In McClintock's App., 29 Pa. St. 360, it was said that the time which elapsed after the death and before distribution should not be counted to make up the six years.

The Statute of Limitations does not run on claim against decedent's estate until grant of administration. Carriger v. Whittington, 26 Mo. 311; s. c., 72 Am.

Dec. 262.

In Alabama the administrator is not bound to plead the Statute of Limitations if the personal assets in his hands are sufficient to pay the decedent's debts; but where a resort to realty is necessary to raise a fund to pay the debts, a contrary rule prevails. Pollard v. Scears's Admr., 28 Ala. 484; s.c., 65 Am. Dec. 364.

For fuller discussion of right of parties in interest to compel executor to plead statute, see EXECUTORS AND ADMINIS-

TRATORS.

allowance of a claim which appears upon its face to have been barred by the Statute of Limitations at the time of its allowance will not on that ground be set aside. An administrator should not allow a claim on the unsupported oath of the defendant when he is warned that the claim is unjust.2 To a claim presented to

The commissioners appointed to adjust claims against an estate cannot allow a claim on which they find the Statute of Limitations would have run but for the pendency of a suit thereon. The presentation to them is but the prosecution of a new remedy, and does not operate as a continuance or revivor.

Jones v. Keep, 23 Wis. 45.

Where a claim not belonging to the contingent class is disallowed by the commissioners, and is thereupon prosecuted and recovered in a suit at law. the creditor is not barred by any Statute of Limitation from having it afterwards added to the list of allowed claims. right so to do does not depend upon any reservation of funds ordered by the judge for contingent claims, nor is it impaired by a distribution of the surplus assets, without any order of the court, among the heirs and legal representations of the deceased, the estate, though represented insolvent, having proved to be solvent. Greene v. Dyer, 32 Me. 460.

A statute authorizing a probate court to renew a commission for the allowance of claims upon the estate of a deceased person, after the close of such commission and the expiration of the time limited by the general law for its removal. is retrospective, disturbs vested rights, and revives rights which have been extinguished, and is therefore unconstitu-

tional. Bradford v. Brooks, 2 Aikens, 284; s. c., 16 Am. Dec. 715.
"When the period prescribed by statute has once run so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded by the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect so as to disturb this title. It is vested as completely and perfectly, and is as safe from legislative interference, as it would have been had it been perfected in the owner by grant, or any species of assurance." Cooley Const. Lim. § 365. See also Wade on Retroactive Laws, § 197, citing Woart v. Winnick, 3 N. H. 473; s. c., 14 Am. Dec. 384; Wires v. Farr, 25 Vt. 41; Knox v. Cleveland, 13 Wis. 245; State v. Sneed, 25 Tex. (Supp.) 69; Woodman v. Fulton, 47 Miss. 682; Gardner v. Stephens, I Heisk. 280; Stine v. Bennett, 13. Minn. 153; Wright v. Oakley, 5 Metc.

(Mass.) 400.

"This doctrine is applicable to all laws of this character, whether they be general Statutes of Limitation or such as have only a particular application to certain actions or proceedings. It in no manner interferes with the right of the legislature to extend the period of limitation upon past as well as future demands. so long as that period has not already elapsed. It merely gives effect to the statute where the time has fully run against the demand, by interposing an obstacle to the revival of a dead claim. Wade on Retroactive Laws, § 197. See also cases cited in notes to Angell on Lim., § 22 (6th Ed.), and Goshen v. Stonington, 10 Am. Dec. 132.

The following cases are said to be at variance with the principle: Caperton v. Martin, 4 W. Va. 138; s. c., 6 Am. Rep. 270; Huffman v. Alderson, 9 W. Va. 626; Bender v. Crawford, 33 Tex. 745; 7 Am.

Rep. 270.

Stronger reasons exist why this general doctrine should be applied to claims against the estates of deceased persons, which have been barred by lapse of time, than to barred demands against living persons. Bradford v. Shine, 13 Fla. 393. See also Brown v. Leavitt, 26 N. H. 497; Bagg's App., 43 Pa. St. 512.
1. Moseley v. Gray, 23 Tex. 496.

An executor may pay in his discretion a debt of the testator, although he might resist it on the ground that it had not, under the North Carolina act of 1789, been presented in time. William Maitland, I Ired. Eq. (N. Car.) 92. Williams v.

As to right of executor to waive the

Statute of Non-claim, see ante.

2. Egerton v. Egerton, 17 N. J. Eq. 419. A party who pays a debt of the decedent in his lifetime cannot probate the amount so paid in an account in his own favor by his own affidavit merely, but must show by other proof that such payment was made at the request of decedent. He ought to have the affidavit of the original creditor showing the amount to be just and true. McWhorter v. Donald, 39 Miss. 779; s. c., 80 Am. Dec. 97. the probate court for allowance, anything is a good defence which

would be available at law or in equity.1

The approval of a claim by the probate court after its allowance by the executor or administrator is a quasi judgment, and is invested with many of the attributes of a judgment.2 Approval by a probate judge of an account allowed by an administrator operates as a judgment so far that it closes the account and authorizes the sale of property for its satisfaction.³ The principle applies only to such claims as were debts against the deceased, and not to expenses incurred or disbursements made by the administrator.4

Claims against the estate of a decedent, proved by oral evidence of declarations or admissions, should be carefully scanned; yet they may be so clear, positive, and specific as to establish their validity. McCann's Appeal (Pa.), 9 Atl.

Rep. 48.
1. Lucas v. Cassaday, 2 Greene (Iowa), 208; Turner v. Ellis, 24 Miss. 173.

In Missouri, claim against estate of decedent must first be allowed by probate court before administrator is authorized to pay money thereon; and it is therefore no objection to an action for the amount claimed to be due that no demand was made on the administrator therefor. Carriger's Admr. v. Whittington's Admr., 26 Mo. 311; s. c., 72 Am. Dec. 212.

Under the Kentucky Civ. Code, § 143, requiring every defence to be made by pleading in some form the grounds thereof, upon a creditor's petition for allowance of his claim the executor or administrator excepting thereto should be required by the chancellor to present a formal and verified answer or exception containing the necessary denials or averments of facts for the issue. Hormer v. Harris, 10 Bush (Ky.), 357.

Want of administration is a good objection at law or in equity to a suit against the estate. Screven v. Bostick, 16 Am. Dec. 664; s. c., 2 McCord's Ch.

2. Tate v. Norton, 94 U.S. 746; Swenson v. Walker's Admr., 3 Tex. 96; Weathered v. Smith, 9 Tex. 626; s. c., 60 Am. Dec. 186; Jones v. Underwood, 11 Tex. 116; Eccles v. Daniels, 16 Tex. 136; Pitv. Burton, 17 Tex. 141; Giddings v. Steele, 28 Tex. 756. See also Cannon v. McDaniel, 46 Tex. 300; Swan v. House, 50 Tex. 653; Deck's Est. v. Gherke, 6 Cal. 666; Pico v. De La Guerra, 18 Cal. 422; Matter of Est. of Hidden, 23 Cal. 362; Est. of Schroeder, 46 Cal. 310; Tucker v. Yell, 25 Cal. 420; Campbell v. Strong, Hempst. (Tenn.) 265; Mc-Kinney's Admr. v. Davis, 6 Mo. 504; Kennerly v. Shepley, 15 Mo. 640; s. c.,

57 Am. Dec. 218; Jones v. Brinker, 20 Mo. 87; State v. Roland, 23 Mo. 95; Whittelsey v. Dorsett, 23 Mo. 236; Dullard v. Hardy, 47 Mo. 403; Tutt v. Boyer, 51 Mo. 425; Levis v. Williams, 54 Mo. 200: Price v. Dietrich, 12 Wis. 626: Jameson v. Barber, 56 Wis. 630.

The allowance of a claim by the ad-

ministrator, and its approval by the probate judge, is a quasi judgment which cannot be reviewed by the county court.

Moore v. Hillebrant, 14 Tex. 312.

The disallowance of a claim against the estate by the administrator and probate judge seems to come within the same principle. McKinney's Admr. v. Davis, 6 Mo. 501; Wyatt v. Hensley, 25 Ark. 476; Yves v. Moore, 29 Ark. 127; State v. Ramsey Co. Probate Court, 25 Minn. 25; Moerchen v. Stoll, 48 Wis. 307; Dullard v. Hardy, 47 Mo. 403; State v. Reigart, 1 Gill (Md.), 1; s. c., 39 Am.

Bec. 628.

3. Finlay v. Carothers, 9 Tex. 517; s. c., 60 Am. Dec. 179. See also Neill v. Hodge, 5 Tex. 489; Becket v. Selover, 7 Cal. 239; Est. of Cork, 14 Cal. 130.

Such approval is a judicial and not a ministerial act. Cossitt v. Biscoe, 12

Ark. 97.

Such judgment, so far as the creditor is concerned, may be questioned at a subsequent term of the probate court. Finlay v. Carothers, 9 Tex. 517; s. c., 60 Am. Dec. 179.

It cannot be collaterally impeached, nor can the administrator impeach it for fraud or mistake. Baker v. Rush, 37

Tex. 242.

A bond for title is prima facie a claim for land, and its approval by the probate judge and by the administrator, he in-dorsing upon it "I have no objection to the payment of the above bond," does not convert it into a money-claim against the estate for the amount of the penalty, and an order to sell property for the payment of such claim was refused. Gregory v. Hughes, 20 Tex. 345. 4. Deck's Est., 6 Cal. 666; Gurnee v. Maloney, 38 Cal. 88.

Allowance by the administrator and approval by the probate court do not constitute the claim a judgment debt for all purposes. Whether or not such allowance and approval will create a

lien does not appear to be settled.2

A note approved as a claim against a decedent's estate does not lose its negotiability. Approval of a claim by the probate court is good as a former recovery, and will, if pleaded as such, bar an action upon the same claim. Approved claims also bear interest the same as other judgments do. Allowance and approval of a claim binds all parties before the court, and cannot be collaterally attacked by them or their privies. 6 As against persons who are neither parties nor privies, it is only prima facie evidence of indebtedness, and they are entitled to go behind the allowance and show that it was not a proper charge upon the estate.

Claims for disbursements and expenses made by the administrator in the management of the estate are conclusive only after having been allowed by the probate court, upon settlement of the account after notice to the parties interested. The parties interested are entitled to be heard upon the propriety of such expenditures; otherwise the administrator might, through judgments collusively permitted in other courts, allow the whole to be squandered. Deck's Est. v. Gherke, 6 Cal. 666; Gurnee v. Maloney, 38 Cal.

1. Magraw v. McGlynn, 26 Cal. 420. A decree of the probate court ascertaining and allowing a claim, and ordering the executor to "pay the same according to law," is not a technical judgment which the court has no authority to render, but a mere ascertainment of the validity and amount of the claim, which remains to be satisfied "according to law." Little v. Sinnett, 7 Iowa, 324.

A decree of the surrogate court establishing the indebtedness of an estate is binding upon the administrators; and is conclusive both as to indebtedness and the obligation of the administrators to make the payment as decreed; and their neglect to do so will forfeit their bond, and their sureties will be liable on the bond for the amount of such indebt-Thayer v. Clark, 48 Barb. (N. Y.) 243.

A surrogate has no power to decide upon the validity and amount of a claim against an estate upon the petition of a creditor, praying for a decree directing its payment, when such claim is disputed by the executor, and the right of the surrogate to make such determination is Magee v. Vedder, 6 Barb. (N. denied. Y.) 352.

Where an appeal is taken to the circuit court from the action of commissioners appointed to audit claims against an estate, the circuit court should not render judgment in the common-law form, but simply allow or disallow the claim. La Roe v. Freeland, 8 Mich. 531.

The evidence to sustain a claim need not appear of record, and the judgment thereon cannot be collaterally attacked on the ground that it is unsupported by

evidence. Little v. Sinnett, 7 Iowa, 324.

2. Kennerly v. Shepley, 15 Mo. 648;
s. c., 57 Am. Dec. 218; Stone v. Wood,
16 Ill. 177. See also Prewitt v. Jewett,

9 Ill. 735. 3. Weathered v. Smith, 60 Am. Dec.

186; s. c., 9 Tex. 622.

Hooley v. Watkins, 5 Ark. 705.
 Finley v. Carothers, 9 Tex. 517;

s. c., 60 Am. Dec. 179.

In California allowance of a claim by an executor and the probate judge is not a judgment of a court so as to bear interest until the claim has passed the accounting, and settlement and payment ordered. The true test concerning the payment of interest after allowance is whether the payment of interest could be enforced against the decedent were he alive. Selby's Est., Myrick's Probate (Cal.), 125.

(Cal.), 125.
6. State v. Ramsey Co. Pro. Ct., 25
Minn. 25; Stone v. Wood, 16 Ill. 177;
Neill v. Hodge, 5 Tex. 487; Eccles v.
Daniels, 16 Tex. 136.
7. Stone v. Wood, 16 Ill. 177; Estate
of Schroeder, 46 Cal. 319; Beckett v.
Selover, 7 Cal. 229; Hopkins v. McCann,
19 Ill. 113; Moline Water Power and
Manufacturing Co. v. Webster, 26 Ill.
233; Mason v. Bair, 33 Ill. 206; People
v. Lott, 36 Ill. 451; Rosenthal v. Renick,
44 Ill. 207; Cutright v. Stanford. 81 Ill. 44 Ill. 207; Cutright v. Stanford, 81 Ill.

The allowance and approval by the probate court is conclusive upon the parties until set aside by a court of competent jurisdiction. The payment by an administrator of a claim against the

243: Higgins v. Curtiss, 82 III, 28; Marshall v. Rose, 86 Ill. 374; State v. Reigart, I Gill (Md.), I; s. c., 39 Am. Dec. gart, 1 Gill (w.d.), 1; s. c., 39 Am. Dec. 328; Neill v. Hodge, 5 Tex. 485. Moore v. Hillebrant. 14 Tex. 312; Pitner v. Flanagan, 17 Tex. 7.

On this ground judgment of allowance and approval has been held not to

hind the heir or devisee in proceedings to sell real estate for the payment of debis. Beckett v. Selover, 7 Cal. 228; s. c., 65 Am. Dec. 237; Est. of Hidden, 23 Cal. 363; Est. of Schroeder. 46 Cal. 317; Est. of Crosby, 55 Cal. 582; State v. Wood, 16 Ill. 177; Marshall v. Rose, 86 Ill. 376.

In West Virginia and Mississippi the courts go still further, however, towards holding the judgment inconclusive as to heirs. In the former State it is held that a judgment against the personal representative is not even prima facie evidence against the heir or devisee, because there is no privity between the personal representative and the parties to whom the real estate has descended or been devised. Laidley v. Kline, 8 W. Va. 218.

In the latter it is held that the allowance by the probate court of a claim of an executor or administrator, who is a creditor of the estate, upon ex parte application and proof, is not binding and conclusive upon the heirs or distributees. Sumrall v. Sumrall, 24 Miss, 258; Haralson v. White, 38 Miss. 178; Gray v.

Harris, 43 Miss. 421. "The allowance of a claim," it is said, "on ex parte evidence serves no other purposes than to afford a protection to the estate against false and fraudulent demands, and to give immunities to the administrator for paying them, unless he has reason to believe that they are unfounded. But such allowance does not import the verities, sanction, or conclusiveness of a judgment." State v.

Bowen, 45 Miss. 350.

And in *Indiana* it is held that this

statute nowhere provides that the mere admission or allowance of a claim against a decedent's estate by the administrator or executor on the appearance docket of the court shall have the force and effect of a judgment in any particular. Fiscus v. Robbins, 60 Ind. particular.

In Illinois a distinction seems to be drawn which doubtless runs through the

decisions of other States. A judgment there, duly obtained against the administrator, binds the personal estate in the absence of fraud, because the administrator is the sole representative of the personal estate of the decedent. cases the courts will not compel persons holding claims against estates to litigate them, first with the administrator and then with the heirs, upon the same points which might have been investigated in the first case. Mason v. Bair, 33 Ill.

206; Gold v. Bailey, 44 Ill. 493.

Allowance by probate court of another State of claim of ancillary administrator there, resident of this State, which allowance was greater than the assets in his hands, is not conclusive upon the heirs Ela v. Edwards, 90 Am. Dec. 174; s. c., 13 Allen (Mass.), 48; Clark v. Blackington, 110 Mass. 369-373

In Arkansas it is held that the allowance and classification of a claim in the probate court has the force and effect of a judgment, and though erroneous, is conclusive as to all persons until reversed by a higher tribunal or set aside in a direct proceeding for that purpose. Error in the allowance is no defence to an application for the sale of land for payment of the claim. Carter v. Engles, 35

Ark. 205
A judgment against the administrator of a succession recognizing the claim of a creditor, and ordering it to be placed on a tableau of distribution, is binding upon the heirs, unless obtained through Sturges v. Sheriff, 14 fraud or error.

La. Ann. 231.1. The mode of procedure to set aside an allowance differs in the several States.

In Texas an original proceeding commenced for that purpose in the district court is necessary. Heffner v. Brander, 23 Tex. 63; Modely v. Gray, 23 Tex. 496. See also Giddings v. Steele, 28 Tex. 756; Smith v. Downes, 40 Tex. 57; Swan v. House, 50 Tex. 653; Cone v. Crum, 52 Tex. 348.

As to procedure in Tennessee and California, see Campbell v. Strong, Hempst. (Tenn.) 265: Beckett v. Selover, 7 Cal. 240; New Const. of California, art. 6, sec. 5.

In Arkansas appeals are allowed, but if error is found the appellate court tries the case de novo. Smith v. Clayton, 25 Ark, 331. See Tucker v. Yell, 25 Ark.

420.

estate which has been allowed and approved is valid without a previous order from the probate court, if such payment is in itself proper and such as the court would decree.1

A duly verified claim against an estate must be admitted or rejected by the administrator within a reasonable time.

An administrator's fraudulent procurement of allowance of a pretended claim cannot be assailed by an exception to his report. Ashton v. Miles, 49 Iowa,

In Missouri, while the allowance and approval of a claim has the effect of a judgment, and is conclusive between the parties interested and concerned therein at law, still an interested party may seek relief in equity against claims fraudulently allowed. Jones v. Brinker, 20 Mo. 88; State v. Roland, 23 Mo. 95; Whittelsey v. Dorsett, 23 Mo. 236; Lewis

v. Williams, 54 Mo. 200. See Miller v. Major, 67 Mo. 247.

In Wisconsin an appeal was allowed from the judgment allowing and approving a claim after the expiration of the time allowed by law in which to appeal, where it was alleged that the claim has no foundation in fact, that it had been allowed in consequence of the fraudulent collusion of the administrator, and that petitioners had acquired no knowledge of the facts, until after the expiration of the time for taking the appeal. Grover v. Hield, 22 Wis. 200. See Moercheu v. Stoll, 48 Wis. 307. In *Indiana* a legatee and the heirs of a

testator may sustain an action against the executor and a creditor of the estate for the fraudulent allowance and payment of the creditor's claim by executor, to have the allowance set aside, and to permit the legatee and v. Ayres, 24 Ind. 92; Lancaster v. Gould, 46 Ind. 397.

An administrator may appeal from an order of the district court approving a claim which he has allowed, and which he wishes to controvert for reasons arising subsequent to such allowance.

v. Stroud, 41 Tex. 367.

In *Illinois* equity will grant relief against judgments of the probate court obtained by fraud or accident in cases where the courts of law cannot do so. Thus a claim allowed against an estate, without notice to the administrator or executor, may be set aside. Propst v. Meadows, 13 Ill. 157.

And where a claim is allowed against an estate, which is in reality paid, but of which fact the administrator is ignorant at the time, he may on discovering the facts have the same set aside in equity. administrator may contest the matter the same as an heir on application to sell property. Higgins v. Curtiss, 82 Compare People v. Lott, 36 Ill. 447; Mason v. Baer, 33 Ill. 206.

To set aside judgment of probate court approving claim barred by Statute of Limitations, before its allowance and approval, independent proceedings must be instituted within a reasonable time in the district court. Moore v. Hillebrant. 65 Am. Dec. 118; s. c., 14 Tex. 312; Giddings v. Steele, 28 Tex. 756; Cone v. Crum, 52 Tex. 348.

It devolves upon the administrator to . show beyond question that the claim has been barred. The mere fact that the claim on its face appears to be barred will not be sufficient. Eccles v. Daniels. 16 Tex. 136; Moseley v. Gray, 23 Tex. 496; Heffner v. Brander, 23 Tex. 631.

Equity will not, however, where a barred note has been allowed and approved by mistake, and where the creditor at the time of presentation held a valid subsequent promise for the same, relieve the administrator against his mistake, or defeat a legal and just claim of the creditor, or punish him for his ignor-ance. It will leave the parties where they have put themselves, as they cannot be placed in the same situation they were in when the mistake occurred. Jones v. Underwood, 11 Tex, 116.

1. Lockhart v. White, 18 Tex. 102.

When an administrator is ordered by the probate court to pay the amount in his hands to his intestate's creditors, he becomes personally liable for such payment, and if he dies without discharging this duty, the creditor's claim against his estate is absolute, and should be prosecuted before the commissioners thereof. Sarjent v. Kimball, 37 Vt. 320.

Decree of payment converts the inchoate judgment of allowance into a final judgment. Magraw v. McGlynn, 26 Cal.

A probate court in Arkansas has no authority to order the administrator to pay demands on its own motion. must distribute by its own order only the money (not uncollected claims) found upon settlement to be in the administrator's hands. Quinlan v. Fitzpatrick, 25 Ark. 471.

absence of any act on his part indicating his rejection, it will be presumed to have been admitted.1

When a claim is disallowed by commissioners, the only remedy

is by appeal; a bill in chancery is not a proper proceeding.2

Claims disputed or doubted must be established by a court of common law, or in a suit commenced by ordinary process, before they can be regarded as debts against the estate so as to entitle them to the cognizance of the surrogate.3

1. Underhill v. Newburger, 4 Redf. (N. Y.) 499. Compare Hoyt v. Bennett,

58 Barb. (N. Y.) 529.

Where a claim is presented to an administrator within the time required by law, and a waiver of notice indorsed thereon, it is tantamount to a rejection and reference of it to the probate court. Randolph v. Watt, 29 Ark. 238. Under Conn. Gen. St. tit. 18, ch. 11;

§ 6, the disallowance and notice of a claim by an administrator must be in terms so unequivocal that the creditor may know with certainty when his claim, if not sued, will be barred. Bradley v. Vail, 48 Conn. 375.

Where an administrator fails to give any reason for the rejection of a claim against the estate presented to him so as to put the owner or agent upon notice of his objection, he cannot be allowed to plead or urge any on the trial. But this rule does not preclude a defence to the merits. Keesee v. Beekwith, 32 Tex. 731.

2. Patton v. Bostwick, 39 Mich. 218.

A claim for money due upon a decedent's written agreement can properly be submitted to commissioners under the Michigan statute. Patton v. Bostwick,

39 Mich. 218.

Plaintiffs presented to the commissioners appointed to adjust demands against an estate a claim for money loaned to the decedent, and also one for labor done for him; and the commissioners allowed a sum for money loaned, but disallowed the claim for labor; and thereupon the administrator appealed from the former allowance, but plaintiff did not appeal from the disallowance of his claim for labor. that the only question which the circuit court could adjudicate was the amount due the plaintiff for money loaned, although testimony as to both claims was taken before a referee without objection. Merchen v. Stoll, 48 Wis. 307.

Hence in an action against an executor on a claim against the testator brought in the circuit court, the complaint must allege that no time has been fixed for presenting such claims, or that no notice thereof has been given, or it will be de-

murrable for lack of jurisdiction. Nierchen

v. Stoll, 48 Wis. 307.

The allowance by an administrator and the approval by the court of a sum smaller than that claimed will not prevent the claimant from demanding a trial as to that part of the claim not allowed. Smith v. McFadden, 56 Iowa, 482.

When commissioners, appointed by a probate court to adjust claims against the estate of a deceased person, examine and pass upon a claim against the estate. single in its character, but comprising several items, and by their adjudication and report allow one portion thereof and disallow another portion, the appeal under Gen. Stat. ch. 53, § 20, must not be restricted to a portion of the decision on such a claim. Capehart v. Logan, 20 Minn. 442.

New York Laws of 1870, ch. 359, § 6, give no authority to surrogates to try the claims of creditors which are disputed by an executor. That section refers to accounts of executors or administrators. rendered to the surrogate, and was not intended to deprive them of the right of trial of claims disputed by them by jury. Cooper v. Fetter, 6 Lans. (N. Y.) 485.

3. Wilson v. Baptist Soc. of New York, 10 Barb. (N. Y.) 308. In this case decision was under N. Y. Rev. St. §§ 36-

and 37, tit. 3, ch. 6, pt. 2.

In Texas the probate court cannot take cognizance of the case. Price v. McIver, 25 Tex. 769; s. c., 78 Am. Dec. 588.

The executor rejected a claim against. the estate on which he was administering, and was sued by the claimant. Held, that. under § 140 of the Probate Act such claimant was only entitled to a judgment which first ascertained the amount due, and adjudged the same to be a valid claim against the estate, and then provided that the same should be paid by the defendant in due course of administration, and upon which no execution could be awarded. Rice v. Inskeep, 34 Cal. 224.
Where one holding a claim against an

intestate estate presents it to the administrator, obtains his approval and allowance, files it in the office of the clerk of the probate court, and the judge re2. Order of Payment.—When a statute prescribes the order in which a decedent's debts shall be paid, if the personal representative of the estate departs from that order without special authority from the probate court the claims are paid at his own risk. 1 In

fuses to class or allow it, the remedy is not by mandamus to compel him, but by appeal to the circuit court. Cheatham v. Cheatham, 6 Ark. 437. See analogous case, Levenson v. Walket, 3 Tex. 93.

1. Schoeneich v. Reed, 8 Mo. App.

:356; Tompkins v. Weeks, 26 Cal. 50; Rice Hunt, 7 Lea (Tenn.), 33; Swift v. Miles, 2 Rich. Eq. (S. Car.) 147; Bass v. Heard, 33 Miss. 131; Miller v. Janney, 15 Mo. 265; Evans v. Taylor, 60 Tex. 422.

In California and Indiana it is held that the probate court cannot authorize the administrator to depend upon the pre-scribed order. Tompkins v. Weeks, 26 Cal. 50; Jenkins v. Jenkins, 63 Ind. 120. Contra, in South Carolina, Hall v. Hall, 2 McCord Ch. (S. Car.) 269.

Where the statute itself fixes the class in which a claim belongs, it is not error for a judgment of the court to fail to designate such class. McCall v. Lee (Ill.),

11 N. E. Rep. 522.

An administrator who, before ascertaining that the estate is insolvent, has paid some debts, other creditors claiming priorities and liens, and a ft. fa. having been levied on the realty, may maintain a bill to marshal the assets, enjoin suits, and obtain directions, etc. Johnson v. Flanders, 65 Ga. 691. As to irregular payment, see Rhea's Succession, 33 La. Ann. 369.

The statute of South Carolina prescribing the order in which an executor shall pay the claims against the estate, is directed to him only, and he may pay the lower grade first if he pleases; but if there is a deficiency, he will be liable personally to the extent of the assets to the preferred creditors. Hager v. Daw-

son, 3 Rich. (S. Car.) 328,

If the administrator disregards the order in which the law requires him to conduct the estate, and pays over to the distributee what is esteemed his portion before the debts are paid, he is not thereby discharged from accounting for the property thus distributed, but is liable to be charged with the same, to the amount at best of outstanding claims against the deceased yet remaining unpaid. Feagan v. Kendall, 43 Ala, 628.

Where a husband, on being divorced from his wife; agreed to pay her \$500 per year as alimony, on the understanding that he should be entitled to certain real

estate of hers, and, after his death, his executors, supposing the rents of such real property to belong to the estate, pay forty per cent dividend on claims against the estate, which were in the seventh class in the order of their priority, and in which class alimony is ranked, which dividend they could not have paid without relying on the said rents, and accordingly paid the wife \$1125 as alimony, and the court afterwards decides that the said real property belongs to the wife; held, that the alimony paid should be refunded. and charged up to the wife in accounting for the rents and profits of said real prop-Pinneo v. Goodspeed (Ill.), 12 N. E. Rep. 196.

An administrator under bond will be liable on his bond for any injury to the beneficiaries resulting from his failure to resist unjust or unfounded claims against the estate he represents. Smith v. Cuv-

ler (Ga.), 3 S. E. Rep. 406.

A creditor of an intestate cannot resiste payment of a note given to the adminis-trator for goods of the estate by setting off his demands either in law or equity, where the assets are exhausted by claims having precedence in law. Willis v. Logan, 2 T. B. Mon. (Ky.) 141.

Where a person leases land from an executor, he cannot purchase judgments against the testator and set them up against the rent, unless the executor acknowledges a sufficiency of assets to pay all the debts of the estate. But the tenant may maintain a bill in such case for the discovery of assets by the executor. White v. Bannister, I Wash. (Va.) 166.

Notice. - If the administrator of a surety in a collector's bond pay away the assets of his intestate before notice of the claim of the United States, such payment is not a devastavit. United States v. Ricketts, 2 Cranch C. Ct. 553.

An executor must, at his peril, take notice of a judgment against his testator in whatever court it may have been rendered; and if he exhaust the assets by paying debts of inferior dignities, he must satisfy the judgment de bonis propriis. Nimmo v. Commonwealth, 4 Hen. & M. (Va.) 56.

An administrator not having notice of specialty debt may pay or confess judgment to a simple contract creditor. May v. Bentley, 4 Call. (Va.) 528.

If, however, the executor has notice of

the administration of an estate debts are always to be paid according to their respective dignity, as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers, not by that of the country where the debt is contracted or the decedent domiciled.¹

the existence of the specialty debt, he will not be justified in paying simple contract debts, though such notice was not by institution of suit. Webster v. Ham-

mond, 3 Har. & M. (Md.) 131.

Giving Preference.—At common law, among creditors of equal degree the executor may pay one in preference to another. Littleton v. Cross, 3 B. & C. (Eng.) 322; Wilson v. Wilson, I Cranch C. Ct. 255.

An administrator may give at law a preference to a creditor by confessing a judgment, and a court of equity will not interfere by injunction to compel him to distribute the assets equally. Wilson v.

Wilson, I Cranch C. Ct. 255.

In Kentucky, an executor cannot, after he is sued by one specialty creditor, pay another who has not sued in preference to the former. He may, however, after a suit by one specialty creditor of which he has notice, confess a judgment in favor of another, and may legally first satisfy the judgment so confessed. Nor does the fact that he was the testator's surety in the debt which he thus pays after the service of the process, before judgment by the suing creditor, give him any advantage over such creditor. Gregg v. Bonde, 9 Dana (Ky.), 343.

There can be no preference among debts of the same class in Alabama. Civ.

Code 1886, § 2080.

In Pennsylvania, executors or administrators cannot vary the rights of creditors in the assets of the decedent. Prevost v. Nicholls, 4 Yeates (Pa.), 479. For fuller discussion, see EXECUTORS AND ADMINISTRATORS. See also 2 Wms. on

Executors (5th Am. Ed.), 930°.

Where a bill was filed against the representative of a fraudulent executor to subject his estate to the payment of a judgment at law, held, that such representative had no right, after the bill was filed, to pay other debts due by such executor of no higher dignity than that sought to be enforced in this court. Barnawell v. Smith, 5 Jones Eq. (N. Car.) 768

New service of process upon an executor in a suit for the demand of the plaintiff only does not prevent the executor from paying other demands of equal degree. But the rule is different where a bill in equity is filed to have an account

of debts and assets and for all the creditors to come in under the decree. Allison v. Davidson, I Dev. & B. Eq. (N. Car.)

An executor who was also a legatee under the will, obtained an injunction against certain of his creditors, prohibiting them from levying upon his interest in the estate until there had been a decree establishing their priorities. *Held*, that he had waived and renounced all legal right to prefer some creditors to others in the liquidation of their claims against him. Fouche v. Harison (Ga.), 3 S. E. Rep.

330.

1. Union Bank of Georgetown v. Smith, 4 Cranch C. Ct. 21. "Every " Every civilized nation is bound to afford to all persons within its jurisdicion the means of obtaining justice; but whoever applies to the tribunals for justice is bound to receive it according to the forms and subject to the regulations of the country to whose forum he resorts. bound by the comity if not by the law of nations to afford to foreigners as well as to our own citizens the means of obtaining payment of the debts due to them; and if the friends of a foreigner are found here, they may, by the municipal law of the country, be made liable for the payment of such debts; but those who resort to the funds, whether they be foreigners. or citizens, must be content to take their remedy in such manner and to such extent as the municipal law will permit. It is not for a foreigner to say that if the funds were in his own country his debt. would have a preference, unless indeed a lien shall have attached before the funds shall have been subjected to the municipal law of this country, in which case he might perhaps be considered as owner to the extent of such lien. with regard to the distribution of the surplus, the sovereign of the country in which a foreigner's goods are found has no concern. He has no interest but to protect it as he is bound to protect all the property of strangers within his jurisdiction. He cannot consistently with the law of nations detain it from the country to which it belongs. Hog v. Lashley, 6 Br. Parl. Cas. 580, 581. But if the subjects of that country come to his tribunals for aid to assert their rights, he is bound by the comity of friendly

At common law it was the duty of the executor or administrator to pay (1) expenses of the funeral and administration; (2) debts due the crown by record or specialty; (3) debts of record, including judgments in courts of record, recognizances, and statutes; (4) debts by specialty; and (5) simple contract debts.1

By the common law one judgment was not entitled to priority over another judgment if both were docketed at the time of the death of the debtor, unless one judgment creditor had obtained a

preference by some proceeding subsequent to the death.2

nations to grant it; and in granting it his tribunals will decide upon those rights according to the laws of the country to which the property belongs, and under whose laws they derive their title. Hence results the difference between the rule for the order of payment of debts, which must be according to the lex loci rei sita; and the rule for the order of distribution of the surplus, which must be according to the lex loci domicilii." Cranch, C. J., at p. 28, citing Hog v. Lashley, 6 Br. Parl. Cas. 580, 581.

On a decedent's death assets are to be collected by the authority and administered according to the law of the country where they happen to be at the time of his decease. Miller's Est., 24 Am. Dec.

345; s. c., 3 Rawle (Pa.), 312.

In the payment of debts, resident creditors have no preference over non-residents, even if there are no more domestic assets than will pay the residents, and there are assets in the State where the non-residents live. Findley v. Gidney, 75 N. Car. 395.
1. 2 Wms. on Exrs. (5th Am. Ed.) 890,

9-29.

The proceeds of land sold under a provision of a will to pay debts, as also the proceeds arising from the sale of an equitable title to land, are equitable assets, and will be distributed pari passu among all the creditors by a court of Dixon v. Ramsay, I Cranch C. equity. Ct. 496; Speed v. Nelson, 8 B. Mon. (Ky.) 499; Law v. Law, 3 Cranch C. Ct. 324; Buckhouse v. Patton, 5 Pet. 159; Clondas v. Adams, 4 Dana (Ky.), 603.

In those States where the common-law order of payment is abolished, and all creditors paid pari passu, the distinction between legal and equitable assets has no significance. Sperry's Est., 1 Ashm.

(Pa.) 347.

Debts created by a testator in his lifetime are entitled to be first satisfied out of the assets of his estate, in preference to debts created after his death in carrying on business under the provisions of his will, even where the will directs that

all the property the testator may die possessed of shall be responsible for the debts thus incurred. Morrow v. Morrow,

2 Tenn. Ch. 549.

On the same principle a claim arising subsequently to the death of a testator. for services rendered to his widow, cannot be made a debt against his estate, to the payment of which the interest of a residuary devisee can be subjected or postponed. Flanders v. Greely (N. H.). 10 Atl. Rep. 686.

Judgments in courts of record, whether obtained compulsorily against the testator or intestate or confessed by him, are in a precedent degree not only to all debts by specialty, but to recognizances and statutes (though the latter are also debts of record), and must be preferred by the executor or administrator whether prior in point of time or not. 2 Wms. on Exrs. (5th Am. Ed.) 899°.

In Louisiana, where a judgment homologating a tableau made and filed by an administrator shows that the assets in his hands are not sufficient to pay the privileges and mortgages against the estate, payment of the ordinary claims cannot be enforced. Money v. Cosse,

20 La. Ann. 418.

Where an executor by leave of court sells lands to pay debts, judgment liens on the land take precedence over preferred claims against the estate-as for funeral expenses, etc. Hecker's Est., 14 Phila. (Pa.) 659.

A vendor's lien for unpaid purchasemoney is not a preferred claim against a decedent's estate. Kimmell v. Burns,

84 Ind. 370.

2. Ainslie v. Radcliffe, 7 Paige (N. Y.),

At common law, of several judgment creditors, he who first sued out execution was preferred; and before any execution sued it was at the election of the executor or administrator to pay whom he would . first. Even if each brought a scire facias upon his judgment, the executor or administrator might confess whichever action he chose, although the scire facias

A decree in a court of equity obtained against the decedent is. in respect to the course of administering assets, equivalent to a judgment at law against him, and stands in the same order of payment. A judgment against the executor or administrator himself is not to be considered within the same class as those which are recovered against the deceased, and has no priorities, except with respect to debts of equal degree with that upon which it was obtained.2 A judgment quod computet in an action of account is of a nature too incomplete to be privileged like other judgments:3

was brought by the one before the other. 2 Wms, on Exrs. (5th Am. Ed.) 904

Under the Rev. Statutes of New York. judgments docketed and decrees enrolled are entitled to preference in payment out of the estate of a deceased debtor, according to the times of docketing or enrolment, without reference to any lien of such judgments or decrees upon real on such judgments or decrees upon real estate. Ainslie v. Radcliffe, 7 Paige (N. Y.), 439. See Stevenson v. Weisser, I Bradf. (N. Y.) 343; Beames v. Weisser, 2 Bradf. (N. Y.) 212; Trust v. Harned, 4 Bradf. (N. Y.) 213.

In North Carolina, judgments against a decedent take precedence according to the date of docketing. Galloway v. Bradfield, 86 N. Car. 163; Manny v. Holmes,

87 N. Car. 428.

1, 2 Wms. on Exrs. (5th Am. Ed.) 904; Astley v. Powis, I Ves. Sen. 496; 3 P. Wms. 401, note to Robinson v. Tonge.

The common decree in a foreclosure suit gives no priority; for it is not a decree for the payment of money, but only in bar of the equity of redemption. 2 Wms. on Exrs. (5th Am. Ed.) 905; Wilson v. Lady Dunsany, 18 Beav. (Eng.) 293, 299.

An executor or administrator, if sued at law for a debt of inferior degree, cannot plead or give in evidence a decree of Stasby v. Powell, I a court of equity.

Freem. (Eng.) 334.

But he may relieve himself by a bill in equity, and have an injunction. Stasby v. Powell, I Freem. (Eng.) 334; Harding

v. Edge. 1 Vern. (Eng.) 143.

2. 2 Wms. on Exrs. (5th Am. Ed.) 901. Among such his debt is allowed precedence, because the executor ought to pay that creditor first who uses the first diligence. Ashley v. Pocock, 3 Atk. (Eng.) 308; Dollard v. Johnson, 3 De G. & Sm. (Eng.) 301.

In most of the States a judgment against an administrator only liquidates the amount of the claim, but gives no preference, even among debts of the same degree. St. John's Est., 1 Tuck. (N. Y. Surr.) 126; Est. of Fox. 92 N. Y. 93; Wells, Fargo & Co. v. Robinson, 13 Cal. 143.

Upon the same principle a judgment creditor of an insolvent intestate gains no priority over other judgment creditors by taking out against him a fi. fa. which relates to a day prior to his death. Leiper v. Levis, 15 S. & R. (Pa.) 108.

Judgment for deficiency obtained against executors under Wisconsin Rev. St., § 3846, in foreclosure proceedings begun against the decedent, stands upon the same footing as any other judgment recovered in an action pending against the decedent at the time of his death. and does not constitute a superior and paramount lien upon the decedent's estate over other claims. Reinig v. Hartman (Wis.), 32 N. W. Rep. 639.

As between the judgment creditors of an intestate, who obtained their judgments after the intestate's death, in a contest for money in the hands of the sheriff, raised by the sale of the intestate's property, the oldest judgment is entitled to be first paid, in the absence of any evidence of the insolvency of the intestate's estate, or any reason shown why the money should not be paid to the oldest judgment as between the contesting parties before the court. Dupree v. Adkins, 43 Ga. 475.

Where, after death of one against whom a verdict has been rendered, a money judgment has been rendered, it is within 2 N. Y. Rev. St. 87, § 27, subd. 3, "docketed against the deceased," and entitled to priority of payment; and this without entry nunc pro tunc, as if before death. Re Dunn, 5 Redf. (N. Y.) 27. See also Mills v. Jones, 2 Rich. (S. Car.)

393.
3. Searle v. Lane, 2 Freem. (Eng.) 103; 2 Wms. on Exrs. (5th Am. Ed.)

An interlocutory judgment not ranking as a judgment, but merely as an authority to have the plaintiff's damages assessed, it follows that the debt or demand recovered by it must be treated in the rank which it occupies as a cause of action not yet in judgment. Thomas v. McElwee's Exr., 3 Strobh. L. (S. Car.) 131.

but a judgment on a scire facias, quod executionem habeat, is equal to a judgment quod recuperet. A decree which does not authorize the issuing of an execution for its enforcement is not entitled to rank as a final judgment in the administration of the estate. Payment of judgment quando upon a simple contract debt after notice of an outstanding bond does not protect the executor against the latter. 3

A foreign judgment at common law ranks merely as a debt by simple contract. Judgments recovered after a fraudulent assign-

1. 2 Wms. on Exrs. (5th Am. Ed.) 900; Wentw. Off. Ex. (14th Ed.) 272.

Under the Georgia statute, in the mar-

shalling of assets a dormant judgment ranks with bonds and other obligations.

Williams v. Price, 21 Ga. 507.

Judgments which were legal, valid, and subsisting at the time of the judgment debtor's death are, under the laws of Georgia, to be paid according to their priority of lien at that time; and if such judgments should afterwards become dormant, and be revived before the assets of the estate shall have been distributed, such revived judgments will relate back, as to the order of payment, to the exact position which such judgments occupied at the death of the debtor, and are to be paid according to the priority of lien, as the same existed at that time. King v. Morris, 40 Ga. 63.

2. Ex parte Farrars, 13 S. Car. 254; 2 Wms. on Exrs. (5th Am. Ed.) 905.

If a decree of a court of equity be not conclusive of the matters in question, as if it be merely to account, and do not ascertain the sum to be paid, it is analogous to a judgment quod computet at law, and is no complete judgment until the account be stated. 2 Wms. on Exrs. (5th Am. Ed.) 905.

Hence it has been holden that pending a bill in equity, and after such decree against his testator, an executor may pay any other debt of a higher or equal rank, in case the assets be legal, although he has no power to do so as against a final decree. Smith v. Eyles, 2 Atk.

(Eng.) 285.

In Ewing v. Taylor, 70 Mo. 394, it was said that the allowance and classification of a judgment against the estate of a decedent, rendered in his lifetime, does not depend on the fact that no execution can issue on it, or that it is not a lien on his real estate; it is not too old, therefore, until the twenty years have elapsed since its rendition, when, under Missouri Rev. St. § 3251, the presumption of payment may be indulged.

3. Roundtree v. Sawyer, 4 Dev. L. (N.

Car.) 44.

Under the laws of North Carolina, the creditor who first proceeds upon his judgment quando, and fixes the administrator with assets, must be first paid, without any regard to priority of judgments. McLean v. Leach, 68 N. Car. 95; Dancy v. Pope. 68 N. Car. 147.

Where many judgments were rendered "to be discharged when assets shall come into the hands of the administraand a large amount of assets came to the hands of the administrators, it was held that these judgments should retain the same rank which would belong to the particular instruments upon which they were founded. "Every creditor is supposed to be entitled to a judgment where there are assets, and it is not reasonable that such a judgment should disturb the order in which debts are payable by law, or should have any other effect than to establish the amount, and to give priority to other debts of equal dignity on which either no judgment or a subsequent judgment may have been Liddesdale v. Robinson, 159, founded. sec. 164.

If an executor or administrator have in his hands assets sufficient to pay a judgment when rendered, ascertaining the amount of a demand against the estate, it is his duty to do so without awaiting the issue of an execution; and if he fail to do so, the creditor may proceed by an action on his bond without further proceedings upon the judgment. Emmerson v. Herriford, 8 Bush (Ky.), 220.

On an application made by the owner of a judgment against an intestate, the surrogate has authority to order the administrator to pay the judgment where its validity is not disputed, but only its ownership and the amount due thereon.

McNuity v. Hurd. 18 N. Y. Sup. Ct. 330.

McNulty v. Hurd, 18 N. Y. Sup. Ct. 339.
4. 2 Wms. on Exrs. (5th Am. Ed.)
900; Dupleix v. De Roven, 2 Vern. 540;
Walker v. Witter, Dougl. 1. See also
Harris v. Saunders, 4 B. & C. 411; Ferguson v. Mahoh, 11 A. & E. 179; Wilson
v. Lady Dunsany, 18 Beav. 293.

A State has power to give a preference

ment of property by the debtor and a sale by the assignee, but before proceeding to set aside the assignment, do not affect the property, and will be paid *pro rata* with simple contract debts. A judgment of a justice of the peace is of superior dignity to a bond or note.2 A judgment rendered against an estate and not authenticated and presented for allowance, as required by the local statute, is postponed in favor of a judgment rendered in a suit pending at the time of the death of the intestate, and prosecuted to judgment against the administrator.3

to its own judgments over the judgments of other States in settling the estates of deceased persons. Harness v. Green. 20 Mo. 316. Compare Gainey v. Sex-20 Mo. 310. Compare Gamey v. Sexton, 29 Mo. 449; Brown v. Public Admr., 2 Bradf. (N. Y.) 103.

1. Le Prince v. Guillemot, I Rich. (S. C.) 187.

2. But not being of record, the administrator is not affected with constructive notice of its existence. State v. Johnson, 7 Ired. L. (N. Car.) 231.

Its dignity is said not to be affected by the fact that it is dormant. State v. Johnson, 7 Ired. L. (N. Car.) 231. But see Bettinger v. Ridgway, 4 Cranch C.

Ct. 340.

3. Neither the administrator nor probate court has power to settle a claim not authenticated, presented, allowed, and approved, according to statute; an attempt to do so would not be valid, and no title would pass by an order or deed made to transfer land to the holder of such claim in satisfaction thereof. verse v. Sorley, 39 Lex. 515.

Where a judgment against the estate of a deceased person is presented in the probate court for allowance, it is the duty of that court to classify it among the debts due from the estate. Wood v.

Ellis, 12 Mo. 616.

By the laws of Texas a judgment against the estate of the deceased should be settled concurrently with other debts of the deceased by the probate court, and execution should not issue from the district court. Bason v. Hughart, 2 Tex.

Under the Missouri administration act (Rev. Code 1855, 151), judgment liens upon the real estate of an insolvent decedent are to be paid out of the proceeds of such real estate in the order of their priority, without reference to the order of time in which they were exhibited to the probate court for allowance. Kerr v. Wimer, 40 Mo. 544.

Under the Arkansas statute, all judgments and decrees obtained against the deceased during his lifetime, and which

were capable of being liens on real property of the deceased, if he had any, whether liens were actually secured by them or not, belong to the third class of claims against the estate. Tucker v. Yell, 25 Årk. 420.

But such judgment loses its priority if not presented to the administrator within one year. Keith v. Parks, 31 Ark. 664.

Judgments against a decedent have preference, under the statutes of Georgia. next after debts due the public. Davis

v. Smith, 48 Am. Dec. 279.

Upon the foreclosure of a mortgage made by one since deceased, a judgment for deficiency against his executors is not a preferred claim under 3 N. Y. Rev. St. (6th Ed.) 95, § 37, entitling judgments against the deceased to a preference in the administration of assets. Execution against the deceased cannot issue upon such a judgment. Redf. (N. Y.) 236. James v. Beesly, 4

A statute prescribing the classification of debts of deceased persons included in the fourth class "all judgments rendered against the deceased in his life-time;" in the fifth class "all demands without regard to quality, exhibited within one year;" and in the sixth class "all demands thus exhibited after the end of one year." Held, that the term "all demands," spoken of as belonging to the fith class, meant "all demands except judgments;" and the same term when it referred to those embraced in the sixth class meant "all demands in-cluding judgments." State Bank v. Tutt, 44 Mo. 366.

Provisions of the laws of Virginia, regulating the priority of judgments against deceased persons over simple contract debts, and the application of the doctrine of marshalling to such cases, is explained. Pugh v. Russell, 27 Gratt.

(Va.) 789.

The right of judgment debts to priority over other debts in cases depending on peculiar and unusual facts determined. Coates v. Muse, I Brock. 557; Davis v. Smith, 5 Ga. 274; Coltraine v.

To entitle a bond to preference to just debts due by simple contract it must be founded upon a valuable consideration. 1 Any claim against the estate of a decedent arising from his covenant is of the same rank as other specialties.² In marshalling the assets of an insolvent estate, bonds not due till after the decedent's death are to be ranked with those due at that time.3 A specialty debt due from the estate of an intestate is only a simple contract debt as to the administrator by whom the assets of the estate have been converted to his own use.4

Spurgin, 9 Ired. L. (N. C.) 52; Est. of Patterson, I Ashm. (Pa.) 336; Thompson v. Palmer, 2 Rich. Eq. (S. C.) 32.

The statute of Feb. 1834, which takes away the preference given by a former statute to judgments, in the order of paying the debts of persons deceased, is not unconstitutional in its application to judgments rendered between the dates of Deichman's App., 2 the two statutes. Whart. (Pa.) 395.

1. Stephens v. Harris, 6 Ired. Eq. (N. C.) 57.

But a bond made in consideration of love and affection by a testator during his life takes precedence of legacies given by will. Gordon v. Small, 53 Md. 550.

2. Daves v. Haywood, 2 Dev. & B.

Eq. (N. C.) 313.

Under the Pennsylvania act of April 19, 1797, an agreement by a testator under seal is the foundation of a specialty. Frazer v. Times, 1 Binn. (Pa.) 254.

An agreement by the purchaser of land, not under seal, to execute a bond for the price, cannot, upon his dving without executing the bond, be treated as a bond debt, to the prejudice of other creditors. Johnson v. Slawson, I Bailey Ch. (S. Car.) 463.

Claim on decedent's broken covenant of warranty ranks as a specialty debt in the order of payment out of his estate. Davis v. Smith, 48 Am. Dec. 279.
3. Hutchinson v. Bates, I Bailey

(S. Car.), 111.

4. Carow v. Mowatt, 2 Edw. (N. Y.) 57; Rolair v. Darby, 1 McCord Ch. (S. Car.) 472. Contra in the case of a deceased administrator. Rice v. Cannon, I Bailey Ch. (S. Car.) 172.

A surety on a single bill, who pays it off after the death of the principal, is entitled to rank as a specialty creditor of the estate of the principal. Ex parte Ware, 5 Rich. Eq. (S. C.) 473.

N. Car. Rev. Stat. ch. 113, § 4, which

confers on the claim of a surety for paying the debt for which he is surety the dignity in the administration of the debts of the principal which the debt if unpaid would have had, applies to any such claim, whether the debt be made before or after the death of the principal, Drake v. Coltraine, Bush, L. (N. Car.)

The mere recital in a deed of trust. that the cestuis que trust are indorsers for the maker of the deed, and that he is willing to indemnify them from all loss in consequence, by conveying property for that purpose, will not entitle them to rank as specialty creditors in the adminrestration of the assets of the maker. Powell v. White, II Leigh (Va.), 309.

The costs of a judgment on an admin-

istrator's bond against a surety or coadministrator who has been subrogated to the rights of the creditor cannot rank as a bond debt. Smith v. Smith, 2 Hill

Ch. (S. Car.) 112.

Debts by specialty created since the South Carolina act of March 9, 1874, providing for the order of the distribution of assets of decedents, have no priority over simple contract debts, but both classes are postponed to bonds and debts by specialty of an earlier date. Heath v. Belk, 12 S. Car. 582.

Mortgages .- The fact that a debt of the decedent was secured by a mortgage of real estate will not justify the payment of legacies before ascertaining the existence of assets sufficient to pay all debts. Glacius v. Fogel, 4 Redf. (N. Y.) 516.

In Mississippi, in cases where a deceased mortgagor is not seized of the mortgaged property at the time of his death, the mortgagee has his choice of following the property or resorting to the decedent's estate for payment; but if he seek payment from the estate his claim will be classed with the "general debts." Rogers v. State, 6 Ind. 31.

If an administrator sell real estate subject to a mortgage, the claim of the mortgagee is to be first discharged in full, subject only to the prior payment of the expenses of the sale, and only the residue thereafter can be held for general expenses of administration or to meet the

In a few of the States the English order of preference is preserved, with slight variations. In South Carolina and Tennessee debts by specialty and by simple contract are placed on an equal-In South Carolina, judgments, mortgages, and executions take precedence according to their dates, and rent is preferred to debts by specialty and simple contract. A mortgage is a preferred claim only as to the particular part of the estate affected by its lien. In Delaware, wages and rent are preferred to judgments, which last include a judgment before a justice of the peace.1 some States fiduciary debts are given a special statutory priority.2

claims of creditors of the estate. Est. of

Murray, 18 Cal, 686,

Where the real estate mortgaged by the testator will probably be insufficient on foreclosure to pay the mortgage debt, the surrogate will direct the executor to reserve enough from the assets to pay the deficiency likely to arise, in the same proportion as that paid on the other debts of the estate. Williams v. Eaton, 3 of the estate. Redf. (N. Y.) 503.

The special mortgage creditor of a succession is entitled to be paid out of the proceeds of the property on which his mortgage rests, by preference over the expenses and charges of administration, only when there are other funds of the succession out of which such ex-Patrick's Succespenses may be paid. sion, 30 La Ann., Part II. 1071.

A creditor of a succession, who gets possession of the price for which land of the succession is sold, has no right to satisfy his claim therefrom. Succession

of McGinnis, 18 La Ann. 268.

A creditor of an estate whose debt operates as a judicial mortgage, and is in a twelve months' bond executed by the deceased, cannot cause the property of the succession to be sold for cash without the benefit of appraisement to satisfy his claim. Succession of Boyd, 13 La Ann.

When the proceeds of lands of a decedent sold under an order of court which is void for irregularity are applied by the administrator to the satisfaction of a mortgage, judgment, or other specific lien, there should be a marshalling of assets as to the general creditors; and as against them, the purchaser of the land should stand in the shoes of the creditor to the extinction of whose lien the purchase money was applied. Short v. Porter, 44 Miss. 533.

Priority of mortgages over simple contract debts considered in view of the peculiar facts of the case. Goepp's App., 15 Pa. St. 421; State v. Mason, 21 Ind.

171.

Instances of Simple Contract Debts .-Where land is sold at a sheriff's sale and the title proves defective, the purchaser's claim against the defendant in the execution is but a simple contract debt, and an executor who pays such claim in preference to a judgment creditor is guilty of a devastavit. Laws v. Thompson, 4 Jones L. (N. Car.) 104.

A claim which a wife has against the administrator of her husband for money arising from the sale of her land which he had received, is a simple contract debt, and must be so treated in the course of administration. Bateman v. Latham, 3

Jones. Eq. (N. Car.) 35.

The demand which the security in a replevin bond, executed in discharge of one of two several judgments against co-obligors for the same debt, obtains against the other by paying off the replevin bond is not a debt of record, but is a simple contract, which an executor is not bound to notice. Justices, etc., v.

Is not bound to notice. Justices, etc., v. Lee, IT. B. Mon. (Ky.) 247.

1. 2 Wms. Ex. (7th Am. Ed.) 992° n.; 2
Kent, 418, 419; Griffith's Law Register, k. t.; Lidder v. Robinson, 12 Wheat.
(U. S.) 594; Bank v. Gibbs, 3 McCord (S. Car.), 377; Fields v. Wheatley, I Sneed, 351; Fiester v. Piester, 22 S. Car. 139: Delaware Rev. Code 1874, ch. 89, § 25; Tennessee Code 1884, tit. 3, ch. 2, art. ix.; Gen. St. of South Carolina 1882,

pt. 2, tit. 4, ch. 65.
2. Virginia Code 1873, tit. 38, ch. 126,

Kentucky Gen. Stat. 1881, ch. 39, § 33, provides that on insufficiency of assets the amount of the estate of a dead person, or of a ward, or of a person of unsound mind, committed by a court of record to and remaining in the hands of a decedent, shall be paid in full before any pro rata distribution shall be made, but this preference shall not extend to a demand foreign to the State. As to construction of former act of 1839, see Curle v. Curle, 9 B. Mon. (Ky.) 309; White v. Carried, 2 Metc. (Ky.) 232.

Fiduciary debts have priority in the settlement of the estates of deceased persons only. Salter v. Salter, 6 Bush (Kv.).

In Georgia, the claim against an intestate's estate for a balance in his accounts as administrator is a demand of a higher dignity in a course of administration than any other debt of said intestate. Johnson v. Bradv. 24 Ga. 131.

Where a guardian dies chargeable to his ward, the liability binds the estate before all other debts, though prosecuted to judgment. Watson v. Watson, I Ga. 266.

Sections 2312, 2494, of the Georgia Code, relative to the priority of payment of debts due to the trust estate by a deceased trustee, apply only to debts of trustees appointed by the laws of Georgia. Caruthers v. Corbin, 38 Ga. 75.

The provision of Illinois Rev. Stat. ch.

3, § 70, cl. 6, placing in the sixth class a claim "where the decedent has received money in trust for any purpose." only embraces trusts implied by the law. Wilson v. Kirby, 88 Ill. 566. For construction of this section see Weer v. Grand, 88 Ill. 490.

An attorney who holds money collected by him for his clients cannot be considered as a trustee having actual possession and control of the trust property (Code, § 2533) so as to give such a claim precedence in distributing his estate among creditors. Southern, etc., Lightning Rod Co. v. Cleghorn, 59 Ga. 782.

In Louisiana, the principal has no privilege claim on the property of his deceased agent's succession on account of money of the principal collected by the agent and not paid over.

Succession, 31 La. Ann. 311.
A sold B's cattle as his agent, and retained the purchase-money. During A's last illness his wife took the money and deposited it in a bank in her own name, and after A's death gave her check to his executor for the amount. Held, that B could claim the fund as against A's cred-

tors. Kirby v. Wilson, 98 Ill. 240.
Under the Virginia Code 1873, ch.
126, § 25, placing "debts of trustees for persons under disabilities" is only pros-Price v. Harripective in its operation.

son, 31 Gratt. (Va.) 114.

B., on settlement with his ward J., on J.'s arriving of age, owed J. \$3000, and executed to J. therefor four bonds, each for \$750, payable in one, two, three, or four years, with interest. B. paid the interest during his life, and part of the principal, and until the death was able to pay the whole. Held, that in the administration of B.'s estate the debt must rank as a fiduciary one; the giving and taking of the bonds was not a novation The bonds being executed for a pre-existing debt, due from the obligor as guardian .- in the absence of an express agreement by the ward to receive them in full satisfaction of what was due to him from his guardian in his fiduciary character .were not a novation of the debt, and did not change its fiduciary character. And the bond being for a debt which is fiduciary, could not lose that character by lapse of time, and continues fiduciary until satisfied. Smith v. Blackwell, 31 Gratt. (Va.) 201.

A note given by an executor, as such. to the legatees, for the balance in his hands on his settlement, is held to be a trust debt and entitled to priority in the distribution. Otherwise as to a note given by one executor to the other for a loan, with a third party as security, and turned over to the legatees as part of the Latimer v. Sayre, assets of the estate.

45 Ga. 468.

Where an executrix wrongfully commingles trust funds, arising from trust property sold by the testator, with other funds of the estate, such wrongful act of the executrix cannot divest the cestui que trust of his right to payment of the amount of the trust fund in preference to an ordinary debt of the estate, or even in preference to funeral and other expenses. Matter of Van Duzer, 51 How. Pr. (N. Y.) 410.

At common law, breaches of trust were considered as simple contract debts. Cas. temp. Talb. (Eng.) 110; Vernon v. Vawdry, 2 Atk. (Eng.) 119; Bailey v, Elkins, 2 Dick. 632.

The party injured by a devastavit is but a simple contract creditor of the execu-Charlton v. Low, 3 P. Wms. 331.

In some cases a breach of trust may amount to a breach of an agreement under hand and seal, and will be regarded as a debt by specialty. Gifford v. Manley, Cas. temp. Talb. 109, cited and commented on by Wood, V. C., Kay, 724, 725; Mayor v. Davenport, 2 Sim. (Eng.) 227; Benson v. Benson, I P. Wms. (Eng.) 130. See also Wood v. Hardisty, 2 Coll. (Eng.) 542. But as a general proposition, a breach of trust does not constitute a specialty debt, and the court cannot raise a covenant without necessity. Adney v. Arnold, 2 De G., M. & G. (Eng.) 432, 437; Wynch v. Grant, 2 Drewr. (Eng.) 312.

Whatever the language of the trust deed may be, it should seem that a breach of trust cannot be held a specialty debt In most of the States the order of payment established by statute is: (1) Expenses of last sickness, funeral, and probate charges; (2) public dues and taxes; (3) all other debts ratably, without regard to whether they are founded upon a judgment, specialty, or simple contract. This is the case, with some slight variations, in the States of Pennsylvania, Virginia, Georgia, North Carolina, Illinois, Ohio, Iowa, Indiana, Kentucky, New Hampshire, Vermont, Massachusetts. Rhode Island, Connecticut, Mississippi, and Alabama, and in such of the Western States as have substantially adopted their statutes and codes.1

in any case where the trustee has not executed the deed. 2 Wms. on Executors (5th Am. Ed.), 918; Richardson v.

Jenkins, 1 Drewr. 477.

In the absence of special statutory priority, or of such circumstances as would entitle the cestui que trust's claim to rank as a specialty, he has no priority over other creditors unless he can identify the trust property among the assets of the decedent. Est. of Fox. 92 N. Y. 97; Wells, Fargo & Co. v. Robinson, 13 Cal. 133; Fowler v. True, 76 Me. 43. See Sharp v. Sharp, 76 Ala. 312.

1. Griffith's Law Reg. h. tit.

In Pennsylvania, the act of 24th Feb., 1834, § 21, P. D. 525, prescribes the following order: 1. Funeral expenses, medicine furnished, and medical attendance given during the illness of the dece-dent, and servants' wages not exceeding one year; 2. Rents not exceeding one year; 3. All other debts without regard to the quality of the same, except debts due to the commonwealth, which shall be paid last.

There is no priority between preferred debts of the same class as between funeral expenses and medical attendance.

Ritter's Est., 11 Phila. 12.

As to the extent to which a physician's bill is a preferred debt, see Duckett's Est., 1 Kulp (Pa.), 222; s. c., 1 Chester Co. R. 78; Reese's Est., 2 Pears. (Pa.)

The term "servants" means menial servants. Ex parte Meason, 5 Binn. (Pa.) 167. And includes a barkeeper. Boniface v. Scott, 3 S. & R. 351. But not a forgeman. Ex parte Meason, 5 Binn. (Pa.) 167.

They waive their preference by taking from the decedent single bills payable at a future day with interest. Williams, 17 S. & R. (Pa.) 292. Silver v.

The claim is not confined to services rendered during the last year of the decedent's life. Martin's App., 35 Pa. St.

The term "rent" embraces the annual

interest due a widow charged on lands taken under proceedings in partition. Turner v. Hauser, I Watts (Pa.), 420.

The provision that debts due the commonwealth shall be paid last does not apply when the debt is secured by judgment. Ramsey's App., 4 Watts (Pa.), 73.
The Virginia Code 1873, tit. 38, ch.

126, provides that assets of decedent shall be applied to (1) debts due the United States; (2) taxes and levies as-sessed upon decedent previous to his death; (3) fiduciary debts; (4) all other demands ratably, except those in next

class; (5) voluntary obligations.

The Revised Code of Georgia, 1882, § 2533, after "judgments, mortgages, and other liens," provides for the payment of "debts due for rent," and "all liquidated demands, including foreign judgments, dormant judgments, and all other obligations in writing for the payment of money, promissory notes, and all debts the amount due on which was fixed and ascertained or acknowledged in writing prior to the death of the decedent;" and lastly, for debts due on open account. This section is substantially a re-enactment of the act of 1792, for construction of which see Moore v. Dortie, 2 Ga. Dec.

The exceptions in favor of judgments, mortgages, and executions, contained in the Georgia statute of 1792, prescribing the priority to be observed by executors and administrators in the payment of debts due by their testators or intestates, apply only to such executions, judgments, and mortgages as existed in the lifetime of the testator or intestate, and had created a lien on their estates. Berugaux v. Bevan, Dudley (Ga.), 110.

The widow's claim, under the Georgia statute, for a year's support out of her deceased husband's property, takes precedence of any lien with which he encumbered the title, but is not superior to liens which adhered to the title when he acquired it. Murphy v. Vaughan, 55 Ga.

361.

The provisions of Georgia Code are in conflict as to the question of whether the year's support of the family of one deceased or the physician's bill for services in his last illness has priority, Held, that inasmuch as the former is a charge on the estate with or without administration, it must have the preference. White-head v. McBride, 73 Ga. 741. A claim acknowledged by the debtor

to be correct, and so entered on his books, which were referred to on the day preceding his death as correctly stating the amount to his expected administrator, held, to be a "liquidated demand" within the Georgia Code, § 2533, subd. 7, upon the creditor's limiting his claim against the estate to that amount.

McNulty v. Pruden, 62 Ga. 135.

On a bill to marshal assets and to settle an estate, a note given by an intestate in his lifetime, for advances to conduct his farm, will take precedence of a debt by open account contracted by the widow in connection with the same farm, pending an application for administration, which was never granted her. Boyd v. Flournov, 67 Ga. 575.

Debts due from the estate of an attorney, on account of money collected from him in that character, are to be classed with "bonds and other obligations," and not with "open accounts," under the act Smith v. Ellington, 14 Ga. of 1792.

Under Georgia Code, § 406, making one half the fee of an attorney a retainer, and payable immediately, such half held to be a "liquidated demand" against the estate of a client who died before the services were rendered, under a parol engagement of counsel to defend certain indictments at a gross sum. McNulty v. Pruden, 62 Ga. 135.

Payee or indorsee of decedents' note has no preference over surety who has paid the debt in the order of payment by the administrator, under the Georgia statute. Davis v. Smith, 48 Am. Dec. 279.

North Carolina Code 1883, ch. 33, § 1416, adopts the following order: 1. Debts which by law have a specific lien on property to an amount not exceeding the value of such property; 2. Funeral expenses; 3. Taxes; 4. Public dues; 5. judgments docketed and in force to the extent to which they are a lien at the death of the deceased; 6. Wages and medical services during last twelve months; 7. All other debts and demands. See, as to construction, Jerkins v. Carter, 70 N. Car. 300; Murchison v. Williams, 71 N. Car. 135; Lee v. Eure, 82 N. Car. 428; Galloway v. Bradfield, 86 N. Car.

163; Manny v. Holmes, 87 N. Car. 428 Daniel v. Laughlin, 87 N. Car. 433.

Every debt must be paid pro rata equally in its class. \$ 1417. A testator cannot give a debt a preference over other debts in the same class, by making a bequest of it to a creditor. Moore v. Byers, 6s N: Car. 240.

The judgment is entitled to priority by virtue of its lien, and not qua judgment simply. See Galloway v. Bradfield, 86 N. Car. 163; Manny v. Holmes, 87 N Car. 428; Daniel v. Laughlin, 87 N. Car.

In Illinois, Iowa, and Ohio, the widow's allowance ranks as a debt, and takes precedence of debts due the public. Illinois Rev. Stat. 1880, ch. 3, § 70; Ohio Rev. Stat. 1884, § 6090. For succinct statement of Iowa law, see Hart v. Iewett. 11 Iowa, 276.

In Ohio, no payment shall be made to creditors of any one class until all those of a preceding class or classes, of whose claims the executor or administrator shall have had notice, shall be fully paid. Ohio

Rev. St. 1884, § 6090.

Nothing in this section shall affect any lien which any one may have upon the personal estate of the deceased during his lifetime. Ohio Rev. St. 1884, § 6091.

Under the Illinois Administration Act of 1872, §§ 71, 109, where the personal estate is insufficient to pay the widow's award in full, the balance may be paid out of the proceeds of the real estate, to the exclusion of claims of creditors of the seventh class. Rector v. Reavill, 3 Ill.

App. 232.

In Indiana, debts secured by lien created in the decedent's lifetime and continuing in force, and wages not exceeding fifty dollars for work and labor performed for the decedent within ten months of his death, have preference over general debts in the above order, If, however, the real estate of the decedent shall have been sold subject to any lien, and the holder thereof shall have accepted the bond of the purchaser as provided in the act, the debt secured by the lien shall be omitted in the distribu-

tion. Indiana Rev. St. 1881, § 2378.
In Kentucky, act of 1839 (3 St. Law, 240) enacts that thereafter all debts shall be of equal dignity in the administration of estates, and shall be paid as therein declared ratably, when the assets are not sufficient for the payment of all. Place v. Oldham's Admr., 10 B. Mon. (Ky.) 404. See also Gen. Stat. of Kentucky,

1881, ch. 39, § 33.

In New Hampshire, the widow's allowance follows funeral and administration In New Jersey, judgments entered of record against the decedent in his lifetime, funeral charges, and the physician's bill during last sickness have preference.¹ In New York, judgments docketed and decrees enrolled have preference, and debts by specialty and simple contract are on an equality.² In Maryland, rent for

expenses, and is preferred to "just debts." If the estate is solvent, the maintenance of children until they arrive at the age of seven is a claim which is preferred to legacies. Gen. Laws of New Hampshire, 1878, ch. 196, § 15.

In Vermont, the expenses of administration and funeral charges constitute distinct classes, and debts due the United States are placed after taxes and debts due the State. Rev. Laws of Vermont,

1880, tit. 15, ch. 112, § 2190.

Under Pub. St. of Massachusetts 1882, ch. 137, § 1, wages or compensation to an amount not exceeding one hundred dollars, due to a clerk, servant, or operative, for labor performed within one year next preceding the death of such deceased person, or for such labor so performed for the recovery of payment for which a judgment has been rendered, are preferred to general debts.

In Rhode Island, debts due the United States, funeral charges, expenses of last sickness, debts due the State, and State and town taxes, are to be first paid in the order in which they are named. Gen. Stat. R. I. 1872, tit. 24, ch. 175, § 1.

Just debts are to be paid pari passim with separate debts by the representative of a deceased debtor. Pearce v. Cooke,

13 R. I. 184.

In Connecticut, the widow's allowance, as prescribed in Gen. St. 1876, tit. 18, ch. 2. art. iii., § 4, is preferred to general debts.

Rev. Code of *Mississippi* 1880, ch. 59, § 2054, the assets shall be distributed *prorata* among all the creditors—expenses of last sickness, funeral and court costs

being first paid.

In Alabama (Civ. Code 1886, tit. 4, ch. 7, art. i., § 2079), the order of payment is (1) funeral expenses; (2) fees and charges of administration; (3) expenses of last sickness; (4) taxes assessed on estate of decedent previous to his death; (5) debts due to employees, as such, for services rendered the year of the death of the decedent; (6) the other debts.

of the decedent; (6) the other debts.

1. Rev. of New Jersey (1806-1877), tit. Orphans' Courts, § 58. Debts due to the State have no preference. Aliter debts due United States. 4 Grif. Law

Reg. 1281, note (2).

2. The New York Rev. Stat. vol. ii. 87,

§§ 27, 28, 29, 30 (see also 3 Rev. St. tit. 3, pt. ii. ch. vi. §§ 27-30), prescribe the following order: (1) Debts under the laws of the United States; (2) Taxes assessed; (3) Judgments docketed and decrees enrolled, according to priority; (4) Recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts, without any preference between those of this fourth class. is a debt due and payable entitled to preference over debts not due; nor does the commencement of a suit for the recovery of any debt, or the obtaining a judgment thereon against the executor or administrator, entitle such debt to any preference over others of the same class. Debts not due may be paid, according to the class to which they belong, after deducting a rebate of legal interest upon the sum paid for the unexpired The surrogate may give a preference to rents due and accruing upon leases held by the testator or intestate at his death over debts of the fourth class. whenever he shall deem the preference

beneficial to the estate.

Under 2 N. Y. Rev. St. 87, § 27, subd. 2, assigning second preference to "taxes upon the estate of the deceased previous to his death," taxes assessed during his life on realty in which he had a life estate, and remaining unpaid at the time of his death, are entitled to preferential payment out of the personalty. Coleman v. Coleman, 5 Redf. (N. Y.) 524.

Rent due for a pew in a church is not a preferred debt, unless due on a lease of the pew for a term of years, which is assets in the hands of the administrator. Johnson v. Corbett, II Paige (N. Y.), 265.

The balance due from a deceased partner to a surviving copartner, on account of the partnership transactions, is an unliquidated demand of the fourth class of debts, which it is competent for the surrogate to liquidate as an equitable demand, and order to be paid. Babcock v. Lillis, 4 Bradf. (N. Y.) 218; s. c., 4 Abb. Pr. (N. Y.) 272.

While the individual creditors of an estate can insist on full payment of their claims before the allowance of partnership debts from the individual assets, yet as to the heirs the mere order of payment is a matter of no consequence,

which distress might have been made is preferred to judgments and decrees; and in both *Maryland* and *Missouri* judgments and decrees are preferred to the general debts. In *Louisiana*, the order of payment is prescribed by the Code, and differs radically from that of the common law. Upon an insufficiency of assets, unless otherwise provided by statute, debts in a prior class must be paid in full before debts in a subsequent class can be paid at all.

Under the acts of Congress which control all State laws for the distribution of estates, debts due the United States take precedence of all other debts of the decedent.³ Taxes, funeral charges,

provided the partnership funds are wholly exhausted before the administration is closed. People v. Lott. 26 III. 447.

closed. People v. Lott, 36 Ill. 447.

1. Maryland Rev. Code 1878, art. 50, § 173. reads: "All taxes due and in arrear from the decedent shall be preferred, to the exclusion of all other debts and claims for rent in arrear against deceased persons. for which a distress might be levied by law, shall next have preference. Judgments and decrees shall next be wholly After such claim for taxes discharged. and rent and judgments and decrees shall be satisfied, all other just claims shall be on an equal footing, without priority or preference. If there be not sufficient to discharge all such judgments and decrees, a proportionate dividend shall be made between the judgment and decree creditors."

This act would seem to place funeral and last sickness expenses with "all other just claims." As to administration ex-

penses, see post.

As between the State and the other general creditors of a deceased debtor, whose lands were sold for the payment of his debts, in consequence of the insufficiency of his personal property, where neither the State nor the general creditors have a lien, the State is entitled to priority. Smith v. State, 5 Gill (Md.) 45.

Where the administrator of a deceased tenant continues the tenancy of his intestate until after the death of the landlord, the owner of the fee, the rent due up to the last day of payment prior to the landlord's decease might have been distrained for by him, and is therefore a preferred claim upon the assets of the deceased tenant found upon the demised premises, under the act of 1836, ch. 192, in Maryland. Longwell v. Ridinger, I Gill (Md.), 57.

As to lien of wages, see Everett v.

Avery, 19 Md. 136.

The *Missouri* statute (Rev. St. 1879, ch. 1, § 184) classes funeral expenses and expenses of last sickness in the order

named, and includes in the latter wages of servants, medicine furnished, and medical attendance during period of ill-Taxes constitute the next class. and require no presentation. Judgments rendered against the deceased in his lifetime, and judgments rendered upon attachments levied upon property of the deceased during his lifetime, constitute the next class. But if such judgments are liens upon decedent's real estate they shall be paid as provided in §§ 152-164. Funeral and last sickness expenses are preferred to lien judgments. Demands exhibited within one year are preferred to demands not so exhibited. no distinction between specialty and simple contract debts.

The classification of a claim exhibited after the year cannot be affected by the fact that it did not accrue till after the death of the intestate. Williams v. Penn,

12 Mo. App. 393.

The Missouri administration law, subjecting the whole estate, real and personal, to the payment of debts, and dividing the demand into six classes as to order of payment, has entirely superseded the machinery of the common law, as to the marshalling of assets in equity, and bills for discovery of assets and account. Titterington v. Hooker, 58 Mo. 593.

Titterington v. Hooker, 58 Mo. 593.

2. Civil Code of Louisiana, arts. 1051-1061. Costs of an executory proceeding against mortgaged property of a succession, commenced in a court of ordinary jurisdiction, before the appointment of a tutor of the minor heirs of the succession, constitute a privilege debt of the succession. Hautan's Succession, 32 La. Ann. 54.

3. Gregory's Estate, 11 Phila. (Pa.) 126; United States v. Duncan, 4 McLean

(U. S.), 607.

The fifth section of the act of Congress of March 3, 1797 (Ingersoll's Abr. 561, Pamphl. Laws, vol. iii., p. 423; 1 Stat. at Large, p. 515), entitled "An act to provide more effectually for the settle-

and the necessary expenses of administration are not "debts due from the deceased," but charges imposed on the estate by the law of the land; and as the priority of the United States can only extend to the net proceeds of the property of the deceased, they must be discharged before satisfying any claim of the United States. Expenses of the decedent in his last illness form a debt due from the deceased, and are payable after any indebtedness to the United States is discharged. 1. A debt due a bank owned entirely by the State is not a debt "due to the public" in legal contemplation, although it is within the power of the general assembly to declare that debts due such bank shall have priority of payment.² A debt due a citizen by specialty is to be preferred to a simple contract with the commonwealth.3 Nor can a bond debt due the State be paid out of the estate of an insolvent debtor in preference to an execution taken out by a citizen.4

Funeral expenses, to be entitled to priority, must be reasonable, and properly comprise the charge incurred for interment and the compensation of the undertaker.⁵ No rule or limitation for the

ment of accounts between the United States and receivers of public money, provides "that debts due to the United States shall be first paid." As to con-struction of this act and the Duty Act of March 2, 1799, ch. 128, § 65 (Ing. Abr. 156, Pamph. Laws, vol. iv., p. 386; I Stat. at Large), p. 576, see United States v. Fisher, 2 Cranch, 358; United States v. Hood, 3 Cranch, 99; Harrison v. Sterry, 5 Cranch, 289; s. c., Bee's Rep.

Though the priority be limited to certain specified cases whilst the debtor is living, it takes effect generally upon his death. Commonwealth v. Lewis, 6 Binn. (Pa.) 266; Dictum of Marshall, United States v. Fisher, 2 Cranch, 390. But in order to bind the personal representative, notice of the existence of the debt is necessary, as no devastavit will be created by his paying creditors in the ordinary course of business. United States v. Fisher, 2 Cranch, 391, n.; Aikin

v. Dunlap, 16 Johns. Rep. 85.

The right of a surety who pays a bond to the United States is only a right to receive payment out of the effects of the principal as fully as the United States would have by reason of their priority; and hence, where the principal has been discharged under a bankrupt or insolvent law he may plead his certificate or discharge to a suit brought against him by such surety, although the United States would not have been barred thereby. Reed v. Emory, 1 Serg. & R. (Pa.) 339; Aikin v. Dunlap, 16 Johns Rep. (N. Y.) 77.
The Federal laws control all State laws

for the distribution of estates, and supersede all State laws upon the subject that come within their provisions. United States v. Duncan, 4 McLean (U. S.), 607. The priority of the United States does

not yield to the claims of any creditors. If a party is to be excepted out of the general rule, it rests upon him to show it. United States v. Duncan, 12 Ill. 523. For further discussion, see 2 Wms. on Exrs. (5th Am. Ed.) 893°, n.
1. United States v. Eggleston, 4 Saw-

yer, 199.

2. Central Bank of Ga. v. Little, II Ga. 346. See also South Carolina Pamph.

Laws, 494.

In Georgia, unpaid county taxes are not taxes due the State so as to be preferred next after expenses of administra-The widow's claim for dower, as well as certain judgment liens, has been preferred to the county's claim for taxes collected, but never accounted for by the collector. Hargrave v. Lilly, 69 Ga. 326.

Under the South Carolina act of 1879, the liability of the deceased as surety on the bond of a county treasurer who has defaulted is a debt due the public, but has no priority over liens general or Baxter v. Baxter, 23 S. Car. special. 114.

Comm. v. Logan, I Bibb (K.), 529.
 Commissioners v. Greenwooy I De-

saus. (S. Car.) 450.
5. Hewett v. Bronson, 5 Daly (N.Y.), r. As to what is a reasonable expenditure for the funeral, authorities differ. Hewett v. Bronson it was said that all services for the dead which are not acts of necessity are necessarily gratuitous,

Under the Maryland act of 1778, ch. 108, § 15, only \$300 can be allowed. Butler's Est., 3 McArthur (D. C.), 535.

In Louisiana the amount cannot exceed \$200 when the estate is insolvent. cession of Hearing, 28 La. Ann. 149.

As against legatees or next of kin, such expenses may be incurred as will bury the deceased according to the station he occupied in life; but as against creditors, nothing will be allowed beyond what is absolutely necessary. Matth. Ex. 69; Flintham's App., 11 S. & R. (Pa.) 16; McGlensey's App., 14 S. & R. (Pa.) 64; Toll. Ex. 245; 2 Wms. Exrs. (6th Am. Ed.) 872°, 11 See also Hancock v. Padmore, I B. & Adol. 260.

A demand for mourning for the family and widow of the deceased would not be allowable in England. Johnson v. Baker, 2 Car. & P. 207. Contra, Wood's Est., i Ashm. (Pa.) 314. Compare Lawall v. Kreider, 3 Rawle (Pa.), 300.

As to what is reasonable, see Re Lecky, 4 Redf. (N. Y.) 95; Vallentine v. Vallentine, 4 Redf. (N. Y.) 265; Freeman v. Coit, 27 Hun (N. Y.), 447; Samuel v. Thomas, 51 Wis. 549; Shaeffer v. Shaeffer, 54 Md. 679; s. c., 39 Am. Rep. 406.

In a proper case a moderate expenditure for a tombstone may be allowed. Burnett v. Noble, 5 Redf. (N. Y.) 69; Campbell v. Purdy, 5 Redf. (N. Y.) 480; Owens v. Bloomer, 21 N. Y. Sup. Ct. 296.

Where the estate was \$1200, an expenditure of \$40 for a burial lot is not unreasonable. Chalker v. Chalker, 5 Redf. (N. Y.) 480. See, further, Metz's App., 11 Serg. & R. (Pa.) 201; Patterson's Est., 1 W. & S. (Pa.) 202; Jennison v. Hapgood, 10 Pick. (Mass.) 77; Hapgood v. Houghton, 10 Pick (Mass.) 154.

An insolvent and his wife and child, residents of New Jersey, while travelling in Texas, were all killed by the same accident. *Held*, that the burial expenses of all, and of transporting the bodies of all to New Jersey, were to be deemed embraced in the burial expenses of the husband and father, and as such a preferred claim against his estate. Sullivan

v. Homer, 41 N. J. Eq. 299.

An undertaker employed for a funeral is only chargeable with such knowledge as to decedent's property as is apparent with reasonable observation. If the expenditure is in accordance with the decedent's apparent condition in life, he is entitled to payment in full, though the estate turns out insolvent. Re Rooney, 3 Redf. (N. Y.) 15.

A creditor cannot legally arrest or detain and prevent the burial of his debtor till his debt is paid. A conspiracy to prevent a burial is indictable at common law. Matth. Ex. 71, 72; Hood on Ex

25. 34. If the executor or expected administrator be not on hand or be unknown. any friend may bury the deceased, and the law implies a promise on the part of the personal representative to reimburse him. Matths. on Ex. 68; Re Miller, 14 Redf. (N. Y.) 302.

An administrator is not liable, either personally or in his representative capacity, for the funeral expenses of his in-

testate, unless he has contracted for them or expressly promised to pay them. Hence, where one of his own motion buries a deceased person, and without notice to the administrator sues him for the expenses, he cannot recover. Gregory v. Hooker, 9 Am. Dec. 646; s. c., 1

Hawks (N. Car.), 394.

The principle to be extracted from the cases would appear to be, that the funeral expenses, not being properly a debt due from the deceased, or contracted by his executor or administrator, but a charge upon the assets, the liability of the personal representative exists solely with respect to the assets. He is therefore entitled to notice of the claim before the asssets are exhausted, and in the absence of such notice cannot be held personally liable. See Parker v. Lewis, 2 Dev. (N. Car.) 21; Ward v. Jones, Busb. (N. Car.) 127; Patterson v. Patterson, 59 N.Y. 574; 127, 1 atterson v. 1 atterson, 39 M. 1. 5/4, s.c., 17 Am. Dec. 384; Regina v. Stewart, 12 Ad. & Ell. 773; Gilbert v. Buzzard, 2 Hagg. Consist. R. 333; Chapple v. Cooper, 13 M. & W. 252; Hapgood v. Houghton, 10 Pick. (Mass.) 154; Adams v. Butts, 16 Pick. (Mass.) 343.

The expenses of a wife's last sickness and funeral are primarily a charge upon the husband, and not upon the wife's estate. Galloway v. Est. of McPherson (Mich.), 35 N. W. Rep. 114.

If, however, the claim has been prosecuted to judgment against the husband, and has not been paid, the wife's estate is not thereby exonerated. Petition of

Johnson (R. I.), 8 Atl. Rep. 248.

In Louisiana, the funeral expenses of a debtor or of his wife and children operate as a privilege on the real estate of the community, when there is no other source from which these expenses can be paid, and this privilege ranks any mortgage on such real estate. To a proceeding in such case by an undertaker claiming a lien on the mortgaged property, a representative of the succession of the wife is not a necessary party. Alter v. O'Brien, 31 La. Ann. 452.

In Georgia, funeral expenses, regulated

duration of the last illness or for the degree of attention paid can be laid down; it will vary with the nature of the disease and the situation of the patient. "Expenses of administration" is a broader term than "probate charges," and under it may be allowed such expenditures as were legitimately made for the benefit of the es-Rights of creditors of a decedent to his assets become fixed. tate.2

by the circumstances of the deceased and the usage of the county, constitute a lien or debt on the estate of the deceased superior to all other claims. White v. Stephens, R. M. Charlt. (Ga.) 56; Parker v. Lewis, 2 Dev. L. (N. Car.) 21. In the former revision of the New Yersey statutes, funeral expenses of an

insolvent are preferred to judgments. In the latter revision, judgments come first in order in enumerating preferred claims. Held, that the funeral expenses take precedence. Sullivan v. Homer, 41 N. I. Eq. 200.

A decree for payment of debts and distribution of assets among creditors may be made without notice, and though funeral expenses remain unpaid. 24 Minn.

1. Percival v. M'Vov. Dudley (S. Car.),

The question whether a physician's charges accrued for services rendered in the last sickness of the deceased within the meaning of the statute of Maine of 1821, ch. 51, § 25, is to be decided by the jury. Huse v. Brown, 8 Me. (8 Greenl.) 167.

A debt due to one as nurse may properly be included under the denomination of "expenses of last illness," as expressed in the South Carolina act of 1789, so as to take preference to judgment creditors under that act. Percival v. M'Voy, Dudley (S. Car.), 337.

All claims for expenses of the last ill-

ness of a deceased person are of equal degree. An executor has no right under the Connecticut statute to prefer one of that class over another. If the estate is not sufficient to pay them all, it must be divided pro rata among them. Bennett v. Ives, 30 Conn. 329.

As to recovery of last illness and funeral charges from estate of adopted member of family, see Schaedel v. Rei-

holt, 33 N. J. Eq. 534.

The provision of art. 3274 of the Louisiana Code, that no privilege claim shall have effect as against third persons, unless duly recorded, applies to fees due physicians for professional services during last illness. Elliott's Succession, 31 La. Ann. 31.

2. Under the laws of California, services

rendered and money advanced at the request of an administrator, for the benefit of an estate, are "expenses of administration," and the probate court has exclusive original jurisdiction to adjust and enforce such demands. Gurnee ν . Maloney, 38 Cal. 85.

Where money belonging to the wifeand heir of the deceased father has comeinto the hands of the administrator, and is applied by him to the payment of debts. due by the succession, no tacit mortgage exists on the property of the succession in favor of the wife or heir, but such money constitutes a debt against the succession, and must be reimbursed in the course of administration as a chargeagainst the same, and not as a debt due-by the deceased. Cordill v. Succession of McCullough, 20 La. Ann. 174.

Money advanced to an administrator

by a creditor of the estate to improve the real estate and protect it against an attachment suit, should be allowed, if at. all, as expenses of administration Nathan v. Lehman, 39 Ark. 256. administration.

Where the expenses of administration are of a general nature, they should becharged pro rata on the community property and on separate estate; but expenses which attach specifically to particular pieces of estate are to be charged against. Patton's Est., Myrick's. such pieces. Probate (Cal.), 241.

Administration expenses are a debt. of the estate and not of the decedent, and it is well settled that the debts of the estate must be paid before the debts of the decedent. United States v. Eggleston, 4 Sawyer, 199; Linton's Succession,

31 La. Ann. 130.

Fees of counsel for a succession are a. charge upon the succession, and take precedence of privileges upon the property of the deceased. Succession of

Lawe, 18 La. Ann. 721.

A judgment recovered in a court of law against an executor for professional legal services rendered in and about the administration of the estate is an expense: of administration, and not a debt of the estate, and is entitled to be paid in full in precedence to all debts of the decedent.

"In order to make the judgment a 'debt' against the estate, and within the and determined at the time of his death. The allowance and classification of a claim against an estate, in favor of a creditor by the probate court is a judicial act," and to change the class to which it has been assigned is to change the force of the judgment as to all creditors in the prior class, and it should not be done but upon such facts only as would authorize the court to set aside or

meaning of the statute, so that it must abate with the other debts due the estate. in consequence of the deficiency of assets. it would be necessary that the services for which the judgment has been obtained should have been rendered to the testator in his lifetime." Thompson's Est., I Tuck. (N. Y. Surr.) 13; s. c., 41 Barb. (N. Y.) 237. As to counsel fees, see also Miller's Ex. v. Simpson (Ky.), 2 S. W. 171.

Where, under a bill to wind up a decedent's estate, the creditors agree that certain fees of an attorney employed to defend a claim against the estate shall be paid out of the assets, held, that they should be taxed, to be paid out of the creditors' shares. Thompson v. Thompson, 6 Rich. (S. Car.) 277.

In Texas, a judgment by the district court against an administrator, adjudgone, and ordering it to be a preferred one, and ordering it to be paid in preference to all other debts, is not binding on the probate court, so that it may direct the payment of reasonable expenses of administration first. Williams v. Robinson, 56 Tex. 347.

All property of a debtor which can be subjected to the payment of debts is a fortiori subject to the payment of administration expenses, and the fact that it has been fradulently conveyed does not Bassett v. McKenna, 52 exempt it.

Conn. 437.

1. Bosler v. Exchange Bank, 45 Am. Dec. 665; 4 Pa. St. 32; Steamship Dock Co. v. Heron, 52 Pa. St. 282; Est. of Patterson, I Ashm. (Pa.) 335.

No one can by superior diligence or by

dealing with the executor get an advantage over others. Boyce v. Escoffie,

2 La. Ann. 872.

Hence, where the estate of the decedent is notoriously insolvent, set-off is not allowed in suits by or against his executor or administrator, if the debt sought to be set off was not due at the time of the death of the testator or intestate, although it became due before the commencement of the suit; otherwise if the estate is solvent or the debt due at the time of the death. Bosler's Admr. v. Exchange Bank, 4 Pa. St. 32; s. c., 45 Am. Dec. 665; Light v. Leininger, 8 Pa. St. 403.

A creditor who obtains possession of his debtor's property after his decease cannot apply it to the payment of his claim, as upon the debtor's death all his creditors have an equal right to a pro rata

dividend of his property. McDonald v. Black, 20 Ohio, 185; s. c., 55 Am. Dec. 448. The property of a succession is the common pledge of the creditors, except so far as privileges have been lawfully Succession of Harkins, 2 La.

Ann. 923.

A transfer of an asset of a succession from an executor to a creditor in payment of the debt, although made under an order of court, if previous to the classification of the debts of the succession is null and void. Snider v. Cutliff. 30 La.

Ann., Part II., 1195. In Thompson v. Taylor, 71 N. Y. 217, it was held that an executor or administrator acting in good faith will be protected in paying a debt in full, pursuant to the surrogate's decree, although it may finally turn out that the remaining assets are insufficient to pay the other creditors in full.

The priorities secured by bringing an action against an administrator, under a statute of *Missouri* classifying claims against the estates of deceased persons, are not lost by voluntarily becoming nonsuit. Tevis v. Tevis, 23 Mo. 256.

2. Cossilt v. Biscoe, 12 Ark. 95.

If the decree of a surrogate authorized by 2 N. Y. Rev. St., ch. 116, § 18, for an executor's payment of a debt before final accounting, remains unexecuted when the general decree for distribution of the estate among the creditors is made, it must in case of insufficiency of assets to pay the debts in full, give way to the paramount authority of the statute providing for equality be ween the creditors; and the creditor obtaining the decree cannot claim a preference under it. In such case his decree need not be formally vacated. Thompson v. Taylor, 71 N. Y. 217.

A judgment in a U. S. circuit court for

a claim against a decedent, which had been previously disallowed by the commissioners and by the State district and supreme courts, held valid and binding upon the administrator until reversed.

Ames v. Slater, 27 Minn. 70.

modify its judgment in other particulars. Where there is a contest as to the relative dignity of conflicting claims against an insolvent estate, a court of equity has jurisdiction, and should entertain a bill by the administrator to bring all the parties into court.2 Creditors who have received a dividend from an intestate estate must, upon a second distribution, be postponed to those of the same class who have proved their claims since the first distribution until the latter shall have received also a dividend equal to that first paid.3

1. Miller v. Janner's Exr., 15 Mo. 265. Compare Jessup v. Spears, 38 Ark. 457.

The classification of a demand against an estate, if erroneous, should be appealed from when made. The county court has no right to change it at a subsequent term, after the administrator has exhausted the assets in the payment of debts. Nelson v. Russell, 15 Mo. 356.

In Arkansas any subsequent classification is void, and should be quashed on certiorari from the circuit court. Cossilt v. Biscoe, 12 Ark. 95. Compare McMorrin v. Overholt, 14 Ark. 244.

The Missouri statute does not require that a classification of a demand should be entered on the record at large. An indorsement of its class on the claim itself and an entry on the abstract book is all that is required to give the allowance and classification validity. Nelson v. Russell,

15 Mo. 356.

The remedy of a creditor whose claimhas been sacrificed by the error of a clerk of probate assigning it, through an erroneous memorandum of the judge, to the wrong class in the order of the administrator's settlement, is by motion for a correction nunc pro tune, and not by injunction to compel the administrator to assign the substituted claim to the proper class. In the absence of fraud or collusion the plaintiff had no equity against Jillett v. Union See Ritchey v. the substituted creditor. Nat. Bank, 56 Mo. 304. Withers, 72 Mo. 556.

The classification of claims against the estate of an intestate made by an administrator is subject to the revision of the Tucker v. Yell, 25 Ark. probate court.

After an administrator has placed a privilege creditor, as such, upon the account and tableau of distribution, he cannot withdraw the acknowledgment of privilege on the ground of mistake, without proving not only the mistake, but his ignorance of it at the time of the acknowledgment. Mulhern's Succession, 33 La. Ann. 1047.
2. Jeter v. Barnard, 42 Ga. 43.

Where a suit is brought by a creditor of an insolvent estate, whose claim has

been allowed, to recover a dividend declared by the court and directed to be distributed amongst the creditors, he can recover only his pro rata proportion of the dividend, and is not entitled to priority of payment over the other creditors.

But the case is different where the suit is brought to recover a debt due by the decedent, on the ground that his estatehas been wasted, and not accounted for In such a case the by the administrator. creditor seeks satisfaction out of the estate of the decedent which has not been. administered; and his rights are distinct from and independent of the action of the probate court, and in a proper case he may recover the full amount of his claim, Burruss v. Fisher, 23 Miss. 228.

The creditors of an insolvent succession have a right to require that their debts should be paid before property, the recorded title and possession of which was in their debtor at the time of his death. can be recovered by one claiming to be the real owner, and producing a counterletter to defeat the apparent title in the Stewart v. Newton, 12 La. succession.

Ann. 622.

If at the expiration of the legal delay the tableau is homologated, except sofar as opposed, those creditors whose claims are not contested have a right to immediate payment without waiting for the delay for a suspensive appeal from the judgment of homologation. sion of Minveille, 12 La. Ann. 72.

3. Dunlop v. McGhee, 98 Ill. 289.

Preferred creditors must bring into account any payments made since the death of their debtor, and are entitled to the benefit of their common security prorata, but are not bound to account for payments during the decedent's lifetime, as a condition of receiving further satisfaction. Tennant v. Stoney, 44 Am. Dec. 213; s. c., I Rich. Eq. (S. Car.) 222.

A creditor of an insolvent, entitled to a preference as to legal assets, who has, been partially paid out of such assets, cannot receive any share of the equita-ble assets until the payments to all the creditors are equalized, when he will be paid ratably out of the residue, and it

Where a distributee has been overpaid by the administrator and dies, the claim for repayment for such excess will not take precedence over the claims of creditors of such distributor.1

3. Property Primarily Liable-Marshalling-What are Assets .-All property of a decedent subject to execution in his lifetime is after his death liable to the payment of his debts, and he cannot by his will exempt any part to the prejudice of his creditors.2

In the payment of debts the assets will be marshalled as follows: 1. Personal estate, with the exception of specific bequests, or such as is exempted: 2. The real estate, if any, appropriated by the will as a fund for the payment of debts; 3. The descended estate, whether acquired since the making of the will or not; 4. The lands specifically devised, although they be generally charged with the payment of debts, but not specifically.³

makes no difference whether he has received payment of one of several distinct claims, or a part of one entire claim. Wilder v. Keeler, 3 Paige (N. Y.), 167.

1. Williams v. McCardell, 14 S. Car.

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A claim "payable out of the next current estimate" is not entitled to preference out of the debtor's estate. Murphy's

Est., 12 Phila. (Pa.) 10. A declaration by a debtor on his death-bed that a specified debt is sacred, and a request that it shall be paid, will not affect

Mason v. Man,

the order of payment.
3 Desau (S. Car.) 116.

debts-other than Priority among specialties-determined in cases dependspecialties—determined in cases depending upon peculiar and unusual facts. Pierce v. Robinson, 13 Cal. 113; Speer v. Wilkins, 31 Ga. 289; Benbury v. Benbury, 2 Dev. & B. Eq. (N. Car.) 235. Estate of Miller. I Ashm. (Pa.) 323; Gish's App., 31 Pa. St. 277; McClellan v. Hetherington, 10 Rich. Eq. (S. Car.) 202; Towles v. Towles, I Head (Tenn.), 601; Putnam v. Russell, 17 Vt. 54.

2. Magruder v. Carroll, 4 Md. 335. See Exemptions; for discussion of what property is liable.

property is liable.

He may, however, as against his heirs, provide that a certain portion of his

provide that a certain portion of his estate be charged with the payment of his debts in exoneration of the rest. Trumbo v. Sorrency, 3 T. B. Mon. (Ky.) 284; s. c., 16 Am. Dec. 103. See Peel v. Ball, Spears Ch. (S. Car.) 518.

3. Hayes v. Jackson, 6 Mass. 149; Alexander v. Worthington, 5 Md. 471; Whitehead v. Gibbons, 10 N. J. Eq. (2 Stock.) 230; Elliott v. Posten, 4 Jones Eq. (N. Car.) 433; Wynns v. Burden, 5 Jones Eq. (N. Car.) 377; Dunbar v. Dunbar, 3 Vt. 472.

Under the statutes of Kentucky, where

Under the statutes of Kentucky, where a testator has during his lifetime other-

wise appropriated the property set apart by his will for the payment of his debts, the debts and special devises should be paid by marshalling the assets and applying them in the following order: I. Personal estate not exempted expressly or by implication; 2. Lands specially devised and set apart for the payment of debts; 3. Lands descended; 4. Lands specially devised. Alexander v. Waller, 6 Bush (Ky.), 330. Compare 2 Redfield on Wills, 868.

The second and third rules change places where the estate set apart for the payment of debts is charged generally, and not specially. McCampbell v. McCampbell, 15 Am. Dec. 59; s. c., 5 Litt. 92. See Livingston v. Newkirk, 3 Johns. Ch. 333; Chase v. Lockerman, 35 Am. Dec. 277; s. c., 11 Gill & Johnson (Md.),

Sir P. Arden, M. R. (afterwards Lord Alvanley), states the four classes thus: 1. The general personal estate, unless exempted expressly or by plain implication; 2. Any estate particularly devised for the purpose and only for the purpose of paying debts; 3. Estates descended; 4. Estates specially devised. Stires v. Stires, 1 Halst. Ch. (N. J.) 224; s. c., 43 Am. Dec. 626.

Land acquired after making of a will, and which descends to heirs at law, will be liable for debts of the deceased in preference to land specially devised. Stires v. Stires, 1 Halst. Ch. (N. J.) 224;

s. c., 43 Am. Dec. 626.

Lands in another State are not in this State subject to debts of deceased owner who died there, nor are they accessible to any process upon a judgment against the heir here. Brown v. Bashport, 11 B. Mon. (Ky.) 67; s. c., 52 Am. Dec. 559. See McLawrin v. Salmons, 11 B. Mon. (Ky.) 96; s. c., 52 Am. Dec. 563.

The personal estate is the primary fund for the payment of debts, where the will does not make them expressly or by necessary implication chargeable on the realty.¹ Taxes on real estate

Administrator's sale of *Ohio* lands by a Virginia court is void for want of power. Salmond v. Price, 13 Ohio, 368; Price v. Johnston, I Ohio St. 392; McLaurin v. Salmons, II B. Mon. (Ky.) 96.

Land descended is applicable to the payment of debts in advance of a specific legacy. Alexander v. Worthington, 5

Md. 493.

Where lands have descended and others have been devised, the former are first liable to the discharge of debts or of an annuity which by the will is charged upon the whole of the real estate. Mitchell v.

Mitchell, 21 Md. 255.

As between a specific legacy and devise, the former is first liable for the payment of simple contract debts. Dugan v. Hollins, 11 Md. 76. See also Addison v. Addison, 44 Md. 202; Trumbo v. Sorrency, 16 Am. Dec. 103; McCampbell v. McCampbell, 15 Am. Dec. 542; Robards v. Worthan, 22 Am. Dec. 738; Rogers v. Rogers, 20 Am. Dec. 716; Newby v. Skinner, 31 Am. Dec. 327.

The Maryland act of 5 Geo. II. c. 7, § 4, subjecting decedent's whole estate, both real and personal, to payment of debts, is law in District of Columbia. Real estate is not merely a secondary fund for the payment of debts of decedent, but his estate, real and personal, is equally liable, unless some equitable reason should require the creditor to proceed first against the personal estate. Suckley's Admr. v. Rochford, 12 Gratt. 60; s. c., 65 Am. Dec. 240.

In Louisiana, if the proceeds of the

In Louisiana, if the proceeds of the movables and unmortgaged property of a succession do not suffice to pay off its privileged debts, those debts must be first referred for payment to the proceeds of its property incumbered by the youngest mortgage. Succession of More, 29 La.

Ann. 412.

Of two separate pieces of mortgaged property liable to contribute to the payment of privileged debts, the one subject to the mortgage of the later date must first contribute to such payment to the extent of its proceeds before the other can be required to contribute. Succession of O'Laughlin, 18 La. Ann. 142.

Specific devisees of freehold and leasehold estate must in *England* contribute in equal proportions to the satisfaction of the testator's debts by specialty, because both are liable for the payment of such debts by the Statute of Fraudulent De-

vises. Chase v. Lockerman, 35 Am. Dec. 277; s. c., II Gill & Johnson (Md.), 185, citing, Short v. Long, 2 Vern (Eng.), 756.

Specific legatees are entitled to have the assets descended to the heir marshalled, but not so as to interfere with lands devised, unless devised subject to the payment of debts. Chase v. Lockerman, 35 Am. Dec. 277; s. c., II Gill & Johnson (Md.), 185.

Under the South Carolina statute of

Under the South Carolina statute of 1789, an executor cannot sell a specific legacy for payment of debts without authority from the ordinary. Saxon v. Barksdale, 4 Desaus. (S. Car.) 522.

1. Hanson v. Hanson, 70 Me. 508; Scott v. Morrison, 5 Ind. 551; Whitehead v. Gibbons, 10 N. J. Eq. (2 Stock.) 230; McKay v. Green, 3 Johns. Ch. (N. Y.) 56; McCampbell v. McCampbell, 15 Am. Dec. 48; s. c., 5 Litt. 92; Robards v. Wortham, 22 Am. Dec. 738; s. c., 2 Dev. Eq. 173; Rogers v. Rogers, 20 Am. Dec. 716; s. c., 3 Wend. (N. Y.) 503; Clarke v. Henshaw, 30 Ind. 144; Newcomer v. Wallace, 30 Ind. 216; Halsey v. Patterson, 37 N. J. 445.

In equity, the personal estate is the natural and primary fund for the payment of debts and legacies, even where they are expressly charged on the real estate descending or devised, and the real estate is to be resorted to only as an auxiliary fund after the personalty has been exhausted. Stevens v. Gregg, 10 Gill & J. (Md.) 143; Hoge v. Brewer, 3 Gill & J. (Md.) 296. See also Elliott v. Carter, 9 Gratt, (Va.) 541.

An administrator cannot make a valid agreement with a creditor of the estate that part of the claim shall be charged upon the land. Xe Jenkins, 3 Demarest

(N. Y.), 551.

Requisites of a bill in equity by an administrator to marshal the assets of an insolvent estate considered, and the priorities and equities of mortgagors and other creditors discussed. Irwin v. Bond, 41 Ga. 630.

Where a creditor by his laches has lost his right to proceed against the real estate, the doctrine of marshalling the assets by which the proceeds of the real estate will be first applied in the payment of the other creditors is not applicable. Groot v. Hitz, 3 Mackey (D. C.). 247.

Although under the West Virginia Code real as well as personal estate is

due at the time of the death of a deceased person are payable out of his personal estate, but those accruing subsequently are a charge upon the land. Heirs or devisees may compel the executor to pay the purchase-money remaining unpaid upon lands purchased by the deceased out of the personal property in his hands.2 Upon the same principle, the heirs and devisees may

made subject to the payment of the just debts of the intestate, still the realty which descends to the heir should not be decreed to be sold for the payment of judgment liens until resort is first had to the personal estate, so far as practicable, and without producing unreasonable de-lay. Laidley v. Kline, 8 W. Va. 218. The whole of a decedent's property,

both real and personal, as against his heirs, is subject by the laws of Indiana to the payment of his debts and liabilities. Therefore a claim for damages upon a breach of a covenant of warranty should, in a deed of conveyance of real estate, be prosecuted against his personal representative or filed against his estate, as provided in section 62 of the act regulating the settlement of decedents' estates (2 Gav. & H. 501), and if not so filed is likely to become barred. Hartman v. Lee, 30 Ind. 281; Ratcliff v. Lennig, 30 Ind. 289.

Personal property bequeathed to the widow of the testator must be applied in payment of the debts of the estate before land devised can be made chargeable. Rogers v. Rogers, 20 Am. Dec. 716; s. c., 3 Wend. (N. Y.) 503.

The direction to an executor contained in 2 N. Y. Rev. Stat. 87, § 27, subd. 3, to proceed with diligence to pay the debts of the deceased, is in effect an appropriation for that purpose of the personal estate, and it must be employed therefor; and this having been attained, a legatee has no right against the widow's dower, founded upon such appropriation. Harrison v. Peck, 56 Barb. (N. Y.) 251. Where personal estate of deceased is

insufficient, and during the contest about probate the income of the realty has accumulated as a fund in the executor's hands, and there are controversies between legatees and devisees, the debts may be paid from the fund, and the legatees and devisees be left to settle their disputes before a competent tribunal: Skidmore v. Romaine, 2 Bradf. (N. Y.)

1. Griswold v. Griswold, 4 Bradf. (N. Y.) 216; Henderson v. Whitinger, 56 Ind. 131; Re Noyes, 3 Demarest (N. Y.), 369.

But a sole heir-at-law, to whom it can make no difference whether certain taxes

and assessments on the land are paid from the land or from the personalty, cannot maintain an action against the executor to compel their payment from the personalty. Smith v. Cornell, 51 N. Y. Super. Ct. 354.

An administrator has no right to use the personal assets of the estate to make repairs or pay taxes upon the homestead while occupied by the intestate's widow. though she has made no formal selection thereof, and no decree has assigned it to her. Wilson v. Proctor, 28 Minn. 13.
2. Lampert v. Beeman, 34 Barb. (N.

Y.) 239.

An administrator has no right, without an order of court, to apply the general assets of the estate to the discharge of a debt secured by vendor's lien upon the homestead set apart to the family of the Mullins v. Yarborough, 44 deceased. Tex. 14.

At the time of the death of A. certain contracts for building houses on real estate owned by him were partially unful-Held, that the contracts constituted a charge on the personal estate, and that this was the fund primarily tobe charged as between heirs and next of kin, though the law might give a lien on the real estate. Taylor v. Taylor, 3 Bradf. (N. Y.) 54.

Where a person, having contracted for the erection of a house upon his land, died intestate, and his administrator, through misapprehension of his rights: and powers, cancelled the agreement, held, that the heir was entitled to the amount which was to be paid for the house out of the personalty. Haleyburton v. Kershaw, 3 Desau. (S. Car.) 105.

By the law of South Carolina, descend-Haleybur-

ed real estate is liable to the testator's. debts before specifically bequeathed personal property. Hence where a testator made his will giving certain specific legacies after directing his debts to be paid, and after he made his will, contracted for the purchase of land which he entered upon but did not pay for, held, that the land must be paid for out of itself. Brown v. James, 3 Strobh. (S. Car.) 24.

Where the land of a deceased debtor is decreed to be sold for the payment of his debts upon the application of a credcompel the payment of a mortgage debt out of the personalty to relieve the real estate of the lien.1

itor whose claim is for the purchasemoney of certain land bought by such debtor, the land so purchased should be first sold. Spencer v. Pearce, 10 Gill &

J. (Md.) 294.

À judgment was recovered against an executor for the price of real estate purchased by the testator, which price was made a special lien upon the land at the time of the purchase. Held, that after the application of personalty undisposed of, and of the proceeds of realty devised expressly for the payment of debts, the land first mentioned was to be charged to the extent of the lien, in exoneration of personalty specifically bequeathed. Robards v. Wortham, 2 Dev. Eq. (N. Car.)

In Pennsylvania, the vendor of land, in an agreement to sell, who has brought ejectment to enforce payment of the purchase-money, has no claim on the personal estate of the vendee, who has deceased. The action of ejectment being in disaffirmance of the contract, he cannot enforce two inconsistent claims at the same time.

Pott's App., 5 Pa. St. 500.

A heritable bond charged upon an estate in a foreign country must be paid according to the laws of that country; and if under the laws of that country such estate is primarily bound for that debt, and the heir must pay it himself, and can have no relief against other estate of the deceased in that country, he cannot be relieved or reimbursed out of any estate of decedent whatever. Alexander v. Waller, 6 Bush (Ky.), 330.

Property in the hands of a bona fide purchaser, from executors who have power to sell, will be protected by compelling the executors, if they have assets, to pay the claims against it. man, 2 Md. Ch. 474. Latrobe v. Tier-

Expenses of management and sale of real estate are to be paid out of the pro-Justice v. Lee, I Man. (Ky.) 247.

1. Sutherland v. Harrison, 86 Ill. 363. See also Clarke v. Henshaw, 30 Ind. 144; Newcomer v. Wallace, 30 Ind. 216; Phinney's Est., Myrick's Probate (Cal.), 239.

Unless, indeed, there is a clear intention indicated by the will that the devisee should take cum onere. Gould v. Win-N. J. Eq. 398; Lennig's Est., 52 Pa. St. 135. See also Wisner's Est., 20 Mich. 412.

A mortgage on the testator's estate, which is a bona fide debt, cannot be deducted from the amount of a general legacv, but must be paid from the residue. Wheeler v. Hatheway, 54 Mich. 547.

In discharging a mortgage, the heir is entitled to the aid of the personalty; but if he dispose of the mortgaged estate without making any application for aid in redeeming it, he cannot afterwards come upon the personal estate for assistance. Executors have no power to redeem mortgages out of the State in which they are appointed. Haven v. Foster, 10 Am. Dec. 353; s. c., 9 Pick. (Mass.) 112.

Payment of a note secured by a mortgage upon decedent's real estate in another State may be properly made by an administrator of his estate in New York. And the voucher for such payment may be allowed in the account of the administrator on his producing the evidence of satisfaction of the mortgage necessary under the laws of such other State. Hart's Est., 1 Tuck. (N. Y. Surr.) 133.

Where land is sold subject to a mortgage, and the purchaser covenants with the grantor to pay the mortgage debt, which is accordingly deducted from the purchase-money, the mortgaged premises are the primary fund for the payment of the debt, and the vendor cannot, by voluntarily paying the debt, make it a charge upon personal estate of the vendee in the first instance. Halsey v. Reed, 9 Paige (N. Y.), 446.

A testator having mortgaged land to secure the payment of a debt of A, then devised it to B. After the death of the testator A transferred to the executors a bond and mortgage as collateral security for the liability of the estate. Held, that B had an equitable claim to the specific appropriation of the proceeds of the bond towards, removing the incumbrance Fisher v. Fisher, I Bradf. (N. Y.) 335. incumbrance.

The common-law rule that the personal property of the deceased is the primary fund out of which all his debts are to be paid, has been changed in New York as to real estate subject to a mortgage; and where such real estate descends to an heir, or passes to a devisee, the heir or devisee is to satisfy the mortgage, unless there be an express direction in the testator's will that the mortgage be otherwise paid. Mosely v. Marshall, 27 Barb. (N. Y.) 42.

In North Carolina, one holding a mortgage on land must enforce it before looking to the personalty. Moore v. Dunn,

92 N. Car. 63.

A devisee of land, acquired by a testator subject to a subsisting encumbrance created by a former owner, takes it

Where the testator charges all his estate with the payment of debts, if after the personal estate is exhausted there remain a debt against the estate, it will be a charge on the realty.1 charging the land will not exonerate the personalty. At common law descended lands constitute a primary fund for the satisfaction of specialty debts and specific liens, and the testator, by making specific bequests of the personalty, manifests his intention to have the land bear its own burden unassisted.3

charged with the encumbrance, without any claim for its satisfaction out of the personal estate, unless the will clearly indicates an intention to charge such encumbrance on the personal assets, or the testator has so dealt with the encumbrance as to make it his proper debt. Hirst's App., 92 Pa. St. 491.

Where two distinct immovables in a succession are subject to the same first mortgage, and each subject to different second mortgages, the administrator cannot, by provoking a sale of one before the other, benefit the second mortgagees, on the immovable unsold, to the prejudice of those on that sold, by the distribution of entire price of the latter to the extinguishment of the first mortgage. The proceeds of the sale of both will be marshalled for simultaneous distribution. Anger's Succession, 36 La. Ann. 252.

1. Hudgin v. Hudgin, 52 Am. Dec.

124; s. c., 6 Gratt. (Va.) 320.

2. Robards v. Wortham, 22 Am. Dec.

738; s. c., 2 Dev. Eq. 173.

A provision in a will giving the testator's wife "the free and uninterrupted possession of the mansion-house, plantation and stock, and profits thereto belonging. Next, all lawful, just debts discharged," does not charge the land with the payment of the debts. McCampbell v. McCampbell, 15 Am. Dec. 48; s. c., 5

A testator directed that no security should be required of his executor, except for his debts, and confided the residue in him, to be disposed of as he should see fit; and directed the sale of all his real estate, except a reservation of a house and garden, and also the emancipation of all his slaves. Held, that his debts were charged upon the land. Dunn v.

Amey, I Leigh (Va.), 465.

A testator by his will, after giving several legacies, gave all the residue of his estate, real and personal, to his two sons, in fee; and by a subsequent clause he appointed them executors and gave them power to sell the real estate, in case the personal property should be insufficient for the payment of his debts. Held,

that the land did not thereby become equitable assets, and that equity would not interfere to deprive a creditor of a preference acquired by the recovery of a judgment at law. Pascalis v. Canfield, r Edw. (N. Y.) 201.

To constitute the real estate equitable assets for the payment of debts, there must be a devise to executors or trustees in trust to pay debts, as in Benson v. Le Roy, 4 J. C. R. 651.

"In some cases where the estate is charged with the payment of debts generally, and the devise is to executors to sell, by means whereof the descent to the heir is broken, there the proceeds upon a sale become equitable assets, While in other cases, where the descent is not broken, and there is a charge for payment of debts and an intention clearly expressed that the property should be sold for the purpose, the same principle attaches. See Lord Eldon's observations in Bailey v. Elkins, 7 Ves. 323; Shiphard v. Luteridge, 8 Ves. 26. But the present case is distinguishable from all these, because there is no devise in trust. . . . It is an absolute one to the two sons in fee, whereby they take as beneficial ownerscharged, it is true, with the payment of a legacy and with debts which they were personally liable for at law. There is also in the case before the court a power to sell for the payment of debts, provided the personal estate should prove insufficient. But this is surplusage: as owners under the devise these devisees could sell without such a power, and in case they did not sell or pay the debts they were liable at law." Pascalis v. Canfield, I Edw. Ch. (N. Y.) 204.

3. Robards v. Wortham, 22 Am. Dec.

738; s. c., 2 Dev. Eq. (N. Car.) 173.

Direction by testator to sell lands for payment of debts, and if there should be a deficiency, to sell such other property as his wife should point out, charges the wife's legacy, as between her and other legatees, but does not exonerate lands descending cum onere. Robards v. Wortham, 22 Am. Dec. 738; s. c., 2 Devereux Equity (N. Car.), 173. objection to the power of the legislature to subject the lands of a decedent to the payment of debts in exoneration of the personalty.¹

One fund cannot be subjected to the relief of another on the principle of substitution, unless it is made to appear clearly that the former fund was liable for the debt which the latter has discharged.² An heir against whom an obligee of a specialty debt has recovered is entitled to contribution from the assets in the hands of the executor or residuary legatee, but not from a general or special legatee.³ Where an executor, to exonerate property devised by will from an encumbrance, pays a debt at the request of the devisee, such payment becomes a charge on the property,

1. Watkins v. Holman, 16 Pet. (U.S.) 26, 63.

2. Greenlee v. McDowell, 3 Jones

Eq. (N. Car.) 325.

3. Chase v. Lockerman, 35 Am. Dec. 277; s. c., 11 Gill & Johnson (Md.), 185.

Where real estate is sold to save the personalty, the widow of the deceased will not be entitled to a distributive share of the personalty so saved, as it must be considered a purchase by the heirs. Waring v. Waring, 2 Bland (Md.), 673.

Heir who has paid the debts of his ancestor, after a deficiency in the personal assets, is entitled to contribution from his co-heirs out of the estate descended to them. Taylor v. Taylor, 48 Am. Dec. 400; s. c., 8 B. Mon. (Ky.)

In regard to contribution among heirs, see Schermerhorn v. Barhydt, 9 Paige, 28; Taylor v. Taylor, 8 B. Mon. (Ky.) 419; Ryan's Admr. v. McLeod, 32 Gratt.

(Va.) 367.

Specific legatees are not entitled to contribution from devisees on account of their legacies being applied to the payment of simple contract debts; but they are entitled to such contribution when their legacies have been applied to the payment of specialty debts, or where the specialty debts have been satisfied out of the personal assets of the decedent, and the simple contract creditors are thereby compelled to resort to the specific legacies. Chase v. Lockerman, 35 Am. Dec. 277; s. c., 11 Gill & Johnson (Md.), 185. See Robards v. Wortham, 22 Am. Dec. 738; s. c., 2 Dev. Eq. 173.

Subscription to stock of a company is a simple contract debt, and the legatee on payment of it is not entitled to be reimbursed out of the real estate; but where such subscription creates a specific lien on the stock itself, and the stock is, by the charter of the company, made real estate, a specific legatee on payment of the balance due on the subscription has

a right to be indemnified out of the stock. Robards v. Wortham, 22 Am. Dec. 738;

s. c., 2 Devereux Equity, 173.

Purchaser with warranty from an heir of realty which is afterwards sold by order of the surrogate to pay the debts of the ancestor, is entitled to be subrogated to the rights of the creditors who are paid by such sale, and has an equitable lien on the rest of the estate remaining in the hands of the heir. Eddy v. Traver, 31 Am. Dec. 261; s. c., 6 Paige Ch. (N. Y.) 521.

A purchased property sold on execution against the administrators of B, and sold the same to C. The property was afterwards recovered from C by a party having a paramount title. He'l, that A having satisfied the judgment against the estate, had a right to be substituted in the place of the execution creditor, and that his right would not have been affected if he had known that the property sold belonged to a stranger, and that his cause of action accrued at the time of eviction.

Where property of the intestate remains in the hands of the administrators after a lapse of more than five years, such property is liable for the payment of the debt, although the administrator is no longer personally responsible, and the administrator cannot avoid the payment of the claim from the fact of having held such property adversely for more than five years. McLaughlin v. Daniel, 8 Dana (Ky.), 182:

Heir or devisee of real estate will be subrogated to the rights of a creditor by specialty who has proceeded against the real estate descended or devised, and will be allowed to reimburse himself out of the personal estate, if such reimbursement will not prejudice any party whose claim is not more favored than that of such heir or devisee. Chase v. Lockerman, 35 Am. Dec. 277; s. c., II Gill & Johnson (Md.), 185.

and a court of equity will decree its reimbursement out of the same 1

In the administration of an estate, debts due the estate are legal assets.2 Damages recovered for the death of a person by wrong. ful act or default are not treated as part of the decedent's estate. and creditors get no benefit therefrom. Advancements made by a decedent in his lifetime to his children constitute no part of his estate, and cannot by his representatives be made to contribute to the discharge of his debts.⁴ Money paid to a guardian or legatee must be returned to the administrator when it is necessary for the payment of debts of the deceased.5 It seems to be settled that

1. Franklin v. Armfield. 2 Sneed

(Tenn.), 305.

Where an executor or administrator pays debts of the deceased to a greater amount than the assets received by him, and the personal estate proves insuffi-cient for the payment of debts, the administrator may be substituted in equity to the rights of the creditors so overpaid, and may proceed against the real assets of the deceased, but only upon the same terms, conditions, and proofs, and subject to the same defences as the creditors themselves. Collinson v. Owens, 6 Gill & J. (Md.) 4. See Watkins v. Dorsett, I Bland (Md.), 530. Compare Johnson v. Corbett, II Paige (N. Y.) 265.

An executor, who was also a trustee under the will, used funds in his hands to keep down the interest upon encum-brances upon a portion of the trust property, and for repairs of the same, instead of applying such fund, in payment of the debts of the deceased. Held, that equity would charge such premises in favor of the creditors of the deceased to the extent of the amount so laid out upon them. Ferris v. Van Vechten, 16 N. Y. Sup. Ct. 12.

Where an administratrix has in hand proceeds of property sufficient to pay a preferred mortgage to which it is subject, and instead of paying the mortgage pays another claim, she cannot recover back the latter, where the mortgage fund from her own laches becomes subsequently Succession of Foster, 4 La. insufficient.

Ann. 479.

Where the real and personal estate together are sufficient to pay the debts and leave a surplus, the administrator is not liable for supplying the wants of the children out of the personal estate, though it alone is not sufficient to satisfy the Billington's Est., 3 Rawle (Pa.), debts.

2. Rutledge v. Hazlehurst, 1 McCord

Ch. (S. C.) 46.

The proceeds of a sale by an administrator of real estate conveyed by his intestate with intent to defraud creditors, although such conveyance was void at the time as against then existing creditors only, are applicable to the payment of the creditors. Norton v. Norton, 5 Cush. (Mass.) 524; Lynn v. Yeaton, 3 Cranch C. Ct. 182.

The proceeds of land sold by order of the court, for the purpose of division, are not assets. Johnson v. Union Bank, 37

Miss. 526.

Moneys coming from the French indemnity to the estate of a person deceased are legal assets. Rogers v. Ho-

3. Chicago v. Major, 18 III, 349; s. c., 68
Am. Dec. 553; N. Car. Code, § 1500. The fund is chargeable, therefore, only with commissions and reasonable counsel fees. Baker v. Raleigh & Gaston R. Co., or N. Car. 308.

In Florida, future vested interests may be subjected to the payment of debts of a decedent by proceedings in equity. May v. May, 68 Am. Dec. 431; s. c., 7

Fla. 207.

Sale of an inchoate equity may be decreed in Alabama. Vaughan v. Holmes,

22 Ala. 593.

4. Chase v. Lockerman, 35 Am. Dec. 277; s. c., 11 Gill & Johnson (Md.), 185. See also Black v. Whitall, 59 Am. Dec. 423; s. c., 1 Stock. (N. J.) 572; O'Neal v. Oates, 8 La. Ann. 78.

5. Wilson v. Soper, 56 Am. Dec. 573; s. c., 13 B. Mon. (Ky.) 411; 2 Bl. Com. 513; Ticknor v. Harris, 40 Am. Dec.

186; s. c., 4 N. H. 272.

Legatees cannot be compelled to refund to an executor where he, mistaking the value of the assets, voluntarily paid them their legacies, there being no creditors of the decedent, but his estate turning out inadequate for the payment Davis v. Newman, 2 of the legacies. Robinson (Va.),664; s.c.,40 Am. Dec. 764.

a bond will be assets in the country of the deceased obligee's domicile, or in the country where the bond happened to be at the time of the obligee's death; but that a parol contract will be assets in the State where the debtor resides, unless it shall lawfully come to the hands of the domiciliary administrator.1

At common law legacies are reached for the payment of debts through the executor or administrator, by retaining until the debts are paid; if more come in afterwards, by recalling sufficient. Ticknor v. Harris, 40 Am. Dec. 186; s. c., 14 N. H.

The New Hampshire statute respecting the settlement of insolvent estates has cut off this remedy, so far as contingent demands which could be allowed by the commissioners are concerned, by its provision that no suit shall be sustained against the executor or administrator otherwise than is provided in that act. Judge of Probate v. Brooks, 5 N.

As no judgment can be had against him, he has no occasion to recall anything from the legatees to answer such demands, and the statute, in taking away this remedy through the administrator, has provided no other by which the legatees are made liable. Ticknor v. Harris, 14 N. H. 272.

Creditors or distributees may follow in the hands of third persons assets of the estate which they have been enabled to obtain by collusion with the representatives of the estate; but to any such bill the personal representative, or in case of his death his representative, must be a party. Johnston v. Lewis, 33 Am. Dec. 74; s. c., Rice's Eq. (S. Car.) 40. See also Worthy v. Johnson, 52 Am. Dec. 399; 8 Ga. 236.

The rights of creditors against the heir may be lost by laches. Collamore v. Wilder, 19 Kans. 67; Bishop v. O'Connor, 69 Ill. 431.

As to the jurisdiction of equity to maintain suits by creditors against heirs for collection of debts due from the ancestor, see 3 Pomeroy's Eq. § 1154.

In Shannon v. Dillon, 48 Am. Dec. 394; s. c., 8 B. Mon. (Ky.) 389, it was said that the creditor might maintain an equitable action against the heir to whom the estate had descended, although there had been no administration of the estate.

In Smith v. State, 13 Smedes & Mar. (Miss.) 140, it was held that the personal property of a testator, specially bequeathed by him, is subject to be sold under execution issued against the executor, issued upon a judgment founded upon a debt of the testator, obtained against the executor after the property had passed into the hands of the legatee with the assent of the executor, and had, upon the legatee's death, passed to his distributees.

Before a creditor having a judgment against an intestate can seek satisfaction out of purely equitable assets in the hands of a stranger, he must make it appear that the estate is otherwise insufficient. Jones v. McCleve, 61 Ga. 602.

When a court of equity has control of both personal and real estate, it will, in order to prevent circuity and save expense and delay, apply them in the order in which, as between the heir and executor, they are liable. Goodburn v. Stevens, I Md. Ch. 420.

Assets may be partly legal and partly equitable, and the court will follow the rule of law as to the legal assets, but will direct the equitable assets to be applied v. Murgatroyd, I Johns Ch. (N. Y.) 119.

1. Fletcher's Admr. v. Sanders, 7

Dana (Ky.), 345; s. c., 32 Am. Dec. 96. Crops of farm purchased between times of making will and codicil are chargeable with testator's debts and annuity, and the net residue thereof is the primary fund for the payment of the debts, under a will directing that the testator's estate should be kept together during the life of his daughter, who should be paid a certain sum annually from the proceeds of the crops, and the net residue of the crops be appropriated to the payment of his debts. Drayton v. Rose, 7 Rich. Eq. (S. Car.) 328; s. c., 64 Am. Dec. 731.

The personal representative of a testator or intestate is, by the usage of the court, entitled to one year after the death of the testator or intestate to get in the assets, pay the debts, and prepare for the distribution or investment of the estate, according to the will, unless specific directions on the subject are given by the testator; and the representatives are justified in appropriating the income of the personal estate for that year to the payment of debts, under a provision in the will though that provision should be void under the statute to prevent the accumulation of the rents or income of personal or real estate. Hawley v. James, 5 Paige (N. Y.) 318.

4. Application of Real Estate to the Payment of Debts.—(a) Liability of Lands in Hands of Heirs, Devisees, and Purchasers—Time of Application—Jurisdiction—Where Vested—Grounds of Juris. diction—Imsufficiency of Personal Assets and Existence of Debts Essential—Debts Barred by Statute of Limitations—Jurisdiction Dependent on Statute—Sale and Conveyance—Form of Order—Administrator must Conform to Order and Statute—Proceeding In Rem-Irregularities which render Sale Void.—At common law. lands in the hands of the heir were subject to the ancestor's debts. of record and specialty, debts in which the heir was expressly named, but not to his debts by simple contract. This distinction has been abolished in England and most of the States, and land now descends subject to the ancestor's debts, whether due by record, specialty, or simple contract. Beyond the value of the land so descending to him the heir is not personally liable.2 At com-

1. Co. Litt. 191a, n. (1); vi. 9 209a. See also Bac. Abr., title Heir and Ancestor, (F.); Co. Litt. 376b; Buckley v.

Nightingale, 1 Strange, 665.

It appears that in the early periods of English history the heir was bound to the extent of the inheritance which descended to him to pay such of the debts of his ancestor as the goods and chattels of the ancestor were not sufficient to satisfy. Wms. on Real Prop. (2d Am. Ed.) 63°; Wms. on Real Prop. (2d Am. Ed.) 03; Glanville, lib. vii. c. 8; Bract, 61a; I Reeves Hist. Eng. Law, 113. These authorities appear to be express; the contrary doctrine, with an account of the reasons for it, will be found in Bac. Abr., title Heir and Ancestor, (F.).

The spirit of feudalism was opposed to the creditor's right to resort to the land, and in the days of Edward I. we find it laid down by Britton that no one should be held to pay the debt of his ancestor, whose heir he was, to any other per-son than the king, unless he were by the deed of his ancestor especially bound to do so. Britt. 64b; Co. Litt. 209a; Wms. on Real Prop. (2d Am. Ed.) 63°.

If, however, the debtor left his land to trustees in trust to sell to pay debts, the court of chancery, acting upon the maxim "equality is equity," distributed the proceeds pro rata among all the creditors. In such cases the lands were called equitable assets. Wms. on Real Prop. (2d Am. Ed.) 64°; Parker v. Dee, 2 Ch. Cas. 201; Bailey v. Ekins, 7 Ves. 319; 2 Jarm. on

Wills, 544.

2. Bac. Abr., title Heir and Ancestor, (F.); Watkins v. Holman, 16
Pet. 25; Bryan v. Blythe, 4 Blackf, 249; Schermerhorn v. Barhydt, 9 Paige (N.Y.), 28; Covell v. Weston, 20 Johns. (N. Y.) 414; Barnett v. Hayden, 5 J. J. Marsh.

(Ky.) 108; Whitaker v. Young, 2 Cuv. (N. Y.) 569; Reardon v. Searcy's Heirs, 1 Litt. (Ky.) 53; Holder's Heirs v. Mount's Heirs v. Lewis's Heirs, 4 J. J. Marsh. (Ky.) 562; Ellis v. Gosney's Heirs, 7 J. J. Marsh. (Ky.) 562; Ellis v. Gosney's Heirs, v. J. J. Marsh. (Ky.) 100; Waller's Exrs. v. Ellis, 2 Munf. (Va.) 88; Louisiana State Bank v. Barrow, 2 La. Ann. 405; Reynolds v. May, 4 Greene (Iowa), 283; Metcalf v. Smith's Heirs, 40 Mo. 572; Hall v. Martin, 46 N. H. 337; Van Meter's v. Martin, 46 N. H. 337; Van Meter's Heirs v. Love's Heirs, 33 Ill. 260; Branger v. Lucy, 82 Ill. 91; Cutright v. Stanford, 81 Ill. 20; Williams v. Ewing, 31 Ark. 229; Payson v. Huddock, 8 Biss. (U. S. C. C.) 293; Sauer v. Griffin, 67 Mo. 654; Stigler v. Poster, 42 Miss. 449. Compare Bland v. Hartsoe, 65 N. Car.

In England, by Stat. Geo. III. c. 74, in 1807, the fee-simple estates of deceased traders were first rendered liable to the payment of their simple contract debts. By a subsequent statute (Stat. 11 Geo. IV. and I Will. IV. c. 47) the above enactments were consolidated and amended, and facilities afforded for the sale of such estates of deceased persons as were liable by law or by their own wills to the payment of their debts. In 1833, by Stat. 3 and 4 Will. IV. c. 104, all estates in feesimple which the owner shall not by his will have charged with or devised subject to the payment of his debts, are liable to be administered in chancery for the payment of all the just debts of the deceased, as well debts due on simple contract as by specialty. But out of respect for the ancient law, the act provides that all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them, before any of mon law, land in the hands of a devisee, or in the hands of a bona fide purchaser from an heir or devisee, was not liable for the debts of the ancestor. In such case, however, the rule has been so far

the creditors by simple contract or by specialty in which the heir is not bound shall be paid any part of their demands. If, however, the debtor should by his last will have charged his lands with or devised them subject to the payment of his debts, such charge will still be valid, and every creditor of whatever kind will have a right to participate in the produce. Thus a debtor by charging his lands with the payment of his debts can place all his creditors on a level, and deprive creditors by specialty of that priority to which they would otherwise be entitled. Wms. on Real Prop. (2d Am. Ed.) 65°, 66°. See also 2 Jarm. Wills, 510.

There was no law in the territory northwest of the Ohio, authorizing executors and administrators to sell a decedent's real estate, previous to August, 1795. Ludlow v. Johnston, 3 Ohio, 553.

Under the statutes of *Ohio*, the widow and heirs of a deceased person, who are the recipients of property from the estate, are liable for his debts to the extent of such property, under the conditions and limitations of the statute. Goshorn v. Alexander, 2 Bond (Ohio), 158.

Foreign heirs are not liable for ancestors' debts, where they succeed to land at their own residence which is beyond the reach of the court. Brown v. Bashford, 52 Am. Dec. 559; s. c., II B. Mon. (Ky.)

An heir's bond for the executor to forbear from selling to pay debts, although executed after and not "before" the order therefor, as prescribed in I Swan & C. Ohio St. 59I, is nevertheless binding upon the obligors, they having had the benefit of the creditors' non-interference. Davisson v. Burgess, 31 Ohio St. 78.

Neither the personal representatives of a decedent, nor his creditors, obtain such an interest to his real estate, by the death of the owner, as precludes the legislature from repealing the law authorizing sales to be made by executors or administrators for the payment of debts. Ludlow v. Johnston. 3 Ohio, 553.

In an action against an heir for the debt of the ancestor on account of real estate descended, there is no necessity for any "allegation of any promise, undertaking, contract, agreement, obligation, or liability, express or implied," on the part of the heir to pay the debt. Lowry v. Jackson (S. Car.), 3 S. E. Rep. 473.

In certain States, as for example in

New York, the action is required to be brought against the heirs jointly. Wambaugh v. Gates, 11 Paige (N. Y.), 505; Mersereau v. Ryerss, 3 N.Y. 438; Selover v. Coe, 63 N. Y. 438.

Action of debt on claim against deceased debtor should not be brought against the heirs and devisee jointly, if the heirs take nothing by descent. Ticknor v. Harris, 40 Am. Dec. 186.

It has been held that such a statute does not make the heirs jointly liable as joint debtors, but that it simply prescribes a mode of enforcing a demand out of assets descended to them. Kellogg v. Olmstead, 6 How. Pr. (N. Y.) 487.

In other States it has been held that decrees against the heirs should be joint, and not several. Cogswell's Heirs v. Lyon, 3 J. J. Marsh. (Ky.) 38; Ransdell v. Threlkeld's Admr., 4 Bush (Ky.), 347; Vanmeter's Heirs v. Love's Heirs, 33 Ill. 260; Cutright v. Stanford, 81 Ill. 240.

200; Cutright v. Stanford, 81 Ill. 240.

1. Campbell's Case, 2 Bland's Ch. (Md.) 209; s. c., 20 Am. Dec. 360; Carman v. Turner, 6 Har. & J. (Md.) 65; Coleman v. Winch, 1 P. Wms. 777; Mathews v. Jones, 2 Anstr. 506; Bac. Abr., tit. Heir and Ancestor, (F.); Wambaugh v. Gates, 11 Paige (N. Y.), 505; Spaight v. Wade's Heirs, 2 Murph. (Tenn.) 295; Den v. Jaques, 10 N. J. L. 259. See Ryan's Admr. v. McLeod, 32 Gratt. (Va.) 367; Warren v. Raymond, 17 S. Car. 188.

In England, neither debts by specialty by which the heirs are not bound, nor simple contract debts, since the statute 3 and 4 Will. IV., constitute a lien or charge upon the land, either in the hands of the debtor or of his heir or devisee. Notwithstanding the existence of such debts the debtor himself may alienate the land. By taking proper proceedings, the creditors both by specialty and simple contract may obtain payment out of the descended or devised real estate in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate; and in the hands of the alienee, whether upon a common purchase or on settlement, even with notice that there are debts unpaid, the land is not liable, though the heir or devisee remains personally liable to the extent of the value of the land alienated. Wms. on Real Prop. (2d Am. Ed.) 65°. See also Richardson v. Horton, 7 Beav. 112. 123; s. c., 4 My. & Cr. 268, 269; Sugd. on

modified by statute in England and most of the States that the heir or devisee may be held personally liable for the value of the land, and all devises made to delay, hinder, or defraud creditors are void as against them.¹ An alienation by the heir or devisee after suit brought by a creditor to enforce his claim against the land is mala fide, and void as against creditors.²

In *England*, and some of the States, it is held that the creditor may follow the specific produce of real assets aliened by the heir or devisee, and take it from any one in whose hands it may be found.³ In other States the purchaser from the heir or devisee

Vend. 834, 835; Spackman v. Trimbell, 8 Sim. 259, 260; note to Silk v. Prime, 2 Lead. Cas. Eq. (4th Am. Ed.) 127°. Compare Sir William Harbert's Case, 3 Coke, 12a; Davy v. Pepys, Plowd. 441; Stileman v. Ashdown, 2 Atkins, 608.

But now, by 32 and 33 Vict. c. 46, in the administration of the estate of any person who has died on or after Jan. 1, 1870, debts by specialty and simple contract are payable out of legal and equitable assets pari passu. Silk v. Prime, 2 Lead. Cas. Eq. (4th Am. Ed.) 358. (See note to this case for a full discussion of the English legislation.)

In Rhode Island, courts of probate may authorize the sale of a decedent's realty for his debts at any time while such realty remains in the hands of his heirs. Maury

v. Robinson, 12 R. I. 152.

In South Carolina, the lands of an ancestor in the hands of his heir are liable for his debts, unless bona fide aliened before action brought; but a mortgagor by the heir does not operate as such an alienation until the mortgage is out of possession. Warren v. Raymond, 17 S. Car. 163.

Under Code of North Carolina, § 1442, providing that all conveyances made, by devisees and heirs at and within two years from the grant of letters shall be void as to creditors and personal representatives of the deceased debtor, such conveyances are void as to them only, and even as to them only in case of deficiency of personal assets. Davis v. Parry, I S. East. Rep. (N. Car.) 610.

A statute providing that, where lands have been sold by the heirs or devisees, the lands remaining in their hands unsold shall first be sold to satisfy the debts of the estate (2 N. Y. Rev. Stat., § 20) should be construed to refer to the residue unsold belonging to the heir or devisee who makes the first-mentioned sale. Re Clark, 3 Redf. (N. Y.) 225. See also Eddy v. Traver, 31 Am. Dec. 261; s. c., 6 Paige Ch. (N. Y.) 521.

1. Campbell's Case, 20 Am. Dec. 360; s. c., 2 Bland's Ch. (Md.) 209; Ryan υ. Jones, 15 Ill. 1; Tremble v. Jones's Heirs, 3 Murph. (Tenn.) 579; Bedell's Heirs v. Lewis's Heirs, 4 J. J. Marsh. (Ky.) 562; Hopkins v. Ladd, 12 R. I. 279; Warren v. Raymond, 17 S. Car. 188.

"It has been declared by statute that all devises in fraud of creditors shall be deemed void,-3 W. & M. c. 14,-that is, where the debtor devises his real estate to any one without leaving a sufficiency in the hands of his heirs or executor to pay his debts; yet if a testator devises real estate for the payment of his debts in a way that may be sufficient and effectual for that purpose, it will not be affected by this statute. But if the real estate set apart by the testator for the payment of his debts be insufficient, or be given in such manner as to be ineffectual, then it will be considered as coming within the meaning of this statute and be deemed void. Otherwise the creditors must take that real estate of the deceased debtor which he has devised for their benefit, and none other." Campbell's Case, 20 Am. Dec. 367; s. c., 2 Bland's Ch. (Md.) 209. See also Hughes v. Doulben, 2 Bro. C. C. 614; s. c., 2 Cox, 170; Bootle v. Blundell, 19 Ves. 528; Ashby v. Palmer, 1 Meriv. 296; Pow. Mort. by Coven, 69, 325; Notes to Silk v. Prime, 2 L. Cas. Eq. (4th Am. Ed.) 125° et seq.

2. Ex parte Morton, 5 Ves. 449; Campbell's Case, 2 Bland's Ch. (Md.) 209; s.

c., 20 Am. Dec. 360.

An executrix and sole devisee applied to the court to have the property sold to pay debts. The court took jurisdiction and enjoined actions by creditors. Held, that a creditor was thus prohibited from seeking to subject the lands by suing the devisee, and that a purchaser from the devisee, pending the proceedings, and with knowledge thereof, and without leave of court, took subject to the order of court in the proceedings, and took only the devisee's interest remaining after the debts were paid. Stackhouse v. Wheeler, 17 S. Car. 91.

3. Ex parte Morton, 5 Ves. 449; Camp-

in all cases holds the land subject to the administrator's lien.1 Where there is no particular time fixed by statute within which the petition for leave to sell real estate for the payment of debts must be filed, application must be made within reasonable time.2

bell's Case, 2 Bland's Ch. (Md.) 200; s.

c., 20 Am. Dec. 360.

1. McCoy v. Morrow, 18 Ill. Graff v. Smith's Admrs., I Dall. (Ra.) 451: Morris's Lessee v. Smith, I Yeates (Pa.), 238. See also Elliott v. Moore, 5 Blacks. (Ind.) 270; Watkins v. Holman, 16 Pet. (U. S.) 25, 63; Ryan v. Jones, 15 Ill. 1; Farran v. Robinson. 93 Am. Dec. 617; s. c., 17 Ohio St. 242.

In North Carolina the quasi lien of a creditor of an estate on the land of the decedent is destroyed by a sale after two years, leaving him only a personal claim on the heir, and notes given for the purchase-money are not subject to that lien. Winfield v. Burton, 79 N. Car. 388.

As to construction of Battle's N. Car. Rev. ch. 46, § 24, requiring devisees who desire to sell before the two years of settlement have expired to give refunding bonds for benefit of creditors, see Badger v. Daniel, 79 N. Car. 372, 386.

An administrator cannot sell lands to pay debts, if the lands were sold by a devisee more than two years after the administrator's qualification; nor if the lands were sold within the two years, provided the devisee's vendee after the two years sold to a purchaser for value without notice. Marchison v. Whitted, 87 N. Car. 465.

An administrator cannot, by consenting to the sale of land by the heir, divest the creditor of his right to have his debt made out of such land, though it might create a personal estoppel against him if the right of creditors was not affected. Moncrief v. Moncrief, 73 Ind. 587. Compare Pell v. Farquar, 3 Blackf. (Ind.)

331. Land was subjected to a claim in favor of a decedent's estate and sold. heirs bid it in, paid no money, but were to account for the price in final settlement. Afterwards they sold the land to the estate's attorney for a certain price, half of which he retained as fees for services rendered the estate, and the other half the heirs paid to the administrator. Held, that the land was not thereafter subject to the claims of creditors of the estate. Westbrook v. Munger, 64 Miss. 575; s. c., I So. Rep. 750.

2. Gunby v. Brown, 86 Mo. 253; Hall v. Woodman, 49 N. H. 295; McCrary v. Tasker, 41 Iowa, 255; Jackson v. Robinson, 4 Wend. (N. Y.) 436; Smith v. Dut-

ton, 16 Me. (4 Shep.) 308. See also Mc-Collister v. King, 10 Mo. App. 243: Mays v. Rogers, 37 Ark. 155; Moore v. Ellsworth, 51 Ill. 308.

It is the duty of courts of probate to refuse an order for the sale of real estate when there has been such delay in making the application as to amount to laches. Crosby's Est., 55 Cal. 574.

No definite rule can be laid down as

to the time within which the creditor must initiate proceedings to compel the administrator to proceed to subject the lands to the payment of the debts of the decedent. Ferguson v. Scott, 49 Miss.

In Gunby v. Brown, 86 Mo. 253, a sale under order of court procured after twelve years from the grant of administration was enjoined. In Smith v. Dutton, 16 Me. 308, it was said that the application must be made within a reasonable time after the expiration of the time of limitation of suits against executors and administrators. In Massachusetts and Connecticut the application must be made within a reasonable time after the death, and what is such reasonable time is to be fixed by analogy to the Statute of Limitations. Ricard v. Williams, 7 Wheat. 59.

A creditor who delays to make the application until the personal estate has passed into the hands of the distributor, who wasted it, and released the executor, has forfeited his equity against the land. Buford v. McKee, 3 B. Mon. (Ky.) 224. An application for an order to sell real

estate by an administrator de bonis non, thirteen years after the executor had given notice of his appointment, is not made within a reasonable time, and is properly refused. McCrary v. Tasker, 41 Iowa, 255.

The lapse of fourteen years between the granting of administration and an application to a surrogate for the sale of real estate, is a sufficient cause, without explanation, for the rejection of the application. Jackson v. Robinson, 4 Wend. (N. Y.) 436.

Unless satisfactorily explained, a delay of seven years in applying for leave to sell land to pay debts precludes the granting of the application. McKean v.

Vick, 108 Ill. 373.

When so explained, however, an order will be made, notwithstanding more than And where the delay of the creditors in applying for the appointment of an administrator has rendered a sale inequitable, a license will be denied.1

Jurisdiction to enforce the creditor's claim against the land is vested in some States in the ordinary courts of common law.2 but

seven years have elapsed. Bursen v.

Goodspeed, 60 Ill. 277.

The filing of a petition by an administrator for authority to sell real estate, after the expiration of the time for filing claims against the estate, is excused by showing that an earlier sale would have been at great sacrifice. Conger v. Cook,

56 Iowa, 117.

Indiana Rev. Stat. 1881, § 294, relating to limitations of actions, applies to a proceeding by an administrator de bonis non for the sale of the decedent's real estate to pay debts, and bars it after the expiration of fifteen years from the time the cause of action accrued; but where the claim to pay which the property has to be sold is litigated, and there are no other claims unpaid, so that it cannot be known that any real estate will have to be sold, the statute will not begin to run until the final allowance of such claim. Scherrer v. Ingerman (Ind.), II N. E. Rep. 8.

Chapter 18, Minnesota Laws 1879, operated to repeal sec. 3, c. 37. Laws 1876, so far as the latter limited the time within which the real estate of a deceased person may be sold for payment of debts to three years from the date of decease, since it authorizes such sale within one year of making the order, or within such further time, not exceeding two years, as may be allowed by the probate court. Culver v. Hardenburg (Minn.), 33 N. W.

Rep. 792.

A sale of lands by the administrator of a deceased person for the payment of his debts, under the provisions of 2 N. Y. Rev. Stat. 100, § 1, must be had, or the proceedings therefor commenced, within three years after the granting of letters of administration. The statute begins to run from the time of the original granting of letters of administration, and not in case of a change of administrators, from the time of granting letters to the one who made the sale. Slocum v. English, 62 N. Y. 494.

See further, as to the application of the three years' limitation under the N. Y. Code, § 2750, to proceedings to sell real estate to pay decedent's debts, United States L. Ins. Co. v. Jordan, 5 Redf. (N. Y.) 207; Mead v. Jenkins, 4 Redf. (N. Y.) 369.

It would be reasonable and less mischievous in its consequences to allow a longer delay and indulgence when the heir or devisee continued the owner. than where the lands had been conveyed to an innocent purchaser. Ferguson v. Scott, 49 Miss. 500.

In New York the three years' limita-

tion is only applicable to purchasers in good faith and without notice. Mead v.

Jenkins, 4 Redf. (N. Y.) 369. Under New York Laws 1873, § 211, providing that real estate of any decedent, the title to which has passed out of any heir or devisee by conveyance or otherwise to a purchaser in good faith for value, shall not be sold, under certain acts therein referred to, to satisfy a debt of the estate, unless application for such sale is made within three years of the grant of letters testamentary or of administration, the lapse of such three years will free from liability the property of an infant devisee which has been sold at guardian's sale under the provisions of 2 N. Y. Rev. St. p. 194, § 170, and it is of no consequence that the title again vests in such infant. In re Stevens (N.

Y.), 12 N. E. Rep. 759.
The provision of New York Laws 1873, ch. 211, that no real estate, the title to which has passed out of any heir or devisee to a bona fide purchaser for value, shall be sold unless letters have been applied for within four years from the death, nor unless the sale be applied for within three years of the granting of letters, applies in the case of a mortgage given within four years from the death. Fonda v. Chapman, 23 Hun (N. Y.), 119.

The interest of one entitled to land on the remarriage of the widow is not real estate within New York Laws 1873, ch. 211, forbidding the sale of the real estate of one deceased for his debts, when the heir has aliened it, unless the application is made within three years. Re Dodge,

40 Hun (N. Y.), 443. 1. Hatch v. Kelly, 63 N. H. 29. Com-

pare Crosby's Est., 55 Cal. 574.

2. Under the statute of Illinois of 1827, application by an administrator to sell real estate of his intestate might be made to the circuit court of the county in which the land was situated. Doe v Hileman, 2 Ill. (1 Scam.) 323.

Real Estate Applied

more frequently in orphans' courts, courts of probate, or surrogates' courts. The probate court may order a sale of the land of a de-

Under the Alabama statute of 1822which repeals the act of 1803-and the Ohio act of 1816, the petition should be filed in the county court from which the executor or administrator derived his authority. Wyman v. Campbell, 6 Port. (Ala.) 219; s. c., 31 Am. Dec. 676; Avery v. Pugh, 9 Ohio, 67.

In Indiana, executors, administrators, and guardians can only obtain leave to sell, etc., from the county court that appointed them, though the lands to be sold are in another county. Ex parte

Shockley, 14 Ind. 413.

In Iowa, the district court has general jurisdiction, and its powers are of such a nature as to give it cognizance of proceedings by creditors to compel an administratrix to sell real estate for the payment of debts. Naples v. Marsh, 19 Iowa, 381.

In Maine, the power vested in the supreme judicial court to grant license to sell real estate for the payment of debts is discretionary, not imperative. Nowell

v. Nowell. 8 Me. (8 Greenl.) 220.

In Florida, the proper course is for the executor or administrator to file a petition in the circuit court of the county in which the letters of administration or letters testamentary were granted, as pointed out by act 4th March, 1841, Thomp. Dig. 23, 204, note 6. Union Bank v. Powell, 52 Am. Dec. 367; s. c., 3 Fla. 175.

Under the Ohio act of 1803, "organizing the judicial courts," the courts of common pleas had jurisdiction to order the sale of real estate of a decedent. Ludlow v. Johnson, 3 Ohio, 553; s. c.,

17 Am. Dec. 609.

In Michigan, where the probate court denies the administrator leave to sell, and on appeal the circuit court reverses this order and grants leave, it should enter the proper judgment itself. Daly's

App., 47 Mich. 443.

The power conferred by 2 Gav. & H. 20, § 4, upon courts of common pleas to order a sale or distribution of decedent's real estate, carries with it the right to determine the title. Gavin v. Graydon, 41 Ind. 559.

1. In Pennsylvania and Alabama, the orphans' courts have jurisdiction. Wyman v. Campbell, 6 Port. (Ala.) 219; s. c., 31 Am. Dec. 677; Hilton's App. (Pa.), 9
Atl. Rep. 434; s.c., 19 W. N. C. (Pa.) 541.
The orphans' court of the county which

issues letters of administration, and has

jurisdiction of the administrator's accounts, has exclusive jurisdiction of an application under the Pennsylvania act of March 28, 1832, relative to decedents' estates, for power to mortgage for the payment of the debts of the deceased; and a mortgage for that purpose made under the authority of the court of the county where the lands are situated is, with the sheriff's sale on foreclosure thereof, void: Spencer v. Jennings, 114 Pa. St. 618; s. c., 8 Atl. Rep. 2.

In Texas, Iowa, North Carolina, California, Missouri, Arkansas, Minnesota, Michigan, and some other States, application must be made in the probate Ansley v. Baker, 14 Tex. 607; s. c., 65 Am. Dec. 136; Long v. Burnett, 13 Iowa, 28; Hyman v. Jaringan, 65 N. Car. 96; Matter of Lewis, 39 Cal. 306; Jackson v. Magruder, 51 Mo. 55; Gordon v. Howell, 35 Ark. 381; State v. Ramsey
Co. Pro. Ct., 25 Minn. 22; Pratt v.
Houghtaling, 45 Mich. 457.
Creditor cannot in Texas sue heir in

possession on intestate's promissory note, though it be the only debt against the estate, but must resort to his remedy by administration in the probate court. Ansley v. Baker, 14 Tex. 607; s. c., 65

Am. Dec. 136.

In Arkansas, jurisdiction for the sale of a decedent's lands is only in the probate court of the county in which the personal representative was qualified; not in another county in which the land may be situated. Gordon v. Howell, 35 Ark. 381.

Under Minnesota Gen. Stat. 1866, ch. 57, § 47, subd. I, the court appointing the administrator acquires jurisdiction to grant the license. Rumrill v. St. Ablans'

Bank, 28 Minn. 202.

A probate court has no power to compel specific performance by an administrator of a contract for the sale of his testator's real estate, when the authority to sell is not derived from statutory provisions, but from an express power in Coil v. Pitman, 46 Mo. 51. the will.

In North Carolina, a proceeding by an administrator to procure the sale of his intestate's real estate for the payment of debts is a special proceeding, and belongs to the original jurisdiction of the probate court; and parties injuriously affected by such proceeding ought to apply, in the first instance, to the judge of that court for such relief as they are entitled to. Hyman v. Jaringan, 65 N. Car. 96. cedent for the payment of his debts, at the instance of a creditor as well as of the administrator. It would appear to be the better opinion that where a statute renders the land of a decedent liable for his debts, and specifies the mode in which the liability shall be enforced, in a case in which the mode prescribed can be pursued equity has no jurisdiction.2

In the absence of an express authority in the will, the executor or administrator cannot sell the real estate of the decedent without an order from the probate court.³ Where, however, authority to

In New York, the only effective remedy for the specific appropriation of the realty to the payment of the debts is in the surrogate's court. Bloodgood v. Bruen, 2 Bradf. (N. Y.) 8.

In proceedings to sell the lands of a decedent for debts, the surrogate has jurisdiction to hear proofs and decide upon a claim disputed by the executor. Adams v. Nellis, 61 N. Y. 138. See also Re Haxton, 102 N. Y. 157.

The proceedings proper to be taken by an executor desiring to sell real estate belonging to his testator, under 2 N. Y. Rev. Stat. 100, §§ 1, 2, ascertained. Richmond v. Foote, 3 Lans. (N. Y.) 244. See also Rockwell v. Geery, 4 Hun (N.

Y.), 606. In Georgia, jurisdiction to order the sale of real estate belonging to an intestate is conferred upon the court of the ordinary, and the act of 1816 is directory merely, and does not limit the jurisdiction conferred. Tucker v. Harris, 13 Ga. 1; s. c., 58 Am. Dec. 488.

1. Scruggs v. Foot, 19 S. Car. 274. Compare Adams v. Holcombe, 14 Am. Dec. 719; s. c., I Harper's Eq. (S. Car.) 202; Sulkley's Admr. v. Rotchford, 12 Gratt. (Va.) 60; s. c., 65 Am. Dec.

2. Springfield v. Hurt, 15 Fed. Rep.

A proceeding by an administrator to sell land for the payment of debts is not a chancery proceeding. Moline, etc., Co.

v. Webster, 26 Ill. 233.

In Alabama, where in closing an administration in chancery it is found necessary to sell the real estate for the payment of debts, the chancellor can order them to be sold, as near as may be, in the manner prescribed by statute for sales in similar cases under an order of the orphans' court. Wilson v. Crook, 17 Ala. 59.

A suit in equity may be maintained against heirs where there has been no administration, to compel them to pay a debt due from their ancestor out of the assets received by them from him. Adams v. Holcombe, 14 Am. Dec. 719; s. c., 1 Harper's Eq. (S. Car.) 202.

Judgment creditor of decedent may maintain bill in equity against executors and devisees to subject the real and personal property of the estate to the satisfaction of his debt to avoid multiplicity of suits. Sulkley's Admr. v. Rotchford, 12 Gratt. (Va.) 60; s. c., 65 Am. Dec. 240.

In Maryland, it is held that where there is a deficiency of assets in the hands of an executor or administrator, a court of equity may decree a sale of real estate devolving on an heir of full age. Tyson v. Hollingsworth; I Har. & J.

(Md.) 460.

On an application to sell real estate of a decedent, the court of chancery has no authority to adjudicate upon a claim of title thereto set up by the heirs as derived from an independent source paramount to that of the decedent. Gill v. Shirley, 55 Miss. 814. In Tennessee, a bill to sell land to pay

debts and for distribution may be maintained upon the ground of necessity to sell for partition and distribution, though the case made for necessity to pay debts wholly fails. Fult Heisk. (Tenn.) 614. Fulton v. Davidson, 3

3. Wellborn v. Rogers, 24 Ga. 558.

Executor or administrator at common law could not sell the real estate of the deceased for the payment of his debts, unless expressly charged for that pur-Such real estate descended to the heir of the deceased. Ticknor v. Harris,

40 Am. Dec. 186; s. c., 14 N. H. 272. By Massachusetts Rev. Stat. ch. 65, §§ 11, 14, the sale by an administrator of real estate mortgages belonging to his intestate, and of the debts secured by the mortgage, is required to be by license of the probate court, obtained in the manner required by Rev. Stat. ch. 71, although neither the intestate nor the administrator has taken possession of the estate. Exp. Blair, 13 Metc. (Mass.) 126.

Massachusetts an administrator may sell any interest in real estate less dispose of the estate is given in the will, the order of the probate court is unnecessary. But the ordinary direction in the opening clause of a will that the executor pay the debts, gives no power other than that created by the law itself.² The jurisdiction of the court attaches upon the presentation of the proper petition by the duly appointed administrator.3

If, however, the petition fails to state jurisdictional facts, or if the land lies in another State, the court never acquires jurisdic-On an application by the administrator to sell the land of

than a freehold, without license. Amory

v. Francis, 16 Mass, 308.

Sales by an executor of any property belonging to his testator's estate, except annual crops carried to market, must, under the laws of Georgia, be made by auction, unless there is express authority in the will to adopt some other method, and a purchaser at such sales is bound to see that the executor is apparently proceeding in the manner prescribed by law. Neal v. Patten, 40 Ga. 363.

Under the Nevada statutes, executors and administrators have the possession and control of both the real and personal property belonging to the estate, under the direction of the court; and a payment by the executor in compliance with the order of the court, of assessments on mining stock legally levied, is proper. Matter of Millenovich, 5 Nev. 161.

1. Payne v. Payne, 18 Cal. 291. See Bell's App., 66 Pa. St. 498; Kinney v. Knovebell, 51 Ill. 112; Bond v. Zeigler,

44 Am. Dec. 656; I Ga. 324.

Provision of California act regulating settlements of estates of decedents, declaring that no sale of any property of an estate shall be valid unless made upon an order of the probate court, is applicable to sales by executors and administrators only, and does not refer to judicial sales under decrees of court, nor to sales in pursuance of testamentary authority. Fallon v. Butler, 81 Am. Dec. 140; s. c., 21 Cal. 24.

The special proceeding provided by New York Code, ch. 18, tit. 5, for disposing of the real property left by one deceased, cannot be instituted where property is directed by will to be sold for the payment of debts, and the execution of such a power of sale is practicable. Dennis v. Jones, I Demarest (N. Y.), 180.

An administrator de bonis non may sell land as directed by the will, although the power of the executor to sell was discretionary. Gullay v. Prather, 7 Bush

(Ky.), 167.
Where the will directs a sale to pay debts, but does not specify whether the sale shall be public or private, the executor may adopt either mode, as he may think the interests of the estate would be best promoted. Bond v. Zeigler, 44 Am,

Dec. 656; s. c., I Ga. 324.

2. Hill v. Den, 54 Cal. 6.
In North Carolina, the words "after all my debts are paid," annexed to a devise of land, do not confer upon the executor a power to sell. Dunn v. Keeling, 2 Dev. L. (N. C.) 283.

3. Satcher v. Satcher, 41 Ala. 26; 91

Am. Dec. 498; Long v. Burnett, 13 Iowa, Grayson v. Weddle, 63 Mo. 523.

28; Grayson v. Weddle, 63 Mo. 523.

Whether the application be accompanied by the exhibits and accounts in the second seconds and accounts and accounts and accounts and accounts and accounts are second seconds. immaterial. Gravson v. Weddle, 63 Mo.

523.
The probate court has no power to order a sale of the real estate by one not legally appointed administrator. Prvor

v. Downey, 50 Cal. 388.

If the court has acquired jurisdiction of the subject-matter by the filing of a petition by an administrator for leave to sell real estate to pay debts, and of the persons of infant defendants by the publication of notice, a failure to appoint a guardian ad litem, or his failure to answer, will not defeat the jurisdiction. Gage v. Schroder, 73 Ill. 44.

The fact that an administrator or executor has been removed after a petition to sell lands to pay debts has been filed is no reason why the proceedings should be dismissed; it is sufficient that the same be delayed until a properly qualified executor or administrator shall be found to proceed. Steele v. Steele, 80 Ill. 51.

A special proceeding in a surrogate's court to obtain leave to have the land of one deceased mortgaged for the payment of his debts cannot, jurisdiction having been acquired, be abandoned or dis-missed, unless by the entry of an order to that effect. Raven v. Norton, 2 Demarest (N. Y.), 110.

4. Wright v. Edwards, 10 Or. 298; Brown v. Bashford, 52 Am. Dec. 559; II B. Mon. (Ky.) 67; Blount v. Blount, I Hawks (N. Car.), 365. Compare Brown v. Edson, 23 Vt. 435; Wells v. Cowper,

2 Ohio, 124.

a decedent for the payment of debts, the court must be satisfied either that the personal estate has been exhausted and other debts are due, or that it will be clearly insufficient for that purpose. In

A statute of Rhode Island ratifying and confirming the sale and conveyance of land in that State, which had been made in good faith, but without legal authority, by an executor, under a license from a probate court in another State, held to be valid, and to confirm the title. Wilkinson v. Leland, 2 Pet. 627.

Upon the same principle, an act of the legislature of Alabama, authorizing the administratrix of A., of the city of Boston, to sell certain real estate of A. in the city of Mobile, and requiring a bond to be executed with sufficient security, payable to the judge of the county court of Mobile, for the payment of the proceeds to the administratrix for payment of the debts, is not unconstitutional. Holman v. Bank

of Norfolk, 12 Ala. 369.
1. Shields v. McDowell, 82 N. Car. See Lynch v. Baxter, 51 Am. Dec. 735; s. c., 4 Tex. 431; Bloom v. Burdick, 37 Am. Dec. 299. See also State v. Ramsey Co. Pro. Ct., 25 Minn. 22; Personette v. Johnson, 40 N. J. Eq. 173.

That there is no personal estate, or that it is insufficient, must be alleged and proved. Foley v. McDonald, 46 Miss. 238; Butts v. Genung, 5 Paige (N. Y.), 254; Gere v. Clarke, 6 Hill (N. Y.), 350; 254; Gere V. Clarke, O. Hill (N. Y.), 350; Mersereau v. Ryers, 3 N. Y. 261; Roe v. Sweezey, 10 Barb. (N. Y.) 247; Stuart v. Kissam, 11 Barb. (N. Y.) 271; Selover v. Coe, 63 N. Y. 638; McLoud v. Roberts, 4 Hen. & M. 443; Ryan v. Jones, 15 Ill. 1; Guy v. Gericks, 85 Ill. 428; Laughlin v. Heer, 80 Ill. 119.

In Maryland, in case of an application for a sale of real estate to pay debts of a deceased insolvent, primary proof of the insolvency stands in place of full proof until further proof is demanded. But such demand dispenses with the primary proof prescribed by the testamentary system. Kent v. Waters, 18

Md. 53.

An administrator may obtain leave to sell real estate, upon the personalty proving insufficient, notwithstanding a de-vise where the condition was that the "shall pay my debts at my Bennett v. Gaddis, 79 Md. 347. devisee death."

It has also been held necessary prove that assets have descended to the phove that a sects have described a section of the line of the lin 118; Guy v. Gericks, 85 Ill. 428; Laughlin v. Heer, 89 Ill. 119.

In Crocker v. Smith, 10 Ill. App. 376. it was held that it need not be averred that the heir has assets by descent, but it devolves on him or her to plead riens per descent.

The burden of showing the necessity of the sale rests on the personal representative, whether there is a contest or not, and this fact he must show in Alabama by depositions. But the contestant may controvert the facts stated in the application by oral evidence. Garrett v.

Bruner, 59 Ala. 513.

Where the record of the probate court showed that notice of the intended application by an administrator to sell land of his intestate had been given, and the order of sale recited that he had shown that the personal assets were exhausted, it was held sufficient, under Thomp. Fla. Dig. 202, 203, to give the probate court jurisdiction to decree a sale. Emerson v. Ross. 17 Fla. 122.

An order of sale under the Florida act of 1833 (Thomp. Dig. 202), authorizing the judge of probate to sell lands to pay debts, "after exhaustion of personal as-sets," is void, unless the fact of such exhaustion is shown. Hays v. McNealy,

16 Fla. 409.

The Maryland acts of 1785, ch. 72, and 1794, ch. 60, \$ 2, are in pari materia; they must be construed together; and evidence will be required of an insufficiency of personal assets where proceedings are had under one or the other law to sell real estate for the payment of debts. Baltzell v. Foss, I Har. & G. (Md.) 504.

In New Jersey, on an application by an executor for an order for the sale of the testator's real estate to pay debts, the court should, on granting the order, ascertain that the personal property has been duly applied, and, should determine the amount of the deficiency, and how much and what part of the land should be sold to supply it. Bray v. Neill, 21 N. J. Eq. 343.

The probate court of Maine, under Rev. Stat. ch. 71, § 1, cannot make a decree licensing an administrator or executor to sell real estate unless it is made to appear that a sale is necessary to pay debts, legacies, or expenses of administration and sale, or that a sale of some portion of the real estate is necessary for these purposes, and that by a partial sale the residue would be greatly depreciated. Gross v. Howard, 52 Me. 192.

Administrators may in New Hampshire

determining upon the insufficiency of the personal assets, uncollected and doubtful demands should not be reckoned. The fact that there is sufficient personal property in the State of principal administration is no objection to an order in the State of the ancillary administration.2 A sale will not be decreed until the refunding lands of the distributees have been exhausted.3 personal estate becomes insufficient to pay the debts in consequence of a devastavit, or any neglect on the part of the administrator, the creditor's remedy is on his bond, and he is not entitled to a sale of the real estate in the first instance.4 The better opinion would appear to be, that where the administrator's petition shows a legal necessity for the sale as prescribed by statute, the court may order the sale before the adjudication of the final ac-

sell lands under license for payment of debts of a deceased person whether the estate be solvent or insolvent. Goodall

v. Marshall, 35 Am. Dec. 472.

The jurisdiction of the orphans' court of Pennsylvania to make an order for the sale or mortgaging of the real estate of a decedent is conferred by the Pennsylvania act of March 20, 1832, § 31. Such order can be made where the personal estate is insufficient for the payment of debts and the maintenance and education of minors, or for the purpose of paying the debts alone, or where, on a final settlement of the administration account, there are not sufficient personal assets to pay the balance due the accountant or others. Hilton's Appeal (Pa.), 19 W. N. C. (Phila.) 541; s. c., 9 Atl. Rep. 434. In Virginia, the entire personal estate

in the hands of the administrator should be applied towards the discharge of the debts of the intestate, before the proceeds of the sale of lands should be charged therewith. Elliott v. George, 23 Gratt.

(Va.) 780.

See, as to the special proceedings under the North Carolina practice, Jones v. Hemphill, 77 N. C. 42; Brandon v. Phelps, 77 N. C. 44.

By section 29 of Texas act of 1840, ad-

ministrator must apply for order for sale of real estate as soon as the facts of the insufficiency of the personal property to pay the debts is apparent; and hence, if this fact should satisfactorily appear to the court before the order for the sale of the personal property is made, there would be no error in its decreeing the sale of both the real and personal property in the same order. Lynch v. Baxter, 51 Am. Dec. 735; s. c., 4 Tex. 431. See also Bloomv. Burdick, 37 Am. Dec.

299. Under the Louisiana Code, 339, 340, before an immovable, of which the widow

in community and the minor children are owners in indivision, can be legally sold or mortgaged, it is necessary that a family meeting, legally constituted, shall set forth in its report that the sale or mortgage is of absolute necessity, or of evident advantage to the minors, and give its reasons for its determination. Mayronne v. Waggaman, 30 La. Ann., Part II. 974.

Requisites of allegation, proof, and practice, in a proceeding under the Mississippi Code, to sell real estate of a decedent. Yerger v. Ferguson, 55 Miss. 190.

1. Bridge v. Swain, 3 Redf. (N.Y.) 487. In this case it was said that the court can only consider the personal property actually in the executor's hands.

It is no ground of opposition to the granting an order of sale of real estate that there is a litigated claim held by the estate against the grantee of a devisee, on which claim the debtor claims there is nothing due. It is not necessary to abide the determination of such litigation before granting the order of sale. Schroeder's Est., Myrick's Probate (Cal.),

2. Lawrence's App., 49 Conn. 411.

3. Foley v. McDonald, 46 Miss. 238. An administrator who has in hand sufficient personal assets to cover his commissions and to reimburse himself for advances, but delivers such assets to the distributees, cannot afterwards apply to sell his intestate's real estate for his demands. Hollman v. Bennett, 44 Miss.

4. Merritt v. Merritt, 62 Mo. 150.

So long as either surety of an executor is solvent, the administrator de bonis non, cum test. ann., must sue on the bond before he can obtain a license to sell the real estate to pay debts. Carlton v. Byers, 70 N. Car. 69. See also Kelly's Est., 11 Phila. (Pa.) 100.

count. To authorize the sale of a decedent's estate, the debt must have been contracted in his lifetime, and continued in existence down to the time of the order.2 If, therefore, the debt it.

1. Abilt v. Burnett, 33 Cal. 658. this case a sale was ordered before final account to meet expenses of adminis-

tration.

In Pennsylvania, a petition by a creditor for a sale of real estate cannot be granted until after the settlement of the administrator's account. Freno's Est., 11 Phila. (Pa.) 42. See also Grier's Est., 11 Phila. (Pa.) 107.

In Louisiana, the right of creditors of a succession to have the property thereof sold by the executor to pay their claims is absolute, and in no manner dependent upon or to be preceded by an account of administration or tableau of distribution. Tabor's Succession, 33 La. Ann. 343.

In New York, jurisdiction to order a sale of realty depends on a petition and account, and the latter cannot be dis-pensed with because an inventory has previously been filed, although a general reference to such inventory is made. If, however, an account is actually presented, its effect is not destroyed by calling it an inventory. One document may answer the double purpose of an account and an inventory; and an inventory made and presented at the time the petition for an order of sale is filed may be treated as an account, and give the court iurisdiction to the same extent as a separate account containing the same Bloom v. Burdick, I Hill (N. matters. Y.), 130; s. c., 37 Am. Dec. 299.

The account required to be given the surrogate is sufficient to vest him with jurisdiction to order a sale if any one of the items of debt be sufficiently stated. Atkins v. Kinnan, 20 Wend. (N. Y.) 241;

32 Am. Dec. 534.

Petition and account for sale of real estate presented to a surrogate, if sufficient in form, confer jurisdiction, and in a collateral proceeding the court cannot inquire whether the petition and account were false. Atkins v. Kinnan, 32 Am. Dec. 534; s. c., 20 Wend. (N. Y.) 241.

If it does not clearly appear at what time the inventory was filed, but there is some evidence tending to show its filing at the time the sale was petitioned for, the question whether it was filed at the proper time to support the order of sale must be submitted to the jury. v. Burdick, 37 Am. Dec. 299.

A creditor desiring the sale under order of the probate court of real estate of a decedent is not obliged himself to exhibit

a list of debts and inventory of effects of the estate. That duty devolves on the administrator. Grayson v. Weddle, 63

Mo. 523.

Illinois Rev. Stat., ch. "Wills," § 103. requiring an administrator before petitioning for an order to sell real estate to pay debts to make a just and true account of the personal estate and debts, so far as he can discover them, does not demand that he file a complete appraisement bill. Shoemate v. Lockridge, 53

Ill. 503.

In Virginia, where, in the case of a deficiency of personal assets, a creditor of the decedent files a bill for the purpose of subjecting land devised by him to the payment of his debt, it is error for the court to decree a sale before ordering an account and settling the priorities of the liens thereon, though the parties agree that a certain statement filed in the cause should be taken as a true exhibit of the indebtedness of the estate to the plaintiff. Daingerfield v. Smith (Va.). I S. E. Rep. 599.

A final account of an administrator is the proper evidence that land acquired by the administrator, by levy of an execution on a judgment recovered by him in that capacity, is not necessary to pay debts; and evidence of the declarations of the administrator are admissible for that purpose. Pierce v. Strickland, 26

Me. 277.

A sale and conveyance of lands of the intestate's estate by his administrator, in Alabama, are not effectual to pass a title to the purchaser unless there has been a final decree requiring the administrator to make such conveyance. Bonner v.

Greenlee, 6 Ala. 411.
In Maryland, sale of realty may be decreed in a creditor's suit against heirs and devisees before the cause is regularly set down for hearing, where the claim has been distinctly established, in whole or in part, and the insufficiency of the personal estate has been shown or admitted. Campbell's Case, 20 Am. Dec. 360; s. c., 2 Bland's Ch. (Md.) 209.

2. Cary v. Dennis, 13 Md. 1; Marden's Est., Myrick's App. (Cal.) 184; Walker v.

Diehl, 79 Ill. 473

Debts incurred in the settlement of the estate alone cannot be the foundation of a decree to sell real estate. Walker v. Diehl, 79 Ill. 473; Grice's Est., 11 Phila. 107.

self never had any legal existence, or is barred by the Statute of Limitations at the time of the application, the court cannot grant the order. The judgment of allowance alone does not conclude

In Personette v. Johnson, 40 N. J. Eq. 173, it was held that the decedent's lands may be sold to pay the costs and expenses of settling the estate, including For further executor's commissions. discussion of this point, see § 3.

It by no means follows, however, that the debt need be payable during the lifetime of the decedent. Cary v. Dennis.

13 Md. 1.

Where a married woman mortgaged her separate property to secure the payment of a debt due by her husband, it was held that the debt being due after her decease was "a debt outstanding against the decedent," and a sale might be ordered in the probate court to pay it. Marden's Est., Myrick's App. (Cal.) 184. Creditor of deceased heir showing by

petition filed in a suit brought by the children of such heir for a decree for the sale of the intestate ancestor's estate; and the distribution of the proceeds among the heirs, that he is a creditor of such heir for goods sold her while a feme sole, and that she afterwards married and died, leaving no assets liable for the payment of her debts, makes a prima facie case, entitling himself to payment of his claim out of the share of the proceeds of the intestate's realty awarded to the deceased heir's children. Hays v. Miles, 31 Am. Dec. 70; s. c., 9 Gill & Johnson (Md.), 193.

1. To authorize the sale there must be existing debts against the estate. Dor-

man v. Lott, 13 Ill. 127.
The term "debts" in the Mississippi statute subjecting real estate of decedents to the payment of debts, when the personalty is insufficient for that purpose, does not embrace commissions allowed to the administrator. Holman v. Bennett, 44 Miss. 322.

Order of sale of real estate may be made to pay money advanced by the administrator, in good faith, for the payment of the debts of the estate. Liddell v. McVickar, 19 Am. Dec. 369; s. c., 6

Halsted (N. J.), 44.

In Ingham v. Ingham, 5 Heisk. (Tenn.) 541, a prayer of an administrator to sell the title of the purchaser. Grayson v. real estate to pay debts and advances Weddle, 93 Mo. 523. Compare Bostwick made by himself to minor heirs for v. Skinner, 80 Ill. 147. · necessaries during the civil war, granted. Carlton v. Byers, 70 N. Car. 691.

An administrator, who is himself a creditor of his intestate, is not precluded

by a judgment against him, in favor of another creditor of the intestate, from showing that the personal assets are insufficient to pay all the creditors, for the purpose of subjecting the real estate to his own claim, as against the heirs-at-Laither v. Welch, 3 Gill & J. (Md.)

Mississippi Code, § 2028, allowing an unregistered claimant to be paid out of any surplus remaining after registered debts are paid, does not import that. by presenting his claim when the personalty is exhausted, he can compel a sale of the realty. Ales v. Plant, 61 Miss. 259.

Sufficiency of Evidence. - Sufficiency of evidence of debt to warrant issuance of license to sell decedent's realty is a matter within the jurisdiction and discretion of the probate judge, the petition being in due form and regular, and legal notice having been given to the heirs and all concerned; and his decision thereupon cannot be inquired into collaterally. Merrill v. Harris, 26 N. H. 142; s. c., 57 Am. Dec. 359.

In proceedings to sell the real estate to pay debts, a judgment for a debt due from the decedent, entered on an offer of his executors, against whom the action had been revived, is not evidence of the debt, there having been no trial on the merits, nor is their offer competent as an admission. For the purpose of such proceedings, the costs awarded on such a judgment are no valid part of the claim. Kavanaugh v. Wilson, 5 Redf. (N. Y.) 43.

Effect of Allowance.—In Iowa, under statute of February 13, 1843, it is sufficient that the claims for which real estate is ordered to be sold be proved and allowed after the decree, at any time before the sale. Little v. Sinnott, 7 Iowa, 324.

In Missouri, by inadvertence, the debt shown by the mortgage note had not, at the date of an order made by the probate court for the sale of the mortgaged property, been allowed, but was subsequently allowed before sale. Held, that the allowance before making the order was a mere irregularity, which would not affect

Upon an application for an order for the sale of lands of a decedent to pay debts, the New Jersey orphans' court has no power to determine the validity of the claims of creditors of the estate; it has the heirs and devisees, and the creditor is not entitled to a sale of the decedent's lands until the debt has been established by a decree concluding them.1

such power only in the case of insolvent estates. The only examination which the orphans' court can make on such application is as to whether the necessity for the sale of real estate does in fact exist; and on that point they are to accept the report of the administrator or executor, as to the amount of the debts, unless the bona fides of his statement is assailed. Smith v. Smith, 27 N. J. Eq. 445.
Where the petition and proof show

that the only legitimate claim paid by an administrator was the funeral expenses of the deceased, and that there is no personal property, but do not show that such claim was proved, and allowed by the county court, a decree for the sale of real estate by the administrator to pay the same cannot be upheld. Walker v.

Diehl, 79 Ill. 473.

Mortgage Debt.—The orphans' court of Pennsylvania will not order a sale of the decedent's land to pay a mortgage debt, as such a debt (by local legislation) would not be discharged by the sale. Grice's

Est., 11 Phila. (Pa.) 107.

Debts Barred by Statute of Limitations. -If the claims of the creditors are barred by the Statute of Limitations when the administrator files his application to sell land, then the application should not be granted. Especially ought this to be so when the lands have passed from the heir to the purchaser. Ferguson v. Scott, 49 Miss. 500.

Proceedings under 2 N. Y. Rev. Stat. 101, § 10, for a sale of devised lands to pay the decedent's debts, can only be maintained when an action on the debt will not lie. The fact that before the latter was barred by the statute a judgment was recovered against the executor, who was also the devisee, will not enable the creditor of the decedent to maintain the proceeding. Raynor v. Gordon, 23

Hun (N. Y.), 264.

Authority to administrator to sell real estate of the deceased to pay debts barred by the Statute of Limitations is void. Heath v. Wells, 16 Am. Dec. 383; s. c., 5 Pick. (Mass.) 139. See In Matter of Estate of Godfrey, 4 Mich. 308; Hoffman v. Beard, 32 Mich. 223; Lockwood v. Sturdevant, 6 Conn. 373; Adams v. Morrison, 4 N. H. 166; 17 Am. Dec. 406; Litchfield v. Cudworth, 15 Pick. (Mass.)

The purchaser at such sale acquires no title to the property, but he is entitled to the value of the improvements placed by him upon the land, under the limitation

and settlement act. Heath v. Wells, 16
Am. Dec. 383; s. c., 5 Pick. (Mass.) 139.
The administrator is the proper party to plead the statute, and the fact that the plea was interposed by him alone is no objection to sustaining it. Bolt v. Daw-

kins, 16 S. Car. 148.

In a proceeding by an administrator to sell lands for the payment of debts the statute may be set up by the heir, devisee, a judgment creditor of the devisee,-though the devisee himself does not appear. -or one to whom the intestate gave the land in fraud of creditors. Warren v. Hearne, 2 So. Rep. (Ala.) 491; Bevers v. Park, 88 N. Car. 466; Raynor v. Gordon, 23 Hun (N. Y.), 264; Syme v. Riddle, 88 N. Car. 463.

The admissions of the administrator that the debt is just, and his declining to set up the statute, do not affect the case. There is no privity between him and the heir. Bevers v. Park, 88 N. Car. 466,

1. Sharp v. Sharp, 76 Ala. 312; Beckett v. Selover, 7 Cal. 215; s. c., 68 Am. Dec. 238; Scherrer v. Ingerman (Ind.), II N. E. Rep. 8; Warren v. Hearne (Ala.), 2 So. Rep. 491.

A judgment at common law was not evidence in an action against the heir. Beckett v. Selover, 7 Cal. 215; s. c., 68

Am. Dec. 238.

Land belonging to the decedent cannot be sold by a sheriff under a judgment against the regularly appointed administrator. Myers v. Evans (Tex.), 55 So. Rep. 66.

While the heir holds subject to the necessities of administration, there is no privity between him and the administra-tor. Beckett v. Selover, 7 Cal. 229; Hopkins v. McCann, 19 Ill. 113.

The heir is no party to the action, cannot controvert the testimony, adduce evidence in opposition to the claim, nor appeal from the judgment. Garnett v. Macon, 6 Cal. 308. Contra, State v. Ramsey Co. Probate Court, 25 Minn. 26.

Rev. St. Ind., 1881, § 2326, providing that upon proper petition, etc., the heirs may have an order setting the claim for trial as in case of claims not allowed, does not furnish an exclusive remedy,. nor prevent the heirs from resisting the claim in a proceeding to sell the real estate. Scherrer v. Ingerman (Ind.), II N. E. Rep. 8.

An act of the legislature authorizing the sale of a decedent's real estate, except in satisfaction of the lien of creditors for the support of the family, or to pay the expenses of administration, is

Hence the heir may dispute validity of claims upon which a petition for the sale of real estate of a decedent is based, upon an application to sell such real estate for the payment of debts, although such claims may have been allowed by the public administrator and by the probate judge. Beckett v. Selover, 7 Cal. 215; s. c., 68 Am. Dec. 238.

Proceedings on petition to sell real estate of intestate amounts, in *California*, simply to re-examination of the claim to test its validity as against the heir, and to procure or prevent a decree for the sale of the land. Beckett ω . Selover, 7 Cal. 215; s. c., 68 Am. Dec. 238.

The widow's award is but a claim against the estate, and the allowance made to her is not conclusive in a proceeding by the devisees to contest it, to show that it was made fraudulently, that it was too large, oppressive, or unjust, particularly where they were not parties to the proceeding when the award was allowed, not before the court, and had no notice of the court's actions in the premises. Marshall v. Rose, 86 Ill. 276

Where a judgment on a certain debt against an administrator was \$1451.85, and on a sci. fa. against the heirs it was only \$871.71, the payment of the latter sum out of the personal estate releases the real estate in their hands from all claims on account of the debt. judgment against the administrator is conclusive only as to the personalty, and is no evidence of indebtedness as against the real estate; the judgment against the heirs is the sole evidence of the amount to which the creditor is entitled as against the real estate, and when he has received that sum, from whatever source, the real estate is discharged from all lia-Walthaur v. Gossar, 32 Pa. St.

Where an heir claims that an allowance against the estate, consisting of only one piece of land, was fraudulently obtained in the probate court, his remedy is not a proceeding in equity to set aside the allowance, but to resist any application by the administrator for an order to sell the land. Casey v. Murphy, 7 Mo. App. 247.

An order empowering the sale of land for debts may be impeached by the heirs on the incoming of the report of sale. Fenix v. Fenix, 80 Mo. 27.

It should not be forgotten, however, that the allowance of a claim by the administrator and its approval by the probate court operate as a quasi judgment, and in attacking it the burden of proof is on the heir, and if guilty of gross laches in allowing the judgment to stand unchallenged for many years he may be precluded from contesting the validity of the claim. In Hillebrant v. Burton, 17 Tex. 140, the court refused to set aside a judgment of allowance which had stood for ten "It must be recollected that the suit was brought to set aside and annul a judgment more than ten years after it had been awarded. Now the rule of law is well settled, that every presumption is in favor of the judgment, and he who attempts to impeach it must assume the labor of clearly and distinctly showing its vice. This is the rule where there has been no considerable lapse of time between the award of judgment and the suit to set it aside; but this rule acquires a great deal more stringency, and with good reason, too, if a great length of time is permitted to elapse before the judgment is impeached. Time, with its continual destructive changes, often removes the evidence by which any facts could be proven. . . . And to call upon a creditor after so great a lapse of time as has occurred in this case would be equally repugnant to justice and sound policy. The plaintiff should have proven distinctly and clearly that the claim was barred at the time it was presented, to impeach the judgment of the probate court allowing it." See also Est. of Schroeder, 46 Cal. 319.

When the heir, whose estate is answerable for judgment recovered, takes the defence of an action upon himself, has opportunity to be and is heard, has the right to adduce evidence and cross-examine witnesses and avails himself of that right, where he has the right to defend the suit, control proceedings, and adopt steps for further hearing, he is effectively a party, and, upon the principle of the maxim cessante ratione ita lex ipsa cessat, he is bound by the judgment. Nichols v. Day, 32 N. H. 133; s. c., 64 Am. Dec. 358.

But the mere fact that the administrator, representing them in a certain sense, resisted the claim, and they were present as witnesses, will not conclude them. Scherrer v. Ingerman (Ind.), II N. E. Rep. 8.

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unconstitutional. The legislature has no constitutional power to determine the fact that there are debts owing, and can only grant power to be exercised when the fact shall be established in due course of administration. The jurisdiction of a court of probate in proceedings for the sale of real estate of a decedent is derived solely from legislation, and its acts, unless warranted by statute. are coram non judice.3 In most States the jurisdictional facts

1. Brenham v. Story, 39 Cal. 179.

An act authorizing certain administrators or executors to sell as in their judgment shall best promote the interest of those entitled to the estate, or "to sell in such manner as they please," falls within Brenham v. Story, 30 the principle. Cal. 179; Dubois v. McLean, 4 McLean,

But in Gannett v. Leonard, 47 Mo. 205, a private act of the legislature authorizing an administrator to sell for the benefit of the heirs was upheld, although no bond was required from the administrator, and the act itself failed to show

that the heirs were minors.

The act of Vermont of 1812, authorizing administrators to convey lands to creditors at a deduction from their appraised value, is constitutional. Deed of administrator need not recite the statute authority by which it is given; it is sufficient if it refer to it, and the administrator describe himself as such.

don v. Strong, 2 Vt. 234.

Sale Must be for Debts Only.—In Illinois, the court is only authorized to license a sale of so much real estate as is necessary to pay debts, and a decree authorizing executor to sell so much real estate as he may deem for the best interest, of the estate is erroneous. Morris v. Hogle, 37 Ill. 150; s. c., 87 Am. Dec.

In Missouri, where the county court has ordered the sale of lands of the deceased to pay debts, it has no power to appropriate the proceeds to make good a deficiency in the widow's allowance, nor to reimburse the administrator for improvements put upon the land, nor for any other purpose than to pay debts. Ritchey v. Withers, 72 Mo. 556.

In Louisiana, an administrator's sale to pay debts and settle the various claims against the estate is a sale to pay debts. It cannot be construed to be a particular sale. Nesom v. Ebers, 34 La. Ann. 1004.

In Alabama, the orphans' court has no power to marshal assets, by directing a sale of land for the payment of debts to secure the payment of pecuniary legacies. Yet when the court has improperly directed the sale of land, it can-

not distribute the proceeds among infant heirs, as they cannot waive the irregularity of the sale in the orphans' court. Such a waiver could only be made in equity, if the chancellor ascertained it was their interest to affirm the sale, and that in equity they were entitled to the money. Price v. Wilkinson, 10 Ala. 172.

2. Davenport v. Young, 16 Ill. 548; s. c., 63 Am. Dec. 320.

Where, therefore, a statute authorizes sale of real estate of decedent for the payment of his debts, a sale made by the administrator, without proving that there were any debts owing, is invalid, and conveys no title. Davenport v. Young, 16 Ill. 548; s. c., 63 Am. Dec. 320.

An act of the legislature authorizing

an administrator to sell the lands of the deceased for the payment of his debts. without providing for judicial proceeding to ascertain that debts are due, is unconstitutional, as an exercise of judicial power by the legislature. Rozier v. Fagan, 46 Ill. 404. See also Lane v. Doe, 4 Ill. (3 Scam.) 238.

3. Wyman v. Campbell, 6 Port. (Ala.)

219; s. c., 31 Am. Dec. 677. See also Goudy v. Hall, 30 Ill. 116; Bree v. Bree, 51 Ill. 371; Dorchin v. Hettinger, 57 Ill. 353; Fell v. Young, 63 Ill. 108; Herdman v. Short, 18 Ill. 59; Gelstrop v. Moore, 26 v. Short, 18 III. 59; Gelstrop v. Moore, 26 Miss. 206, Brown v. Brown, 41 Ala. 215; Hoard v. Hoard, 41 Ala. 590; Kempe v. Pintard, 32 Miss. 324; Wright v. Edwards, 10 Ore. 298; Hilton's App., 19 W. N. C. (Pa.) 541; s. c., 9 Atl. Rep. 434; Withers v. Patterson, 27 Tex. 491; s. c., 86 Am. Dec. 643.

Provisions of statute must be strictly complied with to give validity to an administrator's or executor's sale. Worten v. Howard, 2 Smedes & Marshall ten v. Howard, 2 Smedes & Marshall (Miss.) 527; s. c., 41 Am. Dec. 527; Doe d. Clements v. Henderson, 48 Am. Dec. 216; s. c., 4 Georgia, 148; Stevenson's Heirs v. McReary, 12 Smedes & Marshall (Miss.), 9; s. c., 51 Am. Dec. 102. See also Worthy v. Johnson, 52 Am. Dec. 399; s. c., 8 Ga. 236; Gelstrop v. Moore, 59 Am. Dec. 254; Corwin v. Merritt, 3 Barb. (N. Y.) 343; Sharp v. Spier, 4 Hill (N. Y.), 86; Sharp v. Johnson, 4 Hill (N. Y.), 99; Bangs v. McInternal must appear affirmatively upon the record, or a sale under the decree is void. 1 An application to a court of probate for an order

tosh, 23 Barb. (N. Y.) 599; Battel v. Torrey, 65 N. Y. 299; Atkins v. Kinnan, 20 Wend. (N. Y.) 241; s. c., 32 Am. Dec. 534.

In order to give validity to an executor's sale, 2 N. Y. Rev. Stat. 100 need only be complied with substantially. ' Re Dolan. 88 N. Y. 309. Under Missouri statute substantial

compliance is sufficient. Tutt v. Bover, 51 Mo. 425; Tutt v. Zenor, 51 Mo. 425.

In order to pass title by a sale under a special statutory authority, the authority must be strictly pursued, Van Slyke v. must be strictly pursued, Van Slyke v. Shelden, 9 Barb. (N. Y.) 285; Hill v. Draper, 10 Barb. (N. Y.) 482; Bangs v. McIntosh, 23 Barb. (N.Y.) 599; Locke v. Foote, 49 Miss. 181.

Provisions of a private act empowering administrators to sell decedent's land are as imperative and require as entire obedience as those of the general law in ordinary cases. Williamson v. Williamson, 41 Am. Dec. 636; s. c., 3 Smedes &

Mar. (Miss.) 715.

Strict compliance with a statutory requirement that proceedings concerning administrators' sales of real estate shall be reported to the court at the next term of the court after such sale, is essential to the validity of such sale. Hence a sale made during and reported to the same term of the court at which the order of sale was granted is null and void.

Mitchell v. Bliss, 47 Mo. 353.
In an administrator's proceeding to sell real estate, a surrogate's order to show cause, returnable in less than the six weeks prescribed by 2 N. Y. Rev. Stat. 101, § 5, is fatally defective, and all proceedings founded thereon are void. Stilwell v. Swarthout, 81 N. Y. 109.

Where, as in North Carolina, the statute " vests in the clerk, and not in the court, power to direct the application of the proceeds of an administrator's sale of land for the payment of debts, the order of the court is extrajudicial, and not conclusive certainly as against one who should have been but was not a party to the proceedings. Moore v. Ingram, 91 N. Car. 376.

As to jurisdiction and procedure in North Carolina, see Pelletier v. Saunders,

67 N. Car. 261.

The Tennessee acts of 1784, ch. 11, and 1822, ch. 43, which prescribe the proceedings necessary to subject real estate descended to heirs to the payment of the ancestor's debt, must be taken and construed together. Anderson v. Clark, 2 Swan. (Tenn.) 156.

As to right to question jurisdiction, see Goudy v. Hall, 30 Ill. 116,

Power to Rent.—Pending an appeal

from the probate court for a sale of land, in order that certain debts may be paid. the administrator has no right under the statutes of Mississippi to a decree to rent the premises. Herring v. Harris, 45 Miss. 62.

In Virginia, on a bill by a creditor against the devisees or heirs-at-law of a decedent, the court should first make a decree for renting the land, and, if the rent should prove insufficient to satisfy the debts, a report should be made to the court for further proceedings to be had before a decree can be made ordering a sale. An alternative decree for the sale of land, if the rent offered be insufficient, is erroneous. Daingerfield v. Smith (Va.).

I S. E. Rep. 599.

Power to Mortgage.—When a proper petition for the sale of land to pay a decedent's debts is filed in Michigan, the probate court may, after due notice to and hearing of the parties interested, if it deems best, refuse to order a sale and grant to the administrator a license to mortgage the land to raise the necessary funds, as, under How. St. §§ 6105, 6106, the same facts are required to be set up by the petition in either case. Cahill v. Bassett (Mich.), 33 N. W. Rep. 722.

A similar power was conferred upon the orphans' courts of Pennsylvania by the act of March 29, 1832, § 31. Hilton's App. (Pa.), 9 Atl. Rep. 434.

In a proper case the probate court may license the giving of a mortgage on the real estate to meet the expenses of administration. Church v. Holcomb, 45 Mich. 29.

Under Vermont Gen. Stat. 396, § 39, the word "sell" is the operative word both in the statute and in the license, and imports that the title is to be parted with, and not that the estate is to be encum-Brown v. Van Duzer, 44 Vt. bered.

1. Hilton's App., 19 W. N. C. (Pa.) 541; s. c., 9 Atl. Rep. 434; Gelstrop v. Moore, 26 Miss. 206; s. c., 59 Am. Dec. 254; Brown v. Brown, 41 Ala. 215; Hoard v. Hoard, 41 Ala. 590; Kempe v. Pintard, 32 Miss. 324; Martin v. Turner, 2 Heisk. (Tenn.) 386; Tucker v. Harris, 13 Ga. 1; s. c., 58 Am. Dec. 488.

In Hilton's App., 19 W. N. C. 541; s. c., 9 Atl. Rep. 434, it was held that where the jurisdiction of the court did

not appear upon the record, an order

to sell a decedent's lands for the payment of debts when collaterally attacked is regarded as a proceeding *in rem*, and jurisdiction of the thing, not of the person, is the controlling element of its validity.¹

The court has power to prescribe the mode and terms of sale of the real estate of a decedent, provided it requires as much of the administrator or executor as the statute contemplates.² The

was void, even as against innocent third

parties acting in good faith.

The jurisdiction of the orphans' court to order a sale of an intestate's real estate for the payment of debts, under the act of 1822, affirmatively appears in a collateral proceeding, when the record shows a petition by the administrator alleging a deficiency of personal assets for the payment of debts, and asking an order to sell the real estate, and that the court acted on the petition and granted the order of sale. Saltonstall v. Riley, 28 Ala. 164.

A naked license to an administrator to sell real estate of the intestate will not support a title derived from the administrator's sale. It must appear, either from the license or from the probate records, that such facts existed as would warrant the granting of the license. Clapp v. Beardsley, I Aik. (Vt.) 168.

The answer of the guardian ad litem is not of itself sufficient to support an order for the sale of land for the payment of debts; it must appear by the record that the court heard satisfactory proof on the subject. Fridley v. Murphy, 25 Ill. 146.

Where the allegations of a petition for leave to sell the land of a decedent are denied by the answer, the necessity for the sale must appear upon the record, by depositions taken as in chancery cases. McKenzie v. Bobo, 12 Ala. 268.

Where lands are sold by executors or administrators, under the Ohio statute of February 10, 1810, there must be an order of court for the sale, which order must appear of record, or the sale is void. Goforth v. Longworth, 4 Ohio, 129.

1. Garrett v. Bruner, 59 Ala. 513;

1. Garrett v. Bruner, 59 Ala. 513; Satcher v. Satcher, 41 Ala. 26; s. c., 91 Am. Dec. 498; Moore v. Schultz, 53 Am. Dec. 446; Sackett v. Twining, 57 Am. Dec. 599; McPherson v. Cunliff, 14 Am. Dec. 642; s. c., 11 S. & R. (Pa.) 422; Rogers v. Wilson, 13 Ark. 507.

When, however, the regularity of the

When, however, the regularity of the proceeding is presented on error or appeal, it is regarded as in personam. Garrett v. Bruner, so Ala, 512

Garrett v. Bruner, 59 Ala. 513.

The real estate itself becomes subject to the action of the court for the pur-

poses of sale, as soon as it has obtained information of facts sufficient to give it jurisdiction. Wyman v. Campbell, 6

Port. (Ala.) 219; s. c., 31 Am. Dec. 677. Upon the same principle, an applica-tion to the probate court by an executor or administrator of a deceased person to sell the lands of the estate for distribution, is essentially a proceeding in rem; and when the court has acquired jurisdiction by a petition filed containing the jurisdictional facts, an order of sale will not be void for errors that may enter in the after proceedings of the case. however, the petition is insufficient to give the court jurisdiction, the order of sale, and a sale made under it, will be void, and may be set aside and vacated in the court by which the order was made, on the application of any person or per-sons interested in or prejudiced by said order of sale. De Bardeladen v. Stoudenniere, 48 Ala. 643.

In Ohio, prior to 1824, proceedings by an administrator to sell his decedent's land considered in rem. Ewing's Lessee v. Higby, 7 Ohio, Pt. I. 198; Adams v. Jeffries, 12 Ohio, 253, 272.
Orphans' court proceedings in Penn-

Orphans' court proceedings in *Penn-sylvania* for the sale of lands are proceedings in rem against the estate of the intestate. McPherson v. Cunliff, 14 Am. Dec 642: S. C. H. Serg, & P. (Pa.) 402.

Dec. 642; s. c., II Serg. & R. (Pa.) 422. In Kansas, the fact that notice to the heirs is jurisdictional, and that the proceedings were adverse to them, was thought to indicate that they could not be considered in rem. Mickel v. Hicks, 19 Kan. 578.

In Louisiana, the plea that the order of sale obtained by the administrator is null because, if the estate is solvent, notice of an application to sell must be given to the heirs, and reasonable notice must be given to the interested parties, and if insolvent, the administrator, being the trustee of the creditors, his first duty is to them, and all proceedings for the sale of the property must be carried on contradictorily with them, is not well founded. Tertron v. Comeau, 28 La. Ann. 633.

2. Reynolds v. Wilson, 60 Am. Dec. 753; s. c., 15 Ill. 394.

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order should describe the property to be sold sufficiently to identify it. 1 although the entire omission of the description is merely an irregularity which will not subject the order to collateral attack,2 and can be remedied by reference to the petition when the latter contains a sufficient description.³ So much of the order as designated as designations of the order as designation. nates the person by whom the sale is to be made is merely administrative, and may be modified or rescinded by a succeeding judge having jurisdiction of the subject-matter.4 In most States the order should be made by the whole court and entered on the min-

In a proceeding to sell land to pay the debt of one deceased, the court, under North Carolina Code, § 1444, has a large discretion as to deciding whether the whole or a part, and what part, shall be sold. Tillett v. Oydlett, 90 N. Car. 551.

License by probate court to administrator to sell real estate need not fix the sum of money to be raised at the sale, if, although the property is more than sufficient to pay the demands, it is so situated that a part of it cannot be sold without injury to the persons interested therein, under the New Hampshire statute, notwithstanding another provision in the same statute that the probate judge, in a license to sell the decedent's real estate, shall fix the sum of money to be raised at the sale. Merrill v. Harris, 26 N. H. 142; s. c., 57

Am. Dec. 359.

Where lands of an intestate are sold by order of the probate court to pay the debts of the estate, the court should not direct the execution and delivery of a conveyance of the lands to the purchaser until the whole of the purchase-money has been paid. Hyman v. Jaringan, 65 N. Car. 96.

Under the New York statutes, the

county judge has no power to restrain the disposal of the fund resulting from the sale, after conveyance of the land to the purchaser, in favor of an execution creditor whose judgment was not a lien at the time of the sale. Davis v. Davis, 4 Redf. (N. Y.) 355.

Upon an order "that said petitioners be authorized and empowered to make sale of said land," etc., " and that they be required to make report to this court at the next term thereof of their doings in the premises," held, that as the grant of power to sell was general, without restriction as to time, the clause requiring a report at the next term did not limit the exercise of the power within that time, but that the sale might be made after the next term; notwithstanding that at a succeeding term an order was entered extending the time for making sale to next term, such order was only formal, and in no way changed the original order of sale. Bowen v. Bond, 80 Ill. 351.

1. Graham v. Hawkins, 38 Tex. 628. See Schnell v. Chicago, 87 Am. Dec. 304.

An order of a probate court for the sale of "so much land lying in R. county, and west of the T. river, as would pay the debts of the estate, amounting to about \$1500," is void for uncertainty. Graham v. Hawkins, 38 Tex. 628.

Order authorizing administrator to sell "all the real estate" of the decedent is sufficient authority to authorize sale, but the more regular and better practice is to give a description of the lands in the order, Doe v. Henderson, 48 Am. Dec. 216; s. c., 4 Ga. 148.

Description of land in an order of sale as ninety-one acres of the southwest corner of Lot No. 11, is not fatally defective if the intestate owned that number of acres and no more in the lot named. Burdick, 37 Am. Dec. 299.

In a decree for the sale of decedent's land to pay debts, a failure to state whether the whole or only a part was necessary will not render the sale void. Griffith v. Phillips, 9 Lea (Tenn.), 417. The proper form of a decree for the sale

of land upon a bill by an administrator to marshal assets, where a homestead right is attached to the land, and to be provided for in disposing of the proceeds of the Raley v. Ross, 59 Ga. sale, considered.

2. Wells v. Polk, 36 Tex. 120.

3. Montgomery v. Johnson, 31 Ark. 74. See Cox v. Davis, 52 Am. Dec. 199; s. c.,

17 Ala. 714.

Sale.—Upon the same principle, when petition for order of sale of real estate is in good form, and the order recites "that it appears to the satisfaction of the court that it is necessary to sell said land," a subsequent sale is good without more particularly stating the reasons of such necessity. Cox v. Davis, 52 Am. Dec. 199; s. c., 17 Ala. 714. 4. Meetze v. Padgett, 1 S. Car. 127.

An administrator making sale of land is a mere officer of the court, and has no

possession actual or legal of the premises, which is in the heirs. Robb v. Mann, 51 Am. Dec. 551; s. c., 11 Pa. St. 300. For utes, and when so made can only be amended nunc pro tunc by some matter of record or matter quasi of record.

In making the sale, the executor or administrator must strictly conform to the requirements of the order and governing statute,³

fuller discussion of this point, see Executors and Administrators.

1. Newcomb v. Smith, Wright (Ohio), 808.

A procès-verbal of the sale of real estate by the order of a probate court of Louisiana has no effect against third parties, or registered in the parish where the property is situated. Nor will an injunction lie to defeat the sale of property seized by a third party unless the act of sale of the seized property has been registered in the parish before the date of the seizure Lyons v. Cenas, 22 La. Ann. 113.

2. Summersett v. Summersett's Admrs.,

40 Ala. 596; s. c., 91 Am. Dec. 494.
3. Reynolds v. Wilson, 60 Am. Dec.

753; s. c., 15 Ill. 394.

Where the order prescribes the mode and terms of sale, the executor has no discretion to exercise in the matter. Reynolds v. Wilson, 60 Am. Dec. 753; s. c., 15 Ill. 394. See Worthy v. Johnson, 8 Ga. 236.

As to necessity of compliance with stat-

ute by administrators, see ante.

As to liability of administrator for non-compliance with order, see Payne v. Pip-

pey, 49 Ala. 599.

A party who claims title to land under an administrator's deed must not only show the license to sell given by the court of ordinary, but must also prove that he has complied with all the requisitions of the law respecting the notice, manner, time, and place of the sale; although, where the deed recited all these particulars, it will be considered prima facine evidence of the truth of such acts having been done until the contrary is shown. Clements v. Henderson, 4 Ga. 148.

Parol evidence is admissible to show that executor's sale was private, and not public, as required by the statute, where his return does not show that the sale was made according to the statute. Worten v. Howard, 41 Am. Dec. 607; s. c.. 2 Smedes & Marshall (Miss.), 527. Sale also Gelstrop v. Moore, 59 Am. Dec. 254. Where executor under license from

Where executor under license from court to sell real estate for the payment of debts sells a greater quantity than is authorized by the license, the sale is invalid. Wakefield v. Campbell, 37 Am. Dec. 60; s. c., 20 Maine, 393. See post.

In the cases which have arisen, some attempt has been made to establish the

rule that the sale should be void for the excess only; but this view was not favored, and courts have held the whole sale void. Litchfield v. Cudworth, 15 Pick. (Mass.) 23; Adams v. Morrison, 4 N. H. 166; s. c., 17 Am. Dec. 406; Lockwood v. Sturdevant, 6 Conn. 373.

An executor may sell part of a tract of land under an order of sale of the decedent's real estate to pay his debts, although his petition prays for and the court orders the sale of the whole of it. Ewing v. Higby, 28 Am. Dec. 633; s. c., 7

Ohio, part 1, 198.

If an administrator's deed of land is not delivered within the time limited by law for making sale of land after license, it is merely void, and a delivery afterwards will give no seizin to the grantee. Marr v. Hobson, 22 Me. (9 Shep.) 321.

It will be sufficient compliance, however, with the law requiring executors to set forth in their conveyances the orders confirming the sales and directing conveyances, that the deed contain the whole of the substance of the orders. Sheldon v. Wright, 7 Barb. (N. Y.) 52.

Under the *Michigan* statute, an administrator's sale of real estate is not invalidated by his omission to sell in separate parcels, nor by the fact that the purchasemoney was not all paid before the deed was given, nor the deed given within a year from the issuance of the license to sell. Osman v. Traphagen, 23 Mich. 80.

Terms—Sale for Cash—Power to Warrant.—Administrators should first protect creditors by using every effort to make the property sell at the best price. Pearson v. Moreland, 45 Am. Dec. 319; s. c., 7 Smedes & Marshall (Miss.), 600.

s. c., 7 Smedes & Marshall (Miss.), 609. It is the duty of an administrator, in selling estate of the deceased, by order of the court of probate, to sell for ready money; and if he neglects to do so, and sell on the personal security of the purchaser, it is a breach of duty, for which, if a loss ensues, he is liable on his bond to the probate court. And in such case, his having acted prudently and in good faith will not exonerate him from liability. Foster v. Thomas, 21 Conn. 285.

In California, a probate court has power to compel an administrator to execute a conveyance of land in conformity with a sale made under its order, and duly confirmed. Matter of Lewis, 30 Cal. 306.

and must see that the transaction is completed before the act under which the order was made is repealed. It would also

An administrator's deed passes title if executed and delivered within one year from the sale duly made, although not acknowledged within the year. Poor v.

Larrabee, 58 Me. 543.

He cannot accept a note and mortgage in part payment. If he does, he cannot recover from the estate the expenses of foreclosure. Nor can he be credited with the amount of any worthless claims received, but will be held liable for the total amount the land of the estate sold Richardson v. Adams, 43 Iowa, for. 248.

Where executors of an estate in California received payment in currency for assets of the estate sold by them, held, that the probate court erred in directing them to make payments to creditors in gold coin. Est. of Wen, 30 Cal. 70.

Where, however, the court has ordered the sale of property on terms of credit. and it is sold for cash, the sale will be void for want of an order of sale,

ter v. Blanchard, 15 La. Ann. 254.
Executors and administrators selling property of decedent under authority of law, have no power to bind the estate by warranty, though they may if they choose bind themselves v, tion of this kind. Worthy v. journes 52 Am. Dec. 399; s. c., 8 Ga. 236. See also Lynch v. Baxter, 51 Am. Dec. 735; A Tex. 431. See EXECUTORS AND bind themselves by a personal obliga-tion of this kind. Worthy v. Johnson,

As to contracts by executors to convey clear and satisfactory title to decedent's land, see Dresel v. Jordan, 104 Mass. 407.

Effect of Purchase by Executor or Administrator at his own Sale .- A purchase by an administrator or executor at his own sale is voidable at the option of the parties interested. Froneberger v. Lewis, 70 N. Car. 456. See Rafferty v. Mallory, 3 Biss. 362; Coat v. Coat, 63 Ill. 73; Shakeley v. Taylor, I Bond, 142; Prindle v. Beveridge, 7 Lans. (N. Y.) 225; Anderson v. Green, 46 Ga. 361; Potter v. Smith, 36 Ind. 231; Smith v. Drake, 23 N. J. Eq. 302; McGowan v. McGowan, 48 Miss. 553; Succession of Cadeviolle, 24 La.

Ann. 319.

If an executor, after the sale of the testator's real estate to pay debts, and before the confirmation of such sale, becomes interested in the purchase, the sale is void under 2 N. Y. Rev. Stat. 104, § 27. The facts that the fair value of the premises was given, and that the sale was confirmed, and that the agreement by which the executor became interested might be void under the Statute of Frauds, will not give such a sale validity. Terwilliger v. Brown, 44 N. Y. 237. See further, as to effect of administrator's interest upon the sale. Roberts v. Roberts, 65 N. Car. 27; Clark v. Clark, 65 N. Car. 655.

Title of Purchasers. - The rule of caveat emptor is strictly applicable to sales by Before purchasing, the administrators. purchaser must inquire into the title and quality of the land. Bingham v. Maxey, 15 Ill. 205: Walden v. Gridlev. 36 Ill.

Title acquired under order of sale for payment of decedent's debts will prevail over that of an heir under a decree in partition. Dresher v. Allentown Water Co., 91 Am. Dec. 150; s. c., 52 Pa. St. 225. See, further, Garrett v. Lynch, 45 Ala. 204; Bloodgood v. Hitt, 29 Wis. 169; Withers v. Mason, 86 Am. Dec. 643; s. c., 27 Tex. 491. See Judicial S EXECUTORS AND ADMINISTRATORS. See JUDICIAL SALES;

Where lands are sold by an administrator without authority, the purchaser is entitled to be reimbursed out of such lands for the purchase-money paid by him in good faith, and which has been applied to discharge liabilities of the estate. Bloodgood v. Hitt, 20 Wis, 160; Winslow v. Crowell, 32 Wis. 639.

As to right of purchaser at void sale to

equitable relief, see Levy v. Riley, 4 Ore.

Title of Heirs .- The title of the heir to lands of the ancestor, sold by order of the probate court for payment of debts, is not divested until the administrator, in accordance with an order of court conveys title to the purchaser, and without such title the purchaser cannot defend ejectment by the heir. Doe v. Hardy, 52 Ala.

Parties. - In Maryland, when lands of a deceased debtor are sold to pay his debts, under a decree based on the Maryland act of 1875, ch. 72, § 5, the heirs-at-law are entitled to the rents and profits until the day of sale; and if the decree, with the proceedings thereunder, including the sale, is set aside upon a bill of review, and a decree of restitution obtained while the heirs are infants, they may jointly file a bill in equity against the purchaser, or other person who has received the rents and profits; they are not obliged to sue for them separately at law, but have a right to an account and a discovery. Ritchie v. Bank of U. S., 5 Cranch C. Ct. 605.
1. An order of court authorizing an

executor or administrator to sell lands

appear to be essential that the person making the sale act in the proper capacity, and it is not enough that he is designated as executor in the order.1

The validity of a sale for the payment of debts cannot be sustained where there has been a departure from the requirements of the statute.2 The neglect of an administrator to take the oath,3 or to give the special bond required by statute for the faithful application of the proceeds, is fatal.⁴ The failure of the record of

of the deceased, made before but not executed until after the law is repealed, will not support a sale. And such order remaining unexecuted is not a "suit or prosecution pending," within the saving clause of the general repealing law of Ohio, 1805. Ludlow v. Wade, 5 Ohio, 494. Compare Campan v. Gellett, 53 Am.

Dec. 73; s. c., I Mich. 416.

1. Pratt v. McCullagh, I McLean, 69.
Where two executors have qualified, and only one acts in the petition for a sale, in the sale and in the execution of the deed no title passes. McPherson, 13 Cal. 562. Gregory v.

The administrator of an estate may petition the orphans' court for an order to sell his intestate's land, being "a party interested," within the meaning of the act of 1818. Matheson v. Hearin, 20 Ala. 210.

An attempted sale of land by one who assumes to act as executor or administrator, but who has not been regularly appointed, and who has not given the bond, and qualified and received letters as such, is void, even if the sale is ordered and approved by the probate Pryor v. Downey, 50 Cal. 388.

Upon the death of an administrator, after obtaining an order to sell, his successor should complete the sale; if he is in doubt about his authority so to do, he should apply to a court of equity, not to a court of law, for instructions. Baker v.

Beadsly, 23 Ill. 632.

Administration sale cannot be avoided because the last administrators made it, where, after the death of one of two ad-ministrators, letters of administration were granted to the survivor and another without any express revocation of the former letters. Valle v. Fleming, 19 Mo. 454; s. c., 61 Am. Dec. 566.

A probate sale cannot be made by the agent of the administrator. Gridley v.

Phillips, 5 Can. 394.

The probate court has no jurisdiction to order a sale of personal property at the instance of a personal representative, unless the title in him, which devolved upon him at the death of his testator or intestate, remains in him. Whorten v. Moragne, 62 Ala. 201.

2. Re Mahony, 34 Hun (N. Y.), 501. 3. Campbell v. Knight, 26 Me. 224;

s. c., 45 Am. Dec. 107.
In *Iowa*, the absence from the record of probate proceedings of the oath of the administrator, required by the statute, is fatal to the title of the purchaser at an administrator's sale. Cooper v. Sunderland, 3 Iowa, 114; Thornton v. Mul-

quinne, 12 Iowa, 554.

The administrator's oath required by Maine Rev. Stat. ch. 71, § 1, preliminary to the sale of real estate, will be presumed to have been made before the sale, unless the contrary appears, even though the record of the certificate and license be not made until many—in this case eleven years—afterwards. Fowle v. Coe, 63 Me. 245.

4. Rucker v. Dyer, 44 Miss. 591; Currie v. Stewart, 26 Miss. 646; Williamson v. Williamson, 31 Am. Dec. 677; s. c., 3 Smedes & Mar. (Miss.) 715; Moody v. Moody, 11 Me. (Fairf.) 247.

In Moody v. Moody, 11 Me. (Fairf.) 247, an administrator who had failed to file a bond, but had accounted for the proceeds, was permitted in another account to charge back the amount of the former sale and have a new license to sell

In Alabama and Kentucky, where the court has jurisdiction both of the person. and the subject-matter, the omission does not make the sale void. Wyman v. Campbell, 31 Am. Dec. 677; s. c., 6 Port. (Ala.) 219; Mofferty v. Johnson, 78 Ky.

The failure of an administrator to file a special bond upon a sale of real estate, occasioned by a mistake of law in which the court participated, will not vitiate the sale if it appears that the money received was faithfully accounted for. Foster v.

Birch, 14 Ind. 445. Under the *Massachusetts* statute of 1783, ch. 32, an administrator is not required to give a new bond, on being licensed to make sale of the real estate of his intestate, except in those cases where

the probate court to show an order authorizing the sale is at law a fatal defect, and cannot be supplied by proof aliunde. It is not essential to the validity of the sale that it appear on the face of the order that the application was accompanied by the certificate of a probate judge as required by law; the error occasioned by its omission can be urged on appeal.2 A sale is void when made by virtue of an order obtained in due time, but not acted upon until the Statute of Limitations had run against the debts which made the sale necessary. The purchaser cannot be prejudiced by omission of the administrator to do any act after the sale.4 A sale void for want of notice in not complying with certain sections of the governing statute cannot be sustained on the ground that it might have been made under other sections requiring no notice. Where the record shows that the court had jurisdiction both of the subject-matter and the proper parties, the sale is not void.6 The failure of the administrator to notify the heirs of the facts of payment of the purchase-money, confirmation of the sale, and the court's order to convey, will not avoid the sale." If, however, the sale is actually void, it is not rendered valid against minor heirs because they receive the benefit of the proceeds.8 Where the defendant dies after execution sued out, but before levy, a sale founded on the execution is void.9

An administrator's deed is only presumptive evidence of the regularity of the proceedings to sell. Confirmation of the sale by the county court is not conclusive of its regularity, unless the

he is authorized to sell the whole of such real estate, lest, by a sale of part, the residue would be injured. Hasty v.

Johnson, 3 Me. (3 Greenl.) 282. Upon a sale of mortgaged real estate for the payment of debts of the estate, the penalty of the bond under 2 N. Y. Rev. Stat. 104, § 22, must double the value of the property sold, including the amount of the mortgages. Jackson v. Holladay, 3 Redf. (N. Y.) 379.

1. Evans v. Snyder, 64 Mo. 516.

2. Jackson v. Astor, 39 Am. Dec.

- 3. Campan v. Gillett, 53 Am. Dec. 73;
- s. c., 1 Mich. 416.
 4. Wyman v. Campbell, 31 Am. Dec. 677; s. c., 6 Porter (Ala.), 216.
 5. Valle v. Fleming, 19 Mo. 454; s. c.,
- 61 Am. Dec. 566.
 - 6. Spragins v. Taylor, 48 Ala. 520. 7. May v. Marks, 74 Ala. 249.

An executor's sale of land cannot be avoided by the heirs on the ground that one of the executors did not join in the oath. Nor because the license was granted to a part only of the executors. because a special guardian was not ap-pointed for the heirs who were then minors, the will giving to the widow all

the property, and she having waived its provisions, the estate being insolvent. Melius v. Pfister, 59 Wis. 186.

8. Valle v. Fleming, 14 Mo. 454; s. c., 61 Am. Dec. 566.

9. If the defendant die before levy the execution cannot proceed; if after it, it can. Lessee of Massie's Heir v. Long. 2 Ohio, 287; s. c., 15 Am. Dec. 547.

See, on the question of abatement of executions by death, Erwin v. Dundas, 4 (U. S.), 350; Woodcock v. Bennett, 1 Cowen (N. Y.), 711; s. c., 13 Am. Dec. 568. See also Wilkinson's Lessee v. Fleming, 2 Ohio, 301; Lessee of Cartney v. Reed, 5 Ohio, 221.

Execution does not abate by the death of the plaintiff after a fi. fa. has been levied, but a venditioni exponas may issue. Buckner v. Terrill, 12 Am. Dec. 269. See Freeman on Executions, sec. 37.

Execution cannot issue against the real estate of a deceased joint judgment debtor, without a scire facias against the survivor and the heirs or terre tenants, etc., of the deceased, to show why the money should not be levied out of their respective lands. Woodcock v. Bennett, 13 Am. Dec. 568; s. c., I Cowen (N. Y.), 711.

statute so provides. The sale is void if the administrator was not properly appointed. The appointment of an administrator de bonis non is invalid if the will was not proven. And where the notice of probate is found to have been defective, the presumption

is that there was no hearing.1

(b) Notice—Its Necessity, Sufficiency, and Evidence.—Notice to the heirs and parties in interest of the intended application, as prescribed by the governing statute, is jurisdictional, and in its absence the sale is absolutely void, and conveys no title: 2 and since the court never acquired jurisdiction, its validity may be attacked collaterally, and is unsusceptible of subsequent confirmation.3 Where the sale has been completed and the report confirmed, the court has no power at a subsequent term, without a new notice, to order a sale of more land for the payment of additional debts which had been proved against the estate.4 Publication of notice of petition for sale of decedent's realty cannot be dispensed with. except in the event of personal service, or of written assent to the sale by all persons interested in the estate.⁵ The notice should be in

1. Chase v. Ross, 36 Wis. 267. Under Louisiana Code, 990-992, a sale of succession property for cash to pay the flebts is invalid, if on its first offering it brings less than its appraised value. Tabary's Succession, 31 La. Ann. 409.

Where fraudulent collusion is alleged, parol evidence is admissible to show that the property of a succession sold for what Herriman v. Janney, 31 it was worth.

La. Ann. 276.

As to collusive and fraudulent sales, see Pearson v. Moreland, 45 Am. Dec. 419; s. c., 7 Smedes & Mar. (Miss.) 609; Swink v. Snodgrass, 52 Am. Dec. 190; s. c., 17 Ala. 653; Planters' Bank v. Neely, 40 Am. Dec. 51; s. c., 7 How. (Miss.) 80; Pennock's App., 53 Am. Dec.

7. Teverbaugh v. Hawkins, 82 Mo. 180; Wright v. Heed, 10 La. Ann. 238; Succession of Curley, 18 La. Ann. 728; French v. Hoyt, 6 N. H. 370; s. c., 25 Am. Dec. 464; Doe ex dem. Mitchell v. Buven, 8 Ind. 197; s.c., 65 Am. Dec. 758; Gerrard v. Johnson, 12 Ind. 637; Townsend v. Tallant, 33 Cal. 45; Hawkins v. Hawkins, Admr., 28 Ind. 71; Tucker v. Harris, 13 Ga. 1; s. c., 58 Am. Dec. 488; Van Cleave v. Milliken, 13 Ind. 109.

An administrator's sale is shown to be the publication of notice, required by statute previous to the order, could not have been given. Valle v. Fleming, 61 Am. Dec. 556; s. c., 19 Mo. 454. See also Strouse v. Drennan, 41 Mo. 289.

In Iowa, want of proof of the required oath of notice is fatal to a title claimed to have been made through an administrator's sale. Thornton v. Mulquirone. 12 Iowa, 549.

It is error for the circuit court of Arkansas to make an order for the private sale of testator's real estate to pay debts without notice. Gregg v. Gregg. 33 Ark. 80.

In Louisiana, appraisement and advertisement for thirty days is essential to the validity of the sale. Curley, 18 La. Ann. 128. Succession of

Wagner's Missouri Statutes, art. 3, ch. 2, §§ 25-6 and 47, regulating the annual settlement by executors and administrators, construed to require no notice of sale, further than the order of sale.

Patee v. Mowry, 59 Mo. 161.

3. Doe ex dem. Mitchell v. Buven, 8
Ind. 197; s. c., 65 Am. Dec. 758. See
also Gerrard v. Johnson, 12 Ind. 637;
Hawkins v. Hawkins' Admr., 28 Ind. 71; Van Cleave v. Milliken, 13 Ind. 109; Gibbs v. Shaw, 84 Am. Dec. 737; s. c., 17

Wis. 19.

Administrator's sale of land, under license from probate court, cannot be sustained in a collateral proceeding, if the record fails to disclose any notice to the heirs-at-law of the time and place of hearing the application for the license. Gibbs v. Shard, 84 Am. Dec. 737; s. c., 17 Wis. 19. See further, as to necessity of notice, Morris v. Hogle, 37 Ill. 150; s. c., 87 Am. Dec. 243; Donovis v. Howard, 56 Ga. 430.

4. Cromine v. Sharp, 42 Ill. 120.

5. Townsend v. Tallant, 33 Cal. 451; s. c., 91 Am. Dec. 617.

Where real estate of a decedent was sold by the administrator under an order of the form prescribed by the governing statute, and its sufficiency is to be determined by the court. Substantial compliance with the statute requiring advertisements of administrators' sales is sufficient; a strict and literal compliance is not exacted. The notice should sufficiently describe the property to be sold to identify it,3 and should specify the date of the intended application and place of sale.4 It has been held that the administrator may file the petition

court for the purpose of paying debts of the deceased, but no notice was given of the pendency of the petition for the sale. but a writing containing a waiver of notice and consent to the sale was signed by the widow as guardian of minor heirs, but not in her own right as widow, held, in an action for partition brought by the widow, that the sale did not pass the widow's one third of the real estate to the purchaser, and that the rent of the proceedings and order of sale were inadmissible in evidence to show the sale of said one third. Helms v. Love, 41' Ind. 210.

1. Gibson v. Roll, 27 Ill, 88; s, c., 81

Am. Dec. 219.

In Illinois, the administrator may bring all adverse parties into court in either of two ways: I By serving a written or printed notice, together with a copy of the account and petition, on all the heirs or devisees in whom the title of the land proposed to be sold may be vested. By publishing a notice to all parties interested to come in and show cause why the land should not be sold according to the prayer of the petition. Either mode is equally efficacious to give the court complete jurisdiction. Gibson v. Roll, 27 Ill. 88; s. c., 81 Am. Dec. 219.

The notice need not contain the names of infant claimants, though proceeding is adverse to them. Gilson v. Roll, 27 Ill. 88; s.c., 81 Am. Dec. 219.

The probate court, under Kan. Comp. L. 1879, § 118, may order notice of the hearing upon an administrator's petition to sell land to be served by publication, even where all the parties interested reside in the county where the proceedings are had. Fleming v. Bale, 23 Kan. 88.

Upon the petition of an administrator to sell land, the probate court need not order personal notice to be served on the heirs who are resident in the county where the proceedings are had and the land is situated, or appoint a guardian ad litem for the minor heirs, as neither is required by statute. Fudge v. Fudge, 23 Kan. 416. As to notice, see, further, Osgood's Est., Myrick's Probate (Cal.), 153.

2. Jackson v. Astor, 39 Am. Dec. 281;

s. c., r Pinney (Wis.), 137.

Administrator's sale is void for want of jurisdiction, where the notice, which is required by the statute to be published for four successive weeks in a paper designated by the court is published three-weeks in the paper designated by the court and fourth week in a paper designated by the administrator, the other paper having ceased publication. Townsend v. Tallant, 33 Cal. 45; s. c., 91 Am. Dec. 617.

An order granting leave to an administrator to sell land, obtained upon the published notice required by \$ 2559 of the Code, is valid so far as authority to sell is concerned. Davis v. Howard, 56.

Ga. 430.

Louisiana act 1878, p. 157, does not authorize the advertisement of the sale of succession property in more than one "daily paper." Hautan's Succession, 32 La. Ann. 54.

As to requirements as to notice, and the like, to confer jurisdiction under Iowa statutes, see Cooper v. Sunderland, 3 Iowa, 114; s. c., 66 Am. Dec. 52, and note; Morrow v. Weed, 4 Iowa, 87; s. c., 66 Am. Dec. 122. See also Long v. Bennett, 13 Iowa, 35; State v. Barry, 12 Iowa, 60; Pursley v. Haves, 22 Iowa, 20.

3. If the notice misdescribes the property it is no notice, and the sale is void. Lyon v. Vanattan, 35 Iowa, 528.

A notice of executor's sale of a parcel of land in a city is not rendered invalid by a transposition of the street numbers. if the description otherwise is such that a bidder would have no difficulty in ascertaining what estate was meant-as by naming correctly the late occupant, the owners of estates bounding it on either side, and the streets on which it abuts at either end. New England Hospital v. Sohier, 115 Mass. 50.

4. Dayton v. Mintzer, 22 Minn. 393: Finch v. Sink, 46 Ill. 169. See Johnson v. Clarke, 18 Kan. 157; Waite v. Dennison, 51 Ill. 322; Parmley v. Walker, 102 Ill. 621; Moore v. Neil, 59 Ill. 261.

A notice of an administrator of his intention for an order of court to sell real estate, set forth that he should apply "at the December term of the county court of the county of Mercer, State of Illinois, on a day subsequent to that specified in the notice, but if he makes no application at that term, and without further notice applies at a subsequent term, the sale will be void.² The notice is invalid and the sale conveys no title where the statute provides that the notice shall be published for a specified number of weeks before presenting the petition, and there are less than the specified number between the first publication of the notice and the time specified therein for presenting the petition; and the fact that the petition is in fact not presented until a later day than that fixed by the notice, nor till after the period fixed by the statute has expired, will not cure the defect. If the statute has not been com-

for an order to sell" the real estate described. The notice was dated "Sept. 6, 1852." *Held*, that it sufficiently specified the time of the intended application. Finch v. Sink, 46 Ill. 169.

In Illinois, notice of hearing petition is sufficient as to time of hearing when the term at which it is to be heard is given without any day being specified. Waite v. Dennison, 51 Ill. 322; Parmley v.

Walker, 102 Ill. 621.

Where the notice of sale erroneously states the date at which an application for an order of sale would be made, and the error is so obvious that it could not mislead, it will not invalidate the sale:

Johnson v. Clark, 18 Kan. 157.

1. Shoemate v. Lockridge, 53 Ill. 503.
Parties interested are bound, after proper notice of application for sale of decedent's realty, to appear and attend upon the court during the whole of the day specified for the presenting of the petition for sale, either to resist the application then or to hear the order of the court fixing another time for hearing the proof; but if during that day no petition is presented, they may presume that the purpose of presenting it is abandoned, and are not required to attend during the whole term to see if any more will be made in the matter. Gibson v. Roll, 30 Ill. 172; s. c., 83 Am. Dec. 181.

2. Morris v. Hogle, 37 Ill. 150; s. c.,

87 Am. Dec. 243. 3. Gibson v. Roll, 30 Ill. 172; Cooper v. Sunderland, 3 Iowa, 114; s. c., 66 Am. Dec. 52; Morrow v. Weed, 4 Iowa, 87; s. c., 66 Am. Dec. 122. See also Long v. Bennett, 13 Iowa, 35; State v. Berry, 12 Iowa, 60; Pursley v. Hayes, 22 Iowa, 20.

In Mississippi, it is held that a failure of the executor to give the thirty days' notice required by statute does not render the sale void. Bland v. Mancaster, 24 Miss. 62; s. c., 57 Am. Dec. 162. In *Illinois*, a shorter notice than that

required by the order will render the sale

void. Reynolds v. Wilson, 15 Ill. 304:

s. c., 60 Am. Dec. 753.

Where notice of an administrator's petition to sell land has been ordered to be published "four successive weeks" in a certain paper, the discontinuance of the paper at the end of three weeks does not dispense with the necessity of further publication, except in the event of personal service, or written assent to the sale by all persons interested in the estate. Townsend v. Tallant, 33 Cal. 45.

The three weeks' notice by publication

of sale of real estate required by Minnesota Gen. St. ch. 57, § 35, begin to run from the date of the first publication. Wilson v. Thompson, 26 Minn. 299.

In Georgia, under act of 1816, notice of the application must be given in one of the gazettes of the State at least four months before any rule absolute shall be passed ordering the sale. Tucker v. Harris, 13 Ga. I; s. c., 58 Am. Dec. 488. In Louisiana, a sale of real estate be-

longing to a succession without appraisement and advertisement for thirty days is void. Succession of Curley, 18 La. Ann. 728.

No time is fixed by statute within which property offered for sale at the suit

of a creditor must be appraised. Johnson v. Hamilton, 2 La. Ann. 206.
In Massachusetts, under statutes of 1783, ch. 32, and 1788, ch. 66, relating to notices by executors and administrators upon license to sell real estate, notifications of the sale published three weeks successively, pursuant to the order of court, are sufficient, although neither of the notices was published thirty days before the sale. Frothingham v. March, I Mass. 247.

The provision of the Minnesota Gen. Stat. ch. 57, § 35, requiring notice of the time and place of an administrator's sale of real estate to be published in a newspaper for three weeks successively, is satisfied by three publications in a daily newspaper at the rate of one a week, on plied with, parties are not bound to take notice of the application.¹ The administrator is not bound to state all the conditions of the sale in the advertisement,² nor is it necessary that it contain the

names of particular persons as defendants.3

The title of bona fide purchasers will never be overturned because of objections founded upon captious criticisms, and where the defect is of such nature as not to prevent the parties in interest from obtaining the information intended to be conveyed by the statute, the notice will be sustained. Where a statute requires the notice to be posted up "at the door of the court-house," a presumption arises that the notice perished as soon as the time of sale had passed, and secondary evidence of its contents thereafter may be given without any further foundation than the presumption. It would clearly appear to be the better opinion that a recital in a decree that due notice has been given is at least prima facie evidence of that fact. The sufficiency of notice must be determined

regular publication days, separated by an interval of a week. Dayton v. Mintzer, 22 Minn. 393.

1. Gibson v. Roll, 30 Ill. 172.

Where, on receiving petition for sale from executors, the probate judge orders heirs and others interested to state their objections, if any, his notices given in the ordinary way are good against a devisee of the deceased, though not directed to such devisee or personally served. Spencer v. Sheehan, 19 Minn. 348.

2. Paine v. Fox, 16 Mass. 129.

Though it be stated in the advertisement of a judicial sale of the property of a succession that an act of sale will be executed before the parish judge, the mere omission to execute such act, there being no proof that its execution was demanded or refused, will not release a purchaser who has been in possession of the property since the date of the sale, the adjudication made and recorded by the judge or clerk having given a complete title to the purchaser. Jones v. Read, I La. Ann. 200.

3. Bowlis v. Roate, 8 Ill. (3 Gilm.) 409. In *Illinois*, notice of administrator's sale of decedent's estate need not contain the names of infant claimants, though the proceeding is adverse to them. Gibson v. Roll, 27 Ill. 88; s. c., 81 Am. Dec. 219.

It is not essential that the names of the heirs be given in the notice. Bostwick v. Skinner, 80 Ill. 158. See also Swearengen v. Gulick, 67 Ill. 211.

4. Moore v. Neil, 39 Ill. 261; Johnson

v. Clarke, 18 Kan. 157.

Thus an objection that the administrator's notice of application for sale did not specify in what county or State the court was to be held at which application was to be made, was held to be ill founded, as no human being who read it could have misunderstood it. Moore v. Neil, 39 Ill. 261.

5. Brown v. Redwyne, 16 Ga. 67.

Absence of evidence that citations were posted in public places on administrator's sale of realty, is cured by uninterrupted possession of the purchaser for thirty-four years. Stevenson v. McReary, 51 Am. Dec. 102; s. c., 12 Smedes & Marshall (Miss.), 9.

6. Hobson v. Ewan, 62 Ill. 153.

Where the decree recites that "it appearing to the court that notice according to law was given of the pendency of this cause," the recital is sufficient evidence that the proper notice has been given; and though the printer's certificate be defective, it will be presumed from this recital that the court received other evidence of the date of publication. Botsford v. O'Connor, 57 Ill. 85; Harris v. Lester, 80 Ill. 316.

Where an order for the sale of land by an administrator recites, "and now on this day came the petitioners, by C., their attorney, and made proof of the service of notice according to the provisions of the statute in such case made and provided," held sufficient to show service of notice of the application, together with a copy of the account and petition as authorized by Rev. St. 1845, and give the court jurisdiction of the parties. Bowen v. Bond. 80 Ill. 351.

Defect in publication of administrator's

Defect in publication of administrator's notice of application for leave to sell land, in not stating the first and last days of the publication, is cured by a recital in the decree that it appears to

in the immediate proceeding, and cannot usually be called into question collaterally: but this rule does not apply to a case where the paper offered is so defective as not to answer the requirements of the law in any degree—as where that offered as a notice is not a notice in any sense, or is not a notice of that which is required to be notified.2

(c) Petition—Its Necessity—Time of Filing—Necessary Allegations—Description of Property—Verification—Irregularities.—An order of the probate court for the sale of the land of an intestate is a judgment in a new, separate, and independent proceeding, depending for its validity upon the sufficiency of the facts stated in the petition, and the existence of the petition must be shown if the jurisdiction of the court to make the order is controverted,3 The petition must be filed at the term designated in the notice.4

the court that notice according to law was given of the pendency of this cause. Such a recital raises a presumption that the court received other evidence than the certificate of the date of the publication. Moore v. Neil, 39 Ill. 256; s. c., 89 Am. Dec. 303.

In Illinois, printer's affidavit of publication of notice of hearing application for sale of real estate cannot be attacked as to its sufficiency in a collateral pro-ceeding. Finch v. Sink, 92 Am. Dec. 246; s. c., 46 Ill. 169; Sloan v. Graham,

85 Ill. 29.

In Wisconsin, a bare statement in license to sell land of decedent that it appeared to the judge "that the notice had been published" in a certain newspaper, is not sufficient evidence of due publication to sustain such sale on collateral attack. Gibbs v. Shaw, 84 Am.

Dec. 737; s. c., 17 Wis. 197.
Under *Colorado* Rev. Stat., p. 671, § 104, -requiring an administrator's sale to conform to a chancery sale,—and under the chancery act, p. 94, § 8,—declaring that notice by publication shall not dis-pense with the usual exertion of the sheriff to serve the writ,—a return of non est inventus will not support such notice of sale. Vance v. Maroney, 4 Col.

1. Frazier v. Steenrod, 7 Iowa, 339; s. c., 71 Am. Dec. 447; Shawhan v. Loffer, 24 Iowa, 227; Overton v. Cranworth, 78

Am. Dec. 244.

This position would appear to be inconsistent with the doctrine that the sale is void for want of jurisdiction unless the requirements of the statute as to notice have been complied with. Gibson v. Roll, 30 Ill. 172; Townsend v. Tallant, 33 Cal. 45; s. c., 91 Am. Dec. 617.

That the validity of the sale may be

attacked collaterally for entire want of

notice, is clear. See Valle v. Fleming. 61 Am. Dec. 556; s. c., 19 Mo. 454, and

2. Frazier v. Steenrod, 7 Iowa, 339; s. c., 71 Am. Dec. 447. 3. Ethel v. Nichols, I Idaho (N. S.) 741; Wright v. Edwards, 10 Vt. 298.

An administrator's sale without petition is absolutely void. Teverbaugh v. Hawkins, 82 Mo. 180.

Proceedings for the sale of land by an administrator will be reversed, if the record does not show any petition by the administrator. Monahon v. Vandyke, 27 Ill. 154.

In Louisiana, the court may, on the application of a creditor, order sufficient property to be sold to meet his demand. No petition is necessary to obtain the order: it may be obtained by rule. Dubuch v. Wildermuth, 3 La. Ann. 407. In Missouri, where land purchased but

not paid for by the intestate in his lifetime is sold by the administrator to raise money for the payment of the purchase price, and there is due notice and report thereof, the sale may be valid without a petition therefor, or an appraisement of the property. Garrett v. Bicknell, 64 Mo. 404.

4. Morris v. Hogle, 37 Ill. 150; s. c., 87 Am. Dec. 181; Schnell v. Chicago, 38 Ill. 382; Turney v. Turney, 24 Ill. 625. Compare Shoemaker v. Lockridge, 53 Ill. 503; Gibson v. Roll, 30 Ill. 172; s. c., 83 Am. Dec. 181.

If filed at a subsequent term, without a new notice, all proceedings under it will be void. Turney v. Turney, 24 Ill. 625; Morris v. Hogle, 37 Ill. 150; Schnell v. Chicago, 38 Ill. 382.

In Indiana, an administrator's petition to sell real estate may be properly filed in vacation, and the clerk may issue notice to the heirs without special order

and should contain the essential statement that there is an insufficiency of assets to pay the decedent's debts, together with the amount of indebtedness and the value of the personal estate, as far as can be ascertained. License to sell may be granted, even if there has been no application of the personal estate to the debts; but if there has been an application the petition should so state.¹

of court. Rev. Stat. 1843; Shepherd v.

Fisher, 17 Ind. 229. In Blount v. Pritchard, 88 N. Car. 445, it was said that the petition may be filed at any time after the administrator ascertains there is a deficiency of assets.

It is not necessary that the indebtedness of a decedent should be found by commissioners, in *Michigan*, before a petition for the sale of land to pay his debts and expenses of administration is filed, as proof of the indebtedness may be made by other evidence. Cahill v. Bassett (Mich.), 33 N. W. Rep. 722.

1. Blount v. Pritchard, 88 N. Car. 445.

It must appear that the personalty is insufficient. Eddy's Est, 11 Phila. (Pa.)

An executor petitioned for leave to sell his testator's real estate for the payment of debts and legacies, but in the state-ment in the petition of the assets in his hands he did not include a debt due from Had he included himself to the estate. it, the excess of the liabilities over the assets in his hands would have been little or nothing. Held, that the sale was a breach of his bond for faithful administration. Chapin v. Waters, 110 Mass.

The petition need not contain a particular description of each of the debts; a statement of the aggregate amount Collins v. Farnsworth, 8 is sufficient,

Blackf. (Ind.) 575.

This is also true under the Minnesota Gen. Stat. ch. 57, § 2. State v. Probate Ct. of Ramsey Co., 19 Minn. 117.

An allegation in the petition "that there are debts now standing against said estate which have been allowed, to the amount of - dollars, and that there are no assets in petitioner's hands, the personal property being all exhausted, wherewith to pay said debts without selling real estate," is a sufficient statement of the indebtedness to authorize a decree Moffit v. Moffit, 69 Ill. 641. for sale. Compare Bree v. Bree, 51 Ill. 367.

A petition for the sale of the real estate of a decedent, filed by a duly appointed administrator in a probate court in Michigan, set forth that an inventory of the estate and an appraisal thereof was then on file; that there was no personal estate; that the debts of the deceased, including expenses of administration, were about \$000; that to pay the debts and expenses it would be necessary to sell the real estate or some part thereof, describing it, and giving the names of all the heirs or other persons interested in the estate, and of the creditors, and stating that they all resided in the county where the petition was filed. The petition was duly sworn to, and the officer's jurat was attached thereto. Held, that the petition stated all the facts necessary under How. St. §§ 6025-6027, regulating such sales, to give the court jurisdiction to order a sale. Cahill v. Bassett (Mich.),

33 N. W. Rep. 722.
A statement in an executor's petition for leave to sell the real estate of his testator for debts, as follows: "And your petitioner further says, that in petitioning to sell all the real estate of the said deceased he does it with a view to the distribution of the balance over and above the amount necessary to pay the debt," does not make the petition void, where the prayer of the petitioner is confined to leave to sell to pay debts and charges of administration. Norman v. Olney (Mich.), 31 N. W. Rep. 555.

A bill by a general creditor to subject realty to the payment of his claim must show an original deficiency of the personalty, or that the personal representative wasted it, and that all legal remedies against him and his sureties have been exhausted or would be unavailing. May v. Parham, 68 Ala. 253

Under 2 Ind. Rev. Stat. 1876, p. 523. it is not necessary that the petition by a creditor for the sale of the real estate of a deceased person to pay debts should allege that the executor or administrator

has refused to act in the matter. Whisnand v. Small, 65 Ind. 120.

As to form of petition to confer jurisdiction in Iowa, see Cooper v. Sunderland, 3 Iowa, 114; s.c., 66 Am. Dec. 52, and note; Morrow v. Weed, 4 Iowa, 87; s. c., 66 Am. Dec. 122; Long v. Bennett, 13 Iowa, 35; State v. Berry, 12 Iowa, 60; Pursley v. Hayes, 22 Iowa, 20.

As to requisites of petition in Tennessee, see Linnville v. Darby, 57 Tenn. 306. As to requisites under California Code,

Filing an account of the personal property at or about the date of the filing of the petition does not dispense with a statement of such property in the petition itself, unless the account is directly referred to therein. The necessity of resorting to the real estate must appear affirmatively on the face of the petition.² If, however, the petition is defective, the court has no power to inquire whether a sale is necessary, although all the parties in interest are present in court.3 If the application avers the amount of the debts, and that there is no personalty, the omission to aver the inference that a sale of the land is necessary, is not fatal.4 The petition need not follow the exact language of the statute; any words that necessarily convey to the mind all that the statute requires will be sufficient, and the words used should be construed liberally and favorably, to sustain the jurisdiction of the court and the validity of the order of sale.⁵ The petition is not subject to demurrer because it fails to show that all payments theretofore made by the administrator were valid. It is not essential to confer jurisdiction that the petition of an administrator for leave to sell real estate to pay debts shall state how the petitioner was anpointed, or that he was appointed by a court having power. It is sufficient to state that the petitioner is the administrator of the estate generally.7 The petition should state the names of the heirs, though the omission will not invalidate the decree, and cannot be taken advantage of collaterally.8

. § 155, see Richardson v. Musser, 54 Cal. 196.

1. Gregory v. Taber, 19 Cal. 397. 2. Renner v. Ross (Ind.), 12 N. E. Rep.

Hence where it appears that the only claim against the estate is that of the widow for the statutory, allowance, and that a will was executed by the decedent, it must be shown whether the widow elected to take under the will or under the law. Renner v. Ross (Ind.), 12 N. E. Rep. 508. See also Meadows v. Meadows, 73 Ala. 356.

A complaint averring that complainant "is not informed whether the property of which the said A. B. died possessed will be sufficient to pay her said claim, but believes that the said property will not be sufficient," held, not to authorize the sale of the land. Sharp v. Sharp, 76

Ala. 312. 3. Pryor v. Darney, 50 Cal. 388.

Meadows v. Meadows, 73 Ala. 356.

5. De Bardeladen v. Stoudenmure, 48 Ala. 643. But compare Lynch v. Hickey, 13 Ill. App. 139. See § 4 (a) as to statutory character of jurisdiction.

A petition for the sale of a decedent's

lands is not invalidated by stating the statutory grounds of sale disjunctively. Inman v. Gibb, 47 Ala. 305.

In Illinois, the petition is defective in failing to state that the claims have been allowed. Lynch v. Hickey, 13 Ill. App.

Under the *Illinois* statute—authorizing the sale of the real estate of a decedent, and directing the executor or administrator to make out a petition to the county court "stating therein what real estate the testator or intestate may have died seized of—a statement of the real estate which he died "leaving" is a sufficient compliance with the statute. McNitt v. Turner, 16 Wall. (U. S.) 352.

6. Conger v. Cook, 56 Iowa, 117.

7. Moffit v. Moffit, 69 Ill. 641.

8. Morris v. Hogle, 37 Ill. 150; s. c., 87 Am. Dec. 243; Hobson v. Ewan, 62 Ill. 152.

A petition under the Alabama act of 1828, by an executor or administrator, for an order to sell the real estate of his testate or intestate, should particularly state which of the heirs are of age and which are infants or femes covert. Griffin v. Griffin, 3 Ala. 623; S. P. Cloud v. Barton, 14 Ala. 347; Page v. Matthews, 41 Ala. 719.

In New York, a creditor's petition in the surrogate's court, for the sale of land to pay decedent's debts, which fails to state the value of the land, the names of

The requirement that the petition shall contain a description of the land is jurisdictional, and in its absence the sale will be void.1 The description should be sufficiently accurate to enable the court to identify the land.2 If defective as to a part of the land, it is good for so much as is correctly described.³ In many States the petition should be verified by affidavit.⁴ If the petition upon which a sale is ordered fails to state jurisdictional facts, the validity of the sale may be impeached collaterally. A creditor's petition for an order to

the occupants, or the ages of the heirs, is fatally defective, and will on motion Mead v. Sherwood, 4 be dismissed. Redf. (N. Y.) 352.

1. Townsend v. Gordon, 10 Cal. 188. A petition for the sale of land under

California Code, § 1530, or under § 1537, must, in order to give jurisdiction to the court, set forth the condition of the property. Boland's Est., 55 Cal. 310.

In Pennsylvania, the orphans' will not order the sale unless a full and complete statement of all the real estate is set forth, so far as is within the knowledge of the administrator. Eddv's Est., 12 Phila. (Pa.) 118. See Money v.

Turnipseed, 50 Ala. 499.
2. Smith's Est., 51 Cal. 563; Money v. Turnipseed, 50 Ala. 499; De Bardelaben v. Stoudenmire, 48 Ala. 643; Smith v.

Flournoy, 47 Ala. 345.

If the petition omits, in words, to state that the lands are in the county or within the jurisdiction of the court in which the application is made, yet if such a description is given as to leave no real difficulty in identifying the lands intended, it will be sufficient, especially if no objection is interposed before the final order for the sale has been made. De Bardelaben v. Stoudenmire, 48 Ala. 643.

If the lands are so described in the petition that the court, aided by its judicial knowledge of the surveys of the public lands, must know that they are situated in the county, this is sufficient to support the jurisdiction of the court. Money

v. Turnipseed, 50 Ala. 499.

The probate court may correct an error in the description of land appraised for sale under an administrator's petition. Lasure v. Carter, 5 Ind. 498. Ŝee also

Smith v. Flournoy, 47 Ala. 345.

A clause in the statute that a failure to give such description shall not invalidate the proceedings, if the defect is supplied by proof, and stated in the decree, does not apply when the petition is attacked by demurrer, or where the objection is taken upon appeal from the order of sale. Smith's Est., 51 Cal. 563.
3. Frazier v. Steenrod, 7 Iowa, 339;

s. c., 7t Am. Dec. 447.

Although the Alabama Rev. Code, .\$ 2222, requires the petition for the sale g 2222, requires the petition for the sale of a decedent's real estate to "describe the lands accurately," yet an imperfect description of them in the petition. which is true so far as it goes, and which may have been amended in the probate court, or perfected by the aid of facts judicially known to the courts, is not fatal to the validity of the proceedings. Smith v. Flournoy, 47 Ala. 345.
4. This is true of petitions brought

under § 1537 of the California Code. Boland's Est., 55 Cal. 310.

The verification by an administrator of a petition to sell land for the payment of debts, as required by Rev. Stat. 1843, will be presumed to be waived by a party who appears and contests the petition.

Weed v. Edmonds, 4 Ind. 468.

An affidavit filed in a proceeding by an administrator or executor for an order to sell lands to pay debts to authorize the publication of notice, need not be en-titled in the case. If it states the necessary facts, and is filed in the case, even if not entitled at all, and without any caption, it may be sustained. Harris v.

Lester, 80 Ill. 307.

Such affidavit may be made on information and belief. Rowand v. Carroll,

81 Ill. 224.

5. Wright v. Edwards, 10 Vt. 298.

See §§ 4 (a) and 4 (h).

In Cooper v. Sunderland, 3 Iowa, 114; s. c., 66 Am. Dec. 52, it was said that the sufficiency of a petition calling into action the power or jurisdiction of the courts if there be such petition, cannot be called in question collaterally. pare \S 4 (b).

The surrogate should not confirm a sale of real estate for payment of debts, if the petition on which it was ordered is defective in any of the statute require-ments going to the jurisdiction. The act of 1850 and its amendments-curing defects in titles under such sales-applies only where the sale is collaterally questioned, not in the proceedings to confirm the sale in the surrogate's court. Kelley's Est., I Abb. N. Cas. (N. Y.)

102.

compel the personal representative to sell the land for payment of debts is in effect a creditor's bill, and gives no preference over any other debts of equal dignity. Hence it is not demurrable upon the ground that all the creditors of the estate are not made parties plaintiff, and the fact that it is in the form of a bill in chancery is no objection.2

In a proceeding on an administrator's petition for leave to sell real estate to pay debts, questions of conflicting titles cannot be settled, nor can one claiming the land under an independent title

be ordered to deliver up possession to the purchaser.3

(d) What May be Sold.—Subject to the qualification that the necessity of the sale must be established,4 and that only so much of the land can be sold as is needed to discharge the debt.5 every interest in land, whether legal or equitable, which was vested in the decedent at the time of his death, is liable to the claims of his creditors.6 Thus lands descended or devised, or in the hands of

1. Sinclair v. McBryde, 88 N. Car. 438. Compare Underwood v. Underwood, 22 W. Va. 303; Kinney v. Harvey, 6 Leigh (Va.), 70; s. c., 21 Am. Dec. 597. In a special proceeding against an ex-

ecutor under North Carolina Code, § 1448. to have real estate of the deceased sold for the payment of debts due from the estate, if the complaint alleges the existence of the debt, the exhaustion of the personal estate, and that the decedent died seized of certain real estate, it states facts sufficient to constitute a cause of action; and it is too late to object for the first time on appeal that the statute is not complied with, in that the proceeding does not purport to be for the benefit of plaintiff and all other creditors, in that no account was taken, and in that legatees and devisees were joined as defendants at the beginning of the proceeding, instead of subsequently. Such irregularities were waived by not objecting to them in the court below. Brooks v. Brooks (N. Car.), I S. E. Rep. 487.

2. Thorp v. McCallum, 6 Ill. (1 Gilm.)

3. Harding v. Le Moyne, 114 Ill. 65. Compare Gibson v. Pitts, 69 N. Car. 155.

4. See $\S 4$ (a) and $\S 4$ (c). An estate held by the decedent in trust for other persons is not liable to be sold for the payment of the trustee's Robinson v. Codman, I Summ. 121; S. P. Coverdale v. Aldrich, 19 Pick. (Mass.) 391.

A. bequeaths all his property (which consists chiefly of leasehold estates), after the payment of his debts, to a trustee, in trust for his wife for life, and after her death in trust for his grandchildren. Held, that the executor, who was also trustee, was entitled to apply the incomeof the estate for the first year to the payment of the debts, and was not obliged. to sell the principal. Merryman v. Long. 49 Md. 540.

5. Breevort v. M'Jimsey, 1 Edw. Ch. (N. Y.) 551; Black v. Meck, 1 Ind. 180;; Gill v. Givin, 4 Metc. (Ky.) 197.

But if a sale of a part of a tract will be. injurious to the residue, a sale of the whole tract will, it seems, be proper. Black v. Meek, I Ind. 180.

In Kentucky, a sale of the whole tract, when a part only is needed, will be void. A sale of that part not needed for the payment of debts may be made in the mode prescribed by Rev. Stat. ch. 86.

Gill v. Givin, 4 Metc. (Ky.) 197

In a suit to foreclose, in which the infant heirs of the deceased mortgagee were made parties, a sale of the whole premises was decreed, though more than sufficient to pay the debt. Upon the subsequent appointment of an administrator upon the estate of the mortgagor, he was enjoined from proceeding before the surrogate for a sale of the mortgaged. premises, leaving him to his remedy against the surplus arising from the sale in the foreclosure suit. Breevort v.

M'Jimsey, I Edw, Ch. (N. Y.) 551. See also § 4 (a).

6. § 4 (a).

The liability of land to be subjected to the claim of a creditor of an estate will not be affected by the fact that such creditor has received from the heirs, in part payment of his claim, a sum exceeding the value of the land, and which was paid by them out of their private means. Westbrook v. Munger (Miss.), 1 So. Rep.. 750.

purchasers from heirs or devisees, 1 lands fraudulently conveyed, 2 resulting trusts, or other equities, remainders and reversions. may he sold. An executor or administrator may sell and assign a land certificate belonging to the estate, and which has been but partially paid for, when necessary for the payment of debts.5 Lands acquired after the testator has made the will must be sold before lands devised not charged with the payment of debts.6 The widow's interest in the real estate of her deceased husband cannot be sold for his debts. Lands of which the deceased was actually and not colorably disseized at the time of his death are not liable for the payment of his debts.8

Under the Maryland act of 1870, ch. 82, amendatory of Code, art. 93, § 282, the orphans' court has power to order the sale by an administrator of leasehold property belonging to his intestate. and upon the ratification of the sale by the court and the refusal of the purchaser to comply with the terms the court may order the purchaser to comply with the terms or show cause to the contrary, and upon his failure to do so, may order a resale at his risk and cost. Schwallenberg v. Jennings, 43 Md. 554.

1. See § 4 (a).
2. Brown v. Whitmore, 71 Me. 65.

It is the duty of the administrator to make the sale under Maine Rev. St. ch.

71, § 22.

By the statute of 1821, ch. 52, an administrator on being duly licensed was authorized to make sale of the real estate of his intestate for the payment of his debts, which had been conveyed away in his lifetime, as well where such conveyance was merely fraudulent as to creditors, as where there was an actual premeditated fraud. Westcott v. M'Donald, 22 Me. (9 Shep.) 402.

Where an administrator conveys land which belonged to his intestate, claiming it as his own, his wife being the sole heir to said estate, and dies, the administrator de bonis non is entitled to recover the property for the purpose of administering the same, provided it shall be satisfactorily shown that it is necessary to do so for the purpose of paying the debts of the intestate. Seabrook v. Brady, 47

3. Valle v. Bryan, 19 Mo. 423.

In Ohio, under the law of 1816, regulating the duties of executors and administrators, equitable interests in land were assets for the payment of debts, and could be sold as real estate by the order of court granting administration. Avery v. Dufrees, 9 Ohio, 145.

The orphans' court cannot order to be sold for the debts of one deceased an equitable interest in lands under a contract of sale. Hendrickson v. Hendrickson, 41 N. J. Eq. 376.

4. Williams v. Ratcliffe, 42 Miss. 145.

The remainder interest in a homestead may be sold to pay debts. Linsford v.

Jarrett, 2 Lea (Tenn.), 579.
5. Prevo v. Walters, 8 Ill. (3 Scam.) 35. 6. Crumley v. Deake, 8 Baxt. (Tenn.) 361. Compare 2 Redfield on Wills, p. 867°, and see § 3, ante.

A power in a will to sell all the estates of the testator does not authorize the sale of lands acquired after the execution of the will; and an order from the county court directing the administrator with the will annexed to sell the lands in accordance with the will is null. Meador v. Sorsby, 2 Ala. 712; s. c., 36 Am. Dec.

This position, however, is founded upon the old English rule, that after-acquired lands are unaffected by the will, –Antkin v. Bakerman, Rep. Temp. Holt, 750,-and would preferably not be sustained where the rule has been changed by statute. Whether a sale made by the court on the petition of a creditor, and not under the will, would be sustained in those States in which the old rule still prevails, quære. The better opinion is that it would, for the ground of the position in Meador v. Sørsby is that the decree purported to sell in accordance with the will, lands which never came under its control. Ratione cessante, ita lex ipsa cessat.

7. Elliott v. Frakes, 71 Ind. 412.

Under a decree of court, real estate subject to dower may be sold by the administrator to pay the debts of the intestate; and such a sale when made to the widow cannot be impeached for fraud, because, instead of paying cash, she gave her receipts as against her specific allowance. Kenley v. Bryan, 110 Ill. 652. 8. Thorndike v. Barrett, 2 Me.

Greenl.) 312.

The authority of an executor or admin-

(e) Necessary Parties.—No decree can be passed upon an administrator's bill to subject a decedent's real estate to the payment of his debts until all the parties directly interested have been brought in or properly notified. If the object of the proceedings is to sell lands descended or subject to descent, the heirs are such parties and should be brought in.² and the existence of heirs will be

istrator to sell the lands of the deceased, by law liable to such sale for the payment of debts, is not taken away by a descent from, an alienation by, or disseizin of the heirs or devisees. Drinkwater v. Drinkwater, 4 Mass. 354; Willard v. Nason, 5 Mass. 240. And see Gore v. Brazier, 3 Mass. 523.

1. Gladson v. Whitney, 9 Iowa, 267. In West Virginia a bill by an execu-

tor for the sale of his testator's land to

pay debts should show the names of the widow, heirs, devisees, and all known creditors; and failing to do so, a sale v. Underwood, 22 W. Va. 303.
Under the Vermont Act of Oct., 1831,

it is sufficient to have the proceedings and order recorded in the office of the town clerk where the land lies. rington v. Gage, 6 Vt. 532.

In New York the heirs cannot be made parties after the time of appeal has expired. Patterson v. Hamilton, 26 Hun (N. Y.), 665.

2. Gladson v. Whitney, 9 Iowa, 267; Winston v. McLendon, 43 Miss. 254; Tafford v. Young, 3 Tenn. Ch. 496; Tafford v. Young, 3 Tenn. Ch. 490; Adam's Lessee v. Jeffries, 12 Ohio, 253; s. c., 40 Am. Dec. 477; Patterson v. Hamilton, 26 Hun (N. Y.), 665; Lock-wood v. Shandley, 1 Del. Ch. 298; s. c., 12 Am. Dec. 97; Wallace v. Nichols, 56 Ala. 321. See Dean's App., 87 Pa. St. 24; Patterson v. Hammon, 25 (N. Y.), 665; Hopkins v. McCann, 19 Ill. Patterson v. Hamilton, 26 Hun 113; Fiske v. Kellogg, 3 Oreg. 503; Gibson v. Roll, 30 Ill. 172; s. c., 83 Am. Dec. 181; Morris v. Hogle, 37 Ill. 150; s. c., 87 Am. Dec. 243; Hobson v. Ewan, 62 Ill. 152; Marshall v. Rose, 86 Ill. 374.

In Ohio, since 1824, the heirs must be made parties to the proceeding for the sale of land by an administrator under order of court, or the sale will be void. Adam's Lessee v. Jeffries, 12 Ohio, 253. In Massachusetts, under the application

for license to sell real estate for the payment of debts, it is not necessary that notice should be given to the heirs-at-law of deceased to appear and show cause,

etc. Rulluff's Case, I Mass. 240. In Louisiana, where the object of a sale of succession property is the payment of debts, citation to the heir and the ad-

vice of a family meeting are not required by law. Carter v. McManus, 15 La. Ann. 676. See also Gibson v. Foster, 2 La. Ann. 503; Willard v. Payton, 24 La. Ann. 342.

An heir having only a residuary interest in the succession of an ancestor has no just cause of objection to a probate sale made to pay debts, if the same is in-He should have paid the debts before making complaint. Benedict v.

Bonnot, 3 So. Rep. (La.) 223.

In Illinois the widow, heirs, and devisees of the testator or intestate, and the guardians of any such as are minors, and the conservators of such as have conservators, and the actual occupants of the premises, where the same or any part are occupied, shall be made parties. Rev. L. 1874, ch. 3, §§ 98, 122; Marshall v. Rose, 86 Ill. 374.

It is also perfectly proper for the heir to join with the administrator for an order to sell the real estate; although the parties in such case are not in privity, the admissions of the administrator do not bind the heir, and the heir may contest an application made by the administrator for the sale of the real estate. Hopkins v. McCann, 19 Ill. 113.

To make a perfect title under an order

of sale made by the court, the heirs-atlaw of the decedent are proper parties, and must be decreed to join in the deed of conveyance. Lockwood v. Stradley, 12 Am. Dec. 97; s. c., I Delaware Chancery,

When a bill is filed by an administrator de bonis non, seeking to subject to sale, in satisfaction of the unpaid purchasemoney, lands sold by his predecessor, under a probate decree, for the payment of debts, the heirs-at-law are necessary parties in order that the court may convey a good title to the purchaser under its decree. Wallace v. Nichols, 56 Ala. 321.

Where an administratrix undertook to pay a debt due from the estate by causing a conveyance of land to be made to the creditors, and the creditors afterwards filed their bill against her to recover the amount of the debt, alleging that the land conveyed to them was theirs without such conveyance, held, that the heirs of her intestate were necessary parpresumed until the contrary is shown. Where, however, the petition prays for a sale of the devised lands only, the devisees are the only necessary parties.² If the heirs or devisees are minors. an order of sale should not be granted until after a guardian ad litem has been appointed. Where there is no service of process upon infant heirs who have regularly appointed guardians, the

ties to the bill. Pinson v. Williams, 23

Miss. 64.

Pending foreclosure proceedings the mortgagor died, and the action continued against his widow and his administrator. Decree of foreclosure was rendered, and the property sold and bid in by the mort-gagee. The minor children of the mortgagor, who were not joined in the foreclosure proceedings, brought suit against the mortgagee to partition the property, claiming that their interest as heirs had not been affected. Held, that their only right was to redeem from the mortgage sale. Held further, that the proceedings for foreclosure were not wholly void because of the nonjoinder of the plaintiffs. and did not defeat the mortgagee's rights under the sale, nor affect the plaintiff's right to redeem. Harsh v. Griffin (Iowa). 34 N. W. Rep. 441.

In an action of foreclosure the mortgagor pleaded insanity, and after issue joined thereon he died, and his administrator being substituted, the issue was determined in favor of the mortgagee. Held, an adjudication determining the validity of adjulcation determining the variety of the mortgage, and binding upon the mortgagor's heirs, although they were not parties to the action. Harsh v. Griffin

(Iowa), 34 N. W. Rep. 441.

1. Gladson v. Whitney, 9 Iowa, 267. But in *Louisiana*, until it be shown that there are absent heirs not represented, no attorney of absent heirs should be appointed. Succession of Harris, 29 La. Ann. 143

2. Williams v. Williams, 49 Ala. 439. To a bill under Tennessee Code, §\$ 2267 et seg., to subject the real estate of a deceased person to the payment of the complainant's debts, devisees of the land are properly made parties. Jordan v. Maney,

To Lea (Tenn.), 135.

Devisees not made parties to suit brought by creditor against executor to recover a debt due to him from the testator, and in the event of there being no personal assets to charge the same on the realty, are not bound by the decree in such suit directing a sale of the land devised; and the sale made under a decree, and the deed issued pursuant thereto, will not pass the legal title to the purchaser. Hudgin v. Hudgin, 52 Am. Dec. 124; s. c., 6 Gratt. (Va.) 320.

3. Hyman v. Jaringan, 65 N. Car. 96; Craig v. McGehee, 16 Ala. 41.

In Tennessee the appointment of a guardian ad litem for minors interested is not essential to the validity of an order of sale of land by an administrator for the payment of debts. McClay v. Fox-

worthy, 18 Neb. 295.

In Indiana the omission to appoint a guardian for an infant defendant, on the hearing of a petition by an administrator to sell real estate under Rev. Stat. 1843. ch. 30, is ground for reversing the order of sale. Timmons v. Timmons, 6 Ind. 8. See Same v. Same, 3 Ind. 251.

In Alabama a sale by administrator of real estate of a deceased person will be set aside under acts of 1853-4, p. 55, if in addition to the irregularities it appears that the person appointed as guardian ad litem to represent the minor heirs of the decedent never accepted the appointment, and did not sign the acceptance of service of the citation of the probate court which purported to be signed by him, but that the clerk of the probate court, about that time, was using his name as guardian ad litem generally. Johnson v. Johnson, 40 Ala. 247.

Where, upon an application by an administrator to sell real estate, a guardian ad litem has been appointed for all the infant heirs, the failure of the guardian to answer for one of them does not take away from the court the power to pronounce its decree. Gondy v. Hall, 36 Ill.

In proceedings on a petition by an administrator to sell real estate, the record ought to show affirmatively that the defendants (minors) were notified of the pendency of the suit, or that they were present in court; and where it merely appears that a guardian ad litem was appointed, who waived service of process and consented to the sale of land, held, that the order for sale was erroneous, and that it was error to enter a decree against the infants without proof of the allegations of the petition. Martin v. Starr, 7 Ind. 224; Platter v. Anderson, 5 Ind. 33; s. p., Grey v. Pierson, 21 Ind. 18.

As to conclusiveness of sale in Florida when process has been served on guardian of infant heir or devisee, see Price v.

Winter, 15 Fla. 66.

sale is void.¹ If, however, the guardian of the minors, pending the petition of the administrator, actually enter an appearance for them, they will be bound by the order of sale, although not named in the petition.² The widow, being interested to the extent of her dower, is a necessary party,³ as is also one who purchased the property at a prior sale had in partition proceedings among the heirs.⁴ Upon a bill by certain creditors of a decedent's estate seeking to charge their claims upon the realty in the hands of devisees, other creditors should have an opportunity of coming in and sharing in the equitable assets.⁵ The bill should also make the execu-

1. Taylor v. Walker, r Heisk. (Tenn.)

734.

A sale of real property of a decedent to pay debts, made by virtue of an order of a court of probate under Oregon Laws 1855 (360, §§ 9-16), is void as to an infant heir not made a party to the proceeding and for whom no guardian was appointed. As the proceeding is adverse to the interests of the heirs, they are necessary parties. And the probate court must obtain jurisdiction of their persons in the manner prescribed by law, as well as of the subject-matter, or its order will be void. Fiske v. Kellogg, 3 Oreg. 503. See also Perry v. Adams (N. Car.), 3 S.E. Rep. 729.

In *Illinois* the omission to make the guardian of the minor heirs or devisees a party cannot be taken advantage of in a collateral proceeding. Harris v. Lester, 80 Ill. 307; Barnett v. Wolf, 70 Ill. 76.

A sale of the community property of an estate, made to pay the debts of the estate, cannot be annulled because minor heirs have an interest in the succession of which they have not been divested according to law. Willard v. Peyton, 24 La. Ann. 342.

2. Ewing v. Higby, 28 Am. Dec. 633; s. c., 7 Ohio, part I, 198. See also Ewing v. Hollister, 7 Ohio, part 2, 138, 143; Moore v. Starks, I Ohio St. 369, 374; Benson v. Cilley, 8 Ohio St. 604, 615.

In *Illinois* infants are bound by proceedings by an administrator to sell real estate, although they are not nominally made parties to the proceeding. Gibson v. Roll, 27 Ill. 88; Stone v. Kimball, 28 Ill. 93.

As to necessity of making infant heirs parties by personal service, see Shields v. Allen 77 N. Car. 275

Allen, 77 N. Car. 375.

3. McLaughlin v. McCumber, 36 Pa.
St. 14; Simonton v. Brown, 72 N. Car. 46.
In North Carolina a sale of lands to pay debts is held to be void as to the widow to whom devise had been assigned therein, and who was not made a party thereto. Such sale could not be validated by any subsequent amendment making

her a party. Simonton v. Brown, 72 N. Car. 46. Compare Blythe v. Horts, 72 N. Car. 575.

Section 34 of *Pennsylvania* Act of February 24, 1834, which requires notice to the widow and heirs or devisees of a decedent in order to charge his real estate, applies to a sale under a *testatum* execution, issued after the act went into operation upon a judgment previously obtained. McLaughlin v. McCumber, 36 Pa. St. 14.

4. Kammerer v. Zeigler, I Demarest (N. Y.), 177.

To a proceeding under North Carolina Code, §§ 318, 324, to subject land of a deceased debtor to satisfy a judgment lien, the grantees in a fraudulent conveyance made by the debtor before the lien attached are not proper parties. Lee v. Eure, 93 N. Car. 5.

In North Carolina, upon a petition by an administrator to sell land for the purpose of making assets to pay debts, any person who claims to be the owner of the land has a right to be made a party, and to have an inquiry made as to his title in due course of law. Gibson v. Pitts, 69 N. Car. 155. But compare Harding v. Le Moyne, 114 Ill. 65.

A decree licensing an administrator to sell real estate to pay the expenses of administration will be reversed on appeal, where administration was granted on the ex parte representation of the petitioner that he was a creditor of the intestate, when he was not so, and when, so far as appears, the case was within the provisions of Rev. Stat. ch. 63, § 5. Gross v. Howard, 52 Me. 192.

In Louisiana it is not regular to issue an ex parte order in favor of one or more creditors, without notice or proof, for the sheriff to sell property under administration, to pay said creditors. Proceedings should be taken contradictorily with the administratrix, to have property sold to pay all the debts of the succession. Succession of Spears, 28 La. Ann. 804.

5. Kinney v. Harvey, 21 Am. Dec. 597;

g s. c, 6 Leigh (Va.), 70.

tor or administrator a party; or if none has been appointed, it should so allege. Where there are no heirs or devisees, it has been held that the State, being interested in the escheat, is a necessary party.2 Notice to the heirs and parties in interest is jurisdictional: and where it appears from the record that they had no notice of the suit, the order and sale pursuant thereto are void.3

Under the New York statute, where the netition is brought by a creditor, citations should issue to the creditors generally. Kammerer v. Zeigler, I Demarest (N.Y.),

In Underwood v. Underwood, 22 W. Va. 303, it was said that all the creditors should be named in the petition; but in Sinclair v. McBryde, 88 N. Car. 438, it was held that the petition is not demurrable upon the ground that all the creditors had not been made parties.

1. Kammerer v. Zeigler, I Demarest (N. Y.), 177; Unknown Heirs v. Kimball, 58 Am. Dec. 638; s. c., 4 Ind. 546. In Virginia a bond creditor of a de-

ceased person may, at law, elect to proceed against the heir or personal representative; but if he goes into equity to subject the real estate of the deceased debtor in the hands of the heir or devisee, the executor or administrator must be made a party to the suit, and the personal assets in his hands will be exhausted before subjecting the real estate. Corbet v. Johnson, I Brock, 77; s. p., Foster v. Crenshaw, 3 Munf. (Va.) 514.

On the same principle, to recover personal assets in the hands of legatees the legatees should be made parties. Murdock v. Hundee, I Brock (Va.), 135.
In Florida executors should be made

parties in a scire facias to revive a judgment against the heirs and terre tenants of the decedent. Whether the heirs and terre tenants should be made parties is questionable, but the joining of them is regular. Union Bank v. Powell's Heirs, 52 Am. Dec. 367; s. c., 3 Fla. 175

Under the Massachusetts Gen. Stat. ch. 3, § 7, providing that "words importing the singular number may extend and be applied to several persons or things," the expression "his executor or administrator," in Mass. Gen. Stat. ch. 102, §§ 1, 3, means that all the executors or administrators must join in a petition for the sale of real estate. Hannum v. Day, 105. Mass. 33.

Under Massachusetts Gen. Stat. ch. 101, § 2, authorizing the probate court to remove an executor for cause shown, the supreme court has no jurisdiction to compel an executor to join with a coexecutor in a petition to the probate court to sell real estate. Southwick v. Morrell. 121

Mass. 520.

A defendant in a petition by an administrator to sell real estate cannot set up, by way of answer, that his appointment was invalid. Riter v. Snoddy, 7 Ind. 442.

In New York, if an heir-at-law of the testator is not named in the petition for an order of sale of land to pay debts, nor notified, the sale is invalid, and the omission is not an "omission or defect" which becomes immaterial after the time specified in the statute. Jenkins v. Young,

 35 Hun (N. Y.), 569.
 Trafford v. Young, 3 Tenn. Ch. 496.
 Babbitt v. Doe, 4 Ind. 355; Adam's Lessee v. Jeffries, 12 Ohio, 253; s. c., 40 Am. Dec. 477; Perry v. Adams (N.Car.), 3 S. E. Rep. 729; Sherry v. Deim, 8 Blackf. (Ind.) 542; Hawkins v. Hawkins,

28 Ind. 66.

The rule that where the record is silent notice to the heirs will be presumed applies only when the heir is a party to the suit. Doe v. Bower. 8 Ind. 197; Doe v. Harvey, 3 Ind. 104; Gerrard v. Johnson, 12 Ind. 636; Hawkins v. Ragan, 20 Ind. 193.

An administrator may give notice of the sale of real estate by publication under order of the court, making alien heirs parties. If such proceeding is offered collaterally in evidence, the jurisdiction being undisputed and the heirs content, a stranger cannot object to the irregularity of the proceeding. Forsythe v. Balance, 6 McLean, 562.
Where, in a special proceeding insti-

tuted by an admininistrator for the sale of real estate to pay debts, the court takes jurisdiction, decides that service on non-resident infant heirs and devisees and others has been made by publication, decides that a guardian ad litem for the infants has been appointed, recognizes such guardian, and determines the whole proceeding on the merits, irregularities therein cannot be taken advantage of in an action brought by such heirs and devisees to recover the land. Ward v. Lowndes (N. Car.), 2 S. E. Rep. 591. Compare Perry v. Adams, 3 S. E. Rep.

Where, because of supposed irregularities in a special proceeding instituted by

(f) Confirmation and Ratification.—Confirmation by the court or satisfaction by the parties in interest is essential to the validity of an administrator's sale. The approval of the court need not be in express terms, although it will be fatal if the record shows that the sale has not been confirmed.² Acquiescence by a party in

an administrator for the sale of real estate to pay debts, a second proceeding is instituted by the same administrator, and at the sale had in the second proceeding land is bid off at the same price, with interest, to the same person who bid it off at the first sale, heirs and devisees, having been duly made parties to the second proceeding, and having had their day in court, are concluded. Ward v. Lowndes (N. Car.), 2 S. E. Rep. 591. Under *Illinois* Rev. Stat. p. 122, § 98,

requiring all parties in interest to be made parties defendant to the petition of an executor or administrator for the sale of real estate, the decree of sale is invalid if any person interested has neither been served with process nor entered his appearance. Marshall v. Rose, 86 Ill. 374.

1. Valle v. Fleming, 19 Mo. 454; s. c., 61 Am. Dec. 566. See Johnson v. Cooper, 56 Miss. 608; Rea v. McEachron, Cooper, 50 Miss.008; Rea v. McLachron, 13 Wend. (N. Y.) 465; s. c., 28 Am. Dec. 471; Atkins v. Kinnan, 20 Wend. (N. Y.) 248; Bloom v. Burdick, 1 Hill (N. Y.), 142; Sheldon v. Wright, 7 Barb. (N. Y.) 52; s. c., 4 N. Y. 524; Battel v. Torrey, 65 N. Y. 299; Farrington v. King, 1 Brad. 191; Young v. Keogh, 11 Ill. 644.

In Pennsylvania the sale is in fieri until reported to and approved by the court. Brown's App., 68 Pa. St. 53,
In Rea v. McEachron, 13 Wend. (N.

Y.) 465, it was held that confirmation of a sale of land upon a surrogate's order is necessary before conveyance or the title will not pass, even though the sale be fair and for full value; though a subsequent confirmation by the chancellor, under 2 Rev. Stat. 105, will, it seems, cure the invalidity.

As to law prior to 1819, see Fox v. Lipe, 24 Wend. (N. Y.) 164. If the order of sale was made prior to the passage of the act requiring confirmation, the sale is good without confirmation, even though not completed till after its passage.

The Illinois statute does not require approval of an administrator's sale of land to vest title in the purchaser.

Moffit v. Moffit, 69 Ill. 641.

An orphans' court sale, even after confirmation, does not divest the title of the heir until the deed is delivered. If the heir dies after confirmation but before the deed, his interest passes as land, Overdeer v. Updegraff, 69 Pa. St. 110.

The orphans' court of Pennsylvania has power under the act of April 13, 1854, to confirm an executor's sale of land to pay debts made more than five years after the order of sale. Bowker's Est., 12 Phila (Pa.) 161.

The orphans' court of Pennsylvania can order a sale of land by executors with power to sell and allow security to be entered, in order that a lien of debts not of record may be discharged.

wright's Est., 11 Phila. (Pa.) 147.

Code Alabama, 1876, §§ 2463 and 2467. as amended by acts 1878-70, p. 77. limit the powers of the probate court in passing on the question of confirming or vacating sales of real estate made under Code Alabama, 1876, §§ 2440 et seg., for the payment of a decedent's debts, to the consideration of three issues-(1) fairness of the sale; (2) adequacy of price; (3) sufficiency or solvency of the sureties; and if the court is satisfied on these three points, it must confirm the sale; and failure in the details of the order of sale, as to advertising and selling in sub-divisions, are not of themselves sufficient reason for refusing to confirm a sale of the fairness of which the court is satisfied. Meadows v. Meadows (Ala.), I So. Rep.

When a sale of real estate is ordered by the orphans' court in Alabama, on the petition of an administrator, under the act of 1822 (Clay's Digest, 224-5), the commissioners who are appointed to make the sale have no power to execute a conveyance to the purchaser until a final decree has been rendered confirming their report of the sale, and directing them to convey title to the purchaser; and their deed, without such final decree, does not divest the title of the heirs-at-Wallace v. Hall, 19 Ala. 367.

A probate judge, after he has ceased to hold the office, cannot authenticate a sale made by him when in office. Bradford

v. Cook, 4 La. Ann. 229.

Minor distributees are not bound by a sale made by an administratrix to pay debts after her letters had abated by marriage, although approved by the ordinary. Rumph v. Truelove, 66 Ga.

2. Valle v. Fleming, 19 Mo. 454; s. c.,

61 Am. Dec. 566.

There was no formal entry of ap-

interest of full age may work a ratification of an irregular sale.1 On motion to approve an administrator's sale the court cannot go behind the order or even revise it.2 It may, however, after confirming the sale to one purchaser, with such purchaser's consent. change the order and confirm the sale in the name of a different purchaser.³ The report may be approved in part and rejected in part, and the fact that the sale of one tract is invalid does not invalidate a deed of a distinct tract sold to another party at the same sale.4 Any person interested in the estate may object to the confirmation of the sale on the ground that the sureties on the administrator's bond for faithful distribution of the proceeds are insolvent.5 Confirmation of an administrator's sale gives the purchaser an absolute title from the time of the sale. He can maintain an action for unlawful detainer against one holding under a lease executed by the administrator after the sale and before the confirmation, 6 and his interest may be sold by the probate court after his death, although he had neither paid the purchase-money nor obtained a deed. The better opinion is that mere irregularities in the proceedings are cured by a subsequent confirmation;8

proval by a probate court, but the deed acknowledged before the probate court contained a recital of approval. ministrator in his settlement charged himself with the purchase-money, and the judge's minutes contained this entry: "Report of sale of real estate of W. C. approved; deed ordered and deed acapproved; deed ordered and deed actionwhedged." Held, that it was sufficient if the approval could thus be gathered from the record. Camden v. Plain (Mo.), 4 S. W. Rep. 86.

An order of the probate court directing an administrator to give a deed for lands sold under a previous order will be regarded as a virtual confirmation of Livingston v. Cochran, 33 the sale.

Ark. 294.

1. Beekhan v. Newton, 21 Ga. 187. As to what will be sufficient to establish confirmation by acts of parties, see Johnson v. Cooper, 56 Miss. 608.

 Allen v. Shepard, 87 Ill. 314.
 Davies v. Touchstone, 45 Tex. 490.
 Bacon v. Morrison, 57 Mo. 68.
 Matter of Arguello, 50 Cal. 308. 6. Halliburton v. Sumner, 27 Ark. 460. 7. Inman v. Gibbs, 47 Ala. 805.

The purchaser at an administrator's sale is not bound to pay the administrator until the call is confirmed; and if he does pay him, and the sale is not confirmed, and the money is misappropriated, the loss falls on the purchaser. Darcy v. Duncan (N. Car.), r S. E. Rep. 455.

Under the Alabama Rev. Code, § 2095, athorizing confirmation when "the authorizing confirmation when court is satisfied" that the purchase-money "is sufficiently secured," a con-

firmation of sale on the administrator's false report that the purchaser has made the required cash payment does not divest the title of the heirs, and the land remains bound for the payment of the purchase-money. Wallace v. Nichols, 56 Ala. 321.

As to power of court to order administrators' sales on credit, see Moffit

v. Moffit, 69 Ill. 441.

See, as to ratification of such sales, McCully v. Chapman, 58 Ala. 325.

8. Osman v. Traphagen, 23 Mich. 80; Klingensmith v. Bean, 2 Watts (Pa.), 486; s. c., 27 Am. Dec. 328; McCully v. Chap-man, 58 Ala. 325; Wilkinson v. Allen, 67 Mo. 502; Jackson v. Perkins, 57 Tenn.

Confirmation by the orphans' court of a sale of land by an administrator, made subsequent to the time to which the order directing the sale was made returnable, is tantamount to the continuance of such order to the time that the sale was actually made, and such sale cannot be collaterally attacked as void. Klingensmith v. Bean, 27 Am. Dec. 328; s. c., 2 Watts (Pa.), 486. See also Sankey's App., 55 Pa. St. 496; Musselman's App., 65 Pa. St. 488.

The failure of an administrator to take security upon a sale of real estate, as required by the order of the court, will not render his deed a nullity when the fact has been reported to the court and the sale approved notwithstanding. son v. Allen, 67 Mo. 502.

A sale by an administrator on credit when ordered by the probate court to sell but if the sale is absolutely void for want of jurisdiction, it may be attacked collaterally notwithstanding the confirmation by the

probate court.1

(g) Restraining and Setting Aside.—A sale of real property belonging to an intestate under the order of a court of competent jurisdiction will not be treated as void in proceedings by the purchaser to obtain possession, upon account of irregularities in the proceedings preliminary to the order of sale. The party objecting to the sale must institute some direct proceeding to procure it to be set aside. If void, the order may be set aside at a subsequent term by the probate court on application by the parties interested. or if issued upon insufficient grounds, the sale may be restrained.3

for cash depends for its validity on the subsequent ratification of the heirs or devisees, or, in a proper case, its confirmation by the court of chancery. McCully

v. Chapman, 58 Ala. 325.
Where the license to sell is issued to two administrators, but one refusing to proceed, the other alone qualifies, sells, and conveys, the deed is valid as against an heir of the intestate. The confirmation shields the proceeding from any collateral attack. Osman v. Traphagen, 23 Mich. 8o.

An administrator's sale of property exempted for the widow, under the Tennessee Code, § 2288, may be rendered valid by her ratificaction. Jackson v.

Perkins, 57 Tenn. 367.

1. Townsend v. Tallant, 33 Cal. 45; s. c., 91 Am. Dec. 617; Doe ex dem. Mitchell v. Burven, 8 Ind. 197; s. c., 65 Am. Dec. 758. Compare Gerrard v. Johnson, 12 Ind. 637; Hawkins v. Hawkins, Adm'r, 28 Ind. 71; Van Cleave v. Milliken, 13 Ind. 109; Gibbs v. Shaw, 17 Wis. 19; s. c., 84 Am. Dec. 737. In Wisconsin confirmation of the sale

by the county court is not conclusive of the regularity of the proceedings, unless the statute so provides. Chase v. Ross,

36 Wis. 267.

2. Barbee v. Perkins, 23 La. Ann. 331. Summersett v. Summersett's Admr., 40 Ala. 596; s. c., 91 Am. Dec. 494; Galbreath v. Everett, 84 N. Car. 546.

A motion to set aside an order of sale of real estate by an executor is not too late if made any time within two years after the order, under the Iowa statutes relating to judicial sales. Rev. Stat. §§ 2376, 2831, 3160, 4173, 4174; Huston v. Huston, 29 Iowa, 347. The *Pennsylvania* act of 1853, provid-

ing for sales by the orphans' court, permits a decree for a private sale to be opened for a more favorable proposition, even after assent by the auditor and all the parties interested. The sale is in fieri until the sale is reported to and approved by the court. Brown's App., 68 Pa. St.

In Alabama, the orphans' court may set aside a sale of lands made by commissioners under its decree at any time before its confirmation; and where the orphans' court fails to confirm the comordinant count tails to confirm the commissioners' report, but orders a resale, this is equivalent to setting aside the sale. Duval v. P. & M. Bank, 10 Ala.

See, as to grounds of vacating sale which had never been confirmed, Mc-

Swean v. Faulks, 46 Ala. 610.

Under the Minnesota statute, the probate court has no power, after confirmation, to review its action and set aside the license and subsequent proceedings dependent thereon. State v. Ramsev.Co. Pro. Ct., 19 Minn. 117.

See further, as to setting aside, Hudgin v. Hudgin, 52 Am. Dec. 124; s. c., 6 Gratt. (Va.) 320; Williamson v. Williamson, 41 Am. Dec. 636; s.c., 3 Smedes & M. (Miss.) 715; Pearson v. Moreland, 45 Am. Dec. 310; s. c., 7 Smedes & M. (Miss.) 609; Pritchard v. Askew, 80 N. Car. 86; Devereux v. Devereux, 81 N. Car. 12; Fuller v. Fuller, 59 Ga. 338; Stradley v. King, 84 N. Car. 635.

An injunction against the sale of land for assets is properly granted on motion of the heirs of the decedent, where the land has been advertised under a power contained in an instrument purporting to be a will which has been admitted to probate without notice to the heirs and upon insufficient testimony, and the validity of which is in controversy. breath v. Everett, 84 N. Car. 546.

When, after due notice, leave has been regularly granted by the court of ordinary to an administrator to sell land of a decedent, equity will not restrain the sale by injunction at the instance of an heir If the sale be fraudulent it may be questioned and declared bad in ejectment, even after confirmation. 1 Mere inadequacy of price unless so gross as to "shock the conscience"—is not of itself sufficient ground for setting the sale aside.² If, however, there is

for reasons which could have been as readily urged on a caveat to the application for leave to sell. Baily v. Ross. 68

Ga. 735.

Parties .- In actions brought to restrain administrator from selling property to pay debts of a deceased person, and to set up a lost deed, it is sufficient if the administrator and the heirs are brought before the court, as they fully represent the property and are liable for all demands against it. Kennerly v. Shepley, 57 Am. Dec. 219; s. c., 15 Mo. 640.
Legatees have no right to set aside a

sale of the decedent's estate, except so far as may be requisite to protect their Before they are allowed a decree vacating the sale, the court should ascertain the amount due them, and if such amount can be paid out of the moneys set aside for such purpose, or is paid by the purchaser, the sale should be allowed to stand. Buckles v. Lafferty, 40 Am. Dec. 752; s. c., 2 Robinson (Va.), 202.

1. Rhoades v. Selin, 4 Wash. 716.

A petition in an action brought to set aside an administrator's sale of real estate, which alleges that the sale was private and void, because effected through fraud and collusion between the administrator and purchaser, is not demurrable. Van Horn v. Ford, 16 Iowa, 578.

2. Bradford v. McConihay, 15 W. Va. 732; Allen v. Shepard, 87 Ill. 314; Hardin v. Smith, 49 Tex. 420; Lowe v. Guill, 69 Ala. 80. Compare Field v. Gamble, 47 Ala. 443. See Frey's App. (Pa.), 8 Atl. Rep. 585; Mead v. Conroe (Pa.), 8 Atl. Rep. 375; Weaver v. Lyon (Pa.), 5
Atl. Rep. 782; Smith v. Black, 6 Sup.
Ct. Rep. 50; Davis v. McGeé, 28 Fed.
Rep. 867; Hudgens v. Morrow (Ark.), 2 S. W. Rep. 104; Carden v. Lane (Ark.), 2 S. W. Rep. 709; Bean v. Hoffendorfer (Ky.), 2 S. W. Rep. 556; Central Pac. R. Co. v. Creed (Cal.), 11 Pac. Rep. 772; Tooth v. Taylor (Iowa), 21 N. W. Rep. 115; Coolbaugh v. Roemer (Minn.), 21 N. W. Rep. 472; Maxwell v. Newton (Wis), 27 N. W. Rep. 32; Brown v. Brown (Mich.), 31 N. W. Rep. 34; In re Third Nat. Bank, 4 Fed. Rep. 775; In re Ewing, 16 Fed. Rep. 753; Hunt v. Fisher, 29 Fed. Rep. 801; Fletcher v. McGill (Ind.), 10 N. E. Rep. 651; Sigerson v. Sigerson, 32 N. W. Rep. 462.

Where title to property worth many

thousands of dollars was purchased at a judicial sale for \$100, and the sale took place under adverse circumstances the purchaser was restrained from taking any title by the purchase. Hunt v. Fisher, 29 Fed. Rep. 801.

In Fletcher v. McGill (Ind.), 10 N. E. Rep. 654, it was said in reference to a sheriff's sale: "Conceding the rule to be that a sheriff's sale shall not be set aside for mere inadequacy of price, yet if the inadequacy be so gross as to shock the conscience, or if in addition to gross inadequacy the purchaser has been guilty of any unfairness, or if the owner of the property has for any reason been misled or surprised, the sale will be regarded as fraudulent, and the party injured will be permitted to redeem.

Great inadequacy requires only slight circumstances of unfairness in the party benefited by the sale to raise the presumption of fraud, and when such circumstances appear it is incumbent upon the party benefited to repel the pre-sumption by showing affirmatively that he acted in good faith. Graffan v. Burgess, 117 U. S. 180, 192; s. c., 6 Sup. Ct. Rep. 686. See also Bean v. Hoffendorfer (Ky.), 2 S. W. Rep. 556; Devine v. Harkness (Ill.), 7 N. E. Rep. 54; Fitzgerald v. Kelso (Iowa). 29 N. W. Rep. gerald v. Keiso (Iowa), 29 N. W. Rep. 943; Hubbard v. Taylor (Wis.), 4 N. W. Rep. 1068; Kemp v. Hein, 3 N. W. Rep. 831; Capital Bank v. Huntoon (Kans.), 11 Pac. Rep. 369; Weir v. Travellers' Ins. Co. (Kans.), 4 Pac. Rep. 267; Neel v. Carson (Ark.), 2 S. W. Rep. 107; O'Fallon v. Clopton (Mo.), 1 S. W. Rep. 1001; Pac. Pac. V. Hafforder a.S. W. Rep. 1001; Pac. Pac. V. Hafforder a.S. W. Rep. 302; Bean v. Hoffendorfer, 3 S. W. Rep. .. 138.

Gross inadequacy of price is itself a sufficient ground for setting aside a judiscial sale. *Im re* Palmer, 13 Fed. Rep. 870; *In re* Lloyd, 11 Fed, Rep. 586; Blackburn v. Selma R. Co., 3 Fed. Rep.

It should not be forgotten that the rescission of a contract is an equitable remedy, and rests in the sound discretion of the court; and a chancellor may refuse to interfere to set aside a transaction when he would at the same time refuse to enforce its specific performance. such cases the court simply refuses to exercise its jurisdiction, and leaves the parties to their remedies at law. Bisp. Eq. § 476; Beck v. Simmons, 7 Ala. 71; any collusion between the executor and the vendee, or if the executor sell the land to his relatives for a smaller sum than he could have obtained from others, for the purpose of favoring his relatives at the expense of the legatees, the sale is void. The rule of caveat emptor applies to a sale by a probate court, and the purchaser cannot have the sale set aside on the ground that the deceased had no title to a part of the real estate sold.² A sale of the real estate of an intestate by an administrator to a bona fide purchaser under the license of a probate court, having jurisdiction of the administration of such estate, the record being regular on its face, cannot be impeached collaterally, or set aside by showing.

Watkins v. Collins, 11 Ohio, 31; Kerby v. Harrison, 2 Ohio N. S. 326.

For fuller discussion see RESCISSION

AND CANCELLATION.

Inadequacy of Price.-The refusal of the court to set aside an administrator's sale of real estate on the ground of inadequacy of the price obtained, and nonperformance to the purchaser of his agreement to pay the decedent's funeral expenses in addition to paying the price bid, held, not shown to be an abuse of discretion or otherwise erroneous. Frey's Appeal (Pa.), 8 Atl. Rep. 585.

A proceeding to have an administra-tor's sale of land for a grossly inadequate price rescinded, the deed set aside, and a resale of the land under open and fair competition, must be in equity, as there is no sufficient remedy at law. Bond v. Watson, 22 Ga. 637. See also Lowe v.

Guill, 69 Ala. 80.

Inadequacy of price renders the sale voidable, not void, and it will remain good as to all parties until set aside at the instance of some one or more of the heirs or creditors in a direct proceeding

instituted for that purpose. Capt v. Stubbs (Tex.), 4 S. W. Rep. 467.

An administrator's sale of land in Texas will not be held void on the ground that the order of confirmation does not show that proof was heard upon the question of the sufficiency of the price for which the land was sold when the order was made, as the statute does not require that the minutes of the court shall show affirmatively that this was done, and it is to be presumed that the court did its duty in that respect. Stubbs (Tex.), 4 S. W. Rep. 467.

When the administrator objects to the confirmation of the sale on the ground of gross inadequacy of price, it is error for the court to refuse to hear testimony and confirm the sale. Hardin v. Smith.

49 Tex. 420.

In sales of succession property to pay debts, the property must bring the full amount of its appraisement, or be subsequently sold on credit. But such sales. even when the property is sold below its appraisement, will not be disturbed if it be shown that the property brought its actual value. Herrmann v. Fontelien, 29 La. Ann. 502. Compare Succession of Stolz, 28 La. Ann. 175; Davidson v. Davidson. 28 La. Ann. 269; Norton v. Citizens' Bank, 28 La. Ann. 354; Succession of Fontelien, 28 La. Ann. Succession of Harris, 20 La. Ann.

It is no objection to the sale of land by an administrator, at public sale, that it was made for less than two thirds of the appraisement required before the sale by Kansas Comp. L. 1879, p. 425, § 125. Fuge v. Fuge, 23 Kans. 416. 1. Bradford v. McConihay, 15 W. Va.

732; Oberlin College v. Fowler, 10 Allen

(Mass.), 545. When lands are purchased at an administrator's sale by the person who has appraised them, the sale may be set aside in favor of the heirs. Armstrong v.

Huston, 8 Ohio, 552.

Where the executor sells land to his relatives, upon an issue to determine such question of fraud the court cannot be required to instruct the jury that the executor must be shown to be guilty of gross neglect and mismanagement. Oberlin College v. Fowler, 10 Allen (Mass.),

2. Worthington v. McRoberts, 9 Ala. 297; Beene v. Collenberger, 38 Ala. 647; Watson v. Collins, 1 Ala. Sel. Cas. 515;

Bennett v. Owen, 13 Ark. 177.

Particularly is this true where the creditor cannot be restored to the position he occupied before the agreement, and the agreement itself was induced at the instance of the purchaser. Bennett v. Owen, 13 Ark. 177.

A general warranty binds the administrator personally, but does not affect the estate. Prouty v. Mathel, 49 Vt. 415. See EXECUTORS AND ADMINISTRATORS.

contrary to the petition for a license, that there were in fact no

debts against the estate.1

A sale will not be set aside for slight irregularities in the proceedings which do not affect the jurisdiction, 2 nor for a defective description of the property when there is no reason to suppose that any injury resulted therefrom, and the creditors do not complain,3 nor after confirmation upon the ground that the purchasemoney has not been paid. A sale set aside as to one of two tracts may be set aside as to the other also if it appears that purchaser would not have bought it unless he could have had both. Where the sale has been set aside for informalities, and the purchasemoney has been applied to the payment of the debts of the decedent, the vendee is entitled to be subrogated to the rights of the creditors, and have the amount due him charged upon the land.6

1. Curran v. Reeby (Minn.), 33 N. W. Rep. 907. See Hurley v. Burnard, 48 Tex. 83.

Equity will not interfere by injunction with an administrator's sale of land to pay a debt which, though small, is valid, at the instance of heirs who do not wish the land sold, but prefer a division in kind. Johnson v. Holliday, 68 Ga. 81.

In Louisiana, where the debt itself has no existence or was illegally created, the sale cannot be sustained. Burton v. Burgier, 30 La. Ann., pt. i. 160. See §

4 (a).

If the judgment against the decedent is null and void, or the debt paid, the representative of the minor heirs, or even a beneficiary heir who has only a residuary interest in the succession, may enjoin the sale. Bienoqun v. Parker, 30 La. Ann., Pt. I., 160; Vance v. Cawthon, 32 La. Ann. 124.

2. Norville v. Coble, I Lea (Tenn.), 465. In this case notifying a husband and not the wife was held not to avoid

the sale.

Administrator's sale of lands for payment of debts sustained chiefly on the doctrine of omnia esse rite acta, notwithstanding objections that no petition for sale could be found on file; that the service of citation was waived; that the debt for which the sale was made was not yet. due, and that the description of the lands was insufficient. Hurley v. Barnard, 48 Tex. 83.

A petition to set aside an administrator's sale of real estate, alleging that no citation was issued to notify the parties interested prior to the sale, if this allegation is not admitted by the answer nor sustained by proof, will not be sufficient to justify the court in annulling the sale. Smith v. Denton, 10 Miss. (2 Smed. &

M.) 326.

At the same time it is well settled that an executor cannot give validity to a sale made without the forms of law. v. Phillips, I La. Ann. 173.

3. Succession of Wadsworth, 2 La.

Ann. 966.

Where there is a mistake in the description of the land in an order of the orphans' court for its sale, and the mistake is continued in the notice of the sale by the commissioners, if the purchaser is not thereby deceived, and gets the land he supposes himself to be buying and which the commissioners intended to sell, it will not be ground for a rescission of Nor will a bill lie to corthe contract. rect such mistake unless, on application, those having power to rectify it refuse to do so. Lamkin v. Reese, 7 Ala. 170. See also Ward v. Brewer, 19 Ill. 29.

Evans v. Singeltary, 63 N. Car. 205.
 Davis v. Cureton, 70 N. Car. 667.
 Perry v. Adams (N. Car.), 3 S. E.

Rep. 729. In McCown v. Foster, 33 Tex. 241, it was said that the title of the purchaser will be protected even though the order for the sale be fraudulently procured from the court, unless there be satisfactory evidence of complicity, or that the purchaser had notice of the fraud.

A homestead is exempt from sale for the payment of the debts of a deceased person during the minority of his children; and when an administrator with full knowledge of its character procures a sale of such property by the probate court, buys the land from the purchaser at such sale, and makes valuable improvements on it, a court of equity may, after the majority of such children set aside such sale and conveyance as void, subrogate the administrator to the rights of creditors whose claims he has paid, charge him with the rents and profits of the land

(h) Conclusiveness of Decree.—A sale by authority of a probate court, after its jurisdiction has once attached, is good without regard to the number of errors the court may have committed in its proceedings after it acquired jurisdiction; and to attack the title of the purchaser in a collateral proceeding, such errors as would be good upon appeal or writ of error will not be sufficient. Such a

from the time of sale, and allow him for the value of his improvements. Nichols v. Shearon (Ark.), 4 S. W. Rep. 167.

The administrator of a decedent's estate obtained an order to sell the real estate; sale was made, the purchaser paid the purchase-money in full, and subsequently sold the property to the ancestor of the plaintiffs. After the confirmation of the administrator's sale the widow brought suit to set aside the sale, and it was so ordered. *Held*, that the plaintiffs are not entitled to a deed on the sale so set aside, but they are entitled to a vendee's lien upon the real estate for the money paid by their ancestor.

Stutts v. Brown (Ind.), 14 N. E. Rep. 230.

As to proper relief when an adminis-

trator's sale of land upon which permanent improvements have been made is declared void, see Starkley v. Hammer,

57 Tenn. 438.

Resale. - Where at an administrator's sale the property is bid off, but the bidder refuses to take and pay for it, if the administrator elects to resell and sue the purchaser for any deficiency he must resell as soon as practicable. Saunders v.

Bell, 56 Ga. 442.

When a sale of lands made by order of the probate court is returned unto said court as required by law, and the same is vacated or set aside on account of the inadequacy of the price bid at the sale, it is error for the court to permit the purchaser to increase his bid from \$125 to \$150 and then confirm the sale. A resale in such case should be ordered.

Field v. Gamble, 47 Ala. 443.

In California, when a sale of lands of an intestate is made by an administrator, and a person other than the purchaser afterwards offers to take the land at a price at least ten per cent greater than the bid, and the probate court for this reason refuses to confirm the sale, it may in its discretion either order a new sale or accept the increased price bid. And the increased bid may be accepted notwithstanding an order of the court refusing to confirm the sale was made at a previous term, and contained a clause, inadvertently included, declaring the sale null and void. Griffin v. Warner, 48 Cal. 383.

Where succession property at first of fering fails to bring the required price, no additional order of court is required to authorize the administrator to readvertise and sell on twelve months' time. second sale of such property in which minors are interested, if on twelve months' time, may be valid, although below both the real and the appraised value. Campbell v. Owens, 32 La. Ann. 265.

A creditor of a succession cannot revendicate the property of the succession which has been sold to pay its debts without first tendering the price, or so much thereof as was applied to the extinguishment of those debts. Beard v.

Cash, 32 La. Ann. 121.

As to reauction of succession of property, see Jones v. Succession of Hoss, 20

La. Ann. 564.
Where lands are sold by an administrator under a probate decree for the payment of debts, and the purchasers by agreement with the widow pay her a compensation in money for her claim to dower in the lands, they are not entitled to an abatement of the purchase money to the extent of the money so paid, nor is their claim to the right to such abatement any obstacle to a resale of the lands. at their risk. Weakley v. Gurley, 60 Ala. 399. See further, as to resale, Mc-Clure v. Williams, 58 Ga. 494; Daniel v. Jackson, 53 Ga. 87; Pritchard v. Askew, 80 N. Car. 86; Devereux v. Devereux, 81 N. Car. 12; Fuller v. Fuller, 59 Ga. 338.

1. Cox v. Davis, 52 Am. Dec. 199; s. c., 17 Ala. 714; Long v. Burnett. 13. Iowa, 28; s. c., 81 Am. Dec. 420; Wisdom v. Parker, 31 La. Ann. 52; Fleming v. Bale. 23 Kan. 88; Bland v. Muncaster, 24 Miss. 62; s. c., 57 Am. Dec. 162; Sackett v. Twining, 18 Pa. St. 199; s. c., 57 Am. Dec. 599. Compare Wright v. Edwards, 10 Oregon, 298. See also Mc-Pherson v. Cunliff, 11 S. & R. (Pa.) 422; s. c., 14 Am. Dec. 642; King v. Kent, 29 Ala. 542; Montgomery v. Johnson, 31 Ark. 74; McDade v. Burch, 7 Ga. 559; Grayson v. Weddle, 63 Mo. 523.

The purchaser need only inquire whether the sale was ordered by a court of competent jurisdiction. Orphans' court sales are protected from collateral. sale cannot be attacked collaterally because the petition did not contain a full statement of the claims against the estate. 1 nor because the order is in the alternative, or the court appointed the appraisers instead of the administrators.² The pendency of an attempted appeal does not invalidate a sale made in the mean time.3 In the absence of fraud the propriety of the judgment is

attack to the same extent as those under execution. McPherson v. Cunliff, 11 Ser. & R. (Pa.) 422; s. c., 14 Am. Dec. 642. See King v. Kent, 29 Ala. 542; Satcher v. Satcher, 41 Ala. 26; s. c., 91 Am. Dec. 498, in which the proceeding was said to

be in rem. See also § 4 (a).

A probate order of seizure and sale of mortgaged property at the instance of a mortgage creditor of the succession is binding until reversed by an action of nullity or an appeal. Wisdom v. Parker, 31 La. Ann. 52. See also Bland v. Mun-caster, 24 Miss. 62; s. c., 57 Am. Dec.

A court having jurisdiction may convey title though the proceedings are irregular. Bennett v. Owen, 13 Ark. 177; Halleck v. Moss, 22 Cal. 266; Doe v. Roe, 30 Ga. 961.

The mere substitution of one purchaser for another does not affect the validity of the sale. Halleck v. Guy, 9 Cal. 181.
No advantage can be taken by the

heirs of any defect in the deed of conveyance. Sturdy v. Jacoway, 19 Ark. 499.

A decree of the probate court ordering sale of intestate's land for the payment of debts is as conclusive on infants' property represented by a guardian ad litem as on adults. Chardavoyne v. Lynch (Ala.), 3 So. Rep. 98.

A sale by an administratrix whose letters had abated by marriage is ultra vires and does not bind minors. Rumph v.

Truelove, 66 Ga. 480.

In a suit in equity by a creditor to subject the land of a decedent to the payment of debts, the rights and interests of infant children are under the protection of the court; and where a decree in the cause is entered by the consent of adult parties, and by the guardian ad litem of the infants, which is prejudicial to their rights, such consent decree is not binding on the infants. Daingerfield v. Smith

(Va.), I.S. E. Rep. 599.

Presentation of petition for order to sell decedent's realty for payment of debts by administrator confers upon the court jurisdiction of the subject-matter, and its subsequent proceedings will be presumed to be as regular and conclusive as those of courts of general jurisdiction. And the action of the court will not be

collaterally reviewed when the jurisdiction so far attaches as to require the court to hear and determine the sufficiency of the facts relied upon to confer such jurisdiction, whether they relate to the land, the process, the notice, or the Long v. Burnett, 13 Iowa, 28: s, c., 81 Am. Dec. 420.

An objection that land sold by an administrator under an order of court was not sold in the lowest legal subdivisions cannot be raised by mere intruders or trespassers. Wimberly v. Hurst, 33 Ill.

Where the supreme court of a State has decided that a State court, acting as a court of probate, had jurisdiction to order the sale of the estate of an insolvent decedent, and has adjudged the sale valid, it cannot be questioned after a lapse of more than twenty years in a collateral proceeding in the courts of the United States. Beauregard v. City of New Orleans, 18 How. 497.

Powers of special administrator under *Iowa* Revised Laws of 1843 are limited to the preservation of personal property of the decedent until a regular administrator can be appointed; and an order of the probate court directing a sale of real estate by a special administrator would, under such statute, be without authority of law and void, and the regularity of such an order, and the proceedings thereunder, may be collaterally im peached. Long v. Burnett, 13 Iowa, 28; s. c., 81 Am. Dec. 420.

1. Myers v. Davis, 47 Iowa, 325.

Nor can such judgment be collaterally attacked for defect in service of notice to parties adversely interested, nor in the notice itself, if cured by recitals in the petition to which it was attached. Myers v. Davis, 47 Iowa. 325.

In Calkins v. Johnston, 20 Ohio St. 539, it was said that non-compliance with the statutes regulating service in the set-tlement of estates of deceased persons rendered the order voidable only and not void, and therefore not liable to collateral impeachment. See, as to notice, § 4 (b). 2. Fleming v, Bale, 23 Kan. 88.

3. Robinson v. Glancy, 69 Pa. St.

not open to examination otherwise than in a direct proceeding for that purpose before an appellate court. Even if fraud is alleged. the decree cannot be impeached collaterally when the facts constituting the fraud were directly in issue, and must have been determined by the court before the license could legally have been granted.2 A recital in the decree that due notice was given is conclusive in a collateral proceeding, and can only be rebutted by evidence within the record.3 A judgment rendered prior to an act ratifying and confirming probate sales of a certain class cannot be reversed or a new trial ordered on the ground that the appellant may be within the beneficial operation of the statute. If the party would claim the benefit of the statute, he must make it the basis of an original proceeding in equity.4

1. Cornett v. Williams, 20 Wall. (U. S.) 226; McDade v. Burch, 7 Ga. 559;

s. c., 50 Am. Dec. 407.

Upon ejectment against the heir in possession under the Georgia law, the order will not be conclusive of the existence of debts unless obtained upon personal notice to the heir of the applica-Dorrows v. Howard, 56 Ga. tion.

430.

The decree cannot be impaired by subsequent proof that the court placed too low the value of the property or the price it would bring. Nor is the sale invalidated by the omission of the court, in a case where there are several distinct parcels of property, to insert in its order a direction that the sale shall be stopped when the amount required shall be obtained. Sprigg's Est., 20 Haynes v. Meeks, 2 Cal. 288. Cal. 121;

Nor can the sale be attacked collaterally upon the ground that more land than was necessary was sold. Boyd v. Blank-

man, 20 Cal. 10.

A judgment of a probate court ordering a resale of property sold by an administrator for failure of the purchaser to pay the purchase-money is conclusive on the purchaser and estops him as to all matters which might have been litigated Pavisich v. Bean, 48 Cal. 364.

A decree rendered by the probate court, on the petition of an administrator, ordering a sale of lands for the payment of debts is conclusive as to the debts due, and as to the insufficiency of the personal assets; and these issues cannot be again litigated in a court of equity under a bill to enjoin the sale. Chardavoyne v. Lynch (Ala.), 3 So. Rep. 98. See Boyd v. Blankman, 29 Cal. 19; MacKubin v. Brown, I Bland (Md.), 410.
When it is admitted that there are no

personal assets, a judgment of dismissal on the merits is conclusive against the validity of the claims asserted as debts. McCalley v. Robinson, 70 Ala. 432. See. further, as to irregularities which will not render the sale void on collateral attack, Bryan v. Bander, 23 Kan. 88; Brubaker v. Jones, 23 Kan. 411; McCormack v. Kimmel, 4 Ill. App. 121; Reagle v. Webster, 55 Mo. 246; Peterson v. Vann, 83 N. Car. 118; Dean v. Central Cotton Press Co., 64 Ga. 670; Haynes v. Swan, 6 Heisk. (Tenn.) 560; Click v. Burriss, 6 Heisk. (Tenn.) 539; Glenn v. Glenn, 7 Heisk. (Tenn.) 367.

As to what irregularities are sufficient

to avoid an administrator's sale, see Moore v. Wingate, 53 Mo. 398; Slocum v. English, 4 Thomp. & C. (N. Y.) 266; Cowins v. Toole, 36 Iowa, 82.

See, as to effect of license to sell real estate for payment of debts under Vermont Gen, Stat. 396, § 39, Brown v. Van Duzer, 44 Vt. 529.

2. Gordon v. Gordon, 55 N. H. 399.

3. Andrews v. Bernhardt, 87 Ill. 365.

So a decree finding notice by publication was, under the *Illinois* Act of 1857, held to show jurisdiction although the sheriff's return on the summons showed that no heir was found within the county, and that no process was sent to a different county for service. Andrews v. Bernhardt, 87 Ill. 365.

Recitals in a decree for the sale of land by administrator as to service of process on parties interested, and proof of publication, are prima facie true, but may be questioned in a direct proceeding for that purpose. Seiley v. Summers, 57 Miss. 712. See further, as to effect of recitals,

Hudgin v. Cameron, 50 Ala. 378.
4. Townsend v. Tallant, 33 Cal. 45;

s. c., 91 Am. Dec. 617.

5. Lien of Decedent's Debts.—The right which a creditor has to his just proportion of the property of which his deceased debtor died possessed vests at the instant of his death. Before his death he had but a right of action; afterwards he has precisely such an interest in his deceased debtor's estate as the heirs or next of kin would have had if no debts existed. The creditor's interest is paramount to the title of the heirs and devisees, and to the will of the testator, and prior in time to judgments against them for their individual debts. A judgment creditor having a lien on the real

1. McClintock's App., 29 Pa. St. 361. See also Morris v. Mowatt, 2 Paige (N. Y.), 586; s. c., 32 Am. Dec. 661; Bruch v. Lautz, 21 Am. Dec. 458; s. c., 2 Rawle (Pa.), 392; Vansyckle v. Richardson, 13 Ill. 171; McCoy v. Morrow, 18 Ill. 514; s. c., 68 Am. Dec. 578; Myer v. McDou-gal, 47 Ill. 278. Compare Ludlow v. Johnson, 3 Ohio, 553; s. c., 17 Am. Dec. 600: Paine v. Skinner, 8 Ohio, 159, 162; Wyse

v. Smith, 4 Gill & J. (Md.) 295.

"The only reason why each one may not take what belongs to him is because it is impracticable to make a just distribution without some delay. therefore takes the goods of a decedent into its custody, and bids the claimants to wait until their rights can be ascer-An officer of the law commits them to the care of an administrator upon the express trust and with a solemn in-The credjunction to give each his due. itor need not bring suit. The assets applicable to his debt are already in the hands of a legal officer, whose duty to pay it over will be enforced by the proper authorities without an action. All that he is required to do is to make his claim within a given time." Black, C. J., in Mc-Clintock's App., 29 Pa. St. 361.

2. Morris v. Mowatt, 2 Paige (N. Y.),

586; s. c., 32 Am. Dec. 661; Bruch v. Lautz, 21 Am. Dec. 458; 2 Rawle (Pa.),

Judgment creditors of the devisees, if made parties to a suit brought by the testator's creditors to obtain payment of their claims, may be perpetually enjoined from proceeding against property sold under a decree in the cause. Such judgment creditors may, however, contest the validity of the complainant's claims in such suit, if they are made parties; and if such claims are established, may ask that the personal estate, if any, be first applied thereto, or that they be substituted to the complainant's rights against such personalty, on the principle of mar-shalling securities; and if there be no personalty, they may insist that the realty

be applied to the testator's debts in the

manner provided by the will.

Judgment creditors of the devisees not being made parties to a suit brought by the testator's creditors, may sell the legal estate in the devised premises on execution at law, and the purchaser's title will overreach a sale under a decree in such suit: nor can the court of chancery protect a purchaser under the decree. where the judgments were obtained before the suit was commenced.

The purchaser under a decree can only protect himself in such case by filing a bill upon which he will be compelled to prove the validity of the claims, for the satisfaction of which the decree of sale was made, and to litigate every question which the judgment creditors might have

raised as an objection to the sale.

Final decree against the heir or devisee in a proceeding by creditors of a decedent to obtain payment of their claims, as provided by the New York statutes by a suit in chancery, is a preferred lien on the land descended or devised, as against a judgment or decree for the heir's or devisee's own debt. Morris v. Mowatt, 22 Am. Dec. 661; s. c., 2 Paige Ch. (N. Y.)

A son's indebtedness to his father's estate is not a lien on the son's share of his father's realty, which share is therefore subject to the sale, priority being a matter of diligence between the personal representative of the father and the other creditors of the son. Mann v. Mann, 12

Heisk. (Tenn.) 245.

Where a testator, by his will, directs that a partnership, of which he was a member, should be continued after his death, and the profits, at the end of a specified time, distributed among his devisees, the creditors of the partnership have no lien on the general assets of the estate of the deceased in the hands of his devisees. Remedy of such creditors is by claim against the executor to be pursued like other general claims against the estate of the testator, and not in estate of his deceased debtor is entitled, as against the administrator selling it by order of the court, to have his lien first satisfied out of the proceeds of the sale. The administrator cannot excuse himself from full payment of the lien by the fact that after part payment he has paid out further proceeds to unsecured creditors.1 In most of the States, the duration of the creditor's lien on his deceased debtor's real estate, unless secured by judgment, mortgage, or filed of record, is limited by statute to a specified number of vears.2 and in the absence of such statutory limitation suit must

chancery. Pitkin v. Pitkin, 7 Conn. 307; s. c., 18 Am. Dec. 111.

A claim for medical services rendered to the family of an intestate after his decease upon the request of the administrators, is not a lien upon the assets in the hands of an administrator de bonis non. Johnston v. Morrow, 28 N. J. Eq. 327.

1. Bassett v. Slater, 81 Mo. 75.

Judgment Liens. - In New York, a judgment when docketed becomes a general lien at law on all the debtor's realty as against the debtor, and all persons subsequently deriving title through or under him, which lien cannot be defeated by any species of alienation whatever. Such lien may be displaced by the execution of a power overreaching the judgment in some cases, but will be enforced against a title acquired under such a power where the purchaser has notice that it has been improperly or inequitably executed.

A judgment lien may be displaced by a decree in chancery, where the debtor holds merely as a naked trustee, or where there is a prior subsisting equitable claim against the premises. Morris v. Mowatt, 22 Am. Dec. 661; s. c., 2

Paige Chancery, 586.
Priority Lien.—In Arkansas, a delivery land judgment is a lien on the land of the obligors in the county from the time of the forfeiture, and may be revived by scire facias, and is to be classified in the third class of claims against a decedent's estate. Eddins v. Graddy, 28 Ark. 500.

In Iowa, unsatisfied judgments against a decedent are a lien on his lands, but must be revived against the administrator and heirs by scire facias. Section 1367 of the Code applies only where the judgment plaintiff is seeking satisfaction from the personalty. Carnes v. Crandall, 4 Iowa, 151.

Under the Connecticut statute of 1878 (Sess. Laws, c. 58), which provides that a judgment creditor may obtain a judgment lien upon land belonging to his debtor, and foreclose the same, a judgment creditor who has obtained a judgment against the administrator of his debtor's estate cannot obtain a lien against the land of the estate. Flynn v. Morgan (Conn.), 10 Atl. Rep. 466,

In Pennsylvania, a judgment of a justice of the peace rendered against the decedent during his life, but not filed of record in the manner prescribed by the 10th. section of the act of March 20, 1810, until after his death, is no hen on the lands of the decedent. Est. of Patterson, 1

Ashm. (Pa.) 335.

A personal collateral security given by an administrator for a debt due by his testator, cannot operate to place the creditor in a better situation against the real estate of the deceased than he was in

without such security. Wyse v. Smith, 4 Gill & J. (Md.) 295.

Proof that the personalty of an estate is insufficient to pay the judgment is sufficient evidence of insolvency to invoke, under the Missouri Administration Act, payment of judgments in the order of their liens on the realty. Bassett v.

Elliott, 78 Mo. 525.
2. Irwin v. Nixon's Heirs, 51 Am. Dec. 559; Bruch v. Lautz, 2 Rawle (Pa.), 392; Bindley's App., 69 Pa. St. 295. Under the Pennsylvania act of 1797,

& 4. the duration of the lien is limited to seven years, and volunteers and purchasers are held to be equally within the protection of the act. Penn v. Hamilton, 2 Watts (Pa.), 60; Comm. v. Poole, 6 Watts (Pa.), 32; Bailey v. Bowman, 6 W. & S. (Pa.) 119; Hays v. Heidelberg, 9 Pa. St. 207; Beeson v. Beeson, 9 Pa. St. 298; Hall's App., 40 Pa. St. 414.

Under the act of 1797, in Pennsylvania the lien of a debt upon a decedent's land was extended to twelve years from his death by bringing suit within the first seven years after that event; but if the land was not brought into execution within that time it would vest in the heir absolutely at the expiration of the twelve years, and a purchaser of it at sheriff's sale, after the expiration of he brought by the creditor to enforce the lien within a reasonable time.1 Neither the interest of the creditor in his deceased debtor's estate, nor that of the personal representatives, is of such nature as to preclude the legislature from repealing the law authorizing the sale of the estate for the payment of debts.² A sale of a decedent's land by the court to pay debts, as a general rule, transfers the lien of the debts from the land to the proceeds, and the purchaser takes a clear title.3

6. Conveyances and Contracts of Decedents.—Claims founded upon a contract with the decedent in his lifetime, if the contract has been executed by the claimant, may be enforced against the estate. Whether the estate will be barred by an implied contract raised on a quantum meruit does not appear to be definitely settled.4 A penalty incurred by the decedent in a contract made by

the twelve years, upon a proceeding begun within the first seven, would acquire no title. Maus v. Hummel, II Pa. Št. 228.

The five years' limitation, under the Pennsylvania act of 1834, does not apply to a sale of real estate of a decedent where any one of the debts for which it is ordered as a payment is "secured by mortgage or judgment." In such case the orphans' court has jurisdiction to order a sale more than five years after the decease, and the purchaser thereat takes a valid title. Orders of sale made within the five years do not extend the lien of the debts as against the heirs-atlaw. Bindley's App., 69 Pa. St. 295.
In distributing the proceeds of the de-

cedent's real estate, debts secured by record liens, existing in his lifetime, being paid, a debt whose lien has been continued by suit under the act of February 7, 1834, is entitled to be paid in preference to debts the of which have expired. Kittera's Est.,

17 Pa. St. 416.

Where creditors were persuaded to postpone selling real estate for more than five years after decedent's death, but nothing was said to creditors to induce them to forbear filing a lien, or any promise made that the lien of debts should remain, the lien should not be extended beyond the statutory period of five years limited by the act of February 24, 1834 (Purd. Dig. 422), for suits to enforce liens for debts against a decedent's estate. Webster's Appeal (Pa.), 10 Atl. Rep. 34. In Hemphill v. Carpenter, 6 Watts

(Pa.), 24, it was said that the agreement of the debtor that the lien shall continue beyond the time prescribed by law, although the directions of the law are not pursued, would not affect the purchaser, even though he was told of such agreement; otherwise liens would depend not on record, but on parol. See also Black v. Dobson, 11 S. & R. (Pa.) 94; Bombay v. Boyer, 14 S. & R. (Pa.) 253.

1. McCoy v. Morrow, 18 Ill. 514; s. c.,

68 Am. Dec. 578.

Five years after the decease has been held to be a reasonable time within which to enforce a creditor's lien on the decedent's real estate, as superior to the claim of heirs or devisees and their alienees. Myer v. McDougal, 47 Ill. 278.

2. Ludlow v. Johnson, 3 Ohio, 553; s. c., 17 Am. Dec. 609; Paine v. Skin-

ner, 8 Ohio, 159, 162.
3. Cromer v. Boinest, 3 S. E. Rep.

(S. Car.) 849.

Under Indiana Rev. Stat. 1881, § 2350, providing that on sale of land to satisfy decedent's debts, "if the sale be made subject to such lien, the purchaser shall execute his bond payable to the executor or administrator, ... conditioned that he will pay and discharge the lien," held, that a purchaser took subject to the lien, though he failed to execute a bond. Massey v. Jerauld, 101 Ind. 270. For full discussion of this subject, see Ju-DICIAL SALES.

4. McKeown v. Harvey, 40 Mich 226. See also Chambers v. Wright, 40 Mo. 482; Riblet v. Wallis, I Daly (N. Y.), 360; Rutland R. Co. v. Powers, 25 Vt. 15.

The contract upon which the claim is founded must be valid. Whitmore's

Est., Myrick's Pro. Ct. (Cal.) 103. Where the owner of a stallion insures the getting of a mare with foal by such stallion upon condition that the owner of the mare should not part with such ownership within eleven months, he to forfeit the insurance and pay an agreed price for the service if he should do so, and the owner of the mare having died, his executor sells the mare within the

him while living is a proper item in the account of his debts, and will be deemed due to its whole amount. A warranty of lands in a deed is the subject of a personal action against the executors of the warranty.2 If a covenant real is broken in the lifetime of the obligee, his executor or administrator must sue for the breach: if after the death of the obligee, the heir must sue.³ An admin. istrator cannot impeach the deed of his intestate on the ground of fraud; and hence where an intestate conveys his property in trust for certain purposes, none but the creditors of the grantor can interfere to avoid the conveyance.4

(a) Specific Performance.—If a man enter into a covenant for the sale of land, and die before conveyance executed, his heir at law will be decreed by a court of chancery to perform the agreement in specie. The remedy is administered by a court of equity or

eleven months, the estate is liable to pay for such service although the mare is not with foal. Cummings v. Peed (Ind.),

9 N. E. Rep. 603.

The omission on the part of an employee to present a statement of account to the employer will not prevent the former from recovering the value of his services from the employer's succession. Gaines v. Del. Campo's Succession, 30

La. Ann. pt. i., 2, 45.
On the other hand, a request by a testator in his last illness that a creditor continue to furnish goods to his wife—his executrix—held, not so to bind the estate as to render the debt a legal charge thereon, or afford ground for a bill in equity. Deas v. McRea, 65 Ga. 531.

1. Atkins v. Kinnan, 20 Wend. (N. Y.)

241.2. Townsend v. Morris, 6 Cow. (N. Y.)

Obligee in bond executed by deceased, binding on himself and his heirs, might at common law sue either the heir or the executor at his election, and have execution against the lands of the deceased, unless the same had been specially devised, or the heir had aliened them prior to action brought. Ticknor v. Harris, 40 Am. Dec. 186; s. c., 14 N. H. 272.

3. Abney v. Brownlee, 2 Bibb (Ky.), 170: Hatcher v. Galloway, 2 Bibb (Ky.).

180.

It is not necessary for an administrator to show affirmatively that the intestate's heirs are living in order to sustain an action for land conveyed by the intestate conditionally, after the condition was broken. Austin v. Downer, 27 Vt. 636. On dismissing a bill by the heir and

executor of a vendee of land, to have a good title made by the vendor, and to restrain the collection of the purchase-money until then, costs should not be decreed against the plaintiffs jointly, nor against the executor de bonis propriis. Long v. Israel, 9 Leigh (Va.), 556.

An executor recovering judgment against an obligor in a bond for the conveyance of land to his testator holds the judgment as trustee for his co-devisee: and, if by surrendering the judgment he obtains the land, he holds the land on the same terms. Beauchamp v. Hand-

ley, I B. Mon. (Ky.) 135.

4. Martin v. Martin, I Vt. 91; Avery v. Avery, 12 Tex. 54. See also Connell v. Chandler, 13 Tex. 5.

If an administrator receives payment of a note given for the purchase-money of an estate conveyed by his intestate to defraud creditors, he does not therefore ratify the conveyance, unless the payment is received with full knowledge of all the facts and the administrator is a party in interest, in which case it might be otherwise. Norton v. Norton, 5 Cush. (Mass.) 524.

5. Moore's Admr. v. Randolph, 6 Leigh (Va.), 175; s. c., 29 Am. Dec. 208; Sugden on V. & P. 145; Gill v. Verme-

dun, 2 Freem. (Eng.) 199.

This is said to be equally true even though the heirs are not named. Moore's Admr. v. Randolph, 6 Leigh (Va.), 175; s. c., 29 Am. Dec. 208. See also §

4 (a).
Where one covenants for himself, with out mentioning his heirs, to convey land on a certain event, and dies before the event happens, his administrators are not liable. Earle v. Dickson, 1 Dev. L.

(N. Car.) 16.

After recovery by a vendee for a breach of a covenant to convey against the administrators of a deceased vendor, it is too late for the latter to maintain a bill against such vendee and the heirs of the vendor for specific performance. Moore's probate court with equity powers, on petition of the executors or administrators or any person interested in the contract, after hearing all parties concerned and being satisfied that the specific performance ought to be decreed. The petition should aver that the contract is in writing, and that the petitioner has performed his part of the contract or is ready and willing to perform it, and

Admr. v. Randolph, 6 Leigh (Va.), 175; s. c., 20 Am. Dec. 208.

The county courts' jurisdiction to enforce specific performance of decedent's contract to convey land in a suit against his administrator, under the Texas statute, is special, and exists only where there is a bond or a contract in writing

disclosing all the terms of the agreement. in analogy to the memorandum required by the Statute of Frauds. Peters v. Phillips, 19 Tex. 70; Guildford v. Love, 49

Decedent's bond to convey, reciting contract for conveyance in all its terms. is sufficient to confer jurisdiction upon the county court, under the statute, for the specific enforcement of the contract, although the contract is not produced. Peters v. Phillips, 19 Tex. 70; s. c., 70

Am. Dec. 319.

In Pennsylvania the orphans' courts have power to decree and enforce specific performance of a contract for sale of real estate made by decedent in his lifetime. This power is granted to them by the fifteenth, sixteenth, seventeenth, and eighteenth sections of the act of February 24th, 1834, and is the same possessed by courts of chancery in like cases. Chess's App., 4 Pa. St. 52; s. c., 45 Am. Dec. 668. See also McKee v. McKee, 14 Pa. St. 235.

Before the passage of the act of 1834, if a contract for a sale of land was unexecuted an ejectment was substituted for a bill in equity. But the act of 1834, secs. 15 and 16, investing the orphans court with full authority to make and enforce a decree of specific performance in every case where the vendor is dead, and providing an ample remedy before a tribunal with equity powers, took away the only reason that ever existed for the previous mode of proceeding in the class of cases to which it refers. Myers v. Black, 17 Pa. St. 198.

The probate court of Alabama has no jurisdiction to compel an administrator to convey his intestate's interest in certain lands which were sold by a firm in which the intestate was a partner, unless the intestate had entered into "bond or obligation to make title thereto." Wilker-

son v. Vinson, 20 Ala. 131.

As to the enforcement and completion of contracts made by the decedent in his lifetime to sell and purchase lands, the effect of such contracts and the rights of parties thereunder, see Stewart v. Stewart, 31 Ala. 207; Swink v. Dechard, 41 Ala. 258; Chance v. Beall, 20 Ga. 143; Hurst v. Hensby, I Blackf. (Ind.) 373; Fulwider v. Peterkin, 2 Greene (Iowa), 522; Davis v. Pope, 12 Gray (Mass.), 193; Hunt v. Thorn, 2 Mich. 213; Baxter v. Robinson. 11 Mich. 520; Ferguson v. Bell, 11 Mo. 347; Lake v. Meir, 42 Mo. 389; Swartwout v. Burr, 1 Barb. (N. Y.) 495; Schroeppel v. Hopper, 40 Barb. (N. Y.) 425; Hodges v. Hodges, 2 Dev. & B. Eq. (N. Car.) 72; Lindsay v. Cable, 2 Ired. Eq. (N. Car.) 602; Lambert v. Hob-1fed. Eq. (N. Car.) 002; Lampert v. riorson, 3 Jones Eq. (N. Car.) 424; White v. Hooper, 6 Jones Eq. (N. Car.) 152; Karmance v. Hoober, 3 Watts & S. (Pa.) 253; Wetherill v. Seitzinger, 9 Watts & S. (Pa.) 177; Sutler v. Ling, 25 Pa. St. 466; Vance v. Fisher, 10 Humph. (Tenn.) 211; Wilkins v. Frierton, 2 Sneed (Tenn.), 701; Bartlett v. Watson, 3 Sneed (Tenn.), 287; Jones v. Taylor, 7 Tex. 240; Estes v. Browning, 11 Tex. 237.

1. Cary v. Hyde, 49 Cal. 470; Chess's

App., 4 Pa. St. 52.

In California the averment that the contract is in writing is necessary to give the probate court jurisdiction. Cary v. Hyde, 49 Cal. 470.

A failure to make the latter averment is a defect in form only, which may be amended. Chess's App., 4 Pa. St. 52.

In Texas it seems that in proceedings to enforce a written contract for sale against an estate in the probate court, under the act of 1848, it was not necessary that the heirs be made parties and be cited, as was required in the final partition. Guildford v. Love, 49 Tex. 715. See George v. Watson, 17 Tex. 367.

It is not a contract respecting land, or an interest in land, where A agrees to furnish B with trees to plant upon the latter's land, he to cultivate them at his expense, the fruit to be picked and marketed at joint expense of A and B, and B to account to A for half the net proceeds of the sales. As soon as the trees are planted they vest absolutely in B; and A, as cestui que trust of one half of the should state the substance of the contract, although it need not set out its terms in full. A deed made by the administrator without an order of the probate court to land which his intestate had obligated himself by bond for title to convey on payment of purchase-money is void, although it is perfectly proper for executors to tender a deed executed by their testator in his lifetime. and directed by him in his will to be delivered after his death.2

(b) Agreements to Leave Property by Will.—Contracts to make a particular disposition of property by will are valid, and will be sustained when supported by a sufficient consideration 3 and

profits, is entitled to have the trees properly cultivated and the fruit properly After such an agreement, if marketed. A dies and his administrator sells his interest to C, who brings a bill in equity against B, the court will decree a performance of the agreement and an account and payment to C of one half the net proceeds of the sale. Robbins v. McKnight, I Halst. Chan. (N. J.) 642; s. c., 45 Am. Dec. 406.

1. Carter v. Jackson, 56 N. H. 364.

A petition to the court to enable an administrator to execute a deed is not an adversary proceeding, nor is the power thus obtained imperative on the administrator. Emery v. Sherman, 2 Me. (2 Greenl.) 03.

Such a petition need not be subscribed by the administrator. If it contains his name, written by himself, in the body of it, it is sufficient signing. Carter v. Jack-

son, 56 N. H. 364.
2. Adams v. Harris, 47 Miss. 144; Rearich v. Swinehart, 11 Pa. St. 233.

The recital in a deed that the grantor was administrator of an estate, and 'executed the deed as administrator, is presumptive evidence that he was such administrator until the contrary is shown.

Chase v. Whiting, 30 Wis. 544.
3. Wright v. Tinsley, 30 Mo. 389; Gupton v. Gupton, 47 Mo. 37; Sutton v. Hayden, 62 Mo. 101; Van Duyne v. Vreeland, 12 N. J. Eq. 142; Davison v. Davison, 13 N. J. Eq. 246; Carlisle v. Fleming, I Harr. (Del.) 421; Izzard v. Middleton, I Desau. Eq. 43 and note; Rivers v. Rivers' Exrs., 3 Desau. Eq. 190; s. c., 4 Am. Dec. 609; Fortescue v. Hannah, 19 Ves. 67; Maddox v. Rowe, 23 Ga. 431; Brinker v. Maddox v. Kowe, 23 Ga. 431; Dilliket v. Brinker, 7 Pa. St. 53; Green v. Broyles, 3 Humph. (Tenn.) 167; s. c., 39 Am. Dec. 156; Wright v. Wright, 31 Mich. 380; Mundorff v. Kilbourn, 4 Md. 459; Frisby v. Parkhurst, 29 Md. 58; Logan v. McGinnis, 12 Pa. St. 27; Maddox v. Rowe, 25 Ga. 423; Watson v. Mahan 20 Ind. 23 Ga. 431; Watson v. Mahan, 20 Ind. 223; Stevens v. Reynolds, 6 N. Y. 459; Parsell v. Stryker, 41 N. Y. 480; Rhodes v. Rhodes, 3 Sandf. Ch. (N. Y.) 279; Shakespeare v. Markham, 10 Hun (N.Y.), 311, containing review of the cases: Logan v. Wienholt, I Cl. & Fin. 611; 7 Bligh (N. S.), 53; Needham v. Smith, 4 Russ. 318; Lester v. Foxcroft, Colles, 108; Walpole v. Oxford, 3 Ves. 402; Goilmere v. Battison, 1 Vern. 48; 2 Vent. 353; Jones v. Martin, 3 Aust. 882. See note to Randall v. Willis, 5 Ves. 266; Stockley v. Stockley, 1 Ves. & B. 30. Contra, Harden v. Harden, 2 Sandf. Ch. (N. Y.) 17; Stafford v. Bartholomew, 2 Cart. 153.

Where a father made his will devising certain lands to his son in fee-simple, and charging it with the payment of a certain sum of money, and maintenance of testator and his wife during life, it was held, where the son accepted the arrangement and paid a portion of the money to devise the land to him in fee-simple, and the father having afterwards revoked the first will and devised the land to the son for life, subject to the same charge, that it furnished no ground to entertain a bill against the executors of the father to compel a conveyance in fee-simple. Rowan's App., 25 Pa. St. 292.

Where a crippled person entered into an agreement with one of his sons to leave him his land by will on condition that he would support the father and mother during their lives, and the son having received a part of the land in full compensation, went off years afterwards to the army and died, a second agree-ment of a similar kind with another son was held valid, and the court refused to decree a specific performance of the agreement between the first son and the father. Cox v. Cox, 26 Gratt. (Va.) 305.

The contract may be enforced against the legatees and personal representatives of the testator under a will which does not contain the provision promised. Schutt v. M. E. Church, 41 N. J. Eq. 115.

If no will is made, or if the will proves to be void, the contract may be enforced against the heirs and personal representclearly established by evidence which is definite and conclusive.1 Such an agreement need not be made in any particular form, and its validity must be tested by the rules that govern the validity of other contracts.2 The question in such cases is always, Were the representations made by the decedent terms in a contract, or were they merely voluntary revocable promises which were not carried out? Did the plaintiff drive a bargain with him, or did he trust to his generosity, relying upon his word? 3 And unless the terms

atives. Alderson v. Maddison, L. R. 5 Ex. D. 203; Hiatt v. Williams, 72 Mo. 214.

A father and son agreed together that if the son would remain and support the father and his wife (the son's stepmother) during their lives and work the farm under the father's directions, the farm should at his death belong to the son. The son carried out the agreement for seventeen years, until both the father and stepmother were dead. The father, for the purpose of carrying out the agreement, made a will devising his farm to the son. The will made no mention of the other children, and was therefore void under the Missouri law. Held, that the son was entitled to have the agreement enforced against the other children. The failure of the attempt to carry it out by will could not be allowed to prejudice his rights. Hiatt v. Williams, 72 Mo. 214.

The fact that a former will was made in performance of a contract to execute the same, affords no ground for the rejection of a subsequent will, both being made to execute a power. Wilks v. Brows, 28 Alb. L. J. (Md.) 4x8.

1. Williams v. Shipley, 10 Atl. Rep. 144; Neal's Executors v. Gilmore, 79 Pa. St. 427; Bowen v. Bowen, 2 Bradf. (N. Y.)

336.
"Such claims are always dangerous, and when they rest upon parol evidence they should be strictly scanned. Especially when an attempt is made, under cover of a parol contract, to effect a distribution different from that which the law makes, or that which a decedent has directed by his will, should it meet with no favor in a court of law. Even if any such contract may be enforced, it can only be when'it is clearly proved by direct and positive testimony, and when its terms are definite and certain. The danger attendant upon the assertion of such claims requires, as was said by Chief-justice Gibson in reference to a somewhat similar contract, that 'a tight rein should be held over them by making the quality, if not the sum of the proof, a subject of inspection and governance by the court, and by holding juries strictly to the rule

prescribed.'" Strong, J., in Graham v. Graham's Exrs., 34 Pa. St. 481.

2. Alderson v. Maddison, 2 Weekly Rep. (Eng.) 105; L. R. 5 Ex. D. 293; 6

3. Alderson v. Maddison, 2 Weekly

Rep. (Eng.) 105; L. R. 5 Ex. D. 293, 6 A. & E. 469; reversed in 7 Q. B. 174, on the ground that there had not been a sufficient part performance to bring the case within the exception to the Statute of Frauds. See also Martin v. Wright's Admrs., 13 Wend. (N. Y.) 460; s. c., 28 Am. Dec. 468; Patterson v. Patterson, 13 Johns. (N. Y.) 379; Jav. Patterson, 13 Johns. (N. Y.) 379; Jacobson v. Exrs. of Le Grange, 3 Johns. (N. Y.) 199; Quackenbush v. Ehle, 5 Barb. (N. Y.) 469; Fisk v. Sherman, 25 Barb. (N. Y.) 433, Robinson v. Rayner, 28 N. Y. 494; Shakespeare v. Markham, 10 Hun (N. Y.), 322; Graham v. Graham's Exrs., 34 Pa. St. 475; Neal's Exrs. V. Gilmore, 70 Pa. St. 427; McKey. v. Gilmore, 79 Pa. St. 427; McKay v. McKay, 15 Gr. (Can.) 371; Orr v. Orr, 21 Gr. (Can.) 445; Kay v. Crook, 3 Sm. & G. (Eng.) 407; Black v. Black, 2 E. & A.

A being indebted to B, his former housekeeper, for wages, promised B that if she would forbear to press him for the arrears of wages, and would serve him without wages for the rest of his life, he would at his death leave her a life estate in certain lands. B was induced to forbear to press him for arrears of wages, and to serve him without wages for the rest of his life, and to give up other prospects of establishment in life. *Held*, that there was a contract between A and B, and that B was entitled, as against the heir-at-law of A, to a declaration that she was entitled to a life estate in the land. Alderson v. Maddison, 2 Weekly Rep. (Eng.) 105; L. R. 5 Ex. D. 293; 6 A. & E. 469.

Where the employee is to be compensated in part, in addition to his salary, by a testamentary disposition, and no such provision is made, the employer's estate is liable for enough to make up what the services are reasonably worth. Proof that after the employee had left of the alleged contract are definite and certain, it cannot be enforced.1 Such contracts being generally founded upon an executed consideration, no objection can arise upon the ground of want of mutuality during the decedent's lifetime, and no action can be sustained until after his death.² Only such property as

the service, from dissatisfaction with the company, the employer induced him to remain by representing "that it would be all right, and that he had remembered him in his will," is sufficient to show such an agreement. Bayliss v. Est. of

Prieture, 25 Wis. 651.

In Neal's Executors v. Gilmore, 79 Pa. St. 421, the action was brought by the plaintiffs to recover upon an alleged contract by Adam and Martha Neal in their lifetime, that if the plaintiffs would stay with them until they were respectively twenty-one years of age, Adam and Martha Neal would, "at their death, give them all they had." "Adam and Martha Neal were the first cousins of the The mother of the plaintiffs having died, and their father being intemperate, Adam and Martha Neal took the boys Elias and Richard Gilmore to live with them. They had no children of their own. The boys were then of the ages of two and six years respectively. A short time after, the witness, House,-a half-brother of the plaintiffs, -went to see them. He says the Neals stated to me they had taken a great liking to the children, and would like to keep them, and if their father, John Gilmore, would stay and work the place and behave himself, they would give him a certain share of the crop; and if they, the children, would stay until they were of age, they would take them and raise them as their own. They would give them a good common education, and at their death would give them what they had. This was evidently a mere declaration of in1 tention of the Neals towards the chil-It has none of the marks of a contract. There was no stipulation that the boys should render them service of any kind. They would raise them as their own. It was a contract all on one side. It is true that if you assume that there was a contract, the mere agreement that the boys should stay with them and afford them the comfort of their society would be a sufficient considera-But in determining whether there was a contract at all, the fact that all the important benefits were on one side is most significant. These children were most significant. of tender years; they were to be nur-tured and watched; fed, clothed, and lodged; nursed and provided with medical attendance in sickness, sent to school and launched into the business of life when they attained majority. Neals declared that they would stand to these children in the relation of parents. They did so faithfully. It would have been a cruel thing if, without sufficient cause, they had repudiated their promise and turned them out of doors. compelled to think, however, they could have done so. Their alleged contract. was a mere declaration of their intention at that time." Sharswood, J. Where it is clear from the evidence that the erection of buildings was not a.

voluntary service, nor a service rendered relying upon the generosity of the intestate to make compensation, and where the son expressly refused to proceed with the buildings until he had his father's promise that the farm should be his, the case does not fall within the familiar principle, that no promise can be implied to pay for gratuitous, services, or services rendered in expectation of a legacy. Smith v. Admrs. of Smith, 28 N. J. L. 216.

 Graham v. Graham's Executors, 34. Pa. St. 475; Neal's Executors v. Gilmore, 79 Pa. St. 421; Bowen v. Bowen,

2 Bradf. (N. Y.) 336.

A promise to give plaintiff, in consideration of services, "as much as any relation he had on earth," is too indefinite and uncertain to be enforced against the executors of the promisor. Graham v.

Graham's Exrs., 34 Pa. St. 475.

2. Alderson v. Maddison, 2 Weekly Rep. (Eng.) 105; L. R. 5 Ex. D. 293; 6 A. & E. 469. In this case A promised to leave B a life estate in a por-tion of his property if she would serve him as housekeeper all his life. In an action upon the contract against his estate, the court, in commenting upon the mutuality of the contract, said: was urged that there was no mutuality; that she might have left his service at any moment, and that he would have had no remedy; and that, as every contract implies mutuality, there was thus no contract. Upon full consideration I do not agree with this view. Whether he would have any remedy against her if she had left his service, may be a question; but there are many cases in which the consideration on one side must be

the decedent leaves at his death is subject to the contract of devisement, and in the absence of express restriction upon his eniovment, his power of disposition during his lifetime remains unaffected. 1 Assumpsit is the proper form of action upon such a contract:2 and if a full performance is rendered impossible by the decedent in his lifetime, or if the contract is void under the Statute of Frauds, recovery for the services actually rendered may be had upon the common counts.3 The measure of damages is the

wholly executed before any obligation arises on the other, and in which the party who gives the first consideration is never under any obligation to give it. In such case it is impossible that more than one party to the contract should ever sue upon it. Cases in which an award is offered for information are an illustration. The person who promises the reward can never sue any one for not giving the information, but when the information has been given the promisee

can sue for the reward."

In Patterson v. Patterson, 13 Johns. (N. Y.) 379, it was held that where one performs services under an agreement that he shall be compensated by will, his demand for compensation is not due until the death of the one who is to make the will for such purpose; and that an action brought before that time is premature, for it will be presumed that the testator intended to make the promised provision in his will. A similar view was also taken in Snyder v. Castor's Admrs., 4 Yeates (Pa.), 357. This, however, was doubted in Updike v. Ten Broeck, 32 N. J. L. 119.

The question is of moment in determining when the Statute of Limitations begins to run against the right of action. See Kent v. Kent, 62 N. Y. 560; s. c.,

20 Am. Rep. 502.

In Quackenbush v. Ehle, 5 Barb. (N. Y.) 469, it was held that if the full performance of the contract was prevented by the decedent in his lifetime, the claimant's demand did not become due until after his death, and if the suit was brought within six years of that time it was sufficient.

1. Van Duyne v. Vreeland, 12 N. J. Eq. 147; Johnson v. Hubbell, 2 Stockton's Ch. (N. J.) 332. See note to Cochran v. Graham, 19 Ves. 66; Eyre v. Monroe, 26 L. J. Ch. (N. S.) 757; Needham v. Kirkman, 3 Barn. & Ald. 531; Gregor v. Kampa, Support 1004.

Kemp, 3 Swanst. 404.

He cannot, however, make any disposition of the property which is in effect, though not in form, testamentary, or by a process of conversion so change its identity as to hinder its dissolution according to the intent of the contract. See note to Lewis v. Maddocks, 8 Ves. (Eng.) 158.

2. Updike v. Ten Broeck, 32 N. J. L. 105; Quackenbush v. Ehle, 5 Barb. (N.Y.) 469; Jacobson v. Exrs. of Le Grange, 3; Johns. (N. Y.) 199; Graham v. Graham's Exrs., 34 Pa. St. 475; Roberts v. Swift, I

Exis., 34 Fa. St. 4/5; Roberts v. Switt, 1 Yeates (Pa.), 209; s. c., 1 Am. Dec. 295; Neal's Exis. v. Gilmore, 79 Pa. St. 421. 3. Updike v. Ten Broeck, 32 N. J. L. 105; Quackenbush v. Ehle, 5 Barb. (N. Y.) 469; Smith v. Smith's Admrs., 28 N. J. L. 208. See also Robinson v. Raynor, 28 N. Y. 494; Lisk v. Sherman, 25 Barb. (N. Y.) 433; Neal's Exrs. v. Gilmore, 79 Pa. St. 421.

In Snyder v. Castor, 4 Yeates (Pa.), 358, it was said to be immaterial whether the promise be made before or after the This was in the nature of obiservice. ter, and in so far as it conflicts with the: doctrine that a past consideration will not sustain a contract should not be relied

When the suit is not brought upon a. special contract, but upon the ground that the contract was repudiated, an allowance of interest from the end of each year's service is usual and right. Updike v. Ten Broeck, 32 N. J. L. 105.

Where a son occupied his father's farm as tenant from year to year, and, under a parol promise from the latter that he should have the farm either by deed or decree, erected valuable improvements, it was held that, although the contract was void under the Statute of Frauds, hemight recover the value of the improve-ments. Smith v. Smith's Admrs., 28 N. J L. 208.

Statute of Frauds .- The condition of the law upon the question as to whether a parol contract to make a particular disposition of property by will is within the Statute of Frauds, as one not to be performed within a year, is uncertain. Shakespeare v. Markham, 10 Hun (N.Y.),

The following cases hold that it is therefore void: within the statute and therefore void: Lisk v. Sherman, 25 Barb. (N. Y.) 433; Smith v. Smith's Admrs., 28 N. J. L. 216. Contra: Dresser v. Dresser, 35 Barb. (N. value of the services rendered, and not the proportion of the decedent's estate which has been promised. Specific performance of the contract of devisement will be decreed by a court of equity upon the recognized principles governing it in the exercise of this branch of its jurisdiction.² Such contracts, when resting in parol.

Y.) 573; Kent v. Kent, 3 N. Y. Super. Ct. 630; s. c., 1 Hun, 529; Jilson v. Gilbert, 26 Wis. 637; s. c., 7 Am. Rep. 100; Kent v. Kent, 62 N. Y. 560; s. c., 20 Am. Rep. 502; Fenton v. Emblers, 3 Burr. (Eng.) 1178; Anonymous, 1 Salk. (Eng.) 280: Peter v. Compton, Skin. (Eng.) 353; 280; Peter v. Compton, Skin. (Eng.) 353; Ridley v. Ridley, 34 Beav. (Eng.) 478; Updike v. Ten Broeck, 32 N. J. L. 116; Doyle v. Dixon, 97 Mass. 208; Peters v. Westborough, 19 Pick. (Mass.) 364; s. c., 31 Am. Dec. 142; Lyon v. King, 11 Metc. (Mass.), 411; Worthy v. Jones, 11 Gray (Mass.), 168; White v. Hanchett, 21 Wis.

In Peters v. Westborough, 19 Pick. (Mass.) 364; s. c., 31 Am. Dec. 142, it is said that a parol contract to support a person for a certain number of years is not within the statute; for if he die within one year, having been supported under the contract until his death, the contract

will have been fully performed.

1. Graham v. Graham's Exrs., 34 Pa. "If the measure of damages St. 475. must be what is contended for by the plaintiff, what less is the result than the establishment of a parol will? Is it not a posthumous disposition of William R. Graham's estate? If he could thus dispose of a part of his estate, why not of all? Suppose that, in consideration of their living with him until his death, he had verbally promised one half of his estate to Jane, and the other half to Eliza; if, in an action for a breach of the promise, each may recover the value of one half of the estate, then the verbal agreement would be, to all intents and purposes, a will. It is a palpable error to say that the damages are to be regarded as a debt or liability of the estate. They are a distributive share, and are claimed and recovered as an equivalent for an inherited portion or a legacy. If they are the fruit of a legal liability of the decedent, then the rule which the plaintiff invokes leads to a still greater absurdity than even a parol will; for, under the contract which she sets up, she is only entitled to a share of what remains after all legal liabilities are discharged, and if those liabilities absorb the whole estate she is The extent of her entitled to nothing. rights varies with the residuum of the estate, and is incapable of measurement

until the residuum be ascertained : there is no possible meter for it." Strong, J. See also Neal's Exrs. v. Gilmore, 79 Pa. St. 421; Roberts v. Swift et al., I Yeates (Pa.), 200; Snyder v. Castor's Heirs, 4 Veates (Pa.), 353. Compare Lisk v. Sherman, 25 Barb. (N. Y.) 433; Quackenbush v. Ehle, 5 Barb. (N. Y.) 469; Robinson v. Raynor, 28 N. Y. 494; Cover v. Sterns, 10 Atl. Rep. 231

2. Johnson v. Hubbell, 2 Stockton Ch. (N. J.) 332; s. c., 66 Am. Dec. 773; Needham v. Smith, 4 Russ. 318; Stockley v. Stockley, 1 Ves. & B. 30; Fortescue v. Hennah, 19 Ves. 67; Goilmere v. Battison, 1 Vern. 48; s. c., 2 Vent. 353; Lister v. Foxcroft, Collis, 108.

"There is, upon the authorities," says Talcott, J., in Shakespeare v. Markham. 10 Hun, 322, "no doubt that in a case where a certain and definite contract is clearly established, even though it involves an agreement to leave property by will, and it has been performed on the part of the promisee, equity in a case free from all objection on account of the adequacy of the consideration, or other circumstance rendering the claim inequitable, will compel a specific performance, though as an original question it might be considered doubtful whether in any such case, especially when the contract is sought to be established by parol testimony, so patent a means for the evasion of the provision for the security of property furnished by the Statute of Wills should have been allowed. courts of equity, having been pressed by the hardship of particular cases, and the unreasonable and perhaps often fraudulent conduct of the decedent, have made precedents on the subject which have resulted in the establishment, as a principle of equity law, that in such cases the court will often decree a specific performance, and charge those holding the property uner the will with a trust for the benefit of the party to whom it was agreed to be given." See Parsell v. Stryker, 41 N. Y. given." See Parsell v. Stryker, 41 N. Y. 480; Rhodes v. Rhodes, 3 Sandf. Ch. (N. Y.) 279; Frisby v. Parkhurst, 29 Md. 58; Wright v. Tinsley, 30 Mo. 389; Haly-burton v. Kershaw, 3 Desau. 105; Rivers v. Rivers, 3 Desau. 190; s. c., 4 Am. Dec. 609; Izard v. Middleton, 1 Desau. 116, note; Watson v. Mahan, 20 Ind. 223; are within the provisions of the Statute of Frauds, and the complainant must clearly establish the terms of the contract, and bring himself within the equitable doctrine of part performance.1

DECAY.—See note 2.

Brinker v. Brinker, 7 Pa. St. 53: Gupton v. Gupton, 47 Mo. 37; Maddox v. Rowe, 23 Ga. 431; Logan v. McGinnis, 12 Pa. St. 27; Munford v. Kilbourn, 4 Md. 459; Logan v. Weinholt, 1 Cl. & Fin. 611.

1. Van Duyne v. Vreeland, 12 N. J. Eq. 150; Davison v. Davison, 2 N. J. Eq. 150; Davison v. Davison, 2 N. J. Eq.

246; Munford v. Killourn, 4 Md. 463; 240; Muntord v. Killourn, 4 Md. 403; Rhodes v. Rhodes, 3 Sandf. Ch. 279; Car-lisle v. Fleming, 1 Harr. (Del.) 421; Izard v. Middleton, 1 Desau. 122; Gupton v. Gupton, 47 Mo. 37; Sutton v. Hayden, 62 Mo. 112. See Brinker v. Brinker, 7 Pa. St. 53.

In Harden v. Harden, 2 Sandf. Ch. (N. Y.) 17, and Stafford v. Bartholomew, 2 Cart. 153, it was said that such contracts could not be specifically enforced.

A failure to show a definite arrangement is fatal. Stanton v. Miller, 58 N. Y. 192; Wright v. Wright, 31 Mich. 380; Carlisle v. Fleming, I Harr. (Del.) 421; Munford v. Kilbourn, 4 Md. 459; Izard v. Middleton, 1 Desau. 116; Bowen v. Bowen, 2 Bradf. 336; Moorhouse ν. Calvin, 9 Eng. L. & Eq. 136; s. c., 21 L. J. Ch. N. S. 177; Podmore ν. Gunning, 7 Sim. (Eng.) 644; Barkworth v. Young, 4 Drew, 1; Walpole v. Oxford, 3 Ves. Jr. 402.

Contracts to devise property by will in consideration of services will be scanned closely, and very satisfactory proof of the fairness and justness of the transaction will be required. Wright v. Wright, 31 Mich. 380; Munford v. Kilbourn, 4 Md. 459; Carlisle v. Fleming, 1 Harr. (Del.) 421; Stanton v. Miller, 58 N. Y. 200; Bowen v. Bowen, 2 Bradf. (N. Y.) 336; Rivers v. Rivers, 3 Desau. 196; s. c., 4 Am. Dec. 609; Van Duyne v. Vreeland, 12 N. J. Eq. 142; s. c., 11 N. J. Eq. 370. Specific performance will not be decreed

of any contract when any material part of the terms or conditions are uncertain. Nichols v. Williams, 22 N. J. Eq. 63.

But courts of equity will sometimes allow a bill to be amended after final hearing, so as to conform to the contract as proved, where that as proved is variant from the one charged in the bill. Davison v. Davison, 13 N, J. Eq. 252.

A bill for damages may sometimes be sustained in special cases. where there can be no specific performance. v. Tinsley, 30 Mo. 399; Gupton v. Gupton, 47 Mo. 37; Logan v. McGinnis, 12 Pa. St. 27.

Although circumstances may render it impossible to enforce exactly an agreement to dispose of property by will, yet its substantial specific enforcement will be decreed. Wright v. Tinsley, 30 Mo.

Part Performance, -The ground upon which equity compels a specific performance of a parol agreement concerning lands is the prevention of fraud. Carlisle v. Fleming, I Harr. (Del.) 430. See Van Duyne v. Vreeland, 12 N. J. Eq. 150;

Gupton v. Gupton, 47 Mo. 37.

To bring himself within the principle the complainant must prove that he cannot be restored to his previous condition by anything short of the specific per-formance of the contract; non-payment of the consideration is not enough. But where the character of the services rendered is so peculiar that it is impossible to estimate their value to the promisor by any pecuniary standard, and where it is evident that he did not intend to measure them by any such standard, it is out of the power of any court after the performance of the services to restore the promisee to the situation in which he was before the contract was made or to compensate him in damages. Such a case is clearly within the rule which governs courts of equity in carrying parol agreements into effect, where possession has been taken of landed property or moneys laid out in improvements upon land which the testator agreed to devise in consideration of care and maintenance during his life. Rhodes v. Rhodes, 3 Sandf. Ch.

The complainant must also show that the expenditure was made at the decedent's request and in execution of the con-McClure v. McClure, I Pa. St. See Poorman v. Kilgore, 26 Pa. St. 374.

Unless the complainant has performed his part of the contract he has no standing in court. Cox v. Cox, 26 Gratt. (Va.) 305; Sprinkle v. Hayworth, 26 Gratt.

(Va.) 384. 2. "Decayed" in the condemnation of a vessel was held the same as "rotten." "The word decay in its appropriate sense shows the true source of unsoundness or rottenness in the particular instance." Steinmetz v. U. S. Ins. Co., 2 S. & R. (Pa.) 293.

DECEIT .-- (See also AGENCY; FRAUD; CONTRACTS; SALES.)

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1. Definition.—Deceit is a fraudulent misrepresentation or contrivance by which one person deceives another, who has no means of detecting the fraud, to the detriment of the latter. Deception embraces three things: 1. A fraudulent representation; 2. Inability of the person damaged to prevent the fraud; 3. Damages must follow.1

Deceit is the type of fraud. In law, to obtain damages from the injury caused by deceit it must be shown: I. That there is a false representation of material facts; 2. That it was made with a knowledge of its falsity; 3. That the injured party was ignorant of its falsity, and believed it true; 4. That it was made with the intent that it should be acted upon; 5. That it was acted upon by the injured party.2

Deceit is any trick, collusion, contrivance, false representation.

or underhand practice used to defraud another.3

Deceit is a fraud, cheat, craft, or collusion used to deceive and defraud another. It is deceit to make false representations with an intent to deceive and defraud another who, believing the representations, enters into a contract by which he is damnified.4

(I.) WHAT IS NOT DECEIT.—Generally speaking, a mere silence as to facts important to a person with whom one is dealing, facts which are a protection to his own interest in the particular transaction, is no deception. Every person is required to look after his own interests in his transactions. Caveat emptor is the motto of commercial law. When sources of information are equally open to both parties in any transaction, but one obtains an advantage over the other without resorting to any trick, artifice, concealment, or fraud calculated to throw the other off his guard, there is no deceit. If there be no false representations in obtaining this advantage, it is a legitimate transaction, and the damaged party. must bear the loss of his own negligence and want of vigilance.5

If a person purchase goods of a merchant without, in any way, relying upon the skill and judgment of the vendor, the latter is not responsible for their turning out contrary to his expectation.

- 1. 2 Bouvier's Inst. No. 2321.
- 2. Biglow on Fraud (1877), sect. 1.
- Webster's Dictionary.
 Wharton's Law Dictionary.

5. Cooley on Torts (1880), 476. 6. Brown v. Edgington, 2 Scott, N.

In order to make it a deception in deal-

(II.) WHAT IS DECEIT.—Deceit may be by asserting a falsehood deliberately to the injury of another: by stating or representing to another that a party is an honest man when the speaker knew him to be a rogue; that property, real or personal, possesses certain qualities, or belongs to the vendor, when he knew these things to be false; or by any act or demeanor which would mutually impress the mind of a fraudulent man with a certain belief.1

It is not essential, to make out deceit, that false assertion should

he made in words.2

2. The Wrongdoer's Knowledge of the False Representations.—An honest statement of facts believed to be true by the party making them, and acted upon, will not at law create a liability for damages against the party who made them. Neither will the complaining party be awarded damages under such circumstances on the ground of fraud, because fraud will not be established, and relief granted, without proof that the false representations were purposely made to deceive.³ But this doctrine has exceptions which are important—so much so, that it is sometimes a question whether it should be adopted; for the affirmation of what one

ing, the party in possession of the facts must be under some special obligations, by confidence reposed or otherwise, to communicate them truly and fairly.

Davis v. London Ins. Co., 8 Ch. D. 469.

The losing party under these circumstances must bear the lost of his want of

stances must bear the lost of his want of vigilance. Mitchell v. McDougall, 62 Ill. 498; Mooney v. Miller, 102 Mass. 217; Law v. Grant, 37 Wis. 548; Starr v. Bennett, 5 Hill (N. Y.), 303; Hobbs v. Parker, 31 Me. 143; Brown v. Leach, 107 Mass. 364; Williams v. Spurr, 24 Mich acr.

If one insolvent buys goods of another without divulging his financial standing. and the vendor makes no inquiry and is not deceived by misrepresentation or artifice, there is no deceit in law. Cross v. Peters, 1 Me. 376; Nichols v. Pinner, 18 N. Y. 295; Rodman v. Thalheimer, 75 Pa. St. 232.

1. Hart v. Tallmadge, 2 Day (Conn.),

382. 2. Mizer v. Russell, 29 Mich. 229; Merc. (Mass.) 193; Lobdell v. Baker, 1 Metc. (Mass.) 193; Lee v. Jones, 17 Com. B. N. S. 482.

Morally it would seem that each party is bound to communicate to the other his knowledge of the material facts, provided he knows the other is ignorant of them, and they be not open or equally within the rearch of his observation. But this rule does not find support in the courts of law. It is qualified. The rule is that the party in possession of the facts must be under some special obligation, by confidence or otherwise, to divulge them to the other party. Fish v. Cleland, 33 Ill. 243; Cleland v. Fish, 43 Ill. 282; Beach v. Sheldon, 14 Barb. (N. Y.) 72; Laidlaw v. Organ, 2 Wheat. (U. Shellow) 1. Shellow v. Organ, 2 Whea S.) 178; Kintzing v. McElrath, 5 Pa. St.

There must be a wilful act on the part of one whereby another is sought to be damnified by unjustifiable Green v. Nixon, 23 Beav. 530. The injured party must be induced to act to his prejudice by false representations made by another upon whom he had a right to rely, and whose duty it was to make true statements. Detroit v. Weber, 26 Mich. 284.

There must be an artifice, to make out fraud. Singleton v. Kennedy, o B. Mon. (Ky.) 222; Smith v. Countryman, 30 N. H. 655; Havson v. Edgerly, 29 N. H. But it has been decided that common honesty makes it obligatory on the vendor to tell of defects not open to observation, which the vendor knows, but are unknown to the vendee. McAdams v. Cates, 24 Mo. 223. But this does not appear to be the general doctrine. Law v. Grant, 37 Wis. 548; Smith v. Countryman, 30 N. H. 655; Davis v. London Ins. Co., 8 Ch. D. 469. A purchaser is not bound to disclose his knowledge of the existence of a mine on a farm which he is trying to buy, the vendor not knowing of the mine. Kintzing v. McElrath, 5 Pa. St. 467; Butler's Appeal, 26 Pa. St. 63; Harris v. Tyson, 24 Pa. St. 347; Williams v. Spurr. 24 Mich. 335.

3. Bigelow on Fraud (1877), 57.

does not know to be true is as unjustifiable as the affirmation of what is known to be false. If a person innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates

as a surprise upon the other party.1

When any party makes material representations which he avers to be true, with intent that they shall be acted upon, and these representations are actually relied upon by the other party in completing the negotiations, and then they prove false, to the injury of the party accepting them, relief can be had in a court of equity, although the party who made the representations knew not of their falsity.²

Story Eq. Juris. sect. 193.
 Cooley on Torts (1880), 498.
 Judge Cooley says: "There is some

difference in the aspect which such a case presents in a court of equity and in a court of law, growing out of the difference in jurisdiction in the two courts and in the modes of giving relief." Cooley on Torts, 499. Generally in law to establish fraud and gain relief, it must be proved that the party who made the false representations knew that they were false or recklessly made at the time of the negotiation. The law raises no presumption of the knowledge of fraud from the mere fact that the representations were false. McDonald v. Trafton, 15 Me. were false. McDonald v. Trafton, 15 Me. 225; Barnett v. Stanton, 2 Ala. 181; Edick v. Crim, 10 Barb. (N. Y.) 445; Mahurin v. Harding, 28 N. H. 128; Case v. Boughton, 11 Wend. (N. Y.) 106; Collins v. Evans, 5 Q. B. 820; Behn v. Kemble, 7 Com. B. N. S. 260; Ormrod v. Huth, 14 M. & W. 651; Barley v. Walford, 9 Q. B. 197; Thom v. Bigland, 8 Ex. 725; Taylor v. Ashton, 11 M. & W. 405; Lord v. Goddard, 13 How. (U. S.) 108; King v. Eagle Mills, 10 Allen (Mass.) 198; King v. Eagle Mills, 10 Allen (Mass.), 548. The representation must be made with the contemplation of its being acted upon by the other party to the transaction, or at least by any of a class of persons to which the other party belongs; as when made to the public, or when contained in a director's report which is adopted by the shareholders and circulated. Thom v. Bigland, 8 Exch. 725; Gerhard v. Bates, 2 El. & Bl. 476; Scott v. Dixon, 29 L. J. N. S. Ex. 62. The complaining party must have acted upon it, and hence & N. 225; Smith v. Chadwick, 20 Ch. D. 27; Morgan v. Skiddy, 62 N. Y. 319.

When a party is selling or exchanging

When a party is selling or exchanging real estate situate in another State with a person away from the land, who accepts the lands as described by the owner, the injured party can recover his damages

for intentional false representations as tothe quantity of the land, the location thereof, and the character of the improvements. Under these circumstances. the complaining party may rely upon the statements as being true, without being guilty of such negligence as topreclude a recovery by him for fraud practised on him. It might be different if the land had been situate near so that an examination could readily have been made. Ladd v. Piggott, 114 Ill. 647. The court say in this case: "The representations made by defendant as to the property situated in Kansas, which he was about to exchange with plaintiff, were much more than mere expressions of opinions as to its value and desirableness. Falsely stating the quantity of land contained in a certain tract, and the size and character of the improvements situated thereon, is quite a different thing from expressing a mere opinion concerning them.

When representations are made embracing facts which must be supposed to be known by the party making them, the proof of their falsity is sufficient evidence of his knowledge that they were false. Morgan v. Skiddy, 62 N. Y. 319; Hicks v. Stevens (III.), 11 N. E. Rep. 241; Morse v. Dearborn, 109 Mass. 593; Stimpson v. Helps (Colo.), 10 Pac. Rep.

290.

It is always presumed that a party selling property knows the truth of the representations which he makes. If he knows the facts he states to be false, it is positive fraud. If he does not know them to be true, and they are false, then it is culpable negligence, which in equity amounts to fraud. Glasscock v. Mincr, II Mo. 655; Miner v. Medbury, 6 Wis. 295; Smith v. Richards, 13 Pet. (U. S.) 26.

A misrepresentation of a material fact, innocently made, but which acts as an inducement to the act of another, who is thereby damnified, is a fraud which can be relieved in equity. Davis v. Heard, 44

Miss. 477.

Material misrepresentations, though inadvertently made, through a mutual mistake of the contracting parties, or by mistake of one of them, will be remedied in equity. Spurr v Benedict, 99 Mass. 463; Clapham v. Shillito, 7 Beav. 149; Daniel v. Mitchell, 1 Story C. C. 172; Warren v. Daniels, I Wood & M. C. C. 90; Seeley v. Reed, 25 Fed. Rep. 301; Mills v. Collins (Iowa), 25 N. W. Rep. 109; Smith v. Richards, 13 Pet. (U. S.) 26; Lewis v. McLemore, 10 Yerg. (Tenn.) 206; Parham v. Randolph, 4 How. (Miss.) 435; Coe v. Turner, 5 Conn. 86; Kyle v. Kavanaugh, 103 Mass. 356; Walker v. Dennison, 86 Ill. 142.

It may be said that he who misleads the confidence of another by false representations on material facts shall be the sufferenand not the injured. Doggett v. Emerson, 3 Story C. C. 733; Lynch v. Trust Co.,

18 Fed. Rep. 486.

Where one party receives the positive assurance or representation of another as to a material fact, he has the undoubted right to rely upon it, so far as the other is concerned, and is not bound to make any further investigation. Bank v. Sells, 3 Mo. App. 85; Thorne v. Prentiss, 83 Ill, 99; Boyce v. Grundy, 3 Pet (U. S.) 210; Young v. Harris, 2 Ala. 108; Clopton v. Cozart, 13 Sm. & M. (Miss.) 363; Deveber v. Roop. 3 Pug. (New B.) 295; Mead v. Bunn, 32 N. Y. 275; Rose v. Hurley, 39 Ind. 82; Bean v. Herrick, 12 Me. 262; Vandewalker v. Osmer, 65 Barb. (N. Y.) 556

If a party make representations as of his own knowledge in order to have another party close a negotiation, which statements were false, the injured party It would make no difcan gain redress. ference if the defendant had been misinformed as to the facts. The fraud consists in representing things as true of his Mitchell v. Zimmerown knowledge. man, 4 Tex. 75; Fisher v. Mellen, 103 Mass. 506; Savage v. Stevens, 126 Mass. 207; Ins. Co. v. Reed, 33 Ohio St. 283; Graham v. Nowlin, 54 Ind. 389; Rawson Granam v. Nowlin, 54 Ind. 389; Rawson v. Hargar, 48 Iowa, 269; Hazard v. Irwin, 18 Pick. (Mass.) 95; Hammatt v. Emerson, 27 Me. 308; Doggett v. Emerson, 3 Story C, C. 733; Ford v. McComb, 12 Bush (Ky.), 723; Lynch v. Mercantile Trust Co., 18 Fed. Rep. 486; Seeberger v. Hobert, 8 N. W. Rep. 482; Buckner v. Street, 15 Fed. Rep. 365; Gumby v. Sluter, 44 Md. 237; Parmlee v. Adolph, 28 Ohio St. 10.

To recover damages it must be shown that the complaining party has been injured. It is not sufficient to show that the defendant has gained an advantage. Bartlett v. Blaine, 83 Ill. 25; Medbury v. Watson, 6 Met. (Mass.) 246; McMaster v. Geddes, 19 U. C. Q. B. 216; Hanson v. Edgerly, 29 N. H. 357; Hagee v. Grassman, 31 Ind. 223; White v. Wheaton, 3 Seld. (N. Y.) 352; Young v. Hall, 4 Ga. 95; Phipps v. Buckman, 30 Pa. St. 402; Castleman v. Griffin, 13 Wis. 535; Milliken v. Thorndike, 103 Mass. 385; Newell v. Horn, 45 N. H. 422.

If the false representations of material facts are not within the observation of the other party, and are made to deceive, the injured party can obtain damages. Chamberlain v. Rankin, 49 Vt. 433; Cooper v. Lowring, 106 Mass. 77; Newell v. Horn, 45 N. H. 422; Hess v. Young, 59 Ind. 379; Furman v. Tufts, 8 J. & S. (N. Y.) 284; Long v. Warren, 68 N. Y. 426.

When one sells personal property and makes positive representations of material facts, he is liable for damages in law as well as in equity, because such statements are equivalent to a warranty. It is only necessary that there be a positive assertion which affects the value or worth of the chattel sold, upon which the vendee is to rely and acts upon it. Tewkesbury v. Bennett, 31 Iowa, 83; Iron Works v. Moore, 78 Ill. 65; McGregor v. Penn, 9 Yerg. (Tenn.) 74; Hillman v. Wilcox, 30 Me. 170; Borge v. Stroberg, 42 Ga. 88; Hawkins v. Pemberton, 51 N. Y. 198; Stone v. Covell, 29 Mich. 359; Richardson v. Mason, 53 Barb. (N. Y.) 601; Duffee ψ. Mason, 8 Cow. (N. Y.) 25; Morrill υ. Wallace, 9 N. H. III; Beebe υ. Knapp, 28 Mich. 53; Chapman υ. Murch, 19 Johns. (N. Y.) 290.

Not every misrepresentation is material. It must be as to matters of fact, substantially affecting the interests of the complaining party, in order to obtain redress for damages. Long v. Woodman,

58 Me. 49.

The misrepresentation of facts must have induced the injured party to close the negotiations, when, if he had known the truth, he would not have entered into the transaction. Or the statement must have enhanced the price, or subjected the complaining party to loss caused from some detail of the dealing. Crater v. Binninger, 33 N. J. 513.

When the representations are material and false, the party making them must then show that they were not relied upon, and without the false statements the negotiations would have been closed, to free himself from liability for damages. Fishback v. Miller, 15 Nev. 428; Lynch v. Mercantile T. Co., 18 Fed. Rep. 486.

Where a party makes a statement to a mercantile agency as to his financial

(I.) AGENT, REPRESENTATION OF.—If an agent makes a false representation in any negotiation, with or without the privity or knowledge or assent of his principal, and the principal adopts the bargain and reaps the advantages of it, the principal is held bound by the deceit of his agent. In such a case the injured party has redress for damages. Deceit by the agent is deceit by the principal. because the principal should suffer for the misconduct of his agent. rather than another should suffer. If a principal takes the benefits of an agent's dealings, he must also take the burden, if any follows: the principal cannot adopt part and repudiate part, when

standing which he knows to be false, as to the capital invested in business, for the purpose of answering an inquiry made by a party who is to sell him goods, with intent to defraud, the seller can obtain damages for deceit if goods are not paid for. Eaton v. Avery, 83 N. Y. 31. It is not necessary that the report from an individual to a mercantile agency should be made as to any particular inquiry. answerable for the consequences of the fraud. Addington v. Allen, II Wend. (N. Y.) 374.

To maintain deceit for false representation, the complaining party must have changed his condition by reason of it, and not independently of it. Ming v. Woolfalk, 116 U. S. 599. If the complaining party could not have been damnified by the misrepresentation, he cannot maintain his action for deceit. Marshall v. Hubbard, 117 U. S. 415. The evidence of false representation must be clear and convincing, to make a case of deceit. Wickham v.

Morehouse, 16 Fed. Rep. 324.

If the complaining party was deceived by false representations, he must show that he used ordinary diligence, and that his means of knowledge was not equal to those of the defrauding party, in order to have any redress. Tyre v. Causey, 4 Harring. (Del.) 425; Hazard v. Irwin, 18 Pick. (Mass.) 95; Henshaw v. Robins, 9 Met. (Mass.) 83; Fisher v. Mellen, 103 Mass. 503.

If one represents himself as a partner of a firm, thereby obtaining credit for the supposed partnership, he is liable as partner, whether actually a partner or not.

Rice v. Barrett, 116 Mass. 312.

An expert is liable for making material false statements, although he believed them to be true. Kost v. Bender, 25 Mich. 515; McGar v. Williams, 26 Ala. 467. It has been held that misrepresentations in insurance cases, made by the insured innocently, will not avoid the policy. In order to defeat the contract the representations or answers to questions must be known to be false by the insured. Fitch v. Am. L.

Ins. Co., 5 Big. Ins. Cas. 316; Mutual Ben. Ass., 59 Ill. 123. But this is not the general doctrine, and the weight of authority is opposed to such a rule. Campbell v. New Eng. L. Ins. Co., 98 Mass. 381; Vase v. Eagle L. Ins. Co., 6 Cush. (Mass.) 42; Mutual Ben. L. Ass. 48 Ind. 264; Ætna L. Ins. Co. v. France, of U.S.

If the statements, though innocently made, make the policy differently as to risks insured, the contract must fail as being different from the one intended. Washington L. Ins. Co. v. Hanly, 10

Kans. 525.

One damnified by positive false representations may maintain an action against the offender though the latter was not benefited and did not collude with the one deriving the benefit. Endslev v. Johns

(Ill.), 12 N. E. R. 247.

Where a property owner induces a dealer in brick to furnish his sub-contractors, by verbal false representations that he had the money coming to them in his control, and he would arrange it that the dealer should be paid first, and that if the contractors did not pay he would, it was held that the contract was not void within the Michi-

gan Statute of Frauds. Daniel v. Robinson (Mich.), 33 N. W. Rep. 497.

A partner may annul a partnership and set aside a trust deed given by him to secure his share of the capital stock, if it appears that, being young and inexperienced, he had been admitted into the firm upon false representations made by the other partners greatly exaggerating the value of the firm's business. Gibson v. Cunningham (Mo.), 5 S. W. Rep. 12. False representations as to material facts known to be false by the maker of them, made to induce another to close a transaction whereby he received injury without negligence on his part, are actionable for deception. Ormsby v. Budd (Iowa), 33 N. W. Rep. 782; Busterud v. Farrington (Minn.), 31 N. W. Rep. 360; Tyner v. Cotter (Wis.), 30 N. W. Rep. 782; Schwenck v. Naylor, 102 N. Y. 683. the negotiating is a unit, and he claims the benefit of the whole transaction.1

1. Durant v. Rogers, 87 Ill. 508; Lamm v. Homestead Assoc., 49 Md. 233; Ferson v. Sanger, I Wood. & M. C. C. 147; Venzie v. Williams, & How. (U. S.) 134; Bowers v. Johnson, 10 Sm. & M. (Miss.) 169; Ers v. Johnson, 10 3m. & M. (Miss.) 109, Lawrence v. Hand, 23 Miss. 103; Craig v. Ward, 3 Keyes (N. Y.), 393; Graves v. Spier, 58 N. Y. 349; Mundford v. Wickersham, 63 Pa. St. 87; Abell v. Howe, 43 Vt. 403; Bank v. Gregg, 14 N. H. 331; Railroad Co. v. Saving Soc., 24 Ind. 457; Tagg v. Bank, 9 Heisk. (Tenn.) 479; De Voss v. Richmond, 18 Gratt. (Va.) 338; Chester v. Dickinson, 52 Barb. (N. Y.) 349; Reed v. Peterson, 91 Ill. 288; Insurance Co. v. Kuhlman, 6 Mo. App. 522; Brett v. Clowser, 5 Com. Pl. 376.

Representations of an agent of a corporation that the stock of the company is non-assessable beyond a certain percentage of its value cannot constitute a defence for the holder of the stock who is compelled to pay for the entire amount for which he has subscribed, if he has failed to use due diligence to ascertain the facts concerning the stock. Upton v. Tribilcock, 91 U. S. 45.

If a party assumes to act for another in respect to transactions over which he has no authority, he is responsible to any person whom he has misled. Johnson v. Smith, 21 Conn. 627; Morse v. Dearborn, 109 Mass. 593; White v. Madison, 26 N. Y. 117.

A telegraph company is liable for damages for delivering a message to a party by mistake, though the operator who transmitted it innocently misread the writing intended for the message. May v. West. U. Tel. Co., 112 Mass. 90. Compare Playford v. United Kingdom Tel. Co., L. R. 4 Q. B. 706.

If the agent makes no false representation, but has told the truth, and the complaining party has used his own judgment, the former cannot be treated as having violated his duty. Newmann v.

Sylvester, 42 Ind. 106.

If a director of a corporation issues a prospectus containing false representations, though he believes them to be true. he is liable in damages to a party who has been misled by them to his injury. Morgan v. Skiddy, 62 N. Y. 319. Though in this case it was held that the mere fact that a party permitted his name to be used as trustee of a corporation as to its standing does not make him liable in damages to an injured stockholder, unless he knew the worthless condition of the corporation at the time he agreed to let his name appear as trustee.

In civil jurisprudence the principal is responsible for the agent's acts within the scope and in the execution of the agency, though such acts are unauthorized. Story on Agency, sec. 452; Southwick v. Estes, 7 Cush. (Mass.) 385; Phelon v. Sites, 43 Conn. 426.

It is the general rule that a principal is responsible for the fraud of his agent in the course of service and for the principal's benefit, though no expressed command or privity of the principal is proved. Barwick v. English Stock Co., L. R. 2 Ex. 259. So if an agent within the limits of his authorization makes fraudulent representations, the complaining party may treat them as the principal's who did not direct or expect them. Robwho did not differ to expect mem. 1835 inson v. Walton, 58 Mo. 380; Kennedy v. McKay, 14 Vroom (N. J.), 288; Jewett v. Carter, 132 Mass. 335; Smith v. Tracy, 36 N. Y. 79; Henderson v. Railroad Co., 17 Tex. 560; Morton v. Scull, 23 Ark. 289; Johnson v. Barber, 5 Gil. (III.) 425; Wright v. Calhoun, 19 Tex. 412; Bank v. Campbell, 4 Humph. (Tenn.) 394; Murrav v. Mann, 2 Exch. 538.

For an independent fraud by an agent, not within the scope of his agency, the principal is not responsible. Kelly v. Insurance Co., 3 Wis. 254: Kennedy v. Parke, 2 C. E. Greene (N. J.), 415; Échols v. Dodd, 20 Tex. 190; Fellows v. Oneida, 36 Barb. (N. Y.) 655. But if the principal profits by the fraud and accepts the benefits, he is then liable for damages to the contracting party; Lane v. Black, 21 W. Va. 617; Nat. Ins. Co. v. Minch, 53 N. Y. 144.

In case of a conspiracy to defraud, the court will not entertain a suit of either conspirator against the other. Thorn v. Foundry, 23 W. Va. 522; Kelley v. Ken-

dall, 118 Ill. 650.

A special agent's acts bind his principal, unless the manner of doing a particular business be specified. If he makes false representation on the subject of dealing to influence the other party to close the transaction, the principal is affected and responsible for the deceit. Sanford v. Handy, 23 Wend. (N. Y.) 260; Putnam v. Sullivan. 4 Mass. 45; Hern v. Nichols, 1 Salk. 289.

An agent closed a contract in the name of his principal by an innocent misrepresentation. The principal gave no directions to his agent, who acted in good faith. It was held that the contract was valid, as (a) Matters of Opinion.—The mere expression of an opinion, even in strong and positive language, is no fraud though it be false. This is the rule, because men's judgments are often governed by caprice.¹ Such statements must be considered in the light of the subject-matter, and be understood as being only a strong expression of one's belief on the transaction.² A mere false assertion as a matter of opinion, which does not imply knowledge, does not amount to a warranty. Every party reposes at his peril in the opinion of others when he has equal opportunity to form and exercise his own judgment.³ For the seller of land to assert to the buyer that it has a particular high value, far above its real worth, and to misrepresent as to its wonderful productiveness, is no fraud.⁴

The law does not conform to the rule of morals, and allows a great deal of "lying in trade," when the assertions are merely puffing one's own goods or depreciating those of another. But there are circumstances which will make assertions fraudulent, as where the other party has a right to rely upon them without using his own judgment. This is the case when on purchasing goods, the value of which can only be known by experts, the buyer relies upon the vendor, who is a dealer in such goods, for his accurate judgment concerning them. 6

there was no fraud in either the agent or the principal; and that the false representation of the agent, collateral to the contract, could not affect the principal in a case free from fraud. Cornfoot v. Fowke, 6 M. & W. 358. But Lord C. B. Abinger dissented on the ground that the knowledge of the principal was that of the agent. But Cornfoot v. Fowke has been qualified, doubted, distinguished, and denied by other decisions Nat. Ex. Co. v. Drew. 2 Macq. 103; Wheelton v. Hardisty, 8 El & Bl. 232. Fitzsimmons v. Joslin, 21 Vt. 129; Ludgate v. Love, 44 L. T. 694.

It seems to be the rule in the United States that if a person has been induced to purchase shares of a corporation by the misrepresentation of its directors, he can recover damages from the corporation for the deceit. There is no solid ground to distinguish between corporations and other principals in this class of cases. Actions of deceit have been maintained against corporations. Mackay v. Bank, 5 L. R. P. C. 394; Peebles v. Patapsco Co., 77 N. Car. 233; Railroad Co. v. Schuyler. 34 N. Y. 30; Fogg v. Griffin, 2 Allen (Mass.), 1; Smoke Con. Co. v. Lyford (Ill.), Chicago L. News, 150 (Jan. 7, 1888).

In England it is the rule that if the directors make misrepresentations to induce parties to buy shares, the injured party must bring an action of deceit against the directors individually. Bank

v. Addie, L. R. 1 H. L. Sc. 145; New Brunswick, etc., R. Co. v. Conybeare, 9 H. L. C. 711.

An action for goods sold on account cannot be defeated because the plaintiff's agent stated that another company was about to order and to establish such a plant in the same territory in which the defendant intended to operate. Thompson v. Brush Co. (U. S. C. C. Vt.), 31 Fed. Rep. 535.

A party was induced to trade for land in another State on the false representation of its value by a person whom the owner said was reliable and trustworthy. Held, he could have the trade set aside on the ground of inadequacy of considerations and false representations. Witherwax v. Riddle (Ill.), 13 N. E. Rep. 545.

In England, the directors sold the company's debentures, and made false statements as to the objects of the issue of them. The misstatements were material upon which the plaintiff had relied. Held, the directors were liable to an action for deceit. Edginton v. Fitzmaurice (Eng. Ct. App.), Cent. L. Jour., Jan. 22, 1886.

1. Pasley v. Freeman, 3 T. R. 51.

Haycraft v. Creasy, 2 East, 92.
 Saunders v. Hatterman, 2 Ired. (N. Car.) 32.
 Credle v. Swindell, 63 N. Car. 305.

5. Bishop on Cont. (1887), sec. 664.
6. Kost v. Bender, 25 Mich. 515; Pike v. Fay, 101 Mass. 134.

If a vendor falsely affirms that a particular amount had been offered by other parties, which assertion induced the vendee to buy, and was therefore deceived as to the value, there was no relief. It was the duty of the buyer, in this case, to have informed himself of the facts, and not to have reposed in the confidence of the vendor. Saunders v. Hatterman, 2 Ired. (N. Car.) 32; Dillman v. Nadlehoffer, 119 Ill. 567. the sale of the lease of a public-house, the vendor falsely represented that his average was so much per month; this was deceit, for which damages would Bowring v. Stevens, 2 Carr. &

It is no fraud for the vendor to impress strongly upon the buyer the profitableness of the trade, and the good bargain he will make. Sieveking v. Litzler, 31 Ind. 13. In the sale of land, to exaggerate the fertility of the soil as to productiveness, and the good quality of the land, is no fraud. Sherwood v. Salmon, 2 Day (Conn.), 128; Mooney v. Miller, 102 Mass. 1217. Compare Wise v. Fuller, 29 N. J. Eq. 257; Simon v. Canaday, 53 N. Y. 298. If there were confidential relations existing between the buyer and seller, exaggerations as to the profitableness of the transaction to the buyer would give him redress for the Fisher v. Budlong, misrepresentation. 10 R. I. 525.

If no warranty is made or implied by the false assertion, no ground of relief to the purchaser can be laid. Mere expression of judgment or opinion does not amount to a warranty. Payne v. Smith, 20 Ga. 654; Lehman v. Shackleford, 50 Ala. 437; Reed v. Sidener, 32 Ind. 373; Ellis v. Andrews, 56 N. Y. 83; Bristol v. Braidwood, 28 Mich. 191; Fulfon v. Hood, 34 Pa. St. 365; Tucker v. Downing, 76 Ill. 71; Dugan v. Coreton, 1 Ark. ing, 70 III. 71; Dugan v. Coreton, 1 AIK.
41; Morrill v. Wallace, 9 N. H. III;
Marshall v. Peck, 1 Dana (Ky.), 611;
Davis v. Meeker, 5 Johns. (N. Y.) 354;
Harvey v. Young, Yelv. 21; Bailey v.
Morrell, 3 Bulst. 94; Cro. Jac. 386; Ross
v. Est. Invest. Co., L. R. 3 Eq. 122. Statement of value by the seller of property, though very strongly made, is not fraud. Ellis v. Andrews, 56 N. Y. 83; Medbury v. Watson, 6 Met. (Mass.) 246. It was held in one case that the false statement that certain lands had large deposits of oil within them, and were therefore of great value, was merely a matter of opinion. Holbrook v. Connor, 60 Me. 576. But this doctrine is not considered correct by many courts, and can hardly be the rule. Bradley v. Poole,

08 Mass, 160: Bedford v. Bagshaw, 4 Hurl. & N. 538; Campbell v. Fleming, 1 Ad. & E. 40. Giving distinct and special statements as to the financial condiv. Freeman, 3 T. R. 51. Very slight expressions as to one's pecuniary standing are merely opinion. Gainsford v. Blackford, 7 Price, 544.

Representations made as to facts that will transpire in the future are mere promises or opinions. Markel v. Mondy, II Nebr. 213; Gallagher v. Brunel, 6 Cow. (N. Y.) 347; Pedrick v. Porter, 5 Allen (Mass.), 324.

Some representations are of such a nature that they can be interpreted as mere expressions of opinions, or as statement of facts. In such a case the actual intention must be passed upon by a jury. Teague v. Irwin, 127 Mass. 217; Morse v. Shaw, 124 Mass. 50.

But in order to find that such representations are facts material to the subject, they must be statements susceptible of knowledge, distinguishable from matters of mere belief or opinion. Litchfield v. Hutchinson, 117 Mass. 195; Morse v. Shaw, 124 Mass, 50; Safford v. Grant, 120 Mass. 20.

The fraudulent statement of the amount of hay cut upon a farm the previous year is not a matter of opinion. Martin v. Jordan, 60 Me. 531; Coon v. Atwell, 46 N. H. 510. If the representation had been as to the amount to be cut the coming or future year, the statement would be an opinion. Mooney v. Miller, 102

Mass. 217. If a party gives an opinion, and at the same time has positive knowledge at variance with this statement, and the other party honestly believes it and so acts, he can obtain redress for this de-Birdsey v. Butterfield, 34 Wis. ke v. Fay, 101 Mass. 134. To as-52; Pike v. Fay, 101 Mass. 134. sert that shares are worth a certain sum, much above the real value, is no fraud, unless false quotations of the value of the stock is exhibited in a newspaper to prove the assertion. Manning v. Albee, II Allen (Mass.), 520; same principle, McAleer v. Horsey, 35 Md. 439. An exaggerated estimate of the value of land, or the profits of a projected railroad, is no deceit. Walker v. Railroad Co., 34 Miss. 245. The statements of the utility and operation of a patent machine in most cases are mere opinions, upon which a purchaser should not rely. Hunter v. McLaughlin. 43 Ind. 38; Dillman v. Nadlehoffer, 119 Ill. 567. So also the statements of the cost of a patent, its value, offers made for it, or profits derived from

(b) Matters of Law.—Deceit cannot be predicated upon the false statement of what the law is, however false it may be whether the deception be by false representation or by the suppression of the truth. Every person must know the law. The statement of what the law is is one upon which the party to whom it is made has no right to rely. He can ascertain the truth or falsity of such representation by ordinary diligence. This statement of what the law may be is only an opinion, and must be understood as such.2 But if a party is ignorant of the law, and the other party knowing him to be so, and knowing the law himself, took advantage of such ignorance in order to mislead by false statements of the law, the defrauding party is liable for deceit.3

it, are opinions. Bishop v. Small, 63 Me. 12; Tuck v. Downing, 76 Ill. 71. But if a dealer in patent-rights sells certain territory to a party who is ignorant of the value, and gives a valuation which he knows is false, he is liable in an action for deceit. Allen v. Hart, 72 Ill.

A purchaser of a mill, who is ignorant of the business, but relies upon the positive statements of the owner as to its capacity and profitableness, has a remedy for deceit if the assertions are false.

Fairbault v. Soter, 13 Minn. 223; Wise v. Fuller, 29 N. J. Eq. 257.

A buyer of lands has a right to rely upon the positive statements of the vendor as to the quantity of the land bought. Perkins v. Rice, Litt. Sel. Cas. (Ky.) 218; Hill v. Brower, 76 N. Car. 124. So also in respect to the boundaries of land. Sandford v. Handy, 23 Wend. (N. Y.) 260; Weatherford v. Fishback, 4 Ill. 170. An honest expression of an opinion of the seller as to the boundary line, even though erroneous, cannot be considered as a fraud upon the buyer, Stow v. Bozeman, 29 Ala. 397.

It is held by some courts that statements of value with intent to deceive are actionable. Simor v. Cannaday, 53 N. Y. 298; Cruess v. Fessler, 39 Cal. 336; Gifford v. Carvill, 29 Cal. 589; Davis v.

Jackson, 22 Ind. 233.

If a party using due diligence in the exchange of land is deceived as to the value of the land received in exchange, he has an equitable lien on the land he traded for the deficiency in value. Bradly v. Bosley, I Barb. (N. Y.) 125. A fraudulent representation made that a piece of property cost the vendor \$32,000, when the price paid by him was only \$16,000, was such a fraud as to be actionable by the vendee. Van Epps v, Harrison, v Hill (N. Y.), 63. To the same effect, Green v. Bryant, 2 Kelly (Ga.), 67; McAleer v. Horsey, 35 Md. 439; McFadden v. Robinson, 35 Ind. 24; Morehead v. Eades, 3 Bush (Ky.), 121. Compare Mooney v. Miller, 102 Mass. 217; Tuck v. Downing, 76 Ill. 71; Hemnor v. Cooper, 8 Allen (Mass.), 334; Cooper v.

Lovering, 106 Mass. 77.

When property has been sold and payments made, the deed will not be set aside on the ground of misrepresentations as to value of the property, when the representation is the mere judgment of the vendor, and the vendee had means to vendor, and the vendee hau means to ascertain the value himself. Belz v. Keller (Ky.), 1 S. W. Rep. 420.

1. Burt v. Bowles, 69 Ind. 1; Dillman v. Nadlehoffer, 119 Ill. 567.

2. Fish v. Clelan, 33 Ill. 238.

3. Townsend v. Cowles, 31 Ala. 434.

An agent procuring subscriptions for stock of a corporation, represented that the subscribers would be liable for a certain percentage of the stock, but the law made them responsible for the whole amount of the shares. A subscriber in such a case cannot defend on the ground of fraud. The court said there was no error, no mistake, or false representation. The subscriber made the subscription he intended to make, and received the shares he had stipulated for, and in law incurred a larger liability than he anticipated. Upton v. Tribilcock, 91 U. S. 45. This decision is in accord with the correct rule. People v. Supervisors, 27 Cal. 655; Steamboat v. Boon, 41 Ala. 50; Russell v. Branham, 8 Blackf. (Ind.) 277; Roger v. Place, 29 Ind. 577; Clem v. Railroad Co., 9 Ind. 488; Rashdall v. Ford, L. R. 2 Eq. 750; Lewis v. Jones, 4 B. & C. 506. A party can obtain redress when he has been induced to execute a bill of exchange, supposing it to be an ordinary promissory note, from misrepresentations made by the other party. Ross v. Drinkard, 35 Ala. 434.
The liabilities of a stockholder cannot

3. Ignorance and Reliance of the Complaining Party.—A person who by public false statements causes another reasonably to act upon such representations as true in a matter of business is liable in damages for the loss in relying upon such false declarations.1 The party injured by the deception must be ignorant of the truth of the matter, and must believe the misrepresentations to be true, in order to have redress. He must be ignorant of the true state of facts, and have a right to rely upon the representation as made by the wrong-doer. He must be deceived. But if he knows the truth in regard to the matter, or if he acts independently and does not rely upon the false representation, then he is not deceived and has no relief.3 If the means of knowledge be equally available to both parties, and the subject of the negotiation be equally open to the inspection of both, the party complaining must avail himself of such knowledge, so as to avoid the injury, unless there was a warranty of the facts.4

be evaded by the defence that false representations were made to him and that the law would not hold him responsible if he purchased the shares. Ogilvie ν . Knox Ins. Co., 22 How. (U. S.) 380.

A party knowing that a promissory note was barred by the Statute of Limitations, stated to the agent of the maker that the note was unpaid, but was valid in law; upon this representation the agent gave a bond in consideration of an agreement to provide for part payment of the note. These facts were a good defence to an action on the bond. Brown v. Rice, 26 Gratt. (Va.) 467.

An immigrant went to a certain country and there met an old friend who professed to know all about the lands and titles thereto, and who sold him lands and asserted that the title was perfect, but which proved incorrect. *Held*, that the buyer had redress for the deceit practised. Moreland v. Atchison, 19 Tex. 303.

In negotiations between parties holding confidential relations, false statements of the law may be actionable for deceit practised. Sims v. Ferrill, 45 Ga. 585; Peter v. Wright, 6 Ind. 183; State v. Halloway. 8 Blackf. (Ind.) 45; Cooke v. Nathan, 16 Barb. (N. Y.) 342.

The representation as to a guaranty in law, in a matter of mere judgment, equally open to both parties' inspection, is no fraud. Cowles v. Townsend, 37 Ala. 77.

A representation of what the law will or will not permit is a matter upon which the party to whom it is made cannot rely. If he does rely upon such a statment and it proves false, he has no redress, as there is no breach of the duty under consideration. Upton v. Tribilcock, 91 U. S. 45.

1. Myers v. Malcolm, 6 Hill (N. Y.),

2. Bigelow on Fraud (1877), 64.

3. Humphries v. Pratt, 5 Bligh (N. S.),

4. Slaughter v. Gerson, 13 Wall. (U. S.) 379; Brown v. Leach, 107 Mass. 364; Salem Rubber Co. v. Adams, 23 Pick. (Mass.) 256; Buck v. McCaughtry, 5 T. B. Mon. (Ky.) 221.

It has been held that when there is a warranty of title, the complaining party suing for deceit is not required to aver ignorance in himself of the fraud. Patee

v. Pelton, 48 Vt. 182.

In a mutual agreement, a party not in fault may rely upon the express representation of an existing fact, the truth of which is known by the party making it and unknown to the party to whom it is made. Under these circumstances the ignorant party need not investigate and verify the statement, provided the other party has deliberately pledged his faith as to the truthfulness of the representation. Starkweather v. Benjamin, 32 Mich. 305; Mead v. Bunn., 32 N. Y. 275; Spalding v. Hedges, 2 Barr (Pa.), 240; McClelan v. Scott, 24 Wis. 81; Oswald v. McGehee, 28 Miss. 340; Hale v. Philbrick, 42 Iowa, 81; Walsh v. Hall, 66 N. Car. 233; Upshaw v. Debow, 7 Bush (Ky.), 442. Compare Saunders v. Hatterman, 2 Ired. (N. Car.) 32; Fagan v. Newsom, I Dev. (N. Car.) 20; Fields v. Rouse, 3 Jones (N. Car.), 72.

A party may rely upon the express and positive representation of another, though the means of information are near at hand. Mattock v. Todd, 19 Ind. 130.

But these express representations must be such as would naturally prevent a man of prudence from making further investigation. Kiefer v. Rogers, 19 Minn. 32; Porham v. Randolph, 6 How. (Miss.) 435; Holland v. Anderson, 38 Mo. 55. Where one party practises arts which

deceive another not in fault himself, the injured party may recover damages. Roseman v. Canovan, 43 Cal. 111; Swimm

v. Bush, 23 Mich. 99.

A false statement of what an article cost, in general, is but an opinion. Harvey v. Young, Yelva. 21; Shade v. Creviston, 93 Ind. 591. But if a party sells a judgment and asserts to the buyer that the judgment debtor is solvent, which is not the truth, the vendee has redress. Burr v. Wilson, 22 Minn. 206. Many courts hold that if a vendor fraudulently states what he gave for an article, the vendee has redress. Bishop v. Small, 63 Me. 12; Lindsey Petroleum Co. v. Hood, L. R. 5 P. C. 221; Medbury v. Watson, 6 Metc. (Mass.) 254.

There is considerable conflict as to this doctrine. An Illinois case decides that the vendor may puff his property in the most extravagant manner, or falsely state its cost far above what he paid for it, and thereby incur no liability for this deceit. Tuck v. Downing, 76 Ill. 71; same effect, Banta v. Palmer, 47 Ill. 355.

A party making a fraudulent sale and warranting the thing sold does not destroy the fraudulent transaction so as not to be made liable for the consequences. Larey v. Taliaferro, 57 Ga. 443. In such a case the injured party can sue on the warranty if he so elects. McGowen v. Myers, 60 Iowa, 256. In order to be a fraudulent transaction, the representations must have, of themselves, induced the other party to close the negotiation, who was not in fault by so doing. Smith v. Richards, 13 Pet. (U. S.) 26; Duncan v. Hogue, 24 Miss. 671; Slidell v. Rightor, 3 La. Ann. 199; Central Bank v. Copeland, 18 Md. 305; Shackelford v. Hendley, t A. K. Marsh. (Ky.) 496.

Of course the false statements must relate to the subject of the transaction to constitute a deceit. Ingraham v. Jordan, 55 Ga. 356. Though they may not be the sole inducements that led to the closing of the trade. Hill v. Carley, 8 Hun (N. Y.), 636; Hull v. Fields, 76 Va. 594; Winter v. Bandel, 30 Ark. 362; Selma v.

Railroad Co., 51 Miss. 829.

The misrepresentations must be significant, relevant, and material. Geddes v.

Pennington, 5 Dow. 159.

When a party sells an article and warrants it as represented to him perfect and

good, it is not a fraud. But if he knew it was not as represented, it is a false warranty, and his scientes makes it a fraud. Brown v. Castles, 11 Cush. (Mass.) 348; Cunningham v. Smith, 10 Gratt, (Va.) 255; Stone v. Covell, 29 Mich. 360,

Whenever the actor makes representations which he knows are false, or has reason to believe them false, and that the other party relied upon them as true and received injury, an action for deceit will lie. Oberlander v. Spiess, 45 N. Y. 175; Tryon v. Whitemarsh, I Metc. (Mass.) I: Cross v. Peters, I Me. 378; Griswold v.

Sabine, 51 N. H. 167.

If a party makes representations susceptible of knowledge, in such a way as to impress upon the other party the truth of such assertion, but knows that they are false, with the intent that the other party shall rely upon them, in case the other party acts upon these representations it is fraud. Hazard v. Irwin, 18 Pick. (Mass.) 95; McDonald v. Trafton, 15 Me. 308; Gumby v. Sluter, 44 Md. 237; Monroe v. Pritchett, 16 Ala. 785; Wakeman v. Dalley, 51 N. Y. 27; Ins. Co. v. Reed, 33 Ohio St. 263.

The mere fact that a statement is literally true is no excuse to a party making it, if made with the intention to deceive another who is thereby deceived and injured. Denny v. Gilman, 26 Me.

If a vendor of land makes express representations of title which are fraudulent. and even so appear by the record, he is responsible for the misrepresentations to the vendee. Claggett v. Crall, 12 Kans. 393; Bailey v. Smock, 61 Mo. 213; Kiefer v. Rogers, 19 Minn. 32.

A party signing a contract which he is able to read is bound to know the contents of it, unless there are technical terms which have been wrongly explained by the other party. He cannot say that he did not read an instrument conferring rights upon him which he seeks to enforce, and that the other party falsely stated its terms. Bacon v. Monkley, 46 Ind. 231; Hawkins v. Hawkins, 50 Cal. 558; Starr v. Bennett, 5 Hill (N. Y.), 303.

An assignee of a note not yet due sued the maker, who made defence showing that the note was executed under a false belief; that he was induced to sign it as payable only on a contingency. This was held to be fraud in relation to the contract or consideration, and also a fraud and circumvention in obtaining its execution, as, under the statute, that would defeat its collection. The facts disclosed did not show such negligence on the part of the maker as to make him liable. As to negligence, it must be passed on by a jury. Munson v. Nichols, 62 Ill. III. But if the maker has been negligent the case would be different. Mead v. Munson, 60 Ill. 49. The court of Missouri has gone so far as to say that where the execution of a note has been obtained by false representation of the object of the contract, the paper will be void even in the hands of a bona fide holder for value. Corby v. Weddle, 57 Mo. 452; Martin v. Smylee, 55 Mo. 577.

It is the rule generally that one who executes an instrument should read it before signing. In case he cannot read, then he must have it read to him. If he does not conform to this rule, he cannot in principle complain that the contents were falsely stated to him, at least where the false representation was not made by the other party to the agreement. Craig

v. Hobbs, 44 Ind. 363.

It may appear sometimes that the maker, though able to read the contract, did not, under circumstances which will not make him guilty of negligence either Kellogg v. Steiner, 29 Wis. 626; Chapman v. Rose, 56 N. Y. 137; Whitney v. Snyder, 2 Lans. (N. Y.) 477; Cole v. Williams, 12 Neb. 440; Trambly v. Ricard, 130 Mass. 261; Green v. Buffalo, 6 Smith (Pa.), 110; Griffith v. Stout, 14 Neb. 259; Foster v. Mackinnon, L. R. 4 C. P. 704; Gibbs v. Linabory, 22 Mich. 479; Webb v. Corbin, 78 Ind. 403. This principle is illustrated by the following case: A man very aged was induced to indorse a bill of exchange by a fraudulent representation of the acceptor that he was signing a guaranty. The signor did not see the face of the bill. The party who made the false statement had previously obtained the signor's name as a guaranty for the same amount and the same object. This first transaction involved him in no loss. It was held that the indorser of the bill never intended to indorse the bill; that he was deceived as to the legal effect of thus signing, and as to the actual contents of the instrument. Foster v. Mackinnon, L. R. 4 C. P. 704.

A party cannot be made liable by another's writing a contract over, or in connection with, his blank signature upon a fly-leaf, or in an autograph album, or upon a loose sheet of paper. Caulkins v. Whisler, 29 Iowa, 495; Nance v. Lary, 5 Ala. 370. But if the blank name was so located in appearance that it might readily be converted into a note, it might be that the supposed execution would be binding, with the contract in the hands of an innocent holder, unless under the

circumstances he was prevented from reading it without negligence on his part, or was prevented by the opposite party from reading it. Shirts v. Overjohn, 60 Mo. 305; McDonald v. Bank, 27 Ind. 319; Gibbs v. Linabory. 22 Mich. 479; Chapman v. Rose, 56 N. Y. 137.

If a party executing an instrument fails. to read it before execution, the presumption of negligence is upon him, and in order to clear him from this neglect he must satisfy the court or jury that hisconduct was perfectly free from fault. McDonald v. Bank, 27 Ind. 319; Doug-lass v. Matting, 29 Iowa, 498; Shirts v. Overjohn, 60 Mo. 305; Chapman v. Rose, 56 N. Y. 137. It is also held that if, without negligence on the part of the maker, an instrument is obtained by fraud without, the intervention of any one standing in the relation of confidence. he is not liable on it. Gould v. Segee, 5 Deur (N. Y.), 266; Burson v. Huntington, 21 Mich. 415. Compare Shipley v. Carroll, 45 Ill. 285. Even if the paper be put into circulation by a custodian, the maker is not liable to pay it. Chip-man v. Tacker, 38 Wis. 43; Roberts v. McGrath, 38 Wis. 52; Roberts v. Wood, 38 Wis. 60. But this doctrine is not general and not accepted by many courts. It has been decided that the payment of a promissory note in the hands of an innocent holder for value, assigned before. maturity, cannot be defeated by defending on the ground that it was fraudulently obtained, or that it was stolen or otherwise wrongfully put into circulation. a case where the evidence showed that consideration of the note was a machine which the payee agreed to deliver to the maker, but never complied with the contract, the defendant testified that after executing the note he was about to insert a condition which would insure the delivery of the machine, or render the note void, when the payee snatched it. and ran away. This was not such a circumvention as to entitle the defendant to a verdict. Clark v. Johnson, 54 Ill. 296.

If there be an actual or implied delivery, and an intention to execute an instrument, the maker will be liable to a bona fide holder for value. The contract either arises from intention or negligence. Burson v. Huntington, 21 Mich. 415; Worcester Bank v. Dorchester Bank, 10 Cush. (Mass.) 488.

The maker will be liable if the instrument is put into circulation by the fraudulent breach of confidence in the party intrusted with the signature, in the hands of a bona fide holder for value, at least to

4. Intent that the Misrepresentations should be Acted Upon.—The party complaining of deception must show that the other party intended that the false representations should be acted upon This rule appears chiefly in those cases where deception was used with reference to transactions with a third person. And the complaining party must show by the evidence whereby he was injured in a transaction with a third party, that the wrong-doer intended that he should act upon the false representations. It is not enough to prove, in this connection, that false representations were made. with a knowledge of their falsity.1

It is not necessary that the false statements should have been made with a corrupt motive of personal gain on the part of the person making them, in order to entitle the injured party to relief.2 In general, where the facts themselves show that the wrong-doer intended the fraud, evidence of want of such intention is inadmis-

sible 3

the extent of the outlay in buying the paper. Fullerton v. Sturgis, 4 Ohio St. 529; Bank v. Eldred, 9 Wall. (U. S.) 544; Orrick v. Colston, 7 Gratt. (Va.) 189; Huntingdon v. Bank, 3 Ala. 186; Van Duzer v. Howe, 21 N. Y. 531.

In the execution the maker must use

due care, and then if he is imposed upon by the payee's fraud, causing him to believe that the instrument is different from what it is, he is not bound by it. Camp v. Hanna, 29 Ohio St. 467; Hopkins v. Hawkeye Ins. Co., 57 Iowa, 203; Robinson v. Glass. 94 Ind. 211; Anderson v. Warne, 71 Ill. 20; Jones v. Austin, 17 Ark. 498; Selden v. Myers, 20 How. (U. S.) 506; Foy v. Haughton, 83 N. Car. 467; Danes v. Snider, 70 Ala. 315; Resh v. Allentown, 12 Norris (Pa.), 397; May v. Seymour, 17 Fla. 725; Strong v. Lingington, 8 Bradw. (Ill. App.) 436.

It has been held that notes and bills brought into existence by fraud, without negligence on the part of the maker, like forged papers are void in the hands of an innocent holder for value. logg v. Steiner, 29 Wis. 626; Vanbrunt v. Singley, 85 Ill. 281; Corby v. Weddle, 57 Mo. 452; Butler v. Carns, 37 Wis. 61. But in putting his name to a paper he is estopped from setting up the defence of fraud when sued by an innocent hold-er for value: so held by some courts. Nebeker v. Cutsinger, 48 Ind. 436; Kimble v. Christie, 55 Ind. 140; Draper v. Cowles, 27 Kans. 484.

The misrepresentations need not be

sufficient to justify an indictment in order to sustain damages for deception. If the party knew his affirmations to be false, the consideration is an important element to be considered, though fraud proceeds from a combination of things in most cases, and he will be responsible N. Y. 27; Hall v. Bradbury, 40 Conn. 31; Stone v. Denny, 4 Metc. (Mass.) 151. Or if he made statements in a reckless manner he is liable. Parmlee v. Adolph. 28 Ohio St. 10.

If an unlettered man, without negligence on his part, be induced to sign an instrument by reason of a false reading of the contents, he is not liable on it even to an innocent holder for value. Walker v. Ebert. 29 Wis. 196; Putnam v. Sullivan. 4 Mass. 45.

In absence of any fraud on the opposite party, one who did not read the contract cannot avoid the agreement. Grace v.

Adams, 100 Mass. 505.

A person relying upon papers which he has procured to be executed by one who cannot read is bound to show beyond a doubt that the maker fully understood the object and import of the contents. Sel-

Myers, 20 How. (U. S.) 506.
 Pasley v. Freeman, 3 T. R. 51.
 Hubbell v. Meigs, 50 N. Y. 480;
 Foster v. Charles, 6 Bing. 396.
 Dulaney v. Rogers, 64 Mo. 201.

Where the effect of the false representations was to bring the plaintiff into a business transaction with the defendant, the proof of such fact shows the intent of the defendant to induce the plaintiff to act upon the representation; and express evidence of an intention to this effect is unnecessary. Bigelow on Torts (1878), 31.

In case of sales, if the complaining party establishes the fact that the defendant knew that his representations

5. Deceiving Third Persons.—If one discovers that his own property is being sold by a party to another who is ignorant of any defect in the title, it is his duty to make known his ownership. he does not, he then is guilty of deceit or neglect, amounting to a fraud, and if the sale is completed, he cannot then claim his property. In general, an action cannot be maintained against a party for inducing a third party to break his contract with the complainant; his remedy lies against the party breaking the contract.2 But if the third person was induced to break his contract by deception, it may be different; as where one is induced to break a contract for the delivery of certain property to the plaintiff, by false and malicious claim of an unfounded lien thereon,3 and where a closing of a contract is broken by deceiving the party about to perfect it, the defect being one the party had a right to waive. And it is immaterial that the contract was not binding under the Statute of Frauds, because not in writing.4

6. Acting upon Representations.—It is an established rule that in order to make a party liable the complainant must have acted upon the fraudulent representation to his injury.⁵ An action cannot be founded upon deceit unless the fraudulent conduct, or dishonesty of purpose, or general purpose to deceive, is connected with the particular transaction complained of, and is the very ground upon which the complainant acted and upon which the negotiation took place. Deceit unaccompanied by injury is not actionable. For instance, if a payee of a note is induced to indorse it in blank upon its transfer, by deception, an action cannot be sustained before payment of the note thus indorsed by such indorser. false representations are made to a party who does not rely upon the misrepresentation, but seeks from other sources the verification of the statements, he cannot afterwards allege that he has been deceived by the party who originally made the false statements.8

were false, it is not necessary for the plaintiff to give other evidence to show that the vendor intended to mislead him. Johnson v. Wallower, 18 Minn. 288; Collins v. Denison, 12 Met. (Mass.) 549;

Lindsay v. Davis, 30 Mo. 406.

1. Hardin v. Joice, 21 Kan. 318; Sherrill v. Sherrill, 73 N. Car. 8; Davidson v. Silliman, 24 La. Ann. 225; Miles v.

Lefi, 60 Iowa, 168.

Kimball v. Harman, 31 Md. 407.
 Green v. Button, 2 C. M. & R. 707.
 Benton v. Pratt, 2 Wend. (N. Y.)

385; Rice v. Manley, 66 N. Y. 82.
For merely setting up a false lien against the plaintiff's debtor, or making a fraudulent levy on his property, does not amount to fraud. Green v. Kimble, 5 Blackf. (Ind.) 552; Smith v. Blake, I Day (Conn.), 258.
5. Wells v. Waterhouse, 22 Me. 131;

Lindsey v. Lindsey, 34 Miss. 432; Taylor

v. Guest, 58 N. Y. 263.

6. Rutherford v. Williams, 42 Mo. 18. 7. Freeman v. Venner, 120 Mass. 424.

8. Slaughter v. Gerson, 14 Wall. 379. Fraud without damages, or damages without fraud, gives no cause of action; but where these two concur and meet together an action lies, was said by Coke, J., in 3 Bulst. 95. It is not re-quired to show that the defendant knew the representations were untrue. It is sufficient if the representations be true, and made for a deceptive purpose, and to induce the plaintiff to do what he does do to his injury. Taylor v. Ashton, 11 M. & W. 401.

The complainant must have acted upon the false representation and have sustained damages as a necessary sequence. Collins v. Cane, 4 H. & N. 225; Eastwood v. Bain, 28 L. J. N. S. Ex.

A party who has been induced to subscribe to stock of an insolvent corporation, and who secures payment by mortgage, has been injured though he has not made payment in fact. Hubbard v. Briggs, 31 N. V. 518. It seems that in this case damages accrue, as an actual present estate has been conveyed.

By false representations of the owner a party is induced to withhold the levying of an attachment upon property. Subsequently another creditor attaches the same property, and makes his debt. Held, the first party had suffered no damages, and could not maintain an action. Bradley v. Fuller, 118 Mass. 239.

A person made false representations to a second party that he had authority to lease a certain building. The second party then took a verbal two-years' lease. No action for fraud will lie, as the lease is void. Dung v. Parker, 52 N. Y. 404.

A man negotiated for a farm, and went upon the land for investigation, but the snow was too deep for such purpose. In this case he then accepted the representations of the owner previously made, and purchased the farm. The representations proving false, it was held that he could obtain relief in equity for his injury. Rish v. Von Lillenthal, 34 Wis. 250.

But if the purchaser had not acted upon the representations of the vendor, he has no redress. Lindsey v. Lindsey, 34 Miss.

432.

Though the complainant relied upon other representations, yet if the defendant's representations were a substantial inducement to the closing of the negotiations, he has an action of damages. Mathews v. Bliss, 22 Pick. (Mass.) 48; James v. Hodsden, 47 Vt. 127; Safford v. Grant, 120 Mass. 20; Winter v. Bandel,

30 Ark. 362.

Where the directors of a company or corporation put forth a prospectus containing false statements for the purpose of inducing parties to buy their stock, the false representations are deemed to have been made to all who read the prospectus, and become purchasers from the company or corporation in reliance upon the statements made in the prospectus. Swift v. Winterbotham, Law R 8 Q. B. 244; Gerhard v. Bates, 2 El. & B. 476; Cazeux v. Mali, 25 Barb. (N. Y.) 583.

A corporation is liable for the fraudulent over-issue of stock, both to the person to whom the over-issue is made, and to any subsequent bona fide purchaser thereof. Such acts are done to defraud any and all purchasers. Railroad Co. v. Schuyler, 34 N. Y. 30; Bruff v. Mali, 36 N. Y. 200; Phelps v. Wait, 30 N. Y. 78; Suydam v. Moore, 8 Barb. (N. Y.) 358.

Statements made to a witness in the

presence of the purchaser of property in relation to the property are of the same effect as if made to the purchaser. Alexander v. Beresford, 27 Miss. 747.

But an owner of property sold at auction is not bound by representations which he has made privately to some of the bidders, provided the purchaser did not hear them. Lindsey v. Lindsey, 34 Miss.

A false representation in a contract for the sale of fixtures and fittings of a public house as to the amount of business attached to the house, is sufficient to give the complainant relief. Hutchinson v.

Morley, 7 Scott, 341.

There must be both deception and damage to make the wrong-doer liable. Freeman v. McDaniel, 23 Ga. 354; Bowman v. Corithens, 40 Ind. 90; Abbey v. Dewey, 25 Pa. St. 413; Byard v. Holmes, 31 N. I. 206: Fuller v. Hodgden, 25 Me. 243; Ely v. Stewart, 2 Md. 408; Garrow v. Davis, 15 How. (U. S.) 272; Anderson v. Burnett, 6 Miss. 165; Selma, etc., R. Co. v. Anderson, 51 Miss. 829; Boyce v. Watson, 20 Ga. 517; Jennings v. Broughton, 5 De G. M. & G. 126.

However fraudulent and deceiving a statement may be, if an innocent party learns of the facts before he closes the negotiations he cannot obtain relief. Bowman v. Corithens, 40 Ind. 90,

A very false statement of a very material fact will not be a ground for an action to rescind a contract, unless it was a means of procuring it. Phipps v.

Buckman, 30 Pa. St. 401.

When a purchaser decides not to rely upon the statements of the vendor, but seeks independent means of investigation of his own, there is no deception, though he fails to discover an important fact, provided the vendor interposes no obstacles to a full and free investigation, and does nothing to mislead the purchaser. Halls v. Thompson, 1 Sm. & M. (Miss.) 443.

If the false representations have induced a party to close a contract before the deceit is discovered, and then a new contract is substituted for the first before the facts are known, both contracts are supposed to have been induced by the falsity of the first statements. Henry, 4 W. Va. 571. Davis v.

Acts of confirmation of a contract by the injured party will not bind him unless he is fully apprised of the deception, and of his rights. Shackelford v. Handley, I A. K. Marsh. (Ky.) 495; Johnson v. Johnson, 5 Ala. 90; Crome v. Ballard, I

Ves. 215.

If the complainant did not rely upon the representations of the defendant be-

7. Who May Rely upon Misrepresentations.—No one has a right to rely upon the statements made to influence other parties which do not pertain to him. When representations are made for the express purpose of inducing others to act, it is presumed that they are made deliberately and after due inquiry, and the party making them is responsible to this extent. He is morally accountable to no person whomsoever but the very person he seeks to influence; and whoever may overhear the statements and then act upon them cannot reasonably hold the maker of the statements responsible if they prove false. One may be the party to whom the falsity is stated, and vet entitled to no redress, if they were made to him as an agent for another and to influence the other, and were not intended to influence his own actions. Some representations, false in fact, are purposely made to influence the public and individuals of the public to act upon them. Whosoever does act upon them in manner intended has a right to regard them as made to him personally, and hold the wrong-doers responsible, provided he was thereby damnified.1

cause he did not believe them, or because he chose to act upon his own judgment, he has no ground for relief. Hagee v. Grossman, 31 Ind. 223; Nye v. Merriman, 35 Vt. 438.

If the representations at first were

relied upon, yet before the transaction was closed the party ascertained the falsity of the statements, or if they are completed, he confirmed the negotiation unconditionally, with full knowledge of the facts, the bargain is the same as though first made with the full knowledge of the facts. Pratt v. Philbrook, 41 Me.

A purchaser of shares of stock in the market, upon the faith of the company's prospectus, which he has received from parties who are not connected in any way with the corporation, cannot, by acting upon the statements made, connect himself with the company so as to make the directors liable for the false representations, as if they had personally addressed the prospectus to him. Peek v. Gurney, L. R. 6 H. L. 377, overruling upon this point Bedford v. Bagshaw, 4 Hurl. & N. 548, and Bagshaw v. Seymour, 29 L. J. Ex. 62, note.

When managers of a corporation make false reports, or resort to fraudulent means, and induce parties to buy shares of stock, the purchaser must show that he acted upon the faith of the false representations in order to recover damages. Priest v. White (Mo.), 1 S. W. Rep. 361.

1. Cooley on Torts (1880), 493.

An agent bought for his principal some sheep which proved to be unsound although they were represented as sound. After the principal had received the sheep, but before their diseased condition was known, the agent bought them of his own principal. In an action by the agent for damages against the original vendor, it was held that he had no cause for relief. Wells v. Cook, 16 Ohio St. 67.

If a letter of recommendation is addressed to one party but presented to and relied upon by another, the latter has no cause of action. McCracken v.

West, 17 Ohio, 16.

Where a letter is written and marked "Confidential," concerning the financial condition of a party, it is a question for the jury whether it was intended for the exclusive perusal of the person addressed. Iasigi v. Brown, 17 How. (U. S.) 183.

It is a fact for the jury to determine whether letters of this kind were calculated to inspire, and did inspire, a false confidence in the financial condition of parties, in the party to which the writer knew he was not entitled. Lindsey v.

Lindsey, 34 Miss. 432.

When projectors of corporations publish prospectuses containing false representations which are calculated to influence others to invest money in the scheme, and the purchasers are thereby damaged, they have an action against the projectors. Terwilliger v. Gt. W. Tel. Co., 59 Ill. 249; Booth ads. Wonderly, 36 N. J. 250; Reese River Co. v. Smith, L. R. 4 E.& I Ap. 64; Peck v. Gurney, L. R. 13 Eq. Cas. 79; Henderson's Case, L. R. 5 Eq. 249. If these promoters should induce parties, by false statements to buy

8. Fraudulent Promises.—Deception, in order to be actionable. must relate to existing or past facts. So a promise, made in the course of negotiations, which is never performed, is not of itself a fraud or the evidence of a fraud. It is not a fraud in law that one obtains a release of a recognizance on a promise to pay the amount shortly, but fails to do it.2 But a promise is sometimes the very device resorted to for the purpose of accomplishing the deception. If one promises to take up encumbrances on the title of another's land, and by means of the promise throws the other party off his guard while he secures the title for himself, it would be a singular defence for him to make, that he had only failed to perform his promise. The promise was merely his false token, by means of which he effected his cheat.3

shares of stock and pay cash therefor, the promoters are liable for the damages thus imposed, notwithstanding they did not convert the money received to their own use. Paddock v. Fletcher, 42 Vt. 389. So, also, if the managers of a corporation set afloat false reports and declare false or fictitious dividends, or fraudulently induce persons to buy stock in the corporation, whereby damages result to the purchasers, they have an action for damages against the managers. Cross v. Sackett, 6 Abb. Pr. (N. Y.), 247. Morgan v. Skiddy, 62 N. Y. 319; Huntingford v. Massey, 1 Fost. & Fin. 690; Clarke v. Dickson, 6 C. B. N. S. 453.

The president and the cashier of a bank knowingly made a false statement under oath as to the resources and liabilities of a bank. A party relying upon these statements bought stock of the bank at par, when in fact the stock was worth only thirty per cent. Held, the officers were personally responsible to the party damnified. Morse v. Swits, 19 How. Pr.

(N. Y.) 275.

An officer of an insurance company who issues a false prospectus which induced a party to take out insurance in the company to his damage is liable for this fraud to the party injured. Ponti-fex v. Rignold, 3 M. & G. 63.

A president of a corporation who pre-

tends to aid a shareholder in disposing of his stock, and advises a particular sale at a specified price, which in fact is a sale made to a third party for himself, is liable to the shareholder for his damages. Fisher v. Budlong, 10 R. I. 525.

Under certain circumstances a director of a corporation may evade liability for fraud practised upon him by the officers in selling him its shares of stock. It appears that he may complain of such fraud when he has no notice of the condition of the affairs of the corporation. Lefever v. Lefever, 30 N. Y. 27.

Where one is induced by false reports of the officers and managers of the corporation, showing the company to be in an excellent condition financially, when in fact it was insolvent, to borrow money of the corporation and invest it in the purchase of its stock, he has relief by setting up fraud in the defence to a suit for the money loaned him by the company. Nat. Ex. Co. v. Drew, 32 Eng. Ĺ. & Eg. 1.

A corporation sued a shareholder for calls. He set up as a defence that he was defrauded in buying the shares; that he had never recognized any rights or liabilities since he had discovered the deception; that he had never received any benefits from the shares, and had repudiated the shares and given the corporation notice. Held, that the corporation could not recover. McCreight v. Stevens, 1 H. & C. 454; Bwlch-y-Plwm Lead Mining Co. v. Bynes, L. R. 2 Ex.

When the officers make a fraudulent over-issue of stock, the parties injured thereby by purchasing it have an acv. Mali, 36 N. Y. 200. But the assignees. of the purchasers have no remedy against the corporation. Seizer v. Mali, 32 Barb. (N. Y.) 76.

1. Sieveking v. Litzler, 31 Ind. 13; Long v. Woodman, 58 Me. 49; Farrar v. Bridges, 3 Humph. (Tenn.) 566; Fenwick v. Grimes, 5 Cranch C. C. 439; Jordan v. Money, 5 H. L. Cas. 185.
2. Commonwealth v. Brenneman, I

Rawle (Pa.), 311.

3. Cooley on Torts (1880), 487.

A promise not to assign a note, and to hold it and allow a set-off, made when the note was executed and delivered, and when the note was assigned before

(I.) MATERIALITY AND RELEVANCY OF THE MISREPRESENTA-TIONS.—In order that false representations may support an action at law, or be a ground for relief in equity, they must be material in their nature and relevant to the transaction, and be the determining ground of the negotiations.¹ The representation must be of a decided and apparently reliable character, holding out inducements in the negotiation calculated to mislead the other party and influence him to close the bargain on the faith and confidence of the representations, and in the absence of the means of information to be derived from his own observation and inspection.2

To determine whether the representations are material, every case must be examined on its own facts. A slight difference in the circumstances may arrange cases apparently alike under dif-

ferent principles.3

maturity, is not a fraud sufficient to constitute a defence in the hands of an assignee before maturity. Murray v. Beckwith, 48 Ill. 391.

A warranty does not become a fraud by being broken. Loupe v. Wood, 51

One given a note on a purchase of land, relying on the vendor's verbal promise to make a certain improvement which would enhance the value of the farm, cannot make the failure of the vendor to keep his promise a defence to the note. Miller v. Howell, 2 Ill. 499.

If the promise becomes a false token by which the promisor effects his deception, it becomes a fraud. Wilson v. Eggleston, 27 Mich. 257; Laing v. McKee,

13 Mich. 124.

If a beneficiary in a will, when the maker thereof is on his deathbed, and who is about to make a codicil to give a certain benefit to another, stops the writing of it by promising to carry out the intention of the testator, he makes himself liable to be held in fraud if he nimself hable to be field in traud it ned did not intend to perform his promise. Gross v. McKee, 53 Miss. 536; Richardson v. Adams. 10 Yerg. (Tenn.) 273; Dowd v. Tucker, 41 Conn. 197; Kinard v. Heins, 3 Rich. (S. Car.) 423; Thynn v. Thynn, 1 Vern. 296.

Equity will not relieve against misrepresentation of facts yet to come into existence These representations of facts to come into existence in the future are such as are based upon general knowledge, information, and judgment, as distinguished from representations which, from knowledge peculiarly his own, a party may certainly know whether they are true or false. Sawyer v. Prickett, 19

Wall. (U. S.) 146.

The promise must be an honest intention, with the understanding that the

promisor may change his mind. the promise was not honest, but fraudulently made, the injured party will be Kimball v. Ins. Co., entitled to relief.

o Allen (Mass.), 540.

Representations made as to facts totranspire in the future are mere promises or an opinion, and will not of themselves support an action of deceit. Markel v. Moudy, 11 Neb. 213; Gallagher v. Brunel, 6 Cow. (N. Y.) 347. But if a party makes promises which he never intends to fulfil, whereby another is injured, he may be held liable to an action of deceit. Morrill v. Blackman, 42 Conn. 324; Oldham v. Bentley, 6 B. Mon. (Ky.) 430; Rawdon v. Blatchford, I Sand. (N. Y.) Rawdon v. Blatchtord, I Sand. (N. Y.)
344; Schufeldt v. Schintzler, 21 Hun (N. Y.), 462; Johnson v. Monell, 2 Keyes
(N. Y.), 663; Eaton v. Avery, 83 N. Y.
31; Burrill v. Stevens, 73 Me. 395; Nichols v. Pinner, 18 N. Y. 306; Durell v. Hale, I Paige (N. Y.), 492; Buckley v. Artcher, 21 Barb. (N. Y.) 585.

1 Land v. Firstbrook, 24 U. C. C. P.

1. Lapp v. Firstbrook, 24 U. C. C. P. 239; Winter v. Bandel, 30 Ark. 362; Bond v. Ramsey, 89 Ill. 29; Smith v. Richards, 13 Pet. (U. S.) 26; Noel v. Richards, 13 Pet. (U. S.) 26; Noel v. Horton, 50 Iowa, 687; Mason v. Rapler, 66 Barb. (N. Y.) 180; Miller v. Barber, 66 N. Y. 558; Sanders v. Lyon, 2 McArthur (Dist. Col.), 452; Teaugue v. Irwin, 127 Mass. 217; Jennings v. Broughton, 5 De G. M. & G. 126.

2. Hill v. Bush, 19 Ark. 522.

3. Cooley on Torts (1880), 496.
A misrepresentation to be material must be one materially influencing and inducing the transaction. In re Mining Co., L. R. 2 Ch. Ap. 611.

The misrepresentations must be such that, if true, they would substantially enhance the value of the property. Smith v. Countryman, 30 N. Y. 655.

The representations must affect the

(II.) CONCEALMENT.—Representations may consist of conduct as well as of words, and relief may be granted in cases arising out of acts, even when no words were employed to deceive. Simply passive concealment may not be fraud. To tell half the truth to conceal the other half, is simply a false statement, and differs in no respect from the case of false representations.1 It may be laid

very essence and substance of the transaction to be called material. Hallows v. Fernie, L. R. 3 Eq. 536. But representations are material which substantially en-Melendy v. Keen, 89 Ill. 395; Mather v. Robinson, 47 Iowa, 403; Nolan v. Cain, 3 Allen (Mass.), 263; Welshbillig v. Dienhart, 60 Ind. 94.

Whether a representation is material in the sense used and under the circumstances is a question for the jury.' Mc-

Aleer v. Horsey, 35 Md. 439.

All the circumstances of the transaction must be considered, and an inference drawn from actual facts that took place, and no surmises must be indulged in, in order to say whether representations are false or not. Clark v. Everhart, 63 Pa. St. 347.

Mere intention is not fraud, but this intention carried out to the injury of others is. Williams v. Davis, 69 Pa. St. 21; Fuller v. Hodgdon, 25 Me. 243; Sieveking v. Litzler, 31 Ind. 13; Ayers v. Mitchell. 11 Miss. 683.

In selling a farm, to misrepresent the crops raised the previous year is a material representation. Martin v. Jordan, 60 Me. 531.

To represent the amount of business done at a stand is a material representa-Taylor v, Green, 8 C. & P. 316.

For one to say to a stranger that a certain piece of land near a river would be free from overflow when a levee was repaired, except, in very high and longcontinued floods, a few acres of the lowest land, is material when the maker of the representation knew the statements were false. Estell v. Myers, 54 Miss. 174.

The misrepresentations must be related to the subject of the transaction; independent ones as to some disconnected thing are not material. Ingraham v. Jordan, 55 Ga. 356. They need not be directly related if they are so closely connected that, but for them, the contract would not have been closed. Can-ham v. Barry, 15 C. B. 597. They need not, however, be the sole inducement to the contract, provided they are material. Hull v. Fields, 76 Va. 594; Righter v. Roller, 31 Ark. 170; Safford v. Grout, 120 Mass. 20; Selma R. Co. v. Anderson, 51 Miss. 829.

Representations are material when but for them, the contract would not have been closed. Grymes v. Sanders,

93 U. S. 55.

A false statement of material facts though made bona fide, will avoid a contract, and especially if the representation be of facts which the defendant ought to know, and which the other party had a right to expect the defendant did know, v. Caldwell, 3 Mo. 477; Snyder v. Tindley, Coxe (N. J.), 48; Munroe v. Pritchett, 16 Ala. 785; Thomas v. McCann, 4 B. Mon. (Ky.) 601; Lockridge v. Foster, 4 Scam. (Ill.) 569; Parham v. Randolph, 4 How. (Miss.) 435.

Where a party makes a false representation of a material fact, knowing it to be false, or not knowing whether it is true or false, and induces another to act upon it, who used due care, he is liable for the deceit though he derives no benefit thereby. It may concern the condition. quality, or other material matters affecting the property in question. Busterud v. Fannington (Minn.), 31 N. W. Rep.

360.

A statement that an enterprise is conducted by a company having a cash capital of \$2000, and that a named man of good reputation is a member, if untrue is material, if a party is thereby induced to subscribe \$100 by this false representation. Lebby v. Ahrens (S. Car.), 2 S. E. Rep. 387; Hawk v. Brownell (Ill.), 11 N. E. Rep. 416; Williams McFadden (Fla.), 1 S. Rep. 618.

If a false representation relates to some trivial or unimportant matter, it is not material and is harmless. Hall v. John-

son, 41 Mich. 286.

To be material the representation must be such that it is calculated to deceive a person of common prudence, and must have been an inducement to the closing of the transaction. Clark v. Everhart, 63 Pa. St. 347; Sledge v. Scott, 56 Ala. 202; Hanna v. Rayburn, 84 Ill. 533; McDonald v. Tafton, 15 Me. 225; Gunby v. Sluter, 44 Md. 237; Todd v. Fambro, 62 Ga. 664; Parker v. Marquis, 64 Mo. 38; Cochrane v. Halsey, 25 Minn. 52.

The false representation must be such as to have materially influenced the plain-Safford v. Grant, 120 Mass. 20.

down as a proposition of law, that mere passive concealment, when not joined by active misconduct which misleads the complaining party, is not deception, and cannot give redress on ground of fraud. Mere concealment will not support an action of deceit. to make concealment a fraud, there must be a positive misstatement of fact, or at least a partial statement so that the withholding of that which is not stated makes that which is stated absolutely false.² The mistaken belief as to facts may be created by active means, as by fraudulent concealment or knowingly false statements; or passively, by mere silence when it is a duty to But it is only when a party is under obligations to reveal facts to another that mere silence will be considered as a means of deceit, as when a person conceals a material fact which it was his duty to communicate.3 Or the use of a device may be a deceit, which is calculated to induce the other party to forego inquiry into a material fact upon which the wrong-doer has information, although such knowledge be not exclusively within his reach, and it appears that the concealment or other deception was practised with respect to the particular transaction.4

178; Kintzing v. McElrath, 5 Pa. St. 175; Kintzing v. McEirath, 5 Pa. St. 467; Hadley v. Importing Co., 13 Ohio St. 502; Law v. Grant, 37 Wis, 548; Williams v. Spurr, 24 Mich. 335. Compare Frazer v. Gervais, Walker (Miss.), 72.

2. Atwood v. Chapman, 68 Me. 38; Peek v. Gurney, 6 L. R. H. L. 377.

3. Mathews v. Bliss, 22 Pick. (Mass.)

o. malnews v. Bhiss, 22 Pick. (Mass.) 48; Irwine v. Kirkpatrick, 7 Bell (S. Car.), 186; Brown v. Montgomery, 20 N. Y. 287; Sides v. Hilleary, 6 Harr. & J. (Md.) 86; Paddock v. Strobridge, 29 Vt. 470.

4. Prentiss v. Russ, 16 Me. 30; Roseman v. Canonvan, 43 Cal. 110; Smith v. Richards, 13 Pet. (U. S.) 26; Roper v. Lodge, 91 Ill. 518; Coddington v. Goddard. 16 Gray (Mass.), 436; Howell v. Biddlecom, 62 Barb. (N. Y.) 131; 2 Chitty on Contr. (11th Am. Ed.) 1042, 1043; Green v. Godsen, 3 M. & G. 446.

One who sells goods on credit has a right to suppose that the vendee intends to pay for them, and though insolvent, a man may lawfully buy on credit, even though he does not make his financial condition known to the vendor; but if he buys, intending at the time to take advantage of his insolvency and not pay for the goods, the concealment of this intention is a gross deception, and the title of the goods will not pass. Ayers v. French, 41 Conn. 142; Dow v. Sanborn, 3 Allen (Mass.), 181; Wright v. Brown, 67 N. Y. 1; Donalson v. Farwell, 93 U. S. 631; Stewart v. Emerson, 52 N. H. 301; Bishop v. Small, 63 Me.

1. Laidlow v. Organ, 2 Wheat. (U. S.), 12; Congers v. Ennis, 2 Mor. 236; Ferguson v. Carrington, 9 B. & W. 59; Load v. Green, 15 M. & W. 216. But there is v. Green, 15 M. & W. 216. But there is authority holding a contrary doctrine. Bell v. Ennis, 33 Cal. 620; Smith v. Smith, 21 Pa. St. 367; Backentoss v. Speicher, 31 Pa. St. 324; Rodman v. Thalheimer, 75 Pa. St. 232; Powell v. Bradlee, 9 Gill & J. (Md.) 220; Klopenstein v. Mulcaly, 4 Nev. 296; Buffington v. Gerish, 15 Mass. 156; Hennequin v. Naylor, 24 N. Y. 139; Griffin v. Chubb, 7 Tex. 603. These last authorities hold, if a man buys goods and promises to pay a man buys goods and promises to pay, but knows that he cannot, and besides does not intend to make payment, that there is no deception.

It is a fraud knowingly to make payment in worthless bank bills, the payee supposing them to be good, with an agreement that the payment should be conclusive unless the bills were returned within a certain number of days. v. Click, 4 Humph. (Tenn.) 186.

To give a check on a bank where the maker has no funds is a fraud, and especially when the drawer has no reasonable expectation of having any funds. True v. Thomas, 16 Me. 36; Harner v. Fisher, 58 Pa. St. 453; Mizur v. Russell,

29 Mich. 229.

The fact that a vendor of land had reason to believe that the farm contained less acres than he stated, will not conclusively establish his fraudulent intent. Salisbury v. Home, 87 N. Y. 128. A father by letter recommended his minor son as worthy of credit. He did not

state that he was a minor. A party saw the letter, and on the strength of it gave the minor credit for a large amount of An instruction to the jury was that if the father concealed the fact of the minority of the son, with the view of giving him a credit, knowing or believing that if that fact had been stated he would not have obtained the credit, he was liable in law for the damages to the party trusting the son. Held, a correct statement of the law. Kidney v. Stoddard, 7 Metc. (Mass.) 252. A purchaser is not bound to disclose his knowledge of a fraud which makes the title of the vendor to the property better than he himself supposes, where the means of knowledge are equally open to both parties. Kintzing v. McElrath, 5 Pa. St. 467. Compare Stevens v. Fuller, 8 N. H.

A party who is buying land need not disclose the existence of a mine on the land, of which the owner does not know. Harris v. Tyson, 24 Pa. St. 347; Williams v. Spurr, 24 Mich. 335. Compare Williams v. Beazley, 2 J. J. Marsh. (Ky.) 578. But the vendee must not mislead the vendor in order to make the sale binding. Harris v. Tyson, 24 Pa. St. 347; Williams v. Spurr, 24 Mich. 335. Though a vendee may have a high estimation of the value of land, and in consequence the vendor fixes an exorbitant price, this is not fraud on the part of the seller. Law v. Grant, 37 Wis. 548. Mere silence on the part of the vendor of goods with respect to a latent defect therein, of which the vendee knows nothing, is not a ground for avoiding a sale, provided the vendor did not in the slightest degree mislead the buyer. Hadley v. Importing Co., 13 Ohio St. 502.

If negotiations advance to a certain stage, and then facts change unknown to one party, it is the duty of the party in-formed to make his knowledge known to the other before concluding the business. If not informed, he is deceived, and has an action for his injury. Nichols v. Pinner, 18 N. Y. 295. Same principle: Bank v. Albright, 21 Pa. St. 228. It is fraudulent in a vendor to sell a horse having an internal disease of a secret and fatal character, not apparent by external indications, but known to the vendor, and known by him that the vendee is ignorant of the defect, if the disease was such as to render the horse worthless. Paddock v. Strobridge, 29 Vt. 470. Where one is making a purchase for a specific purpose, which is disclosed to the seller, and the latter knows that the goods offered for sale are wholly unfit for the purpose by reason of some defect not manifest, the vendor is bound at his peril to inform the vendee. Van Brock-lin v. Fonda, 12 Johns. (N. Y.) 468; French v. Vining, 102 Mass, 132.

Where a bull was bargained for to be put with cows, the vendor knowing for what the animal was wanted, and also knowing that the bull was impotent, the vendor was liable for deceit. Maynard

v. Maynard, 49 Vt. 470.

A mere unintentional concealment on the part of the vendor, to disclose material facts which are known to himself but not to the vendee, and to the knowledge of which he has not equal means of access, is not deception in law. Such concealment to make it deceit must be coupled with the intent to deceive. Laidlow v. Organ, 2 Wheat. (U. S.) 178; Hanson v. Edgerly, 29 N. H. 343; Howard v. Gould, 28 Vt. 523; Harris v. Tyson, 24 Pa. St. 347; Stevens v. Fuller, 8 N. H. 463. But in *Missouri* it is held that if a

But in *Missouri* it is held that if a party sells property having a latent defect, of which he knows, but which he fails to disclose to the vendee, he is practising a deceit. Cecil v. Spurger, 32 Mo, 462; Borrow v. Alexander, 27 Mo. 530.

The same doctrine seems to be held in Mississippi. Patterson v. Kirkland, 34 Miss. 423. If one has unwholesome commodities for sale, such as meats or provisions, and knows their condition, and then exposes them for sale for consumption by the public, he thereby warrants them fit for consumption as such, Van Broklin v. Fonda, 12 Johns. (N. Y.) 468; Moses v. Mead, 1 Denio (N. Y.), 378; Hoe v. Sanborn, 21 N. Y. 552. But wholesale dealers do not impliedly warrant their provisions which they sell to retail dealers. Emerson v. Brigham, 10 Mass. 196; Hart v. Wright, 17 Wend. (N. Y.) 267; Goldrich v. Ryan, 3 E. D. Smith (N. Y.), 324; Ryder v. Neitge, 21 Minn. 70. A warranty is implied whether the vendor is a dealer or not, if he knows the article is purchased for immediate consumption. Hoover v. Peters, 18 Mich. 51. A vendor of cotton was held not liable for deception, when the defect in a quantity of cotton of an unusual character, which extended equally through the bulk, and was fully exhibited in samples. Carnochan v. Gould, I Bailey (S. Car.), 179. It has been decided that implied warranties upon the sale of chattels, and arising by operation of law, are of two kinds: I. In cases where there was no fraud, as that the provisions purchased for domestic use were wholesome; or that the article contracted for in an executory contract, and which the vendee had no opportunity to inspect, should be salable as such in the market. 2. Where the fraud existed, as if the vendor, knowing the article to be unsound, disguises it or represents it as sound. Osgood v. Lewis, 2 Harr. & G. (Md.) 495.

Contracts completed through negative deceit are fraudulent. Thus for the defendant to induce his landlord to accept an insolvent tenant in his place, knowing of his insolvency without disclosing it, is deception. Bruce v. Ruler, 2 Man. & R. 3. And allowing a vendee to purchase goods under the wrong impression as to their quality in an essential particular was deceit, though the vendor did nothing to induce the sale under such circumstances.

Hill v. Gray, 1 Stark. 434.

As to the sale of food and provisions it is held: "It is perfectly well settled that there is an implied warranty in regard to manufactured articles purchased for a particular use, which is made known at the time of the sale to the vendor, that they are reasonably fit for the use for which they are purchased. It may, perhaps, be more accurate to say that, independently of any expressed and formal stipulation, the relation of the buyer to the seller may be of such a character as to impose a duty upon the seller differing very little from a warranty. The circumstances attending the sale may be equivalent to a distinct affirmation on his part as to the quality of the thing sold. A grocer, for instance, who sells at retail may be presumed to have some general notion of the use which his customers will probably make of the articles which they buy of him. If they purchase flour or sugar, or other articles of daily domestic use for their families, or grain or meal for their cattle, the act of selling to them under such circumstances is equivalent to an affirmation that the things are at least wholesome and reasonably fit for use; and proof that he knew, at the time of the sale, that they were not wholesome and reasonably fit for use would be enough to sustain an action against him for deceit, if he had not disclosed the true state of the facts. The buyer has a right to suppose that the thing which he buys under such circumstances is what it appears to be, and such purchases are usually made with a reliance upon the supposed skill or actual knowledge of the vendor." French v. Vining, 102 Mass. 132. It has been held that the sale of animals which the sellers know, but the purchaser does not, have a contagious disease, should be regarded as a fraud when the fact of the disease is not disclosed. Jeffrey v. Bigelow, 13 Wend.

(N. Y.) 518. Compare Hill v. Balls, 2 H. & N. 299. Infecting a pasture by one in possession as a mere licensee, and allowing the owner to turn in his cattle without informing him of the fact of the infection, is a gross fraud. Eaton v. Winnie, 20 Mich, 156. The concealment of facts which one is bound to disclose to the other party is in law a deception. Mitchell v. McDougall, 62 Ill. 498; Trigg v. Read, 5 Humph. (Tenn.) 529; Smith v. Ins. Co., 49 N. Y. 211; Mintz v. Morrison, 17 Tex. 372; Belden v. Henriques, 8 Cal. 87; McAdams v. Cates, 24 Mo. 223; Grove v. Hodges, 5 Smith (Pa.), 504; Junkins v. Simpson, 14 Me. 364; Van Arsdale v. Howard, 5 Ala. 596; Dickinson v. Davis, 2 Leigh (Va.), 401; Parker v. Marquis, 64 Mo. 38; Ryan v. Ashton, 42 Iowa, 365. If a grain-dealer should sell for seed grain apparently sound, but the dealer knew that its germinating power was destroyed, he would be liable for this deception if the other Cooley on Torts party was injured. (1880), 479. Where a person is induced to become a surety on a false representation of facts, which ought to have been disclosed to him, he cannot be held liable. Greenfield v. Edwards, 2 De G. liable. Greenfield v. Edwards, 2 De G. J. & S. 582. A surety is generally a friend of the principal debtor, and in ordinary cases it may be presumed that the surety obtains all necessary facts concerning the transaction. Bigelow on Fraud (1878), 44.

If a party becomes a surety to a de-

If a party becomes a surety to a defaulting cashier, and this fact is known to the directors, who publish a fine report of the bank's financial condition, there is such a concealment that the surety cannot be held liable. Graves v. Bank, 10 Bush (Ky.), 23. For a creditor knowingly to induce a party to become a surety to one of his debtors, without disclosing the fact that he holds a mortgage on all of his debtor's property, is a deception on the surety, and he is not liable. Bank v. Albright, 21 Pa. St. 228.

It is a deception upon a wife for a husband to induce her to give a mortgage on her property to enable him to purchase goods and continue in business, when a secret arrangement between the husband and the mortgagee provided that a part of the consideration of the mortgage should pay an old indebtedness of the husband; this mortgage is void as to the extent of the old debt secured. Smith v. Osborn, 33 Mich. 410. Whenever any greditor has a private arrangement with his debtor, unknown to the surety, that will increase his liability; and in case the ordinary rule of self-protection does

9. Slander of Title.—A representation may be made of a man or of his property to his injury, as well as to him. False representation of a person may consist either (I) in disparaging his credit or title of his property, or his property itself; or (2) in attempts to personate him or his badge of business. If the representation relate to the plaintiff's title to property or to the quality of the property itself, the wrong done is termed "slander of title;" if an attempt to personate him or the reputation of his goods in business. it will commonly be the case of an infringement of his trade-mark. 1

10. Self-protection.—It is the duty of every person in transacting business to use ordinary care and prudence. If false representa-

not apply, it is a deception upon the surety. Booth v. Storrs, 75 Ill. 438; Bank v. Cooper, 36 Me. 179. An action on the case is maintainable by a woman against a man for deceit, when he induces her to enter into a contract for a void marriage. Blossom v. Barrett, 37 N. Y.

1. Bigelow on Torts, 34. The false representation must be made with knowledge of its falsity and with the intent to deceive. Pitt v. Donovan, I Maule & S. 639. It must appear that the party was deceived by the defendant's statement, or the plaintiff cannot recover damages. Pater v. Baker, 3 Com. B. 831. In order to make out deceit in the matter of trade-marks it must appear (1) that the defendant knew of the existence of the plaintiff's mark when he committed the alleged wrong; (2) that the defendant intended to palm off the goods as the goods of the plaintiff, or to represent that the business which he was carrying on was the plaintiff's or the business of which the plaintiff had a special patronage; (3) that the public were deceived thereby. Bigelow on Torts, 36. A plaintiff had the exclusive right, by contract with the proprietor of a hotel, to have the patronage of the hotel, to carry passengers from a railway station to the hotel. The defendant was sued for violating the plaintiff's rights. *Held*, the defendant commits no breach of duty to the plaintiff, unless he so makes use of the sign upon his coaches as to indicate that the proprietor of the hotel has granted him such a right of patronage. Marsh v. Billings, 7 Cush. (Mass.)

A party was induced to purchase lands by false representation by the vendor, that if he would buy them he would be be entitled to certain adjoining lands under water belonging to the State, the vendor knowing that the State had already sold them. Held, fraud. Monell v. Colden, 13 Johns. (N. Y.) 395. The

same doctrine is held in other cases. Claggett v. Crall, 12 Kans. 393; Gilpin v. Smith, 19 Miss. 109; Ward v. Wiman, 17 Wend. (N. Y.) 193; Watson v. Atwood, 25 Conn. 313; Wade v. Thurman, 2 Bibb (Ky.), 583; Rhode v. Alley, 27 Tex. 443; Eames v. Morgan, 37 Ill. 313; Bristol v. Braidwood, 28 Mich. 191; Bailey v. Smock, 61 Mo. 213; Kiefer v. Rogers, 19 Minn. 32. The doctrine of these cases indicates that the defendant was guilty because he knowingly and falsely misrepresented facts with respect to the subject-matter of the contract, In Monell v. Colden, 13 Johns. (N. Y.), 395, the court said: "If no representation had been made on the subject by the defendant, both parties would have been equally chargeable with a knowledge of the law and the public records of the State. But according to the declaration the defendant knowingly and falsely misrepresented the fact with respect to the situation of the land under water, and if so, he is chargeable with all damages resulting from such false representation."

False representations of this kind arevery different from mere silence respecting defects known to the vendor, and which he is not bound to disclose. Kerr

v. Kitchen, 7 Pa. St. 486.
An action will lie for fraud in selling land notwithstanding the deed of conveyance contains covenants of title. Upshaw v. Debow, 7 Bush (Ky.), 442; Hayes v. Bonner, 14 Tex. 629; Rhodes v. Alley, 27 Tex. 443; Holland v. Anderson, 38 Mo. 55; Bailey v. Smock. 61 Mo. 213; Wardell v. Fosdick, 13 Johns. (N. Y.) 325; Updike v. Abel, 60 Barb. (N. Y.) 15; Claggett v. Crall, 12 Kans. 393.

In an action for slander of goods it must be shown that the defendant has injured the plaintiff by his false represen-The mere averment that the plaintiff was compelled to go out of business is not sufficient to sustain the action...

Dudley v. Briggs, 141 Mass. 582.

tions are made regarding matters of fact, and the means of knowledge is equally open to both parties, and then one party instead of informing himself sees fit to put himself in the hands of the other whose interest it is to mislead him, the law will give him no remedy for his injury. The rule caveat emptor (let the purchaser beware) does not apply where there is a positive representation essentially material to the subject sold, and which at the same time is false in fact.²

If a man purchases goods of a dealer, without in any way relying upon the skill and judgment of the vendor, the latter is not liable for their turning out contrary to the buyer's expectation; but if the vendor be informed, at the time the goods are purchased, of the purpose for which they are wanted, the buyer relying upon the vendor's judgment, the latter impliedly warrants that the goods are fit and proper for the use intended. The buyer has no remedy when he requires no warranty, and takes the risk of quality upon himself and chooses to rely upon the bare representation of the vendor, unless he can show the representation to be fraudulent.

1. Slaughter v. Gerson, 13 Wall. (U. S.) 379; Rockafellow v. Baker, 41 Pa. St. 319; Hobbs v. Parker, 31 Me. 143.

Lowndes v. Lane, 2 Cox, 363.
 Brown v. Edgington, 2 Scott N. R.

4. Warren v. Phila. Coal Co., 83 Pa. St. 437; Jackson v. Wetherill, 7 Serg. & R. (Pa.) 480; Whitaker v. Eastwick, 75 Pa. St. 229.

As a general rule, caveat emptor does not apply to cases of fraud. Irving v. Thomas. 18 Me. 418; Alts v. Alderson, 10 Sm. & M. (Miss.) 476. But it applies generally when the buyer requires no warranty, and takes the risk upon-himself in absence of deceit. Roberts v. Hughes, 81 Ill. 130; Hadley v. Prather, 64 Ind. 137; Hadly v. Clinton, 13 Ohio St. 502; Mixer v. Coburn, 11 Met. (Mass.) 559; Frazier v. Harvey, 34 Conn. 469; Kingsbury v. Taylor, 29 Me. 508; Cozzins v. Whitaker, 3 Stew. & Port. (Ala.) 322; Whitaker v. Eastwick, 75 Pa. St. 229; Winsor v. Lombard, 18 Pick. (Mass.) 59.

Relief is often refused when the property is close at hand, and the purchaser failed to use due diligence in buying it. Long v. Warren, 68 N. Y. 426. But when the property is at a distance, and the buyer relies upon the representation of the seller, though he knows the vendor has never seen it, yet the seller is liable for damages. Smith v., Richards, 13 Pet. (U. S.) 26; Maggart v. Freeman, 27 Ind. 531; Lester v. Mahan, 25 Ala. 445. And in such cases the buyer may

hold the seller upon his assertion as to value, if the latter persuaded the vendee not to go and investigate for himself. Harris v. McMurry, 23 Ind. 9.

Harris v. McMurry, 23 Ind. 9.

One selling personal chattels in his possession as his own, and for a fair price, warrants the title. Williamson v. Sammons, 34 Ala. 691; Boyd v. Whitfield, 19 Ark. 447; Costigan v. Hawkins, 22 Wis. 74; Dryden v. Kellogg, 2 Mo. App. 87; Fawcett v. Osborn, 32 Ill. 411; Word v. Cavin, 1 Head (Tenn.), 506; Sherman v. Trans. Co., 31 Vt. 162; Chancellor v. Wiggins, 4 B. Mon. (Ky.) 201. Ordinarily, there is no warranty by implication to the quality of a chattel sold, even where the full price for a good article is paid. Preston v. Dunham, 52 Ala. 217; Mason v. Chappell, 15 Gratt. (Va.) 572; Weimer v. Clement, 1 Wright (Pa.), 147; Beninger v. Corwin, 4 Zab. (N. J.) 257; Dean v. Mason, 4 Conn. 428; Boit v. Maybin, 52 Ala. 252; Gossler v. Eagle, 103 Mass. 331; Penniman v. Pierson, 1 D. Chip. (Vt.) 394; Gaylor v. Allen, 53 N. Y. 515; Jones v. Murray, 3 T. B. Mon. (Ky.) 83; Goldrich v. Ryan, 3 E. D. Smith (N. Y.), 324. But other courts hold that the taking of a sound price warrants the chattel sound. Rose v. Beattie, 2 Nott & McC. (S. Car.) 538; Champneys v. Johnson, 2 Brev. (S. Car.) 268; Crawford v. Wilson, 2 Mill (S. Car.), 353; Missroon v. Waldo, 2 Nott & McC. (S. Car.) 76. This warranty extends to sales by sample and to things away, and not subject to inspection. Fish v. Rose-berry, 22 Ill. 288; Moore v. McKinlay,

11. Remedy.—Courts of law and of equity, in general, have concurrent jurisdiction in cases of deception. Some frauds can only be relieved in equity, but the distinction separating cases of law and of equity as to deception is not uniform with the authorities.² party deceived in a transaction may, on discovering the fraud, either rescind the contract and demand back what he has paid under it. or he may affirm the bargain and sue and recover damages for the deception. If he elects to rescind, he must act with diligence, and not sleep on his rights.³ Equity will refuse relief where the delay in seeking redress has been such that laches may be imputed to the party asking a remedy.⁴ Both law and equity will refuse relief if the delay has been long, with full knowledge of the deception.5 Unless some obstacle intervenes, after the discovery of the deception the injured party can rescind.6

5 Cal. 471; Getty v. Rountree, 2 Chand. (Wis.) 28; Howard v. Hoey, 23 Wend. (N. Y.) 350; Hanks v. McKee, 2 Litt. (Ky.) 227; Whittaker v. Hueske, 29 Tex.

355; Merriam v. Field, 24 Wis. 640.

1. Anderson v. Hill, 12 Sm. & M. (Miss.) 679; Smith v. McIver, 9 Wheat. (U. S.) 532; Skine v. Simmons, 11 Ga. 401; Gilbert v. Borgatt, 10 Johns. (N.Y.) 457; Tomlin v. Cox, 4 Harrison (N. J.), 76; Turnbull v. Gadsen, 2 Strob. (S. Car.)

2. Furgerson v. Coleman, 2. Heisk. (Tenn.) 378; Rogers v. Colt, I Zab. (N. J.) 704; Burrows v. Alter, 7 Mo. 424; Higgs v. Smith, 3 A. K. Marsh. (Ky.) 338; Wood v. Goodrich, 9 Yerg. (Tenn.) 266; Hazard v. Irwin, 18 Pick. (Mass.) 95; Duton v. McKensie, I Des. (S. Car.) 289; Stryker v. Vanderbilt, I Dutch. (N. J.) 482.

3. Masson v. Bonel, I Denio (N. Y.), 69; Pearsall v. Chapin, 44 Pa. St. 9; Hammond v. Stanton, 4 R. I. 65; Cook

v. Gilman, 34 N. H. 556.

4. Lupton v. Janney, 13 Pet. (U. S.) 381; McKnight v. Taylor, I How. (U. S.) 161; Badger v. Badger, 2 Wall. (U. S.) 87; Purlan v. Martin, I Sm. & M. (Miss.) 126; McLean v. Borton, Har. (Mich.) 279; Banks v. Judah, 8 Conn. 145; Howley v. Cramer, 4 Cow. (N. Y.) 717; Coleman v. Lyne, 4 Rand. (Va.) 454; Graham v. Davidson, 2 Dev. & B. (N. Car.), 155.

5. Wright v. Peet, 36 Mich. 213; Mitchaud v. Girad, 4 How. (U. S.) 503; Crawley v. Timberlake, 2 Ired. (N. Car.) 460; Railroad Co. v. Row, 24 Wend. (N. Y.) 74; Finley v. Lynch, 2 Bibb (Ky.), 566; Dill v. Camp, 22 Ala. 249.
6. Dietz v. Sutcliffe, 80 Ky. 650; Leeds

v. Boyer, 59 Ind. 289; Davis v. Henry, 4 W. Va. 571; Douchy v. Silliman, 2 Lans. (N. Y.) 361; Gates v. Bliss, 43 Vt. 299; Hall v. Fullerton, 69 Ill. 448; Yeoman v.

Losley, 40 Ohio St. 190; Jones v. Emerv. 40 N. H. 348; Holbrook v. Burt, 22 Pick, (Mass.) 546; Cook v. Moore, 39 Tex. 255;

Foster v. Gressett, 29 Ala. 393.

In case a purchaser of goods discovers the deception before payment he may re-fuse to accept them; or if he has paid he can rescind by returning the goods in the same condition he received them, and demand the return of his money. Downer v. Smith, 32 Vt. 1; Phillips v. Commissioners, 119 Ill. 626; Manahan v. Noyes, 52 N. H. 232; Pierce v. Wilson, 34 Ala. 596; Buchanan v. Harvey, 12 Ill. 336; Shaw v. Barnhart, 17 Ind. 183; Blen v. River Co., 20 Cal. 602; Hoops v. Strasburger, 37 Md. 390; Farris v. Ware, 60 Me. 482; Perkins v. Bailey, 99 Mass. 61; Butler v. Northumberland, 50 N. H. 39. If the rights of innocent third persons have intervened, acquired for value, it is too late to rescind. Oakes v. Turquand, L. R. 2 H. L. 325. mand the return of his money. Downer L. R. 2 H. L. 325.

The contract must be rescinded wholly, and not in part. Minor v. Bradley, 22 Pick. (Mass.) 457; Voorhees v. Earl, 2 Hill (N. Y.), 292; Kellogg v. Turpie, 93 Ill. 265; Bishop v. Stewart, 13 Nev. 25. If the parties cannot be placed in statu quo the contract cannot be rescinded. Montgomery v. Gibbs, 40 Iowa, 652; Hendrickson v. Hendrickson, 51 Iowa, 68; Potter v. Titcomb, 22 Me. 300.

The party endeavoring to rescind must place the other in statu quo by giving back or offering to return whatever he has reor offering to return whatever he has received, yet he need not include that which cannot be of any possible benefit. Bishop v. Stewart, 13 Nev. 25; Herman v. Haffenegger, 54 Cal. 161; Morse v. Brockett, 98 Mass. 209; Lane v. Latimer. 41 Ga. 171; Gay v. Alter, 102 U. S. 79; Demerest v. Eastman, 59 N. H. 65; Tis dale v. Buckmore, 33 Me. 461; Beetem v. Buckholder, 19 Smith (Pa.), 249; Vance

v. Scroyer, 79 Ind. 380; Perley v. Balch, 23 Pick. (Mass.) 283; Hoas v. Nonnemacher, 21 Minn. 486; Underwood v. West, 52 Ill. 307. A rescission in pais, obtained by deception, may itself be rescinded. Jones v. Booth, 38 Ohio St. 405; Byers v. Chapin. 28 Ohio St. 300. Whatever has been received by the rescinding party. whether in properties or securities, must v. Holmes, 33 N. J. 120; Wheaton v. Baker, 14 Barb. (N. Y.) 594; Babcock v. Case, 61 Pa. St. 427; Cushing v. Wyman. 38 Me. 580; Coghill v. Boring, 15 Cal. 213; Downer v. Smith, 32 Vt. 1. If the party fails to restore all the property, the burden of proof is on him to establish the worthlessness of the unrestored. Babcock v. Case, 61 Pa. St. 427; Smith v. Smith, 30 Vt. 133. Generally, if the defrauded party has placed himself in such a position that he cannot restore the thing a position that he cannot restore the thing received, his remedy is a suit at law for damages. Freeman v. Reagan, 26 Ark. 373; Downer v. Smith, 32 Vt. 1; McCormick v. Malin, 5 Blackf. (Ind.) 336; Jemison v. Woodruff, 34 Ala. 143. A party cannot rescind and retain the property, and then sue for damages. Jenkins v. Simpson, 14 Me. 364; Weeks v. Robie, 42 N. H. 316. The contract cannot be rescinded as to one party and affirmed as to the other. Coolidge v. Brigham, 1 Met. (Mass.) 550; Fullager v. Reville, 3 Hun (N. Y.), 600. The defrauded party can recover damages at law from the party working the injury. McKee v. party working the injury. McKee v. Eaton, 26 Kan. 226; Byard v. Holmes, 4 Vroom (N. J.), 110; Ives v. Carter, 24 Conn. 392.

When a vendor would rescind a contract on account of deceit by the purchaser, he must return anything paid to him before he can maintain his action for the fraud. Norton v. Young, 3 Greenl. (Me.) 30; Warren v. Taylor, 81 Ill. 15; Haas v. Mitchell, 58 Ind. 213; Wood v. Garland, 58 N. H. 154. The party deceived may stand to the bargain, even after he has discovered the fraud, and recover damages for the injury, or he may recoup in damages, if sued by the vendor for the price. Weiner v. Clement, 37 Pa. St. 147; Whitney v. Allaire, 4 Denio (N. Y.), 554; Lilley v. Randall, 3 Colo. 298; Miller v. Barber, 66 N. Y. 558; Foulk v. Eckart, 61 Ill. 318. It has been said that this doctrine does not hold in case of purchase of shares in a jointstock company; that the vendee's only remedy is by rescission. Houldsworth v. City of Glasgow Bank, L. R. 5 App. Cas. 317. The right to rescind must be exercised at the earliest possible moment

after the discovery of the deception. Matteson v. Holt, 45 Vt. 336; Gatling v. Newell, 9 Ind. 572; Willoughby v. Moulton, 47 N. H. 205; Parmlee v. Adolph, 28 Ohio St. 10; Pence v. Langdon, 99 U. S. 578. The earliest possible time after discovery of the fraud means that the rescission must be prompt. Williams v. Ketchum, 21 Wis. 432; Bonfield v. Price, 40 Cal. 535; Railroad Co. v. Neighbors, 51 Miss. 412; Hall v. Fullerton, 69 Ill. 448; Fisher v. Wilson, 18 Ind. 133; Cook v. Gilman, 34 N. H. 556; Desha v. Robinson, 17 Ark. 228; Gould v. Bank, 86 N. Y. 75; Samuels v. King, 50 Ind. 527.

The deception may be waived by an express affirmance of the transaction. This will appear when the party knowing of the deception decides to stand by the contract and to waive his remedy. Negley v. Lindsay, 67 Pa. St. 217; Roberts v. Barrow, 53 Ga. 315; Coal Co. v. Sherman, 20 Md. 117; Butler v. Haskell, 4 Des. (S. Car.) 651; Lyon v. Waldo, 36 Mich. 345; Boyd v. Hawkins, 2 Dev. (N. Car.) 195; Cherry v. Newson, 3 Yerg. (Tenn.) 369; Williams v. Reed, 3 Mason C. C. 405; Edwards v. Roberts, 7 Sm. & M. (Miss.) 544; Parson v. Hughes, 9 Paige (N. Y.), 591.

Any act by which he treats the contract as subsisting, knowing at the same time of the deception, will be an affirmance precluding a rescission. Jackson v. Jackson, 47 Ga. 99; Cobb v. Hatfield, 46 N. Y. 533; Evans v. Foreman, 60 Mo. 449; Moffatt v. Winslow, 7 Paige (N. Y.), 124

Some decisions hold that a party must give notice of his rescission to the other party. Parmlee v. Adolph, 28 Ohio St. 10; Beetem v. Burkholder, 19 Smith (Pa.), 249. But the rule seems to be that if anything is to be returned, it should be explained; but outside of this judicial proceedings are a sufficient notice. Schofield v. Holland, 37 Ind. 220; Thurston v. Blanchard, 22 Pick. (Mass.) 18; Laudaur v. Cochran, 54 Ga. 533.

One who has rescinded a contract for deception may recover back whatever he has delivered, either money or goods. Dorst v. Thomas, 87 Ill. 222; Stevens v. Austin, I Met. (Mass.) 557; Mann v. Stowell, 3 Chand. (Wis.) 243; Woodworth v. Kissam, 15 Johns. (N. Y.) 186.

The court of equity will in certain cases reform the contract and let it stand. Hitchins v. Pettingill, 58 N. H. 386; Scott v. Duncan, I Dev. (N. Car.) 407.

A party who has been induced to buy stock by false representations may, upon discovery of the deceit, rescind the contract and recover back the purchase-

12. Burden of Proof.—Fraud is never presumed. The party alleging and relving upon it must prove it. A contract honest and lawful on its face must be treated as such until it is shown to be otherwise by suitable evidence.² In order that an injured party may have an action for deception, the following facts must appear: I. That the false representations were made as alleged. 2. That they were made to influence the plaintiff's conduct. 3. That, relying upon them, the plaintiff closed the negotiations. 4. That the statements were false. 5. That the plaintiff has thereby suffered damage. 6. That this injury followed proximately the deception.3

money. Bridge v. Penniman (N. Y.), 12

N. E. Rep. 19.

A party, in order to gain relief in equity for deception, must go in with clean hands, with no deceit on his part in the transaction. Kelley v. Kendall, 118 Ill. 650. A manipulator of a great lard "corner," by false representations, induced a party to make large investments in speculative transactions. Held, the injured party could recover for the deception. Wells v. McGeoch, Wis. Sup.

Ct., Jan. 10, 1888.

A party purchased shares of stock on the fraudulent representations of the president of the company. In order to recover from the corporation for such deception, the alleged misrepresentations must be proved, and the party making them must have been the duly authorized agent of the defendant company, and he must have known the representations to have been false when made, and they must be such that a man of ordinary prudence would rely upon them, and the plaintiff must rely upon them, and thereby be induced to make the purchase. Smoke Consuming Co. v. Lyford (Ill.), Chi. L. News, 150, Jan. 7, 1888.

1. Thompkins v. Nichols, 53 Ala. 197;

Hill v. Reifsnider, 46 Md. 555.

2. Kaine v. Weigley, 22 Pa. St. 179; Wood v. Clark, 21 Ill. App. 464. 3. Seller v. Clelland, 2 Colo. 532; Byard v. Holmes, 34 N. J. 296; Tryon v. Whitmarsh, 1 Met. (Mass.) 1.

Deception is generally made out by marshalling the circumstances surrounding the whole transaction, and this circumstantial evidence is as convincing oftentimes as positive and direct testimony of the intent to deceive. McDaniel v. Baca, 2 Cal. 326; Waddingham v. Laker, 44 Mo. 132; Kaine v. Weigley, 22 Pa. St. 179; Watkins v. Wallace, 19 Mich. 57; Bank v. Fink, 7 Paige (N. Y.), 87; Hopkins v. Sieunt, 58 Mo. 201; Hennequin v. Naylor, 24 N. Y. 139.

The circumstantial evidence must be

such that it cannot be explained on any

other hypothesis than that an intent to deceive was manifest. Alabama Co. v Pettway, 24 Ala. 544; Buck v. Sherman, 2 Doug. (Mich.) 176. Whatever satisfies the mind or conscience of the judge or iury that deception has been practised upon the plaintiff is sufficient. Devoe v. Brandt, 53 N. Y. 462; Kaine v. Weigley, 22 Pa. St. 179; Hildreth v. Sands, 14 Johns. (N. Y.) 493. The complaining party must show that the defendant made false and fraudulent assertions in regard to some fact or facts material to the transaction by means of which he had been Long v. Woodman, 58 Me. 40. injured. The injured party must show due care and diligence in acting upon the representations, and this question is generally for the jury. Roberts v. Plaisted, 63 Me. 335; Savage v. Stevens, 126 Mass. 207; Greene v. Hallenback, 24 Hun (N. Y.), 116. If the defendant makes representations which are material, and which he intends to influence the plaintiff, and knows them to be false, the case is clear. Page v. Bent, 2 Met. (Mass.) 374. The weight of authority seems to be that if a person positively states as of his own knowledge material facts, which are susceptible of knowledge to one who relies and acts upon them, as true, it is no defence, if the representations are untrue, to an action for deceit, that the defendant believed them to be true. Litchfield v. Hutchinson, 117 Mass. 195; Savage v. Stevens, 126 Mass. 207; Bird v. Kleiner, AI Wis. 134; Catzhausen v. Simon, 47 Wis. 103; Bower v. Fenn, 90 Pa. St. 359; Snyder v. Findley, 1 N. J. 48; Cabot v. Christie, 42 Vt. 121; Baughman v. Gould, 45 Mich. 481; Wheelden v. Lowell, 50 Me. 499; Thomas v. McCann, 4 B. Mon. (Ky.) 601; Lockridge v. Foster, 5 Ill. 56; Monroe v. Pritchett, 16 Ala. 785; Parham v. Randolph, 4 How. (Miss.) 435; Wharf v. Roberts, 88 Ill. 426; Phillips v. Jones, 12 Nebr. 213; Bank v. Hiatt, 58 Cal. 234; Taylor v. Leith, 26 Ohio St. 428; McKoun v. Furgason, 47 Iowa, 636; Dunn v. White, 63 Mo. 181; Duff v.

13. Measure of Damages.—In estimating the measure of damages the recovery should be commensurate with the injury. The payment of money and other necessary expenditures should be considered.¹ Damages which have naturally and proximately resulted from the injury are to be charged against the defendant.² The representations must be made good as if a warranty had been given, and the difference between the real state of the case and what it was represented must be adjusted. When there is a false representation of quantity, quality, or title, the measure of damages is the difference in value between that which is actual and that which was represented to exist;³ and interest, at least, in the discretion of the jury, on this difference, may be added.⁴

Williams, 85 Pa. St. 490. In an action for false representations concerning a patented article, which is sold to prevent pain in dentistry operations, the plaintiff offers proof that it is worthless; then the defendant is allowed to show by a witness that he suffered little pain when he used it, and great pain when it was not used. Reeve v. Bennett (Mass.), II N. E. Rep. 938. When a bill in an action to rescind a contract in the exchange of lands charges fraud, and fully sets out the false representations made by defendant as to description, quality, and value of land, together with the scienter and intent to deceive, it is sufficient to maintain the action. Witherwax v. Riddle (Ill.), 13 N. E. Rep. 545. In an action for slander of goods it was alleged that the defendant by false representations had compelled the plaintiff to go out of business; but the plaintiff failed to allege that he had thereby been damnified. Held, no legal cause of action. Dudley v. Briggs, 141 Mass. 582.

1. Crater v. Binninger, 33 N. J. 124; Suydam v. Watts, 4 McLean C.C. 162.

2. Benton v. Watts, 4 McLean C.C. 102.
2. Benton v. Pratt, 2 Wend. (N.Y.) 385.
3. White v. Smith, 54 Iowa. 233;
Mason v. Raplee, 65 Barb. (N. Y.) 180;
Ives v. Carter, 24 Conn. 302; Crosland
v. Hall, 33 N. J. 111; Markel v. Mondy,
11 Nebr. 213; Morse v. Hutchins, 102
Mass. 439; Rheem v. Naugatuck Co., 33
Pa. St. 356; Sollund v. Johnson, 27
Minn. 455; Wright v. Roach, 57 Me.
600; Hiner v. Richter, 51 Ill. 299; Briggs
v. Brushaber, 43 Mich. 330; Gaulden v.
Sbebee, 24 Ga. 438; Foster v. Kennedy,
38 Ala. 359; Parker v. Walker, 12 Rich.
(S. C.) 138; Brown v. Woods, 3 Cold.
(Tenn.) 183; Miller v. Barber, 66 N. Y.
558; Russell v. Clark, 7 Cranch (U. S.),
69; Page v. Parker, 43 N. H. 363;
Ahrends v. Adler, 33 Cal. 608.

4 Morse v. Hutchins, 102 Mass. 430;

4. Morse v. Hutchins, 702 Mass. 439; Wright v. Roach, 57 Me. 600.

Sometimes the rule is stated that the measure of damages is the difference between the real value and the amount which the injured party was induced to pay. Hallam v. Todhunter, 24 Iowa, 166; Clayton v. O'Connor, 35 Ga. 193; Hiner v. Richter, 51 Ill. 299. This rule is based on the assumption that the amount paid is the value fixed by the parties. But to compel the injured party to accept compensation according to this last rule, is to deprive him of such benefit of his purchase as the state of the market would enable him to realize if there had been no deception. Reggio v. Braggiotte, 7 Cush. (Mass.) 166. Where one by fraudulent representations induced one to buy worthless shares of stock, the damages is the difference between the value of the stock, in reference to the condition of the company issuing it, and what it would be if the company had been as represented. Hubbard v. Briggs, 31 N. Y. 581. The amount paid is evidence of the value, but according to the weight of authority, it is not conclusive of the value as it was represented to be. Woodward v. Thatcher, 21 Vt. 580; Stiles v. White, 11 Met. (Mass.) 356; Carr v. Moore, 41 N. H. 131; Tuttle v. Brown, 4 Gray (Mass.), 457; Sherwood v. Sutton, 5 Mason C. C. 1; Drew v. Beall, 62 Ill. 164; Muller v. Eno, 14 N. Y. 597. The defendant fraudulently induced a party to buy a note against an insolvent person. He sued for recovery of the note and obtained judgment, but could not collect it. Held, he could not include the costs thus incurred as damages against the vendor of the note. Slingerland v. Bennett, 66 N. Y. 611. This does not seem to be the weight of authority. Generally, where the prosecution or defence of a suit is rendered necessary by some wrongful act, the cost of litigation, reasonably and judiciously incurred, are recoverable as damages.

(I.) EXEMPLARY DAMAGES.—Whether exemplary damages may be allowed in actions of deceptions is not entirely settled. Authorities differ; but it is supposed that in that class of cases where the doctrine of punitory damages prevails that exemplary damages would be allowed on the same principle in cases of deceit.

14. Deceit, Writ of .- Formerly there was a writ of deceit, which was an action brought in the common pleas to recover judgment obtained in any real action, by fraud or collusion between the

Zeigler v. Powell, 54 Ind. 173; Kragg v. Ward, 67 Ill. 603; Westfield v. Mayo, 122 Mass. 100; Noble v. Arnold, 23 Ohio St. 264; Alexander v. Jacoby, 23 Ohio St. 358; Ryerson v. Chapman, 66 Me. 557; Call v. Hagor, 69 Me. 521; Bonesteel v. Bonesteel, 30 Wis. 511; Ah Thaie v. Quan Wan, 3 Cal.

One who has been induced to buy diseased animals by false representations and warranty can recover as damages the loss or depreciation of the animals by reason of the disease and the trouble and expense in caring for them; and if such diseased animals have communicated the disease to other animals, the loss or depreciation of them and the trouble and care of them is an element of damages. Marsh v. Webber, 16 Minn. 418; Sherrod v. Langdon, 21 Iowa, Fig. Wintz v. Morrison, 17 Tex. 372; Pinney v. Andrus, 41 Vt. 631; Rose v. Wallace, 11 Ind. 112; Johnson v. Wallomer, 18 Minn. 288; Brown v. Wood, 3 Cold. (Tenn.) 182. So also, if the warranty proves false, the damages may include compensation for personal injuries and incidental expenses, in the ordinary use of the warranteed property. Mosher, 17 Barb. (N. Y.) 518. Sharon v.

Plaintiffs jointly interested in a damage suit may join in the action. purchased land and partitioned it. It was discovered that the vendor had misrepresented the facts as to the location and size of the land. Held, both might join in the action for damages. Porter v. Fletcher, 25 Minn. 493. Evidence is admissible in an action of deceit only of the false statements as averred in the declaration or complaint. Jackson v. Collins, 39 Mich. 557. When land is purchased on false representations, which affect its value, the measure of damages is the difference between the value of the land as it was represented and its real value. Woolmun v. Wirtsbaugh (Nebr.), 35 N. W. Rep. 216. A party falsely represented a third person to be worthy of credit, whereby the party deceived by such representations was in-

duced to sell this third party goods. Held, the measure of damages was the Naugatuck, 33 Pa. St. 356; Viele v. Goss, 49 Barb. (N. Y.) 96. Generally, remote, contingent, and conjectural damages cannot be taken into consideration. Freeman v. Venner, 120 Mass. 424. A surety was drawn into the execution of a contract by false representations or suppression of the truth. Held, the testimony of the surety was admissible that he would not have become a surety if he had known the facts concealed. Sewing Mac. Co. v. Kezertee, 49 Wis. 409. A contract was broken off by the interference of a third person, by his false representations. Held, an action would lie against such third person for the deception. Benton v. Pratt, 2 Wend. (N. Y.) 385. A holder of a deed tainted with usury made false representations at a sheriff's sale of the land as to the amount of his lien, and thereby became purchaser of the land. It was proved that another would have given \$500 more if the truth had been told. Held, the mortgagor was entitled to recover \$500 from the purchaser. Denham v. Kirkpatrick, 64 Ga.

1. Nye v. Merriam, 35 Vt. 438; Oliver v. Chapman, 15 Tex. 400; Platt v. Brown, 30 Conn. 336; Byram v. McGuire, 3. Head (Tenn.), 530; I Sutherland on Dam. 724. Compare Lane v. Wilcox, 55 Barb. (N. Y.) 615. Defendant had sold a lot to plaintiff for a site to build on, and had falsely misrepresented as to the locality of the streets. The plaintiff, relying upon such representation pur-chased the lot and erected a valuable residence. In an action for damages it was held that the plaintiff could recover special damages in addition to the difference in the value of the lot according to the general rule. White v. Smith, 54 Iowa, 233. Where the buyer of mort-gaged property conceals the same from the mortgagee, the latter is entitled to the value of the property and damages for its detention. McDonald v. Norton (Iowa), 34 N. W. Rep. 458.

parties to the prejudice of the right of a third person. It is abolished by 3 and 4 William IV. c. 27, s. 36.1

DECEIT.—Deceit is a fraudulent misrepresentation by which one man deceives another to the injury of the latter.2 (See DECEIT. ACTION OF, ante, p. 318.)

DECIDE.—To "decide" includes the power and right to deliberate, to weigh the reasons for and against, to see which preponderate, and to be governed by that preponderance.3

1. Wharton's L. Dictionary,

The action of deceit is abolished, an action on the case being now the substitute. 3 Cooley's Blackstone (1884), 165. note.

2. Farwell v. Metcalf, 61 Ill. 374. "Deceit excludes the idea of mistake, and fraud has been termed a grosser species of deceit." The word "deceit" in an act limiting the time of prosecution "in all trespasses and other misdemeanors, except the offences of perjury, forgery, malicious mischief and deceit," is used as being "the same as cheating by false tokens."
State v. Christianbury, Busb. (N. Car.)

Deceit and Fraud .- "The ground of the action is fraud and not deceit. There is a distinction. A false assertion, whether the falsehood was known or unknown to the asserter, made in some dealings and calculated to occasion, and occasioning injury to another, is a deceit in law. When the falsehood of the assertion is known to the asserter it is a fraud." Gibbs v. Odell, 2 Coldw. (Tenn.) 133.

3. Com. v. Anthes, 5 Gray (Mass.), 253 (diss. op.). "It is their [the jury's] duty 'to decide, by a general verdict, both the fact and the law involved in the issue.' Of the meaning of these words I can have no doubt. . . . But that nothing may be left to implication, however clear, or inference, however sound, it is in express terms made the duty of the jury to decide both the fact and the law. Nor can it escape observation that the same word 'decide' is used as to the determination of the law by the jury and by the court. The duty of the jury is 'to decide by a general verdict both the fact and the law involved in the issue; duty of the court 'to decide upon the admission and rejection of evidence.' can see no good reason for saying that, in the same clause of the statute and upon the same subject-matter, the legislature have used the word to express wholly different ideas; that, when used as to the court, it means to deliberate, to weigh the reasons for and against, and to determine; and, when used as to the

jury, it means to follow implicitly the judgment and discretion of another. man,' says Chief Justice Vaughan. in Bushnell's Case, 'cannot see by another's eve, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning. Vaughan, 148." In the opinion of the court (the above being a dissenting opinion) it is said: "If, therefore, the statute of 1855, c. 152, in providing that it shall be the duty of the jury to decide, at their discretion, by a gen-eral verdict, both the law and the fact involved in the issue, can be so interpreted as to prescribe that the jury, consistently with their duty, may decide the law, upon their judgment, contrary to the decision and instruction of the court before whom the trial is had, as received and understood by them, such enactment is, in my opinion, beyond the scope of legitimate legislative power, repugnant to the constitution, and, of course, inoperative and void. In all those cases, therefore, in which a different direction has been given by any judge to a jury as the true interpretation of the statute, or affirming its constitutionality, exceptions to such rulings must, in my opinion, be sustained. If the statute will not bear that construction, but was declaratory only, it did not change the pre-existing law, then for that reason such instructions as above stated were given without warrant of law, and exceptions to them must in like manner be sustained."

A recital in a bill of exceptions, that "the court decided" certain legal propositions, is not sufficient to show that such decisions were given as instructions to the jury. "Those decisions may have been announced incidentally during the trial, and not given as authoritative statements of the law to the jury." ten v. Bradley, 38 Ala. 506.

Where a testator gave property to trustees under his will on trust to sell, after the decease of his wife, at their sole discretion, and declared that "in case under the above clause, it shall be agreed, or my trustees shall decide to sell" the

DECISION .- See note 1.

property, one of his sons might purchase the same at less than the market-price, it was held that the will created not a mere power but a trust to sell, with a discretion in the trustees as to the manner and particular time of selling, which after the wife's death became absolute. "The word 'decide' occurring later in the will, I think, means nothing more that having said, if a sale takes place during my wife's life there must be a form gone through, and more than a form, a resolution come to by the majorrity of my children and the trustees in this matter, to all of whom I give a voice: he then says, if it takes place after her death, it is to be at the discretion of the trustees, whether it be in the wife's life-time or whether it be after her death, they must decide what is the right moment, in their reasonable discretion, for the sale, which they must effect in a reasonable time." Another judge remarks: "I think that the word 'decide' in a subsequent part of the will may fairly be taken to point, not to a capricious or unlimited capacity of action or postponement, but to the exercise of that 'discretion' in fixing judiciously the period for the fulfilment of the trust to sell." another says: "The word 'decide' was perhaps inadvertently used. But the moment it is ascertained that an absolute trust for sale is created, all nice criticisms as to the meaning of the words 'received' and 'decide' fall to the ground." Minors

v. Battison, I App. Cas. 428.

Decide upon the Election.—Where, under a provision of the constitution, 'The governor shall decide upon the election and qualification of the person returned," this language "confers the jurisdiction upon the governor to decide both as to the election and qualification of the person returned as elected, as well in case of a contest as where there is no contest. . . . Although the governor is vested by the constitution with jurisdiction of a contested election for attorneygeneral, the power thus conferred is not self-executing; that is to say, it cannot be executed by the governor until he is clothed by law with the authority, means, and instrumentalities which will enable him to execute the power. . . . For this purpose the action of the legislative department must be called into exercise, for the legislature alone has the power of passing laws." Groome v. Gwinn, 43 Md. 626, 627

Decide, or Take Part in the Decision.— The prohibition against a judge "deciding or taking part in the decision" of a case argued when he was not present in court and sitting as judge, was held not to apply to the case of a judge who, without having heard the argument, sits as one of the three necessary to constitute the court, when the other two members who did hear the argument make the decision, their associate taking no part therein. Corning v. Slosson, 16 N. Y. 204.

Decided Against.—Where a rule has been granted to enter a verdict for the defendant on a point reserved at the trial, or for a new trial on the ground of misdirection and that the verdict was against evidence, which rule was afterwards rnade absolute to the extent of granting a new trial, the defendant was held not to be "decided against" on the points reserved at the trial so as to be entitled to appeal from this decision. Abbott v. Leary, 6 H. & N. 113.

Where an appeal is dismissed for want of jurisdiction, and not decided on the merits, the appellant is a party 'decided against." Reg. v. Padwick, 8 El. & Bl. 704.

Decision-Opinion .- "The 'opinions' and 'decisions' are often confounded, yet there is a wide difference between them, and in ignorance of this, or by overlooking it, what has been a mere revision of an opinion has been sometimes regarded as a mutilation of a record. A decision of the court is its judgment; the opinion is the reasons given for that judgment." Houston v. Williams, 13 judgment." But the words are sometimes Cal. 27. used interchangeably. See Pierce v. State, 7 West. Rep. 909 (Ind.); s. c., 10 N. E. Rep. 302; where it was held that an exception to the "opinion" of the court overruling a motion for a new trial is sufficient as an exception to the "decision" as required by statute. In a statute providing that "the application for a new trial must be made at the term the verdict or decision is rendered," the term "decision" "is clearly used in the sense of finding upon the facts where the cause is tried by the court." Wilson v. Vance, 55 Ind. 396; Rodefer v. Fletcher, 89 Ind. 563.

Where an appeal is allowed "from all decisions" of a board of commissioners, in construing the word "decisions" the court says: "Powers are conferred upon them [the board], legislative in their nature, and the exercise of these powers involves a law-making discretion. From the exercise of these powers no appeal

DECKS.—See note 1.

DECLARATION (in Pleading).

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(I.) Joinder of Counts, 359. (II.) Non-joinder, 360.

1. Definition.—The declaration is a statement in legal form of the plaintiff's cause of action.2 It was formerly called a count in real actions.3 It answers to a bill in chancery. And in the various State codes of procedure in this country it is known as a complaint, petition, or statement.

would lie, for no court or jury is authorized to exercise legislative functions. The exercise of such powers is not included in the word 'decisions.' The language authorizing an appeal is comprehensive, and was undoubtedly intended to include all action of the commissioners not strictly within the limit of the local legislative power conferred by statute. For the purpose of authorizing an appeal the word 'decisions' will be applied to every ruling, final in its nature, upon any subject upon which the board of county commissioners are not authorized to take legislative action. Where they are thus authorized an appeal will not lie." Hanna v. Bd of Commrs., 29 Ind. 173. An order of sale of railroad stocks is not such a "decision." O'Boyle v. Shannon, 80 Ind. 159. In an act declaring the "decision of the collector" to be final as to the amount of duty to be paid, except in certain cases, the words "decision of the collector" mean the ascertainment and liquidation of the duties in the usual manner by the proper officers. U. S. v. Consinery, 7 Ben. (U. S.) 251, 257.

Decision -Order .- In an act allowing an appeal to be brought within 21 days from the date of any "decision or order, those words are equivalent. Ex parte Whitton, 13 Ch. Div. 881.

Where, on appeal, it is made the duty of the clerk of the court of appeal to remit the record to the court below with the decision or final judgment, the order of dismissal of the appeal "must be deemed the decision on the appeal. The counsel, however, contends that this provision was not intended to apply to this class of decisions or judgments, but only to those judgments rendered upon actual consideration and determination of the judicial mind. But the statute makes no such distinction, and we cannot." Estey v.

Sheckler, 36 Wis. 437.

Rules of Decision.—The rules of evidence prescribed by the laws of a State are "rules of decision" for the U. S. courts within the meaning of the 34th sec. of the Judiciary Act. Haussknecht sec. of the Judiciary Act. Haussknecht. v. Claypool, I Black. (U.S.) 431. As the law of a State allowing a party to a suit to be examined as a witness in his own behalf "must be considered to be a rule of decision to guide the judgment, and not a rule of practice." Dibblee v. Furniss, 4 Blatch. (U. S.) 262. So, also, the statutes of limitation of the several States. Leffingwell v. Warren, 2 Black. (U. S.) 599. But "the provisions of that section do not apply, nor was it intended they should apply, to questions of a general nature not based on a local statute or usage, nor on any rule of law affecting titles to land, nor on any principle which had become a settled rule of property." Boyce v. Tabb, 18 Wall. (U. S.) 548.

1. Hay in bales placed in the engineor deck-room, though the room be enclosed by bulkheads, is upon the "decks or guards" of a steamer, within the meaning of the Act of July 25, 1866, prohibiting ignitible commodities being so placed unless protected in a certain manner. Un. Ins. Co. v. Shaw, 2 Dill. (U. S.)

2. Bl. Com. b. iii. p. 293; Chitty on Pl. 264*; Smith v. Fowle, 12 Wend. (N. Y.) 10; Stephens on Pl. § 29; Cheetham v. Tillotson, 5 Johns. (N. Y.) 435.

3. Stephens, § 29.

2. Generally.—The declaration in order to entitle the plaintiff to recover must set out a good and sufficient cause of action, and if it fails to do so it is not cured by the verdict. But if no objection is made to the declaration for the bad statement of a good cause of action, the judgment will not be arrested after verdict;³ that is, defects in form are cured.⁴ It follows, therefore, that if defendant replies or answers to plaintiff's declaration or complaint he waives any objection to its irregularity.5

(I.) REQUIREMENTS.—There are certain general rules which must be attended to in the drawing of a declaration, and which

are usually given in the text-books as follows:

First. The declaration should correspond with the process, and

1. Cox v. Jones, 5 Gill & J. (Md.) 65; Frary v. Dakin, 7 Johns. (N. Y.) 75; United States Bank v. Smith, 11 Wheat. (U. S.) 172.

If it contains all that is necessary for the plaintiff to entitle him to recover under the general issue, it is good. Beardslev v. Southmayd & Dwight, 14 N. I. L.

The same requisites are necessary in a complaint. Walker v. Fleming, 14 Pac. Rep. 470. In a suit for breach of contract the petition should state clearly what was to be done, agreed, what has been done, and what omitted. Woodward v. Gould, 27 Fed. Rep. 182. And if it does not so appear the complaint will be bad on demurrer. Brandenberg

v. Miles, 7 Col. 537.

The substance of the contract should be stated, or such a clear statement of the facts made, that a contract can be predicated. Martin v. Atkinson; 64 Wis.

But not any more; and therefore, 493. But not any more; and therefore, if a pleader states material and relevant facts which constitute a defence, the comof the constitute a defence, the complaint will be bad. Knopf et al. v. Morel (Ind.), 13 N. E. Rep. 51. That is, the proof should not be stated. Van Hooyer

v. Van Hooyer, 18 Mo. App. 19.

The law on this point was well summed up by the opinion of the court in Flenniken v. Buchanan, 21 S. Car. 434. rule was there laid down in the language of Pomeroy, as follows: "The true doctrine to be gathered from all the cases is that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete, and defective, such insufficiency pertaining, however, to the form rather than to the substance, the proper mode of correction is not by demurrer nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and certain by amendment."

2. Stilson v. Tobey, 2 Mass. 521.

3. Keller v. Henry, 24 Ark. 575; Schlosser v. Brown, 17 S. & R. (Pa.)

And the same rule applies to a com-plaint. "The assignment of its insufficiency after judgment can only be sustained on the grounds that the facts contained therein, even if well stated, constitute no cause of action." Rhodes et al. v. Hutchins (Colo.), 15 Pac. Rep. 329; Powers v. Powers (Neb.), 31 N. W. Rep. 1; State v. Williams et al., 77 Mo.

463.

There is no propriety in requiring techniques when they nical and formal proceedings when they tend to delay and embarrass the admin-

istration of justice. Kelsey & McIntyre v. Hobby & Bond, 16 Pet. (U. S.) 269.

"It is claimed if a petition be not attacked by motion or demurrer all objection thereto must be deemed to have been waived. This may be true as a question of pleading, but a failure to make such objection is no waiver of the proofs necessary to establish the cause of action." Babcock et al. v. Hamilton et al., 64 Iowa, 558.
4. Chitty on Pl. 703* et seq.; Lebanon

4. Chitty on Pl. 703* et seq.; Lebanon Bank v. Karmany, 98 Pa. St. 65.

5. Chitty on Pl. 703* et seq.; Orvis v. Cole, 14 Ill. App. 283; Ullman et al. v. Verne (Texas), 4 S. W. Rep. 548; Powers v. Powers (Neb.), 31 N. W. Rep. 1; Jones et al. v. Poster et al. (Wis.), 30 N. W. Rep. 697; Cooper et al. v. Davis Sewing Mac. Co., 15 Pac. Rep. 235. Such as certainty or vargueness. as certainty or vagueness. Morgan v. First National Bank, 93 N. Car. 352. It is too late to object after trial that

the complaint and bill of particulars did not sufficiently apprise defendant of the plaintiff's cause of action. Nothe v. Nomer (Conn.), 8 Atl. Rep. 134. it is an indispensable requisite of every declaration that it substantially adhere to the form of the action therein stated.1

Where they do not correspond, advantage of the variance must be taken by a plea in abatement or by filing a special demurrer.

It cannot be done by motion.2

Second. It must be certain, precise, and clear, 3—that is, certain to a common intent;4 but if the facts are more within the knowledge of the opposite side, notice is required;5 otherwise it is demurrable.6 It is a settled rule of practice also, that if uncertainty does occur in any of the pleadings of a party they will be most strictly construed against him whose pleadings they are."

1. Chitty on Pleading, § 269; Bank v. Greenfield, 7 T. B. Mon. (Ky.) 290; Schenck v. Exrs. of Schenck, 10 N. J. L. 274. But if the variance is immaterial the judgment will not be arrested after verdict. Bradley v. Jenkins, 3 Brev. (S. Car.) 42; Prince v. Lamb, I Breese (Iil.), 298. Contra: Stump v. Graves, 4 Hawks (N. Car.), 102.

And where a plea in abatement alleged a variance between the summons and declaration, because in the one the defendant was named Saffle and in the other Saffell, the plea was held fatally defective, as both names were idem sonans. Hoffman v. Bircher, 22 W. Va. 537. 2. How et al. v. McKinney et al., I

McLean, 319. Contra: Gilleland v. Wil-

kins, 2 Miss. 574.

8. Co. Lit. 303 a.

4. Addison v. Lake Shore, etc., R.

Co., 12 N. W. Rep. 42; S. & N. Alabama R. Co. v. Schafner, 78 Ala. 567.

The same degree of certainty is not required in a complaint as is necessary in a declaration. Hence, if the price of the goods for the value of which suit is brought can be ascertained from the exhibits to the complaint, it is sufficient. U. S. 676; Muser v. Robertson, 21
Blatch. 368. Contra: Brooks v. Paddock,
6 Colo. 36. Where the complaint al-6 Colo. 36. Where the complaint alleged "a delay of about four days," that was sufficient. Richardson v. Chicago & N. W. R. Co., 58 Wis. 543. But the petition may be subject to a motion to make definite and certain. Tessier v. Reed, Jones & Co., 17 Neb. 105.

It is not error to deny such a motion if the allegations are unnecessary. Spensley v. Janesville, 62 Wis. 549.

It must be sufficient to advise the dedendant of the nature of the claim. Butts' Admr. v. Phelps (Mo.), S. W. Rep. 219. But if it does not apprise the defendant of the claim it will be bad on demurrer. Burnham v. Peck (Me.), 8 Atl. Rep. 15. And in general, the complaint must allege the time when and the place where.

And an allegation that defendant is indebted to plaintiff in the sum of \$1.50 for services to defendant in looking up title to property in the fall of 1883 is good before a justice. Guthrie v. Olson, 32 Minn. 465.

Consequently, in a declaration for in-juries received it is not necessary to state with particularity the acts of omission or commission which constitute the negligence complained of. Berns v. Gaston Coal Co., 27 W. Va. 285; Pittsburgh, C. & St. L. R. Co. v. Hixon, 11 N. E. Rep. (Ind.) 285.

Under the Missouri statute no further petition shall be filed in the same cause of action after three have been judged insufficient; and the same law is enforced in the Federal courts in the District of Missouri. Woodward v. Gould, 28 Fed.

Missouri. Woodward v. Gould, 22 red. Rep. 736; Chitty on Pl. 272*, n.

5. Carlisle v. Cahawba & Marion R.
Co. 4 Ala. 70. But see Wright v. Smith, 19 Vt. 110; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643.

6. Cases cited supra, note 2.
7. Hooker v. Johnson, 10 Fla. 198. Elliot, C. J., in State v. Castrel (Ind.), II N. E. Rep. 219: "Pleadings are to be liberally construed so far as concerns matters of form, but this rule does not dispense with the necessity of pleading and properly pleading the facts which constitute the cause of action. Where the pleading in its statement of facts is ambiguous or defective it will be construed most strongly against the pleader. Pond v. Sweetger, 85 Ind. 1.44. In Clark v. Dillon, 97 N. Y. 378, it was said: "It was formerly the settled rule to construe doubtful pleadings most strongly against the pleader, but this rule has been so far modified by our Code as now to require them to be liberally construed, with a view to substantial justice between the parties. This modification has, however, been held to apply to matters of forms, and not to the fundamental requisites of a cause of action. Spear v. Downing, 34 Barb. 522; Cruger v. HudAnd where a conclusion of a law is not sufficiently certain, the facts upon which that conclusion is based should be stated.1

The cause of action must have been complete before the com-

mencement of the suit.2 and it must be so stated.3

(II.) SURPLUSAGE.—Where the allegations in a declaration are superfluous, they may be rejected, and treated as if they had not been there: 4 and such redundance, whether it be good or bad, will not vitiate.5

And, generally, an adherence to the same rules' is as necessary in

drawing a good declaration in tort as in contract.6

(III.) AMENDMENTS.—In general, the declaration may be amended as to its form, but it must be without prejudice to proceedings already had; nor can the cause of action be changed.9

son R. R. Co., 12 N. Y. 190; Bunge v. Koop, 48 N. Y. 225. A construction of doubtful or uncertain allegations in a pleading which enables a party to throw upon his adversary the hazard of correctly interpreting their meaning is no more allowable now than formerly; and when a pleading is susceptible of two meanings, that shall be taken which is most unfavorable to the pleader. v. Rosekrans, 23 How. Pr. 98."

Hence the fact that it cannot be ascertained from the complaint whether the action is in the nature of an action of replevin or of trover or of trespass is not enough to sustain a demurrer. U. S. v.

Williams (Montana), 12 Pac. Rep. 852. A party cannot be allowed to take advantage of contradictory and inconsistent allegations. Losch v. Pickett, 12

Pac. Rep. 822.

1. County of Sac v. Hobbs et al., 33 N. W. Rep. 368; Miner v. White and other, 14 Pac. Rep. 794; Laffrey et al. v. Chapman, 12 Pac. Rep. 152. But if there are accompanying allegations which amount to the averment of an issuable fact, it is sufficient. State v. Rush, 77 Mo. 586.

2. Chitty on Pl. § 272. In actions in tort, however, a declaration need not contain averment of time.

Knapp v. Ilscomb, 9 Gray (Mass.), 73.
Where a declaration in libel was to the November term, and the memorandum was to the effect that the 14th day of November was the first day of the term, and the libel was alleged to have been published on the 18th of the same November, it was a mistake which could not be cured by the verdict. Cheetham v. Lewis, 3 Johns. (N. Y.) 42. And in a Pennsylvania case, where a jury gave damages for a period after the commencement of the suit, it was held that though on demurrer it would have been a fatal

defect, yet it was cured by the verdict. Crouse v. Miller, 10 S. & R. (Pa.) 155.

4. Hoyt v. Seeley, 18 Conn. 353; Hall v. Spaulding, 42 N. H. 259; Ashe v. Gray, 90 N. Car. 137.

Statements in a complaint which are in themselves material and relevant to the cause of action, are not to be regarded as surplusage. Knoff et al. v. Morrell, 13 N. E. Rep. (Ind.) 51.

5. Collison v. Lemons, 2 Porter (Ala.).

6. Chitty on Pl. §§ 389, 398.
7. Chitty on Pl. § 715 et seq.; Rice v. Candle, 71 Ga. 605; Brisbris v. Lewis, 13 Pac. Rep. 179.

Where a refusal to allow amendment may be an abuse of discretion in the court below. L. K. R. W. D. Co. v. K. R.

& F. C. Co., 67 Cal. 577.

Even though it changes the form of action from one ex contractu to one exdelicto as such, amendment does not "substantially change the claim or defence." Robertson v. Springfield R. Co., 21 Mo. App. 633. But a change in an allegation from a right of way ingross to a right of way appurtenant would be substantial. Whaley v. Stevens, 21 S. Car. 221. As would a change from a claim in an action of trespass for single. damages to one for treble damages under a statute. Holliday v. Jackson et al., 21.

Mo. App. 660.

8. Rector v. Ridgewood Ice Company, 38 Hun (N. Y.), 293; Hancock v. Hub-

bell, 12 Pac. Rep. (Cal.) 618.

Hence, where plaintiff neglected to move for an amendment to which he was entitled in the court below, the supreme court decided that the amendment could be made in that court on paying the costs in error, including the expense of the paper book. Waite v. Palmer, 78 Pa. St. 192.

9. Button v. Schuyler's Steam. Tow-

Parties

3. Parties.—The parties to a suit must be set out in the declaration with certainty and accuracy, and the capacity in which they sue should be stated. After once stating them, however, it is sufficient to designate them as plaintiff and defendant. And if there was a non-joinder of defendants in an action ex contractu or

boat Line, 40 Hun (N. Y.), 422; Bull v. Danforth, 63 N. H. 420; Gwins v. Wheeler, 6 Colo. 149; Silver v. Jordan, 139 Mass. 280; Brodek v. Hirschfield, 57 Vt. 12; Snyder v. Harper, 24 W. Va. 206; Roberts v. Germania Fire Ins. Co.. 71 Ga. 478; Hollehan v. Roughan, 62 Wis.

What is Not a Change in the Cause of Action. - Eighie v. Taylor, 39 Hun (N. Y.), 366. In this case an action was brought to recover for the breach of an oral warranty; judgment was recovered below, which was set aside by the court of appeals on the ground that such an action would not lie. The plaintiff then moved to amend his complaint by alleging that at the time of making the statements and representations set forth in the original complaint defendant knew them to be false, and made them with intent to induce the plaintiff to purchase certain property, and with intent to de-fraud the plaintiff thereby. It was held that the court had power to allow such an amendment, and that the fact that the Statute of Limitations had run against the plaintiff's claim at the time the mo-tion was made was no bar to its allowance, and that such an amendment was

And B, "late partners," brought an action against C on a judgment in a foreign State obtained against C, D, and E. C demurred on an amended complaint, A and B suing as individuals against all the judgment debtors, C alone being served. Held, no change of the cause of action. Stewart v. Spaulding, 3

Pac. Rep. 661.

Clerical Mistakes.—In the closing statement of an allegation, the word "plaintiff" was used for the word "defendant," and it was held immaterial, the court saying: "Merely clerical mistakes, such as the use of one word for another, where, as in this case, there is and can be no possible room for doubt as to which one of two words or names the pleader intended to use, will not and ought not to vitiate the pleading in any court, under the statutory rule that 'its allegations shall be liberally construed, with a view to substantial justice between the parties.'" Indiana, B. & W. R. Co. v. Dailey (Ind.), to N. E. Rep. 631. And this is true in

a criminal case. Hickman v. Swartz, 64 Wis. 48.

1. Com. Dig. Pleader, c. 18.

Therefore parties cannot sue in the name of the partnership. name of the partnership. Levis v. Lamme & Brothers, 3 Mo. II. 198; Norcross v. Clark, 15 Me. 80; or declare against A, B & Co. not being a corporation. 8 T. R. 508; Bentley et al. v. Smith et al., 3 Cai. (N. Y.) 170. And initial letters of the Christian name are not sufficient. Herf & Co. v. Shulze et al... 10 Ohio, 263; State v. Knowlton, 70 Me. 200. But if a person is known generally as A. W., etc., it is sufficient. City Council v. A. W. King, 4 McCord (S. Car.), 487; Blood v. Crandall, 28 Vt. 396. Plaintiffs died after the commencement of the suit, but before the filing of the narr. Held, it must be in the names of the original parties. Clow & Cay v. Brown et al., I Y. 324; Hausman v. Reiss, II Phila. 196. In Ramsey v. Cortland Cattle Co., 13 Pac. Rep. 247, defendant was sued under the wrong name, but he disclosed his true name in the answer. and the court thereupon granted leave to amend, which the supreme court of Montana affirmed. In Beggs and another v. Wellman, 2 So. Rep. 877, a complaint on pleas in abatement was by leave of court amended by inserting the Christian name in place of the initial letter. Held, that such amendment was properly allowed. But in a suit against the Fuller I. & C. Co. a recovery cannot be sustained against the Fuller I. Co. without

plaintiff proves the identity. McGregor v. Fuller Implement Co., 33 N. W. 464.

2. Watkins' Admr. v. McDonald et al., 3 Ark. 266; Engles v. Day et al., 3 Ark. 273; Cole v. Peniwell et al., 5 Black. (Ind.) 175. See Herf & Co. v. Shulze et al., 10

Ohio, 263.

If one sues as executor, and justice requires it, the word will be considered descriptio personæ,—Grew v. Burditt, 9 Pick. (Mass.) 269; Buffum v. Chadwick, 8 Mass. 103,—and mere surplusage. Talmage Adm. v. Chapel et al., 16 Mass. 71; Higgins v. Halligan, 29 Ill. 173; Commonwealth v. Haffey, 6 Pa. St. 348. That is, when a personal liability is proved. Geddis et al. v. Irvine, 5 Pa. St. 588

3. Chitty Pl. § 271.

of plaintiffs ex delicto, advantage of it could only be taken by a plea in abatement: but for non-joinder of plaintiffs ex contractu advantage might be taken at the trial for a variance.2

4. The Parts of a Declaration are—(1) Title; (2) Venue; (3) Commencement: (4) The body or statement of the cause of action:

(5) The conclusion.

(I.) TITLE.—Every declaration shall be intituled in the proper court, and also intituled of the day of the month and year when

actually filed or delivered.3

(II.) VENUE.—The venue is the place where the facts are alleged to have occurred and where the cause is to be tried.4 It immediately ately follows the title and term. A venue is necessary to every material traversable fact. In local actions the true venue must be laid and tried in the county in which the cause of action arose:7

Metcalf v. Williams, 104 U. S. 93.
 Farni v. Tesson, 1 Black (U. S.),
 Wilson v. Wallace, 8 S. R. 53.
 Where there is a defect of parties,

plaintiff or defendant, as where a member of a partnership is not joined as a plaintiff in action for a demand due the the firm, objection must be made by demurrer or answer. Otherwise it is said to be waived. Davis v. Chonkan, 32 Minn. 548; Merrit v. Walsh, 32 N. Y.

And in a late case, where objection to the misjoinder of the plaintiffs was taken by demurrer, and the defendants then answered and went to trial, it was held they had waived their rights to be heard on the demurrer on appeal. Fillmore et al. v. Wells et al. (Colo.), 15 Pac. Rep. 343. See Hoffman v. Bircher, 22 W. Va. 537. As to joinder of parties or of defendants ex delicto: Atkinson v. Clapp. 1 Wend. 71.

The name of a party improperly made a defendant in an action ex contractu will be stricken off on payment of costs.

Parsons v. Plaisted.

3. Chitty on Pl. § 279. To so state the title in the caption is sufficient. Yassett v. Palmer, 3 McLean (U. S.), 105.
4. Chitty on Pl. § 281; Titus v. Frank-

fort, 15 Me. 89; Gardner v. Thomas, 18

Johns. (N. Y.) 134.

5. Under the English rules the venue is laid in the margin only, but here, if there is a venue in the body of the declaration, that is sufficient. Dwight v. Wing & Miller, 2 McLean (U. S.), 580. And the want of it is only reachable by a special demurrer. Cocke v. Kendall, I Hempst. 236. The venue may be in either the margin or the body of the declaration. Rucker v. McNeely, 4 Blackf. (Ind.) 179. See also Rullen v. Chase, 4 Ark. 212.

And where a code provides that the petition must contain the name of the court and county in which the action is brought, it must properly appear, or the court is without jurisdic-Jordan v. Brown (Iowa), 32 N. W. 450.

The place where should be alleged in a complaint. S. & N. Alabama R. Co. v.

Schafner, 78 Ala. 567.

6. Cocke v. Kendall, I Hempst. (U.S.)

236.

7. Mixed and real actions are local. such as ejectment, -7 Co. 2 b; -waste or trespass for injuries affecting things real. as for nuisances to houses or lands, -2 Fast, 498,—or trespass quare clausum fregit. Loeb et al. v. Mathis, 37 Ind. 306; Rucker v. McNeely, 4 Blackf, 179. That is, when the cause of action could only have arisen in a particular county, I Saunders, 505.

A section of the Maine Code provided that an action of debt should be brought against persons engaging in the business of an apothecary without a certificate and registration by the commissioners of pharmacy. It was held that an action brought to enforce the penalty was a local action. Plaisted v. Walker, 77 Me.

In Genin v. Greir, 10 Ohio, 209, the court said: "We entertain the opinion that it is the person of the defendant which gives the court jurisdiction in a particular case so far as locality is concerned. And as a defendant cannot be compelled to answer in any other county except the one in which he is served with process, except in some few specified cases, he must be held to answer there, provided the action be personal, and sounds merely in debt or damages, and that such actions must in this State be considered as transitory."

but in actions of a transitory nature the place is immaterial, and it is a mere matter of form.3

(III.) COMMENCEMENT.—This part of the declaration contains the names of the parties to the suit and the capacity in which

they sue.4

(ÍV.) THE STATEMENT OF THE CAUSE OF ACTION OR THE BODY OF THE DECLARATION in contractual actions consists principally of three things: the right, the injury, and the consequent damage. It may be general or special.6

And in actions for wrongs the declaration should state the same things, and in addition it should state the matter or thing affected.7

The body of a declaration in assumpsit consists of six parts: (a) Inducement; (b) Consideration; (c) The contract itself; (d) Necessary averments; (e) Breach; and, (f) Damages.

(a) The inducement states under what circumstances the con-

tract was made, and is explanatory.8

- (b) A consideration must be fully and truly alleged.9 be certain, 10 and it must be the whole consideration, 11—such a
- 1. The test of local or transitory actions is the subject-matter to which the injury is done, not the subject causing the injury. Injuries to persons and personal property are transitory. Mason v. Wander et al., 31 Mo. 588. Hence an action for the use and occupation of land in New Jersey may be brought in Pennsylvania as the action is founded on privity of contract. Henwood v. Cheeseman, 3 S. & R. (Pa.)

2. But where in a transitory action it is necessary or expedient to state when the contract was made or where the cause of action actually arose, then it is necessary to lay the venue under a videlicet. 2 Ld. Ray. 1043; Duyckinck v. Clinton Mutual Ins. Co., 23 N. J. L. 280.

3. Gay v. Horner, 13 Pick (Mass.) 535. Its omission is aided by a judgment by default. Pullen v. Chase, 4 Ark. 210.

4. See supra, Parke's Saunders on Pl.

& Ev. 414.

In a complaint, if the right or title to sue can be reasonably inferred, it is good. Clemens v. Kersteller, 97 Ind. 373.

5. Chitty on Pl. 293*.

In actions in torts, however, if the right is implied by law it is unnecessary to state it. Taylor v. Eastwood, I East, 212. But if the plaintiff's right consist in an obligation on the defendant to observe some particular duty, the nature of such duty must be stated. Chitty on Pl. 397*; 12 East, 92.
6. Thus in debt on bond a declaration

averring on the penal part only, is general; but if it sets out both the penalty and condition, and assigns the breaches, it is special. In assumpsit, if the declaration states only a general legal liability it is general; but if it alleges a special express agreement and a specific consideration, it is special. Bac. Abr. Pleas, etc., B. 6; Gould on Pl. c. 4, § 50.

7. Chitty Pl. 391*.
In the case of realty the quality should appear, and for goods, their quantity, quality, and number and price. The People v. Dunlap, 13 Johns. (N.Y.) 437.

In some States this seems not to be necessary if the damages are properly laid. Brunswick, etc., v. Brackett 332 W. Rep. (Minn.) 214

8. Chitty Pl. 296.*

9. Gould on Pl. 502, and case cited; Harding v. Cragie, 8 Vt. 501; Liverpool Steamship Co. v. Commrs., 113 U. S. 33.

10. Cunningham v. Shaw, 7 Pa.St. 401; Rogers v. Newbury, 105 Mass. 533. Or it is substantially defective. Stanton v.

Shipley, 27 Fed. Rep. 498.

11. Chitty on Pl. 301*.

For a variance in the consideration is fatal, even though it be laid under a videl-Chitty Pl. 305*; Cleaves o. Lord, 3 Gray, 71. But the statement in a declaration on an insurance policy of the premiums paid and payable as the consideration of the contract does not create a variance, although the policy contains the expression that it is made "in consideration of the representations made in application," and of the payment of premiums. Phœnix Mutual Life Ins. Co. v. Raddin, 7 Sup. Ct. Rep. 500. See Struthers v. Drexel, 7 Sup. Ct. Rep. consideration as is legally sufficient to support the cause of action 1 as a benefit to the defendant or a detriment to the plaintiff.2 If the consideration was executory at the time of the promise and formed a condition precedent, its execution must also be alleged. In the case of a misfeasance or a malfeasance, or of a tort, how, ever. it is unnecessary.3

(c) The declaration must allege the promise positively,4 but it is not necessary to use that word; any other intelligible word or expression conveying the same idea will serve the purpose.5

And in an action on an instrument in writing the instrument need not be set out in its precise words; it is sufficient if it be

stated according to its substance and legal effect.6

(d) Averment signifies a positive statement of facts. 7 It is twofold, general, and particular.⁸ In a special action of assumpsitthey usually are of the performance,⁹ or excuse for non-performance, 10 of a condition precedent; 11 that defendant had notice of

1. If a complaint fails to do this it does not state a cause of action. Felt v. Judd, 3 Utah, 414.

2. Chitty on Pl. 301*.

3. 2 Ld. Raym. 989; 12 East, 89.

4. Sexton v. Holmes, 2 Munf. (Va.) 566; Chitty Pl. 308*.

5. Avery v. Inhabitants of Tyringham,

6. Mitchell v. Welch, 17 Pa. St., 339; Ferguson v. Harwood, 7 Cranch, 413; De Forest v. Brainerd, 2 Day (Conn.), 528; Page v. Wood, 9 Johns. (N. Y.) 82.

And where a suit was brought on a

judgment for \$778.83, and it was proved the judgment was for \$767.13 and \$11.70 costs, it was held no variance. Frevert

v. Swift et al., 13 Pac. Rep. 6.

In a late case, Phillips v. South Park Commrs., reported in 10 N. E. Rep. 230, where one P., who was seized of certain lands, executed two contracts with reference to the same tract of land on the same day, one with the park commission and a second one with its attorneys, and the second referred to the first, it was held on a bill of interpleader by the commission setting out the first, that the two contracts were not necessarily one and the same transaction, that the second contract might be put in evidence although the bill had no reference to it, and when so put in evidence that there was no variance between the allegata and probata.

7. Bacon's Abb. Pleas, B. And a recit-7. Bacon's Abb. Pleas, B. And a recital is insufficient. Syme v. Griffin, 4 Hen. & M. (Va.) 277. But this is not true in the case of torts, as in a declaration in trespass for assault and battery; it is sufficient though it begin 'For that whereas,' etc., by way of recital. Coffin v. Coffin. 2 Mass. 358; Collier v. Moulton, 7 Johns. (N. Y.) III.

8. 1 Saunders. 235 n.
9. Wilcox v. Cohn, 5 Blatchf. (U. S. C. C.) 346.

Where the action is for a breach of a promise in consideration of a promise it is not necessary to aver performance. Whitall v. Morse, 5 S. R. 358. To aver a readiness and willingness to perform is all that is required. Smith v. Lewis, 26 Conn. 110; Funk v. Hough et al., 29 Ill.

In a complaint, petition, or statement, however, the averments need not be so specific; yet it has been held that if the complaint did not allege when the contract sued on was to be performed, nor performance or tender of performance by complainant within the time, it was such a defect as could not be waived because objection was not taken by demurrer or answer. Pope v. Terre Haute Car Míg. Co., 13 N. E. Rep. (N. Y.) 592.

A complaint for indebtedness setting forth an account of certain articles and their prices is bad if a sale and delivery to defendant is not averred. Mershon v. Randall, 4 Cal. 324. But it is good if the sale and delivery is alleged, though it does not allege that no part of the agreed price has been paid. Rossiter v. Schultz, 62 Wis. 655.

10. And where the defendant prevents the plaintiff from performing his part of the contract, the performance need not be averred. Miller v. Whittier, 32 Me. 210. Nor even a readiness to perform, if the declaration averred the refusal of the defendant. Smith v. Lewis,

26 Conn. 110.

11. That is, when a right of action is given subject to a condition the plaintiff must aver the fulfilment of the condition. Baker v. Slater Mill & Powder Co., 14 such performance; 1 that he was requested to perform his con-

- (e) Damage.—When there has been a breach of contract some damage must have resulted, and what may be presumed necessarily to have arisen from the breach, that is, general damages, need be stated with no great particularity; but special damages, such as the law will not imply from the facts, must be specially laid in the declaration.⁴ In this particular the proof need not sustain the allegations.⁵ Under the allegation of alia enormia damages, matters which naturally arise from the act complained of may be given in evidence. There may be a pro tanto recovery of damages in tort as well as contract.7
- (f) Breach.—The breach of the contract must in all cases be stated in the declaration.8 It should conform substantially to the words or sense of the contract.9 The same degree of particularity is not required as is necessary in setting forth the terms of the contract. 10 An omission to substantially aver the breach cannot be cured by a verdict.11

(V.) CONCLUSION.—After stating the tort or cause of action, and when necessary the special injury or damage resulting therefrom, the declaration concludes to the damage of the plaintiff, naming a sufficiently large amount to cover any possible verdict.12

5. Counts are special and general, or common, 13 and they may be

R. I. 531. It is sufficient to set out performance in the language of the condition. Smith v. Lloyd's Ex., 16 Grattan,

295.

If performance, however, can be reasonably inferred in a complaint it is good. Aughie v. Landis, 95 Ind. 419. But the condition must be a qualification of the original obligation or liability, or its averment is unnecessary. Mix v. Page, 14 Conn. 329. And the judgment will not be reversed after verdict for an obscurity in the averment. Giles v. Perryman, I Harris & G. 164.

Hence in a complaint under a statute the plaint should allege all the facts necessary to bring the plaintiff within its scope. Droune v. Simpson, 2 Mass.

1. Worster v. Canal Bridge, 16 Pick.

(Mass.) 541.

That is, whenever notice is necessary either by the terms or nature of the contract, it is of the gist of the action, and must be specially averred. Walker, 23 N. H. 491. Watson v.

2. Bach v. Owen, 5 T. Rep. 409; Burt v. Stevens & Kendle, 24 Wend. (N. Y.) 256. And where a covenant is to pay on request the special request must be alleged.

3. Chitty on Pl. 348* 411*.

4. Stanfield et al. v. Phillips, 78 Pa. 73;
Ryerson v. Marseilles, 16 N. J. L. 450;
Squier v. Gould, 14 Wend. (N. Y.) 159.

And if no damages are laid in a special count the court will intend the general averment of the end to apply to it. Adams v. M'Millan, 7 Port. (Ala.) 73. See Brunswick, etc., v. Brackett, 133 N. W. Rep. (Minn.) 214.

In a complaint the general allegation of damages would seem sufficient. Long et al. v. McCauley, 3 S. W. Rep. (Texas)

5. Mallory v. Leach, 35 Vt. 156. 6. Chitty on Pl. 412*.

7. Chitty on Pl. 400*.

When a complaint omits to demand damages, a supplemental complaint may

remedy the omission. De Lisle v. Hunt, 36 Hun (N. Y.), 620.

8. Chitty on Pl. 342; Benden v. Manning, 2 N. H. 289; Fletcher v. Peck, 6 Cranch, 127; Sherburne v. Tobey, 19 Ill. App. 617; Pumeroy v. Bruce, 13 S. R. (Pa.) 188. 9. Wilcox v. Cohn, 5 Blatchf. (U. S. C.

C.) 346.

10. Chitty on Pl.347*; East Tennessee R. Co., etc. v. Staub, 7 Lea (Tenn.), 397.

11. Winslow v. Plimpton, 134 Mass. 44; White v. Romans (W. Va.), 3 S. E. Rep.

An averment of the breach at the end may be sufficient. Somerville v. Grim, 17 W. Va. 863.

12. Chitty on Pl. 435*.

13. Chitty on Pl. 295*.

joined.1 The common counts are certain general counts introduced into a declaration to set out the plaintiff's same cause of action in various shapes, so that if he failed in the proof of one count he may succeed on another, and thereby prevent a fatal variance.2 It follows, therefore, that if any one of several counts is good a verdict will be sustained, and a demurrer to the whole declaration will be adjudged bad. The common counts are generally sufficient, even in the case of a special agreement if it has been executed.4 and there only remains on the part of the defend-

1. Kirkpatrick v. Bethanv. 1 Ala. 201; Bogardus v. Trial, 2 Ill. 63.

A special count and a quantum meruit may be joined. Longprey v. Yates, 31 Hun (N. Y.), 432.

Counts on a special contract under seal and a quantum meruit for labor done and materials found may be joined in an action of debt. Smith et al. v. First Cong., etc., 8 Pick, (Mass.) 178; Van Duesen et al. v. Blum et al., 18 Pick. (Mass.) 229.

Where the contract proved in evidence varies from the contract declared upon, the plaintiff cannot recover on it, nor can he recover on the quantum meruit hecause there was a special agreement. But if he declares upon contract and fails to prove it, but proves an agreement and a performance of it, it raises a duty for which a general indebitatus assumpsit will lie. Speake v. Sheppard, 6 Harr. & J. 81; Kelly v. Foster, 2 Binn. (Pa.) 4. Or on a quantum meruit. Keyes v. Stone, 5 Mass. 301.

The agreement may be used as evidence of the amount of compensation due. Harris v. Leggit, t W. & S. (Pa.) 301.

There can be no recovery on a quantum meruit under a special count, though a common count may be joined under which a recovery may take place. Fonnholy v.

Taylor, 13 Iowa, 500.

A declaration was made up of the common money counts and two special counts. The evidence as put in entitled the plaintiff to a recovery on one if not both of the special counts. Held, no recovery on the common counts. Smithers v. Drexel, 7 Su. Ct. Rep. 1293.

The non-performance of a condition precedent need not be alleged under a count for a quantum meruit though there was such a special agreement, and such averment would have been necessary on a special count. Wolf v. Howes, 20 N.

2. Chitty on Pl. 424*. In assumpsit the common counts are indebitatus assumpsit, quantum meruit, quantum valebant, and account stated or insimul computassent.

3. Mumford v. Fitzhugh et al., 18

Johns. (N. Y.) 457.

A defective count may be aided only by an express reference to a good count. Saunders on Pl. & Ev. 417; Crookshank v. Gray et ux., 20 Johns. (N. Y.)

This rule was relaxed in Morrison v. Spears. 8 Ala. 93, and it was held that a reference may be made to a previous count for dates, etc., though such previous count be held bad on demurrer, or abandoned. Robinson v. Drummond, 24 Ala.

It is the practice under the codes of some of the States, however, to require each paragraph of a pleading to be complete in itself, and not to permit it to be aided by a reference to another paragraph. Ludlow v. Ludlow et al., 9 N. E. Rep. 769; Neier v. Missouri Pacific R. Co., 86 Mo. 35.

The several counts of a declaration are regarded as its different parts or sections, and in framing it unnecessary repetition should be avoided. This may be done by the counts referring to each other, but unless such reference is made, one count will not be aided by another; for though both counts are in the same declaration, yet they are as distinct as if they were in separate declarations, and consequently they must independently contain all necessary allegations or the latter count must expressly refer to the former. Saunders on Pl. & Ev. 417.

In Ryder v. Robins, 13 Mass. Rep. 284, the first count concluded that the defendant, though often requested, has never paid, etc., but neglects and refuses, etc., but the second contained no such averment or anything equivalent. Held, that the allegation in the first might be applied to the second count. And in Dent's Admr. v. Scott, 3 Har. & J. 28, it was considered to be sufficient for one count to set out a consideration, and for the other counts seeking to enforce a contract founded upon the same consideration to refer to it. Mardi's Admrs. v. Shackel-

ford, 6 Ala. 436.
4. M'Carty v. Rhea, 1 Blackf. (Ind.)
55; French v. Tunstall, 1 Hempst. (C. C.)

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ant a simple duty to pay money; but if the quid pro quo was not money, but something else, as a bill of exchange 2 or a promissory

note.3 there can be no recovery under the common counts.

And in the case of a sale of goods a count for goods bargained and sold (not showing a delivery) cannot be maintained unless it appear that there has been a complete sale, and that the property in the goods has become vested in the defendant.4 or in general where the contract is only executory.5

The counts should be positive and sufficiently certain.6

(I.) JOINDER OF COUNTS.—The rule as to what forms of action may be joined together is that when the same plea may be pleaded and the same judgment given, or when the counts are of the same nature, and the same judgment is to be given on them all, they may be joined. Hence counts containing no inconsistent averments may be joined, and all the common counts may be combined in one count. In other words, could there be a recovery

1. Bank of Columbia v. Patterson, 7 Cranch (U. S.), 200; Miles v. Moodie, 3

S. & R. (Pa.) 211.

In a late case in Louisiana, however, it was held that there could not be any recovery under a quantum meruit on a special contract although the special agreement had been executed. Succession of Piffet, 37 La. Ann. 871.

2. Adlard v. Muldoon, 45 Ill. 193.

But common counts cannot be resorted to when there is a special contract and the breach of the contract is the gravamen of the action. If, however, the contract has been completely executed so that only a duty to pay the money remains, a recovery may be had under the common counts in indebitatus assumpsit. Rollins et al. v. Duffy, 14 Ill. App. 69.
3. Yale & Henshaw v. Coddington, 21

Wend. (N. Y.) 175; Ascutney Bank et al. v. McK. Ormsby, 28 Vt. 721; Appleton et al. v. Parker et al., 15 Gray (Mass.),

As where plaintiff declares on the common counts for work and labor done, and it is proved that there was a special contract between the parties whereby the plaintiff should receive a part of the crop, although the precise terms of the contract are not shown. Snedicor v. Leachman, 10 Ala. 331; Cochran v. Tatum, 3 Munroe (Va.), 405; Steans v. Washburn, 7 Gray (Mass.), 187. 4. Stearns v. Washburn, 7 Gray

(Mass.). 18q.

5. Colburn v. Pomeroy, 44 N. H., 23; Morse v. Sherman, 166 Mass. 432.

6. In Keyser v. Shafer a count in debt was sustained, though it did not contain time, place, nor a request to pay. 2 Cow. (N. Y.) 437.

7. Miller v. Northern Bank of Mississippi, 5 George (Miss.), 412; s. c., 19 Fed. Rep. 630.

8. Rethgriev v. Rethgriev, 1 Stew. (Ala.) 580; Hays v. Borders, 6 Ill. 46; Brown v. Warnock, 5 Dana (Ky.), 492; Brady v. Spurck, 27 Ill. 478.

In a declaration in assumpsit there is no misjoinder of actions because one of the counts in form assumpsit is on a promissory note under seal. French v. Tunstall, I Hempst. 204.

9. The common counts are properly joined with a count on a bill or note,-Kirkpatrick v. Bethany, 1 Ala. 201,-as counts in debt for statute penalties with a count for money had and received— Spence v. Thompson, 11 Ala. 746;—or debt on a writing and debt on simple contract. Patterson v. Chalmers, 7 B. Mon-

roe (Ky.), 595.

A count in debt may also be joined with a count in detinue, because detinue may be an action ex contractu. Rucker v. Hamilton, 3 Dana (Ky.), 44; Calvert v. Marlow, 18 Ala. 67. Also a count for breach of contract partly of that kind of wrong known as a misfeasance and trover. Smith v. Rutherford, 2 S. & R. (Pa.) 358. And trespass quare clausum fregit, with a count for assault and battery. Arnold v. Maudlin, 6 Blackf. (Ind.) 187. Trespass with trover. Alger v. Curry, 38 Vt. 382. Or case and trover. Wilkinson v. Moseley, 30 Ala. 562. As may be one in case for negligence with one for trover and conversion. Patterson v. Anderson, 40 Pa. St. 359. That is, where the counts are substantially the same, whether they are regarded as founded in tort or in assumpsit. Church v. Munford, II Johns. (N. Y.) on a separate suit in the same form of action and on the same proofs? And is the fund out of which the damages are to be

paid the same?2

It has also been said that the correct principle on which counts are joined is whether the action is founded in tort or contract: if the former, it may be joined with any tort, and if the latter, with

any contract.3

(II.) NON-JOINDER.—But counts which require different pleas and different judgments,4 and which unite distinct demands in different rights, cannot be joined.⁵ Nor can there be united in one action a count against two or more and in the same action a count against one of the defendants. Such a misjoinder of counts is a fatal defect on demurrer and writ of error, or arrest of judge. ment 7

480. So if the gist of the action is tort there is not a misjoinder for alleging the acts out of which the tort arose. Stogel v. Westcott, 2 Day (Conn.), 418. And whether the action be in tort or contract is determined by the conclusion. v. Dickerson, Meigs, (Tenn.) 459. A count in trespass quare clausum fregit may be joined with count in case for maliciously and without probable cause breaking open a house, etc. Winnie v. Pond, 34 Conn. 391.

As in criminal actions a count for robbery, with assault with intent to commit robbery,-McGregg v. State, 4 Black (Ind.), 101;—and in trespass the several species of quare clausum fregit and de bonis asportatis. Bishop v. Baker, 19 Pick.

(Mass.) 517.

1. Ingent v. Maybee et al., 54 Mich. 226. Election between counts need not be required where in assumpsit for money obtained by defendant through fraud the common counts are joined to a special count waiving the tort.

2. Reeve v. Cawley, 17 N. J. L. 415. 3. Jones v. Conoway, 4 Yeates (Pa.), 109, where it was held an action for deceit could be joined with the common counts in assumpsit.

4 Dobbs v. Green, 2 Wis. 228; Angus v. Dickerson, I Meigs (Tenn.), 450.

Consequently debt and assumpsit can-not be joined,—Phelps v. Hurd, 31 Conn. 444; Adams v. Hurdin, 19 Ill. 273; Amer-ican Linen Thread Co. v. Sheldon et al., 31 N. J. L. 420;—nor deceit with money counts,—Wilson v. Marsh, I Johns. (N. Y.) 503;—nor detinue and trover,—Hood v. Hanning, 4 Dana (Ky.), 21; -nor trespass and case, - Ziegler v. Scott, 10 Ga. 389; Sheppard v. Furniss, 19 Ala. 760; Boerum v. Taylor, 19 Conn. 122;—nor trespass and trover,—Cooper v. Bissel, 16 Johns. (N. Y.) 146; Wickliffe v. Sanders, 7 T. B. Mon. (Ky.) 298;-nor assumpsit and debt with covenant. Gaines v. Craig, 24 Ark. 477;—nor assumpsit and trover. "It is not enough that they all relate to the same subject-matter and that the evidence is the same to support them: the counts, to stand together, must be in the same form of action. Howe v. Cook & Maxwell, 21 Wend. (N. Y.) 29. Hence counts in tort and contract cannot be joined. Nimocks v. Inks, 17 Ohio, 600; Clinton v. Hopkins, 2 Root (Conn.).522."

5. Henshall v. Roberts, 5 East, 150; Dobbs v. Green, 2 Wis. 228; Pierce et al.

v. Eustis, 6 Black (Ind.), 158.

Therefore a count upon a promise made to plaintiff's intestate cannot be joined with a count alleging that the defendant "being indebted to the plaintiff as aforesaid" (the plaintiff having been previousby described as administrator), in a certain sum "for goods sold and delivered by the plaintiff to the defendant in consideration thereof promised to pay the same to the plaintiff," and a declaration in which such counts are joined is bad Brown v. Webber, even after verdict. 6 Cush. (Mass.) 560.

6. Where, however, in an action against the heir of a deceased debtor, to which the administrator of the debtor is made a party, some of the facts stated in the complaint would constitute a cause of action against the administrator, but it is manifest that if such facts are stated not for the purpose of furnishing a cause of action against such administrator, but to show that plaintiff has a cause of action against the heir, the statement of such facts does not render the complaint amenable to the objection that two causes of action have been improperly joined. Lowry v. Jackson, 3 S. E. Rep. 473. 7. Cooper v. Bissell, 16 Johns. (N. Y.)

146; Nimocks v. Inks, 17 Ohio, 599.

DECLARATIONS (in Evidence).—(See also BOOKS AS EVIDENCE.)

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- (f) As to the Contents of a Will, 368.
- (g) Dying Declarations, 368. (h) Declaration of Bankruptcy, 368. (i) Declaration of Trust on Use, 368.
- 1. **Definition.**—A statement made by a party to the transaction. or by one having an interest in the existence of some fact in relation to the same, is known as a declaration.1

Such declarations are either admissible as original or primary evidence, or as non-original or secondary evidence, under certain well-defined exceptions to the rule that hearsay is generally inad-

In this article we shall treat first of those writings or words which are not within the meaning of hearsay, but are deemed to be independent and original facts.

2. Declarations Admissible as Primary Evidence.—(a) Where the Fact in Controversy is whether certain things were written or spoken, and not whether they were true, declarations as to their existence are admissible in evidence.3

Thus, where the question is whether a party acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original evidence.4

(b) Expressions or Exclamations of the Bodily or Mental Feelings of a Party indicating present pain or malady when made at the time, and when material, are competent in evidence.⁵

When plaintiff declares in the same action upon a several demand against the defendant alone and upon a joint demand against the defendant, he may recover on both demands if the defendant does not plead non joinder in abatement. Holmes v. Marden, 12 Pick. (Mass.) 169; Bertand v. Byrd, 4 Ark. 187. Contra: Moore & Hunt v. Platte County, 8 Mo. 467. See Eisenhouer v. Stein, 15 Pac. Rep. 167, where it was held that a statement alleged defendant was indebted to plaintiff to balance due as per settlement, and also upon an open itemized account, states two separate causes of action, and cannot be joined. But if the count were properly divided it might be good. O'Connor v. Chicago, R. I. & P. R. Co., 34 N. W. Rep. 795.

1. Bouv...L. Dict. tit. "Declaration." As distinguished from a confession. People v. Strong, 30 Cal. 151. Nor are

declarations equivalent to certificates where that word is used in the Revised Statutes. U. S. v. Ambrose, 2 Fed. Rep.

2. Greenl. Ev. §§ 100, 124; Whart.

Ev. § 170.
3. Whitehead v. Scott, 1 Moody & R. 2; Bartlet v. Delfort, 4 Mass. 702; Pelletreau v. Jackson, 11 Wend. (N. Y.) 116.
4. Coleman v. Southwick, 9 Johns. (N.

Y.) 45.
5. Greenl. on Ev. § 102. Such evidence is not to be extended beyond the necessity on which the rule is founded. Bacon v. Charlton, 7 Cush. (Mass.) 581. But a different rule is applicable to the statements made by a patient to a medical man. Rorsa v. Boston Loan Co., 132 Mass. 439. The most common examples are exclamations of pain to prove pain Insurance Co. v. Mosley, 8 Wall. (U. S.) 397. Or the representations by a

(c) Declarations as to Pedigree.—Declarations as to the exist. ence of any relationship 1 between persons, whether living or dead.2 or as to the facts of birth, marriage, or death, and the time when these events happened, or any fact immediately connected with their occurrence made by any deceased person who was related by blood or marriage 5 to the person so spoken of, are admissible as primary evidence. The fact of relationship, however, must appear by evidence aliunde. 6 And the better rule, is that they are only inadmissible in cases in which the pedigree to which they relate is in issue." They must be made, however, prior to any lis mota.8 but they do not cease to be admissible because they were made for the purpose of preventing the question from arising.9 Under this head are included also inscriptions, tombs, funeral monuments, engravings on rings, and inscriptions on family portraits or charts. 10

(d) Res Gestæ.—See RES GESTÆ.

(e) Declarations made in the Ordinary Course of Business. (See also RES GESTÆ.)—A declaration is deemed to be relevant when it was made by the declarant in the ordinary course of business 11 and in the discharge of professional duty, 12 at or near the time when the matter stated occurred, 13 and of his own knowl-

sick person of the nature and symptoms and effects of the malady under which he is laboring. Gilchrist ν . Bates, 8 Watts (Pa.), 355; Wilkinson v. Moseley, 30 Ala. N. S. 562. See Collins v. Waters, 54 Ill. 485.

1. See Greenleaf on Ev. §§ 103, 104,

and note.

2. And general repute in the family may be sufficient. Doe v. Griffin, 15 East, 293.

3. Morrill v. Foster, 33 N. H. 379; Watson v. Brewster, 1 Barr (Pa.). 381.

That evidence as to the place where declarant was born is not admissible. Greenfield v. Camden, 74 Me. 56. As to time of birth. Cherry v. State, 68 Ala.

4. Stokes v. Dawes, 4 Mason (U. S.), 268.

5. Jewell v. Jewell. 17 Pet. (U. S.), 213.
6. Thompson v. Wolf, 8 Oregon, 454.
7. Stephen Dig. Ev. art. 31; Whittuck v. Walters, 4 C. & P. 375; Hathaway v. Evans, 113 Mass. 267; Comstock v. State, 14 Neb. 205, where a child was allowed to testify to the fact of his pa-

8. Berkley Peerage Case, 4 Camp.

401-417.

9. Canjole v. Ferrie, 23 N. Y. 91.

10. Greenl. Ev. § 105; Davies v. Loun-

des, 7 Scott N. R. 193.

Lord Denman, in the course of an opinion in favor of admitting a pedigree compiled from parish registers, wills.

monumental inscriptions, family records, etc., by a member of the family, said: "But the reason why a pedigree when made or recognized by a member of a family, is admissible, may be, that it is presumably made or recognized by him in consequence of his personal knowledge of the individuals therein stated to be relations, or of information received by him from some deceased member of what the latter knew or heard from other members who had lived before his time." 7 Scott N. R. 216.

11. Brice v. Earl of Torrington, 1 Sm. L. C. (8th Am. Ed.) 372; Stephen Dig. Ev.

art. 27; Greenl. Ev. § 115.

In actions for materials furnished, plaintiff may introduce entries in his books of account kept by his clerk and made up from small books kept by the workman, and from memoranda made by the plaintiff and clerk when goods went out. Taggart v. Fox, 11 Daly (N.

Y.), 159.
12. Welsh v. Barrett, 15 Mass. 380.
13. Laird v. Campbell, 100 Pa. St. 159.

In this case the entry was made before the title to any specific goods had passed, and the books were excluded. In order to render admissible entries made in the course of office or business, they must, unlike declarations against interest, be proved to have been made contemporaneously with the acts to which they relate. Taylor on Ev. § 704. That is, such a reasonable time after, as to be considered edge. 1 Such declarations are deemed to be irrelevant, except so far as they relate to matters which the declarant stated in the ordinary course of his business or duty.2

a part of the transaction. Taylor on Ev.

§ 704. Such entries are admissible to charge a municipality. St. Louis Gas-Light Co. v. St. Louis, 11 Mo. App. 55, and in its favor

In an action brought by the city against a street-car company to recover the expense of paving which the company should have done, the city called as a witness W., the foreman in general charge of the work, who had under him a gang foreman. W. kept a time-book containing the name of each laborer in the gang. Twice a day he visited the work and checked the time as reported to him by the gang foreman, who did not see the entries. W. marked the men's names as he saw them, and knew their faces. The gang foreman testified his reports were correct. Held, that the time-book was admissible. New York v. Second Ave. R. Co., 102 N. Y. 572.

It would seem that where entries from a slate or card are transcribed into a book they are deemed to be original entries if they are done in the regular course of business from day to day. Stroud v. Tilbin, 4 Abb. App. (N. Y.) 324.

In Massachusetts the rule seems rather relaxed. Faxon v. Hollis, 13 Mass. 420. In Pennsylvania the opposite is the

case, though the cases are somewhat

conflicting.

In Ogden v. Miller, 1 Browne (Pa.), 47, they were rejected; but they were admitted in Ingraham v. Bocknis, 9 S. & R. (Pa.) 285; Patton v. Ryan, 4 Rawle (Pa.), 408; Koch v. Howell, 6 W. & S. (Pa.) 350.

In Walker v. Bollman, 8 Watts (Pa.), 544, an interval of one day between the transaction and the entry in the book was held a valid objection to the admissibility of the evidence. But in Morris v. Briggs, 3 Cush. (Mass.) 342, daily memoranda were kept by the workman, and the entries were made by the employer, sometimes in the day, sometimes every two or three days, and one or two at longer intervals, yet they were admitted.

1. Wharton Ev. § 245.

That entries made by a bookkeeper by direction of his employer not in the presence of the person to be charged and as to which bookkeeper has no personal knowledge, are not admissible against that person. Hart v. Kendall (Ala.), 3

So. Rep. 41; Chicago, St. Louis, etc., R. Co. v. Province, 61 Miss, 288.

An account containing marking indicating the number of loads of sand is admissible, being supported by plaintiff's oath. Miller v. Shay (Mass.), 13 N. E. Rep. 468.

Photograph.—Archer v. N. Y. N. H. & H. R. Co. (N. Y.), 13 N. E. Rep. 318. So a telegram must be authenticated. Burt v. W. & St. Peter R. Co., 31 Minn. 472.

Refreshing Memory. - A written memorandum may be referred to by a witness to refresh his memory. But it is not enough for him to swear that he made a memorandum which he believes to be true. Lawrence v. Barker, 5 Wend. (N. Y.) 301.

In Cowan v. Witter, 31 N. W. Rep. 709, the court indorse the opinion of Dixon, C. J., in Schettler v. Jones, 20 Wis. 412: "The charges were not mere private memoranda made by the witness for his own convenience, but entries of the books of the plaintiff in the regular course of business. In such cases we think the sounder and better rule to be, that if the witness can swear positively that the memoranda or entries were made according to the truth of the facts, and consequently that the facts did exist, that it is sufficient though they may not remain in his memory at the time when he gives the testimony. He may testify to the entries, and when he does so he swears positively to the truth of the facts stated therein."

But if the witness has a distinct recollection of the facts, the memoranda or account-book cannot be admitted in evidence. Collins v. Rocky Pr. (N. Y.) 57. 2. Stephen Ev. art. 27. Collins v. Rockwood, 64 How.

The statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. This is illustrated in a case in which it was necessary to show in what place the plaintiff had been arrested. For this purpose a certificate of a deceased sheriff's officer which had been returned by him to the office in the ordinary routine of his duty, and which specified among other circumstances connected with the arrest the spot where it took place, was offered in evidence. It was admitted by the court for the sake of argument that the certificate was evidence of the arrest, but not of the place where

Under this principle a party's own shop books are admitted to prove the delivery of goods, 1 and in this country the rule has been extended to the case of entries made by the plaintiff himself.2 This also accords with the practice under the Roman law. Such entries are admissible for the purpose of charging a party 4 as for goods sold and delivered, or work and labor done, but not to prove that credit was given; nor are they admissible if made in a lumping charge. The memoranda or book entries of an officer. agent, or business man, when thus made in the ordinary course of his duties, become evidence after his decease, or after he has passed out of the range of process, on due proof of handwriting. 10

3. As Secondary Evidence.—(a) Declarations as to Public or Gen-

eral Rights .- Declarations as to the existence of any public or general right or custom, or matter of public or general interest.11

the arrest was made, for it was not the duty of the sheriff's officer to enter the place of arrest. Chambers v. Bemasconi, 1 C. M. & R. 368; Taylor on Ev. § 705.

M. & K. 308. Taylor on Ev. 9 765.
 Greenl. Ev. § 117.
 Suyer v. Brochaut, 33 Minn. 501;
 Barley v. Harvey, 60 N. H. 152.
 If after an inspection by the court the

books appear proper to be laid before the jury, the party himself is then required to make oath that they are the books in which accounts of his ordinary business are usually kept. Fryer v. Barker, 2 Pick. (Mass.) 65.

3. Greenl. Ev. § 119.

4. But not to prove that a certain thing occurred on the same day as entry made therein. Masters v. Marsh, 10 Neb. 458.

And they are admissible though neither weight, measure, nor quantity is given in connection therewith. Pratt v. White, 132 Mass. 477.

Nor must the entries show the price of each article. Jones v. Orton, 65 Wis. 9.

5. Greenl. Ev. § 117.

6. Mathes v. Robinson, 8 Met. (Mass.)

269; Morse v. Potter, 4 Gray (Mass.), 292.
7. Field v. Thompson, 119 Mass. 151; Winslow v. Dakota Lumber Co., 32 Minn. 237; Alexander et al. v. Kaiser, 144 Mass. 71. In this last case Morton, C. J., said: although the books of original entries of a party, supported by the suppletory oath of the person who made the entries. are admissible to prove the sale and delivery of goods, such books are not competent to prove to whom credit was given where that fact is in issue."

In a Texas case, Baldridge v. Penland, 4 S. W. Rep. 565, plaintiff sued for balance of an account. He offered in evidence an account taken from his books as liquor and billiard saloon-keeper before the books were destroyed by fire.

Some of the charges were "to bar, for billiards, and drinks;" some "to billiards, games, and drinks," without further specification; others for cash, one for bushel of corn, and others for balance. He testified that the books were correctly kept, and two persons who had served him testified that they had made some of the entries, and that the articles embraced in the entries were delivered to the defendant; the other entries were in the handwriting of the plaintiff. Held, the account was improperly admitted: (1) as to the items games, corn, and money, they are not a part of the business of a saloon-keeper; (2) as to the other items they fail to show with sufficient certainty what thing was made the basis of such charge; (3) the plaintiff's testimony was not alone sufficient to prove that his books were correctly kept.

8. Corr v. Sellers, 100 Pa. St. 169. In this case the court has to do with the limit to the amount for which a book entry will be received in evidence.

9. Whart. Ev. § 238.

In some States it seems that they are only admissible when the party making them is dead. State v. Phair, 48 Vt. 366; Whetcher v. McLaughlin, 115 Mass. 167.

In Connecticut, if the party has been in parts unknown for a long time. New Haven, etc., Co. v. Goodwin, 42 Conn.

But it is not enough for the plaintiffs to say: "I don't know where he (referring to their clerk who made the entry) now is." Farrington v. Tucker et al., 6 Colo. 357. See Ives v. Waters, 30 Hun (N. Y.), 297.

10. Sherman v. Crosby, II Johns. (N. Y.) 70; Cluggage v. Swan, 4 Binn. (Pa.) 154; Farrington v. Tucker et al., 6 Colo.

11. Stephen's Digest of Ev. art. 30.

are admissible as secondary evidence when the rights are ancient and they are the declarations of persons supposed to be dead.1

There is a distinction between public and general rights or interests. It is public if it concerns all the citizens, and it is general if it refers to a less number, though still a large portion of the community.2 They can only be admitted when it has been shown that they were made by persons who have had competent means of knowledge,3 and they are excluded as to private or particular matters because no general reputation 4 exists as to them. And they must have been made before the controversy originated, that is, before the same particular subject-matter was in issue. Such declarations may be in any form and manner.6

(b) Ancient Possessions and Documents.—Ancient documents to which the party against whom they are produced is not privy are admissible in evidence, when they come from the proper custody,8 have been shown to have been acted upon,9 and when they purport to constitute part of the transactions themselves. 10

All the presumptions are in favor of the correct execution of an

ancient deed.11

Greenl, Ev. § 130.
 Greenl, Ev. § 128.
 Wharton on Ev. § 191.

4. Greenl. Ev. §§ 137, 138.
Some apparent exceptions exist to this proposition in the case of quasi public rights, as in Blackett v. Lowes, 2 M. & S. 404, where the question was as to a general usuage of all the tenants to a manor, the defendant being one, to cut wood.

5. Greenl. Ev. § 132.

It is not necessary that suit should have been commenced. Shedden v. Atty. Gen., 2 Sw. & Tr. 170. 6. Greenl, Ev. § 139.

As documents, maps, or verdicts.
7. Greenl. Ev. § 141; Greenfield v. Camden, 74 Me. 56; Applegate v. Lexington, etc., Co., 117 U. S. 255; Quinn

v. Eagleston, 108 Ill. 248.

A letter purporting to be over thirty years old, and produced from the proper repository, or where such letters are usually kept, is admissible as an ancient document. Bell v. Brewster (Ohio), 10 N. E. Rep. 679. Or bounty certificate over thirty years old. Shinn v. Hicks (Texas), 4 S. W. Rep. 486. See McClung v. Steen, 32 Fed. Rep. 373. So the tribal records of an Indian tribe. Fowler v. Scott, 64

Wis. 509.

8. Fulkerson v. Holmes, 117 U. S. 389; Hogans v. Carruth, 19 Fla. 84; Frost v.

Carruth, 21 S. Car. 501.

Documents are said to be in proper custody if they are in the place in which and under the care of persons with whom they would naturally be; but no custody

is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. Stephen's Dig. Ev. p. 131; Floyd v. Tewksbury, 129 Mass. 362.

It is not necessary that the party producing a deed should be in possession of the land in controversy. Harlan v. Howard, 79 Ky. 373. And ancient deeds duly searched for and proved by the recorded copies do not need testimony concerning their custody.

v. Ryan, 78 Ala. 37.
9. Greenl. Ev. § 143; Holmes v. Congell, 58 Texas, 680; Davis v. Higgins, 91 N. Car. 382. As far as the nature of the case will admit. But where the transaction is very ancient, so that proof of contemporaneous acting, such as possession, is not likely to be obtained, its production is not required. Bristow v. Cormican, L. R. 3 App. Cas. 641; Gardner

v. Granniss, 57 Ga. 539.
In Long v. McDow, 87 Mo. 197, the court decided that an ancient deed bearing no suspicious marks might be read in evidence without proof of possession of

the land conveyed.

10. As an ancient deed, that is, one over thirty years, and possessing all the above requisites, is presumed to constitute a part of the actual transfer of property therein mentioned. Greenl.

11. Fleming v. Burnham, 36 Hun (N.Y.), 456; Hoopes v. Auburn Water Works Co., 37 Hun (N. Y.), 568; Ensign v. Mc-Kinney, 30 Hun (N. Y.), 249.

(c) Declarations as to Boundaries.—In the case of boundaries of counties and of municipalities, rights of common and public highways, the declarations of deceased ancient persons and old documents are admissible.1

But in questions of private boundaries only the declarations of deceased persons who are shown to have had knowledge of the facts whereof they spoke, and who were on the land or in posses-

sion of it, are admissible in evidence.2

(d) Declarations against Interest.—If a person have peculiar means of knowing a fact,3 and have no interest to misrepresent it,4 and make a written or oral declaration of that fact which is against his pecuniary or proprietary interest⁵ at the time, it is evidence of the fact as between third persons after his death.6

Such declarations are admitted on the ground of the extreme

improbability of their falsity.7

The most usual example of declarations of this kind are entries

1. Wharton Ev. § 185, and cases cited. As the line of ancient street never formally laid out may be shown by occu- dary line was admitted, pancy. Seely v. Bridgeport, 53 Conn. 1. Declarations of de

To prove that an offence was committed within a certain county hearsay evidence of the boundary line is admissi-People v. Velarde, 59 Cal. 457.

2. Hunnicutt v. Peyton, 102 U.S. 333;

Greenl Ev. § 145.

In England, the weight of authority is against admitting such evidence without the boundary in question is identical with another of a public or quasi-public nature. Greenl. on Ev. § 145. This is also the rule in Massachusetts. Water Power Co. v. Hanlon, 132 Mass. 483.

In many of the States the English rule has been relaxed, owing to the situation in our country, and it is submitted that the view taken in the text now generally prevails. Buchanan v. Moore, 10 S. & R. (Pa). 281; Beard v. Talbot, 1 Cooke (Tenn.), 142; Hurt v. Evans, 49 Tex. 311; Halstead v. Mullen, 73 N. Car. 252; Great Falls v. Worcester. 15 N. H. 412; Kennedy v. Sabold, 88 Pa. St. 246.

Flagg v. Mason, 141 Mass. 64. the purpose of showing the true boundary line of land, declarations of a mortgagor in possession are admissible against one claiming under a foreclos-

ure of the mortgage.

That is, declarations of particular facts, as distinguished from reputation, are admissible when made by those in possession of or on land at the time, and who have knowledge of that of which they speak. Lemmon v. Hartsook. 80 Mo. 13.

And in Frazier v. Hunter, 5 Cranch

C. Ct. (U. S.) 470, a declaration that a certain spring was on one side of a boun-

Declarations of deceased disinterested parties as to the location of a boundary line are admissible. Tucker v. Smith (Tex.), 3 S. W. Rep. 671. See Child v. Rengsbury, 46 Vt. 47.

In Smith v. Headrick, 93 N. Car. 210, the court, by Mr. C. J. Smith, say:

"The objection that it must affirmatively appear, before such declarations are received, that the person making them had such knowledge or opportunity of obtaining information of the location and boundaries of the land as would enable him to speak of them as facts, finds no warrant in the adjudications. laration itself presupposes such knowledge or information

3. In Crease v. Barrett, I C. M. & R. 925, the question whether the deceased person should have his own knowledge of the fact stated was expressly raised; and it was held he need not, and that if the entry charged himself, the whole of it became admissible against all persons, and that the absence of such knowledge went to the weight rather than to the

admissibility of the evidence.

4. Whart on Ev. § 226 et seq.

5. Sussex Peerage Case, 11 Clark & Fin. 85, in which case it was held that the apprehension of possible danger of a criminal prosecution was not sufficient to make the declaration admissible.

6. Wharton Ev. § 226; Taylor v. Gould, 57 Pa. St. 152; Union Canal Co. v. Lloyd et al., 4 W. & S. (Pa.) 394; Tram-

well v. Hudmon, 78 Ala. 222.
7. Greenl. on Ev. § 148.

in books of account.1 And they seem to be admissible where the entry is itself the only evidence of the charge, of which it shows the subsequent liquidation.2

Nor is it necessary that the declarant should have been a com-

petent witness if he had been living.3

And when the entry is admitted as being against the interest of the party making it, the whole of the statement goes with it, so far as it is referred to in, or necessary to explain, such declarations.4

- (e) Declarations in Disparagement of Title.—Declarations in disparagement of the title of the declarant are admissible as original evidence. But they must be made during the continuance of title in the declarant, or while the property was in his control. They are not admissible if made before title has been acquired.8 or after it has been transferred.9 And when such declarations are offered, the time at which they were made must also be shown. 10
- 1. An ancient book kept among the records of a town, purporting to be the selectmen's book of accounts with the treasury of the town, is admissible in evidence of the facts therein stated, and the selectmen being at the same time assessors on entry in such book of a credit by an order in favor of the collectors for a discount of a particular in dividual's taxes, was held to be evidence of the abatement of the tax of such individual. Boston v. Weymouth, 4 Cush. (Mass.) 538.

2. Higham v. Ridgway, I East, 100; Smith L. Cases (8th Ed.), 380. The entry of a memorandum of an agreement is not sufficient. Regina v. Worth, 4 Q. B. 132.

It would seem that the better ground for admitting book entries is that they were made in the ordinary course of business. Mr. Justice Story in Nicholls 2'. Webb, 8 Wheat. (U. S.) 337.

3. Greenl. Ev. § 153.

4. Livingston v. Annex, 56 N. Y. 507. See Taylor on Ev. § 680. But independent matters are not admissible merely because they were made at the same time or place.

5. Greenl. Ev. § 109.

6. Harrington v. Chambers, 3 Utah, 94; Rust v. French, 1 Ariz. 99; Header v. Womack, 88 N. Car. 468; Bowen v. Chase, 94 U. S. 254.

7. Abend v. Mueller, 11 Ill. App. 257. Or at the time of the execution of the deed in a transfer of realty. Kenney et al. v. Phillipy, 91 Ind. 511.

8. "The declarations made by P. before he acquired title to the property, as to what he intended or wanted to do when he should acquire it, and his motive in acquiring it, were, we think, inadmissible." Hutchins v. Hutchins, 98 N. Y.

Declarations of an assignor for the benefit of creditors made to a third person before and after the assignment are inadmissible to show the assignment to be fraudulent. Flogles v. Wheeler, 40 Hun (N. Y.), 178, 125.

9. Agnew v. Adams et al. (S. Car.). I S. E. Rep. 414; Crow v. Watkins (Ark.), 2 S. W. Rep. 659.

Not after the execution of a deed. Sanford v. Ellithorp, 95 N. Y. 48; Perkins v. Towle, etc., 59 N. H. 583; McSweney v. McMillen, 96 Ind. 298;

Marion v. Hoyt, 72 Ga. 117.

As where vendor after a sale declared that the sale was a sham, and was made to defraud his vendor's wife of her marital rights. Johnson v. Johnson, 2 S. W. Rep. (Ky.) 487. Or the declarations of a former holder of a promissory note against a purchaser for value. Clews v. Kehr, 90 N. Car. 633. Or of assignor Ind. 588. Or of vendor after sale. Hischfeld v. Williamson, 18 Nev. 66; Edwards v. Hamilton, 19 Ill. App. 340; Smith v. Hamlet, 43 Ark. 320; Garlick v. Bowers, 66 Cal. 122.

Declarations of a seller of a chattel in dispargement of the purchaser's title made some days after the chattel has been attached as the property of the seller, and while it is in possession of the attaching officer, are inadmissible in a suit by the purchaser against the officer for conversion, on the issue whether the sale was fraudulent. Roberts v. Med-

bery, 132 Mass. 100.
10. Taylor v. Central Pacific R. Co.,67 Cal. 615.

(f) Declarations as to a Lost Will.—The declarations of a deceased testator as to his testamentary intentions and as to the contents of his will are deemed to be relevant when his will has been lost, and when there is a question as to what were its contents, and when the question is whether an existing will is genuine or was improperly obtained, and when the question is whether any and which of more existing documents than one constitutes his will.¹

(g) Dying Declarations.—See DYING DECLARATIONS.

(h) Declaration of Bankruptcy.—A declaration of inability to pay debts, when signed and filed with the required formalities, is declaration in bankruptcy. On such a declaration the debtor may

be adjudicated a bankrupt in England.2

(i) Declaration of Trust on Use. (See also FRAUDS, STATUTE OF; TRUSTS; USES.)—An act by which a person acknowledges that a property, the title of which he holds, is held by him for the use of another. Such declarations may be in writing or by parol.³

1. Sugden v. St. Leonards, L. R. I P. D. (C. A.) 154; Stephen's Dig. of Ev. art. 29. Contra: Thomasson v. Driskell, I3 Ga. 253. See Tilton v. American Bible Society, 60 N. H. 377; Hinckley v. Thatcher, 139 Mass. 477; Heny v. Heny, 81 Ky. 342; Taylor v. Morris, 90 N. Car. 619; Chambers v. Watson, 60 Iowa, 339; Washington and Lee University's Appeal, III Pa. St. 572 So a codicil fraudulently destroyed may be sustained by parol evidence of its contents. Clark v. Wright, 3 Pick. (Mass.) 67. So if a party takes a will to destroy it and fraudulently preserves it. Card v. Grenmair, 5 Conn. 164.

Statements made before or after the execution of the will are admissible to show what papers constitute the will. Gould v. Lakes, L. R. 6 P. D. I.

Where, in the clause appointing executors, a testator refers to a will as written on eleven pages, while in fact there are but ten, and on page six the 6 is altered from 5, on page eight the 8 from 7, and on the last page, at the bottom, is 11, and at the top 11 altered to 10, and the pages of a codicil are numbered 12, 13, and 14, there is an ambiguity which may be explained by the evidence of the testator's declarations at the time when the codicil was drawn, showing that these ten pages were the whole will. Burge et al. v. Hamilton et al., 72 Ga. 567.

A testator devised land to the "four boys." Held, that parol evidence that he had seven sons, three of whom were adults living in their own homes, and the other four were minors living with him; of his declarations before, at, and after the execution of the will,—were competent to show that the devise was to the minors. Bradley v. Rees, 113 Ill. 327.

minors. Bradley v. Rees, 113 Ill. 327.

2. Rep. & Law. Law Dict. See Declaration. It was formerly known as a declaration of insolvency.

2 Bl. Com.

488 n.

Declaration of Intention.—(1) The act of an alien whereby he declares in a formal manner before a court of record his bona fide intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince; potentate, State, or sovereignty, whereof at the time he may be a citizen or subject. Rev. Stat. § 2165. It is one of the steps in naturalization.

(2) To vary a writing by parol. See

EVIDENCE.

3. Bouv. Law Dict. title "Declaration of Trust."

In the case of real property, however, the Statute of Frauds, 29 Char. II. c. 3, requires that such declarations must be manifested in writing to render them binding on the declarant. And hence a declaration of trust has been defined as a paper subscribed by a grantee of property acknowledging that he holds it in trust for the purposes and upon the terms set forth. Abbott's Law Dict. 352.

It is not necessary that the paper be a formal document. A letter signed by the person to be charged is sufficient. Lewin on Trusts, p. 55; 1 Hilliard's Real

Prop. 303.

DECLARATOR.—(See also DECLARATORY ACTION.)—An action whereby a party prays something to be declared in his favor.¹

DECLARATORY ACTIONS.—Those wherein the right of the pursuer is craved to be declared; but nothing claimed to be done by the defendant.2

DECLARATORY DECREE OR JUDGMENT.—One which simply declares the rights of the parties, or expresses the opinion of the court on a question of law without ordering anything to be done.

DECLARATORY PART OF A LAW.—That which clearly defines rights to be observed and wrongs to be eschewed.3

DECLARATORY STATUTE.—One which declares or formally states what the existing law is on a given subject, so as to remove any doubts which may have been raised.4

DECLARE.—(See also DECLARATION.)—To state; to assert; to publish; to utter; to announce; to announce clearly some opinion or resolution.5

DECLINE.—In Scotch practice, to object to.6

1. Bell's Dict.

2. Bell's Dict.

3. Rapalje & L. Law Dict
4. Rapalje & L. Law Dict, I Bl. Com.
86; Dwar. Stat. 637; I Kent's Com. 456.
5. "He declared that he would not. To

declare is to state; to assert; to publish; to utter; to announce; to announce clearly some opinion or resolution; while to some opinion of resolution, while to promise is to agree; 'to pledge one's self; to engage; to assume or make sure; to pledge by contract.—Worcester." Knecht v. Mutual Life Ins. Co., 90 Pa.

St. 121. "It might clearly appear that an admixture of any substance, not noxious, with intent to increase the weight, unless declared, was intended to be an adultera-tion within the act. It appears to me that the respondent is not within the 3d section, for both by word of mouth and by the printed label he affected the purchaser with notice that there had been some foreign substance admixed with the article sold. If he had sold the article without such declaration of the admixture he would have been brought within the provisions of the 2d section." Pope v. Tearle, L. R. 9 C. P. 502.
"It was said that the following word,

'declararet,' hath a certain signification and is more comprehensive than 'con-sentiret,' if it had been right, because a man may consent to a thing, and never declare his consent openly; but when he makes a declaration thereof he does both."

Company of Vintners v. Clerke, 5 Mod.

"To 'declare the law' means that he is to charge the law arising upon the evidence. He is not bound to charge every principle of law that may be insisted on by counsel whether applicable to the case or not." Crabtree v. State, I Lea (Tenn.),

270.
"Under the existing statute, as under the first, express trusts may be 'created' in the first instance, or subsequently 'declared' by any proper writing signed as required." McClellan v. McClellan, 65

Me. 505.
"Where a statute required an official oath to be in the words I promise and affirm,' an oath in which the words 'declare and affirm' were used was held sufficient." Bassett v. Denn, 17 N. J. L. 432.
"By the Revised Statutes (vol. ii. p. 63,

§ 40), the testatrix, at the time of making the subscription, or at the time of acknowledging it, shall declare the instrument to be his last will and testament." Heyer v. Burger, I Hoffman Ch. (N. Y.)

"Testator must, in the presence of two witnesses, declare the instrument to be his last will and testament." Seymour v. Van Wyck, 2 Selden (N. Y.), 120.

6. And declinature, in Scotch law, a plea to the jurisdiction on ground of in-terest in the judge. Bell's Dict.

Declines.—"... Another objection

is based upon section 20. That gives

DECOY.—A place made for catching wild water-fowl; a pond used for the breeding and maintenance of water-fowl.¹

the creditors, legatees, heirs, etc., the right to appeal from the decision of the commissioners, when the executor or administrator 'declines to appeal.' It was urged that it could not be known whether the administrators declined to appeal without an express demand and refusal. Perhaps this might be so, if either of the other parties interested in the estate desired to appeal within the time limited. Until that time had expired, the mere neglect to take an appeal could not be insisted on as a sufficient declining to sustain an appeal by other parties; because the executor or administrator might still appeal within the time. But where the latter has allowed the whole time to expire without appealing, if an heir or other person interested can present a case justifying in other respects the interposition of the circuit court to allow an appeal, after such expiration, it certainly would sufficiently appear that the executor or administrator had declined to appeal within the meaning of the statute. A neglect to ap peal until the right was barred would be declining in the most effectual manner.'

Groner v. Hield, 22 Wis. 204.

1. In Carrington v. Taylor, 11 East, 571, which was an action on the case for wilful disturbance of and damage to a decoy by which plaintiff made his living, it was held that evidence that defendant being out in his boat shooting wild-fowl in a part of an open creek first fired his fowling-piece within about a quarter of a mile of the plaintiff's decoy, when two or three hundred wild-fowl came; and afterwards approached nearer, and fired again at wild-fowl on the wing at the distance of about two hundred yards and upwards from the decoy pond, when he killed several widgeons, and immediately on the noise of the gun four or five hundred wild-fowl took flight from the pond; but it did not appear that he fired into the decoy, which was an ancient one, and to which plaintiff's right had been proved,-was sufficient to show such wilful disturbance of and damage to the decoy for which an action on the case would be maintainable by the owner. The court, in its opinion in this case, followed the case of Keeble v. Hickeringill, reported in a note thereto; s. c., II Mod. 74, 130, the facts of which are stated thus: "That the defendant was lord of the manor and had a decoy; and the plaintiff had also made a decoy upon his

own ground, which was next adjoining to the defendant's ground, and pretty near also to the defendant's decoy; and therein the plaintiff had decoy and other ducks, whereof he made considerable profit," etc.; and the declaration charged that defendant fired guns with a view to damnify the plaintiff and frighten away the wild-fowl from the decoy. Holt C. J., said: "I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, firstly, this using or making a decoy is lawful. Secondly, this employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy-ducks to come to his To learn the trade of seducing pond. other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wild-fowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not effect any damage, yet are they mischievous in themselves, and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him, though they do not charge him with any crime that may make him obnoxious to punishment; as to say a merchant is broken, or that he is failing, or I Roll. is not able to pay his debts. 60, I; all the cases there put. How much more when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employment. Now there are two sorts of acts for doing damage to a man's employment for which an action lies: the one is in respect of a man's privilege, the other is in respect of his proper-

DECREE.—(See also Admiralty; Appeal; Chancery Prac-TICE: EQUITY: JUDGMENTS: PROBATE.)

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- (III.) Other Methods, 300. o. Decrees of Sister States, 391.
- 10. Foreign Decrees, 392.
- 1. Definition.—(I.) IN LEGISLATION.—In some countries some acts of the legislature or of the sovereign which have the force of law are called decrees.1
- (II.) IN SCOTCH LAW.—The final judgment or sentence of the court by which the question at issue between the parties is decided.2
- (III.) IN ENGLISH AND AMERICAN LAW.—A decree is the decision or judgment of a court of equity or admiralty.3 ments of courts of bankruptcy and probate are commonly called decrees.

An interlocutory decree is one made pending the cause which

- 1. Bouv. Law Dict.; Webster.
- 2. Bouv. Law Dict.

3. See Burrill Law Dict. According to Bouvier, a decree is "the judgment or sentence of a court of equity."

Law Dict.

"A decree is the sentence or order of the court pronounced on hearing and understanding all the points in issue, and determining the rights of all the parties to the suit according to equity and good conscience." Danl. Ch. Pr. (5th Ed.) *986. See also Lube Eq. Pl. sec. 128. Of this definition Mr. Freeman says: "It is hoped that decrees generally conform to the description here given of them. They are none the less decrees, however, if pronounced without hearing or under-standing the points in issue. Neither is it necessary to their existence or validity that the rights of the parties be determined according to equity or good conscience." Freeman on Judg. sec. 9. See also Randall v. Payne, I Tenn. Ch. 144.

Superiority of Decree over Judgment at

Law .-- "A judgment at law was either simply for the plaintiff or simply for the There could be no qualifications or modifications of the judgment. But such a judgment does not always touch the true justice of the cause, or put the parties in the position which they ought to occupy. While the plaintiff may be entitled in a given case to general relief, there may be some duty connected with the subject of litigation which he owes the defendant, the performance of which equally with his duty by the defendant ought in a perfect system of remedial law to be exacted. This result was obtained by the decree of a court of equity which could be so framed and moulded or the execution of which could be so controlled and suspended that the relative duties and rights of the Bisph. Pr. Eq. (3d Ed.) 8. See also Story Eq. Juris. sec. 27: 1 Pom. Eq. Juris. 134, 135. And for decrees in Admiralty, Walker's Am. Law (8th Ed.), sec. 234leaves the détermination of the particular question raised or the merits of the cause generally to a future hearing.1

1. See Freeman on Judg. (3d Ed.) sec. 29; Danl. Ch. Pr. *986; Teaff v. Hewitt,

1 Ohio St. 511; s. c., 59 Am. Dec. 634.
"An interlocutory decree is a decree pronounced for the purpose of ascertaining matter of law or fact preparatory to a final decree." Barb. Ch. Pr. *327.

A decree is interlocutory which reserves the right to set the cause down for further consideration consistent with the present decree. Williamson v. Field, 2 Barb. Ch. (N. Y.) 281; Harris ν. Clark, 4 How. Pr. (N. Y.) 78.

Where the further action of the court in the cause is necessary to give com-pletely the relief contemplated by the court, there the decree upon which the question arises is to be regarded not as final, but interlocutory." Cocke's Admr. v. Gilpin, I Rob. (Va.) 20.

Under Code. — Strictly speaking, there is no such thing as an interlocutory decree under the codes of procedure adopted in some States. Interlocutory decrees are included in the definition of the word "order." Freeman on Judg. (3d Ed.) secs. 14. 15.

Illustration. -An order for the trial of an issue at law is interlocutory. Dabbs v. Dabbs, 27 Alá. 646; Eames v. Eames, 16 Pick. (Mass.) 141.

An order overruling a demurrer, motion to dismiss for want of equity or plea, is interlocutory. Knapp v. Marshall, 26 Ill. 63; Donner v. Fortescue, 2 Atk. 248; Shaw v. Patterson, 2 Tenn. Ch. 172.

A decree dismissing a cross-bill is interlocutory. Fleece v. Russell, 13 Ill, 31; Ayres v. Carver, 17 How. (U. S.) 594. But a decree dismissing a cross-bill by which one makes himself a party to the suit may be final as to him. Nichol v.

Dunn, 25 Ark. 129.
Reference to Master.—A decree directing a reference to a master and reserving the further consideration of the merits of the cause to the coming in of the report, is not final, although it may dispose of the main principles of the case. Freeman on Judg. (3d Ed.) sec. 31; Broughton v. Wimberly, 65 Ala. 549; Garner v. Prewitt, 32 Ala. 13; Gaines v. Patton, 8 Ark. 67; Gates v. Salmon, 28 Cal. 320; Owens v. Love, 9 Fla. 325; Griffin v. Osman, 9 Fla. 22; Pryor v. Smith, 4 Bush (Ky.), 379; Cook v. Knickerbocker, 11 Ind. 230; Caswell v. Comstock, 6 Mich. 391; Enos v. Sutherland, 9 Mich. 148: Kane v. Whittick, 8 Wend. (N Y.) 319; Johnson v. Everett, 9 Pai. (N. Y.) 636; Chittenden v. Missionary Society, 8

How. Pr. (N. Y.) 327; Craighead v. Wilson, 18 How. (U. S.) 199; Beebe v. Russell, 19 How. (U. S.) 283; Cook's Heirs v. Bay, 4 How. (Miss.) 485; Berryhill v. McKee, 3 Yerg. (Tenn.) 157; Porter v. Burton, 10 Heisk. (Tenn.) 584; Templeman v. Steptoe, 1 Munf. (Va.) 339; Ryan's Admr. v. McLeod, 32 Gratt. (Va.) 367; Humiston v. Stainthorp. 2 Wall. (U. S.) 106; Chace v. Varquez, 11 Wheat. (U. S.) 430 (U. S.) 429.

A decree which does not determine the amount due nor the premises to be sold is generally interlocutory. Railroad Co.

v. Swasey, 23 Wall. (U. S.) 405.

A decree for a separate maintenance not fixing the amount is interlocutory. Hunter v. Hunter, 100 Ill. 519.

A decree for a sum of money which provides that property conveyed in trust be delivered to satisfy it, unless other property be found, held interlocutory. Hill's Ex'r v. Fox's Admr., 10 Leigh (Va.), 587.

A decree opening or setting aside a decree already entered is interlocutory. Perkins v. Perkins, 10 Mich, 425; Prentis v. Rice, 2 Doug. (Mich.) 297; Merriam v. Gordon, 17 Neb. 325.

A decree for alimony pendente lite is

not final. Aspinwall v. Aspinwall, 18

Neb. 463.

Injunctions.-A decree for an injunction in a patent case, with a reference to a master to take an account of profits, is interlocutory. Barnard v. Gibson, 7 How. (U. S.) 650; Humiston v. Stain-thorp, 2 Wall. (U. S.) 106. See also Russell v. Lathrop, 122 Mass. 300.

A decree reinstating an injunction and directing a trial at law is interlocutory. Price v. Strange, 2 Hen. & Munf. (Va.)

A decree granting or refusing to grant or continuing an injunction pendente lite is interlocutory. Moss v. Ashbrooks, 15 Ark. 169; Jefferson v. Bohemian Association, 5 Ill. App. (Bradw.) 230; Harrison v. Rush, 15 Mo. 175; Gibbons v. Ogden, 6 Wheat. (U. S.) 448; Wing v. Warren, 2 Dougl. (Mich.) 288.

So is a decree dissolving a temporary injunction which is merely an incident of the relief sought. Ex parte Hawley, 24 Ark. 596; Pentecost v. Magabee, 4 Scam. (Ill.) 326; Cornelius v. Coons, Breese (Ill.), 14; Choteau v. Rice, 1 Minn. 24; Tanner v. Irwin, I Mo. 65; Johnson v. Board of Education, 65 Mo. 47; School District v. Brown, 10 Neb. 440; Scofield v. State Nat'l Bank of Lincoln, 8 Neb. 16;

A final decree is one which determines the rights of the parties in the suit or an independent branch of it, and reserves no further question or direction for the judgment of the court.2

Verden v. Coleman, 18 How. (U. S.) 86; International, etc., R. v. Smith Co., 58 Tex. 74; Green v. Banks, 24 Tex. 522; Hiriart v. Ballou, 9 Pet. (U. S.) 156.

A decree making an injunction perpetual, but reserving matters of account for future consideration, is not final. Brown v. Swann, 9 Pet. (U. S.) 1.

Partnerships.—The decree dissolving a partnership is generally interlocutory. Grav v. Palmer, 9 Cal. 616; Kingsbury v. Kingsbury, 20 Mich. 212; Rhodes v. Williams, 12 Nev. 20; Huntington v. Moore, 1 N. Mex. 471; Cocke's Admr. v.

Gilpin, I Rob. (Va.) 20.

Partition. - The first decree in partition finding cotenancy, ordering partition, and appointing commissioners, is generally interlocutory. Freeman on Coten. & Part. (2d Ed.) sec. 519; Gates v. Salmon, 28 Cal. 320; Peck v. Vandenburg. 30 Cal. 11; Putnam v. Lewis, 1 Fla. 455; Kern v. Maginnis, 41 Ind. 398; Davis v. Davis, 36 Ind. 160; Clester v. Gibson, 15 Ind. 10; Pipkin v. Allen, 29 Mo. 229; Durham v. Durham, 34 Mo. 447; Medford v. Harrell, 3 Hawks (N. Car.), 41; Mills v. Mills, 2 Neb. 299; Beebe v. Griffing, 6 N. Y. 465; Gesell's Appeal, 84 Pa. St. 238; Templeman v. Steptoe, 1 Munf. (Va.) 339; Young v. Skipworth, 2 Wash. (Va.) 300; Craighead v. Wilson, 18 How. (U. S.) 199; Green v. Fisk, 103 U. S. 518. Compare McFarland v. Hale, 17 Tex. 676.

But when the first decree in partition settles all the rights of the parties, it is final. Ansley v. Robinson, 16 Ala. 793; Banton v. Campbell's Heirs, 2 Dana (Ky.), 421; Damouth v. Klock, 28 Mich. 163. And for the purposes of appeal it is sometimes made final by statute. Pegan v. McMahon, 43 Cal. 627; McCourtney v. Fortescue, 42 Cal. 387; Shephard v. Rice, 38 Mich. 556; Randles v. Randles, 67 Ind. 434. See also Hunter v. Miller,

17 Ind. 88.

The decree made on the report of the commissioners is usually the final decree. Peck v. Vandenberg, 30 Cal. 11; Bull v. Pyle, 41 Md. 419; Gudgell v. Mead, 8 Mo. 53.

As a general proposition, a decree is not final in the sense of authorizing an appeal which settles the rights of some of the parties only, and not all. Freeman on Judg. (3d Ed.) sec. 28; Gates v. Salmon, 28 Cal. 320; Peck v. Vandenberg, 30 Call. 11; Chittenden v. M. E. Church, 8 How. Pr. (N. Y.) 327: Tompkins v. Hyatt, 19 N. Y. 535; Harrison v. Farnsworth, I Heisk. (Tenn.) 751; Delat v. Hunter, I Sneed (Tenn.), 101; Martin v. Crow, 28 Tex. 611; Wills v. State, 4 Tex. App. 613. But if the interests of the parties are distinct, a decree may be final as to some parties, though not as to all. Royal v. Johnson, I Rand. (Va.) 421; Rhodes v. Williams, 12 Nev. 20; Harrison v. Farnsworth, I Heisk. (Tenn.) 751.

An order to carry into effect a decree already entered held interlocutory. Callan v. May, 2 Black (U. S.), 541; Smith v. Trabue's Heirs, 9 Pet. (U. S.) 4.

For further instances of interlocutory decrees, see 60 Am. Dec. 428, note. See

also title, APPEALS, ante, vol. i.

1. Freeman on Judg. (3d Ed.) sec. 24;
Kingsbury v. Kingsbury, 20 Mich. 213;
Cannon v. Hemphill, 7 Tex. 184. But see Mayor v. Lamb, 60 Ga. 342; Lake v. King, 16 Nev. 215; The Palmyra, 10 Wheat. (U.S.) 502.

2. See Teaff v. Hewitt, I Ohio St. 511;

s. c., 59 Am. Dec. 634.
"When a decree finally decides and disposes of the whole merits of the cause and reserves no further question or direction for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree."
Beebe v. Russell, 19 How. (U. S.) 285;
Turner v. Plowden, 5 G. & J. (Md.) 52;

s. c., 23 Am. Dec. 596.

A decree is not final which reserves some matter in issue for the future consideration of the court. Ware v. Richardson, 3 Md. 505; s. c., 56 Am. Dec. 762; Perkins v. Sierra, etc., Co., 10 Nev. 405; Choteau v. Rice, I Minn. 24. in some instances, to avoid hardship. courts have considered decrees capable of immediate enforcement as final within the meaning of the statute regulating appeals, which did not dispose of the whole merits of the cause. Stovall v. Banks, 10 Wall. (U. S.) 538; Freeman on Judg. sec. 35.

A decree is final under the statute regulating appeals which ends the particular suit without necessarily determining the rights of the parties litigant. Freeman on Judg. (3d Ed.) sec. 16; Weston v. City Council, 2 Pet. (U.S.) 449.

The character of a decree really final is not taken away by a reservation therein contained that "all points and questions not herein expressly decided are reserved to the final decree." Jones v. Wilson,

54 Ala. 50.

An order suspending the operation of the decree as to one item till the determination of another suit held not to take away its final character. Fleming v.

Bolling, 8 Gratt. (Va.) 292.

Under Code.-Under the Code of Procedure final decrees are called judgments. but the essential differences between decrees in equity and judgments at law re-Freeman on Judg. main unchanged. (3d Ed.) secs. 14 and 39. S rahan v. Maxwell, 28 Cal. 85. See McGar-

Reference to Master .- " It is true a decree may be final, although it directs a reference to the master, if all the consequential directions depending upon the result of the master's report are contained in the decree, so that no further decree of the court will be necessary upon the confirmation of the report to give the parties the entire and full benefit of the previous decisions of the court."
Bank of Mobile v. Hall, 6 Ala. 141; s.c.,
41 Am. Dec. 41; Bradford v. Bradley's Admr., 37 Ala. 453; Hastie v. Aikin, 67 Ala. 313; Neall v. Hill, 16 Cal. 145; Damouth v. Klock, 28 Mich. 163; Guardian mouth v. Klock, 28 Mich. 163; Guardian Savings Bank v. Reilly, 8 Mo. App. 544; Johnson v. Everett, 9 Pai. (N. Y.) 636; Jacques v. Methodist Church, 17 Johns. (N. Y.) 548; Brown v. Brown, 31 How. Pr. (N. Y.) 497; Butler v. Lee, 33 How. Pr. (N. Y.) 260; s. c., 3 Keyes 70; Miller v. Hoag, 7 Pai. (N. Y.) 18; s. c., 31 Am. Dec. 271; Meek v. Mathis, 1 Heisk. (Tenn.) 534; McFarland v. Hall's Heirs, 17 Tex. 676; Forgay v. Conrad, 6 How. (U. S.) 201; Beebe v. Russell, 19 How. (U. S.) 285; Hawey v. Branson, 1 Leigh (Va.), 108; Rawling's Exrs. v. Rawlings, 75 Va. 76.

If the questions arising on the master's report are merely incidental to carrying the decree into effect, the decree is final. Johnson v. Everett, 9 Pai. (N. Y.) 638.

Receivers .- A decree appointing a receiver is generally regarded as final. In re Graeff, 30 Minn. 358; Lewis v. Campan, 14 Mich. 458; s. c., 90 Am. Dec. 245; Taylor v. Sweet, 40 Mich. 736. Compare Eaton, etc., R. v. Varnum, 10 Ohio St. 622; Hottenstein v. Conrad, 5 Kan. 249. See also State v. Alabama, etc., R., 54 Ala, 139; Adams v. Woods, 21 Cal. 165. Partnerships.— A decree dissolving a

partnership which directs an accounting and sale of the assets, and specifically states the manner of distribution, is final. Clark v. Dunham, 46 Cal. 204. See also

26 Ohio St. 439.

A decree settling the affairs of a corne. ration and ordering an accounting held final. Wall v. Hill, 16 Cal. 145.

A decree pro confesso is final. Smith a Yell, 4 Ark. 293. Unless a reference to ascertain the facts for a final decree is necessary. Gaines v. Potter, 8 Ark, 67.

Injunctions .- A decree perpetually enjoining the sale of property is final. Merchant's, etc., Bank v. Kent, 43 Mich. 296; Rickards v. Coon, 13 Neb. 419. So is a decree dissolving an injunction on whole merits of case. Saloy v. Collins, 30 La. Ann. 63. So is a decree for damages on the dissolution of an injunction. Of. futt's Exr. v. Bradford, 4 Bush (Ky.), 413. So is a decree generally dissolving an injunction, where that is the sole relief sought. Titus v. Mabee, 25 Ill. 257; Prout v. Lomer, 79 III. 331; Hedges v. Myers, 5 Ill. App. (Bradw.) 347; Oberkoetter v. Luebbering, 4 Mo. App. 481. See Johnson v. Board of Education, 65 Mo. 47.

An order refusing to set aside a default is final. Steele v. Haynes, 20 Neb. 316. Or to open a decree. Michigan Ins. Co. v. Whittemore, 12 Mich. 311.

A decree that a dismissal be entered as a non-suit is final. West v. Bagby, 12

Tex. 34; s. c., 62 Am. Dec. 512.

A decree of dismissal unless expressly without prejudice is final. Snell v. Dwight, 121 Mass. 348.

A decree modifying a decree for alimony in a divorce case *held* final. Chandler v. Chandler, 24 Mich. 176. Foreclosure. - A decree of foreclosure

and sale is generally final. Myers v. Manning, 63 III. 211; Morris v. Morange, 38 N. Y. 172; Baker v. Lehman, Wright (Ohio), 522; Allen v. Belcher, 2 Hen. & Munf. (Va.) 595; Fairfax v. Muse's Exrs., 2 Hen. & Munf. (Va.) 558; Ray v. Law, 3 Cranch (U. S.), 179; Whiting v. Bank of U. S., 13 Pet. (U. S.) 6; Bronson v. Railroad Co., 2 Black (U.S.), Compare Thurston v. Belote, 12 Heisk. (Tenn.) 249. See also Benedict v. Thompson, 2 Dougl. (Mich.) 299; Cromwell v. Craft, 47 Miss. 44; Roberts v. Johnson, 40 Miss. 500. So is an order setting aside a sale and directing a resale. Perkins v. Perkins, 16 Mich. 162; Bullard v. Green, 9 Mich. 222. But not when the decree provides that the first sale shall stand unless a larger sum is bid on the second sale. Demary v. Little, 17 Mich. 386.
A decree which simply determines the

right of property without directing a conveyance or sale is not final. Perkins v. Fourinquet, 6 How. (U. S.) 206; Pulliam v. Christian, 6 How. (U. S.) 209. But a decree which required the immediate sale except such as may be necessary to carry the decree into ef-

A decree taken pro confesso is one pronounced by the court upon hearing the pleadings and considering plaintiff's equity, when the defendant has not appeared within the time prescribed by the

rules of court, or having appeared has failed to answer.2

A decree nisi is one drawn by plaintiff's counsel and entered as drawn, when the defendant, having been served with subpana to hear judgment, does not appear to open his answer on the hearing. It contains a provision that the decree shall not become absolute unless the defendant, having been served with process, shall fail to show cause to the contrary by a certain time.3

A decree by consent is one whose terms are settled by agreement of counsel for the parties. It must be entered without

change.4

A decree in personam is one given where the proceedings are against the person, and are of such a nature as to bind only the

parties and their privies in blood and estate.5

A decree in rem is a decree against some person or thing upon the status of the person or the nature and condition of the thing equally binding on all persons.6

A decree is final which determines the right of property and directs a future conveyance. Lewis v. Outton's Admr., 3 B. Mon. (Ky.) 453; Larue v. Larue, 2 Litt. (Ky.) 258.

A decree for a conveyance under the direction of a master on the payment of a certain sum of money is final. Travis

v. Waters, 12 Johns. 500.

Costs.—A decree directing the payment of costs from a fund remaining in the hands of the court was held pro tanto final. Trustees v. Greenough, 105 U. S.

A decree which left undetermined the question of costs has been held not the question of costs has been held not the less final. McFarland v. Hall, 17 Tex. 691; Travis v. Waters, 12 Johns. 500. Compare Williams v. Field, 2 Wis. 421; s. c., 60 Am. Dec. 426; Dickenson v. Codwise, 11 Pai. (N. Y.) 191; Williamson v. Field, 2 Barb. Ch. (N. Y.) 281; Chittenden v. Missionary Society, 8 How. Pr. (N. Y.) 327.

A decree is not interlocutory because

ti directs the taxation of costs. Craig v.
Steamer Hartford, r McAll. (U. S.) 91.

1. Mills v. Hoag, 7 Pai. (N. Y.) 18;
Quackenbush v. Leonard, 10 Pai. (N. Y.) 131; Dickenson v. Codwise, 11 Pai. (N. Y.) 189.

A decree against an administrator rem; 2 Ph. Ev. 5.

of property for complainant's benefit held awarding distribution among the heirs final. Forgay v. Conrad, 6 How. (U.S.) and execution, is not the less final because subsequently the court enters an order permitting the administrator to set off a note held by him against them. Stovall v. Banks, 10 Wall. (U. S.) 583.

For further instances of final decrees,

see 60 Am. Dec. 427, note.

2. Freeman on Judg. (3d Ed.) sec. II;

Bouvier's Law Dict.

3. Decrees for divorce and decrees against infants are entered nisi under the English practice. See Freeman on Judg. (3d Ed.) sec. 10; Barton's Suit in Equity, 149; Lube's Eq. Pl. sec. 130.

The decree nisi seems to be the equivalent of the decree by default as classi-

fied by some writers.

For English practice, see Lube's Eq. Pl. secs. 129-131; I Bish. M. & D. (6th Ed.) sec. 743, and 2 Bish. M. & D. sec. 743, and cases cited.

For American Practice, see Lawrence v. Lawrence, 73 Ill. 577; Garnett v. Garnett, 114 Mass. 347; Sparhawk v. Sparhawk. 116 Mass. 315; Moore v. Moore, 121 Mass. 232; Oliver v. Oliver, 20 Mo. 261. See notes to sub-title, How FAR CONCLUSIVE, post.

4. 1 Barb. Ch. Pr. (2d Ed.) *351.

5. See Freeman on Judg. (3d Ed.) sec.

6. See Freeman on Judg. (3d Ed.) secs. 13, 606-612; Bouv. Law Dict., title In 2. Form and Contents.—Decrees generally consist of: 1st, the date and title; 2d, the recitals; 3d, the declaratory part (if

any); 3 4th, the ordering or mandatory part.4

In general, it may be said that the decree should contain what. ever the law requires should be passed upon by the court; not what arises on such findings from the law itself.⁵ The decree The decree

1. In modern practice the date should be that of the actual entry, unless otherwise ordered. Barclay v. Brown, 7 Paige (N. Y.), 245.

The parties should be designated in the decree as in the bill. Danl. Ch. Pr.

2. Decrees formerly contained recitals of the pleadings in the case; but by the modern practice, except in special cases, the pleadings are only referred to. Danl. Ch. Pr. *1002; Story Eq. Pl. (9th Ed.) 407; Clapp v. Thaxter, 7 Gray (Mass.), 384; Dexter v. Arnold, 5 Mason (U. S.),

311.

A short recital of the answer and other evidence is sometimes entered in this part of the decree. Danl. Ch. Pr. *1003. But a statement of the facts found by the court from the evidence upon which the decree is based would seem to be proper practice. Tatum v. Hines, 15 Ark. 180; Moore v. School Trustees, 19 Ill. 83; Trenchard v. Warner, 18 Ill. 142; Walker v. Carey, 53 Ill. 470; Moss v. McCall, 75 Ill. 190; Hawes v. Hawes, 33 Ill. 286; Hilleary v. Thompson, 11 W. Va. 113.

Admissions.-Where the decree is founded wholly or in part on admissions, consents, submissions, undertakings, or waivers, they should be inserted in the decree before the ordering part, if they relate to the whole decree, or, if not immediately, before the part to which they do relate. Danl. Ch. Pr. *1008.

A decree pro confesso should show proper service on the defendant. Keiffer v. Barney, 31 Ala. 192; Allen v. Blunt, 1 Blatchf. (U. S.) 480. And the summons or publication notice should appear of Hanson v. Patterson, 17 Ala. 738; Randall v. Songer, 16 Ill. 27. Compare Craig v. Sebreel, 9 Gratt. (Va.) 738.

3. When the suit seeks a declaration of the rights of the parties, such declaration should precede the ordering part of the decree. Danl. Ch. Pr. *1004.

4. The ordering part of the decree contains the specific directions of the court depending upon the nature of the particular cause in controversy. Danl. Ch. Pr. *****1004.

5. 2 Bish. M. & D. (6th Ed.) sec. 745; Freeman on Judg. (3d Ed.) sec. 47; Hawes v. Hawes, 33 Ill. 286; Leviston z. Swan, 33 Cal. 480.

While a court of general jurisdiction will be presumed to have jurisdiction of a cause, it would seem proper that a decree should find the facts which give jur-2 Bish. M. & D. (6th Ed.) isdiction.

sec. 746.
Where the Code of Procedure is adopted, the old chancery form should be modified to meet its requirements See Freeman on Judg. (3d Ed.) sec. 47.

Money Decree. - A decree for money must specify the sum found due, and not leave it to be computed or fixed by others, Clarkson v. White, 4 J. J. Marsh. (Ky.) 529; s. c., 29 Am. Dec. 229; Clark v. Ball, 4 Dana (Ky.), 16; Barstow v. Mc-Lachlan, 5 Ill. App. (Bradw.) 96; Smith v. Trimble, 27 Ill. 152; Codwise v. Taylor, 4 Sneed (Tenn.), 346; Boone on

Mtges. sec. 189.

Descriptions —The property involved should be described in the decree with precision; but it seems that a reference to a proper description in the pleadings is sufficient. Jones v. Minogue, 29 Ark. 637; Tribble v. Davis. 3 J. J. Marsh. 037; 111001e v. Davis, 3 J. J. Marsh. (Ky.) 633; Gayle v. Singleton, 1 Stew. (Ala.) 566; McManus v. Stevens, 10 La. Ann. 177; Jones v. Belt, 2 Gill (Md.), 106; McGee v. Smith, 1 C. E. Greene (N. J.), 462; Simms v. Cross, 10 Yerg. (Tenn.) 459; Hurt v. Moore, 19 Tex.

Alimony.—A decree for alimony without divorce should be for the separate support of the wife during separation.

Anon., 2 Des. (S. Car.) 198; Hewitt v.

Hewitt, I Bland (Md.), 101. It should not be for a separation. Jelinean v. Jelinea inean, 2 Des. (S. Car.) 45. It is usually expressed that the husband pay the sum named, till he agrees to take back the wife and treat her with conjugal kindness and affection. 2 Bish. M. & D. (6th Ed.) sec. 361; Prather v. Prather, 4 Des. (S. Car.) 33; Rhame v. Rhame, 1 McCord Ch. (S. Car.) 197; Purcell v. Purcell, 4 Hen. & Munf. (Va.) 507. See also Slack v. Slack, Dudley (Ga.), 165; Head v. Head, 3 Atk. 547. The decree may contain a provision requiring the husband to give bond for the peace. Anon., I Des. (S. Car.) 113; Threewits v. Threewits, 4 Des. (S. Car.) 560. And to settle on her property of her own not vested in him. Anon., 1 Des. (S. Car.) 113. The decree

should be for a periodical allowance, unless the statute provides otherwise, and not for specific property. Almond v. Almond, 4 Rand. (Va.) 662. See also Purcell v. Purcell, 4 Hen. & Munf. (Va.) 507; Wallingsford v. Wallingsford, 6 Har. & J. (Md.) 485.

A decree for alimony periodically should be for their joint lives, reserving to the court the right to change the allowance from time to time. 2 Bish. M. Name from time to time. 2 Bish. M. & D. (6th Ed.), sec. 428; Lockridge v. Lockridge, 3 Dana (Ky.), 28; Logan v. Logan. 2 B. Mon. (Ky.), 142; Mayhugh v. Mayhugh, 7 B. Mon. (Ky.) 424; Paff v. Paff, by Hopkins (N. Y.), 584.

For alimony with support and custody of children, see Hewitt v. Hewitt, I Bland (Md.), 101; Bish. M. & D. sec. 781. Divorce.—The form of decree for di-

vorce a mensa et thoro was, in ecclesiastical law, "until they should be reconciled to each other." Poynter M. & D. 182 n.; 2 Bish. M. & D. (6th Ed.) sec. 228. And where the court may decree a divorce a mensa et thoro temporarily or perpetually, the better practice is to make the decree for a perpetual separation, with a proviso that by mutual consent the parties may apply to be discharged from the decree. Barrere v. Barrere, 4 Johns. Ch. (N. Y.)
187. See also Bedell v. Bedell, I Johns.
Ch. (N. Y.) 604; Clutch v. Clutch, Saxton
(N. J.). 474; Graecen v. Graecen, I
Green Ch. (N. J.) 459; Coles v. Coles, 2 Md. Ch. 341. For forms see 2 Bish. M. & D. (6th Ed.) sec. 780; Tayman v. Tayman, 2 Md. Ch. 393.

A decree for nullity of marriage as

well as for divorce should affirm the fact of the pretended or real marriage. Bish. M. & D. (6th Ed.) sec. 265. For forms for nullity of marriage decree, see 2 Bish. M. & D. (6th Ed.) 778; I Bish. M. & D. sec. 778; Fielding's Case, 14 How. St. Tr. 1327, 1369. For form of decree for divorce, see 2 Bish. M. & D. secs. 777, 779; McCaulley v. McCaulley,
1 Harr. (Del.) 137. For questions of practice in making decrees of alimony and divorce, see Wardlaw v. Wardlaw, 39 Ga. 53; Ifert v. Ifert, 29 Ind. 473; Bradley v. Bradley, 45 Ind. 67; Taylor v. Gladwin, 40 Mich. 232; Merrick v. Merrick, 5 Mo. App. 123; Hoffman v. Hoffman, 55 Barb. (N. Y.) 269; Galinger v. Galinger, 4 Lans. (N. Y.) 473; s. c., 61 Barb. (N. Y.) 31; Taylor v. Taylor, 25 Ohio St. 71.

Partition .- " In chancery, the decree for partition ordered: 1st, that a partition be made between the plaintiffs and defendants in certain moieties which it specified; 2d, that a commission or commissions issue to certain persons to be therein therein named: 3d, that the commissioners do make a partition (here specifying the manner in which it shall be made): 4th, that all writings, surveys, muniments of title, etc., be produced before the commissioners; 5th, that the commissioners examine witnesses as they may think fit; 6th, that after partition has been made. that the parties execute conveyances to each other respectively. The decree in addition to these directions usually contained another in reference to the title deeds, and one in regard to costs." Freeman on Coten. & Part. (2d Ed.) sec. 516; Seton on Decrees, 184; Danl, Ch. Pr. (4th Ed.) 2254.

The decree should state the title and moieties, and not leave it to the commissioners. Phelps v. Green, 3 Johns. Ch. (N. Y.) 304; Ledbetter v. Gash, 8 Ired. (N. Car.) 463; Agar v. Fairfax, 17 Vesey, For form, see Freeman on Coten.

& Part. (2d Ed.) sec. 527, note.

Foreclosure. - A decree for strict foreclosure provides for payment by a day named, or in default thereof that the conveyance shall become absolute and the equity of redemption foreclosed and barred. Boone on Mtges., sec. 189; Kendall v. Treadwell, 5 Abb. Pr. (N. Y.) 16; s. c., 14 How Pr. 165; Bolles v. Duff, 41 How. Pr. (N. Y.) 355; s. c., 10 Abb. Pr. (N. S.) 399; Farrell v. Parlier, 50 Ill.

A decree for foreclosure and sale need contain generally only a description of the premises, the amount due, the designation of the parties from whom due and to whom due, a direction for the sale of the property, or so much thereof as is necessary to pay the indebtedness and costs. Leviston v. Swan, 33 Cal. 480; Boone on Mtges., sec. 188 et seq.

Redemption Suit .- The decree usually is that plaintiff pay the amount due by a fixed time, or in default thereof that his bill be dismissed. Boone on Mtges., sec.

167; 2 Barb. Ch. Pr. *199.

Decrees for Accounting.—See Hudson v. Trenton, etc., Co., I C. E. Greene (N. J.), 475; Cummins v. Adams, 2 Ired. Eq.

Partnership Dissolution, Etc. - See Lindley on Part. (Ewell's Ed.) *732, 1068; Parsons on Part. *457 et seq.

Specific Performance. — The

practice seems to be to make the decree final for a conveyance, and then appoint commissioners to convey on failure of the party to do so. Sproule v. Winant's Heirs, 7 T. B. Mon. (Ky.) 195; s. c., 18 Am. Dec. 164. For form, see Rector v. Rector, 3 Gilm. (Ill.) 105.

should be founded on and supported by both the pleadings and

the proofs in the suit.1

3. Drawing, Entering, Enrolling, etc.—In the English practice the decree was drawn by the registrar from the papers in the case and minutes taken down when the decree was pronounced by the court.² In due course it was then "passed." by the registrar and entered in the registrar's books.4 It was afterwards signed by the chancellor and enrolled.⁵ The enrolment of decrees became little known in English practice.6

1. Langdon v. Roane, 6 Ala. 518: Maury v. Mason, 8 Port. (Ala.) 211; Cloud v. Whiteman, 2 Harr. (Del.) 401; Jackson v. Miner, 101 Ill. 550; Knowles v. Rablin, 20 Iowa, 101; McConnell v. Dunlap, Hardin (Ky.), 41; s. c., 3 Am. Dec. 723; Evans v. Gibson, 29 Mo. 223; s.c., 77 Am. Dec. 565; Ringgold v. Ringgold, 1 Har. & J. (Md.) 11; Sipp v. Hosbach, 12 Neb. 371; Simonson v. Blake, 20 How. Pr. (N. Y.) 484; s. c., 12 Abb. Pr. 331; Smith v. Smith, 1 Ired. Ch. (N. Car.) 83; Pigg v. Corder, 12 Leigh (Va.), 69; Crock-ett v. Lee, 7 Wheat. (U. S.) 522. The decree cannot be based on facts

not in issue in the pleadings. Carneal v. Banks, 10 Wheat. (U. S.) 181; Gregory

v. Power, 3 Litt. (Ky.) 339.

The finding of facts should follow the pleadings. Sipp v. Hosbach, 12 Neb.

Plaintiff's relief is limited by the prayer in his bill. Ellis v. Sisson, 96 Ill. 105. The decree should not include damages arising after the commencement of the suit. Waterman v. Buck, 58 Vt. 519.

Personal decrees for money are not usually sought in equity, but such a decree may be proper. Hays v. Wood, 4 Rand. (Va.) 272; s. c., 15 Am. Dec. 754.

A failure to answer admits the facts

alleged in the bill only, and an interlocutory decree does not aid the bill. Meux v. Anthony, 11 Ark. 411; s. c., 52 Am. Dec. 274; Boston v. Nichols, 47 Ill. 353;

Klein z. Horine, 47 Ill. 430.

A decree pro confesso cannot be entered when the bill contains great lack of precision. Marshall v. Tenant, 2 J. J. Marsh. (Ky.) 155; s. c., 19 Am. Dec. 126. But where the obligations of the bill are specific, and the defendant has been properly served, a decree pro confesso on default may be entered. Colerick v. Hooper, 3 Ind. 316; s. c., 56 Am. Dec. 505. Without proofs. Boston v. Nichols, 47 Ill. 353; Harman v. Campbell, 30

A decree may be confessed under power of attorney, and when set aside another decree confessed, unless the power of attorney has been revoked.

Hunter v. Doolittle, 3 G. Greene (Iowa).

76; s. c., 54 Am. Dec. 489.

Where only one of several defendants answers, but he disproves the whole case made by the bill, a decree pro confesso cannot be entered against those failing to answer. Roots v. Mason City, etc., Co., 27 Va. 483.

A decree pro confesso cannot be entered safely against an infant. Quigley v. Roberts, 44 III. 503; Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367. But a decree pro confesso against an infant is sometimes entered on consent of his solicitor. Walsh v. Walsh, 116 Mass. 377; s. c., 17

Am. Rep. 162.

The decree should provide for the interests of all parties directly affected by it. McPherson v. Parker, 30 Cal. 455; s. c., 89 Am. Dec. 129; Wabash, etc., Co. v. Beers, 2 Black (U. S.), 448.

The decree may be against all defendants jointly or against each as the pleading and nature of the case may justify. Lingan v. Henderson, I Bland (Md.), 256. It may be for several plaintiffs jointly, or it may be several. Elliott v. Pell, I Paige (N. Y.), 263; Quarles v. Quarles, 2 Munf. (Va.) 321.

A decree may be entered between codefendants on the pleadings and evidence between plaintiffs and defendants. Motte v. Schult, 1 Hill Ch. (S. Car.) 146; s. c., 26 Am. Dec. 194; Roots v. Mason City, etc., Co., 27 W. Va. 483. See also Hulbert v. Douglas, 94 N. Car. 128; Ashby v. Bell, 80 Va. 811.

A decree for affirmative relief will sometimes be entered for defendants on bill and answer. Hall v. Harris, 113 Ill. 410; Owing's Case, I Bland (Md.), 370; s. c., 17 Am. Dec. 311.

 Danl. Ch. Pr., *1008-1014.
 "A decree or order is said to be passed when the registrar has inserted, his initials in the margin at the foot of the last page, as an authority to the clerk of entries to enter it in the registrar's books." Danl. Ch. Pr., *1015.

4. Danl. Ch. Pr., *1016.

5. Danl. Ch. Pr., *1023.

6. Story's Eq. Pl. (9th Ed.) sec. 403.

In some American courts the decree is drawn by the registrar or clerk of the court; in others by the solicitor of the party who obtains it. In the courts of the *United States* and most State courts, decrees are matters of record, and are deemed to be enrolled. as of the term when entered, whether actually enrolled or not.2

- 4. Nunc pro Tunc Entries.—Where a suit is in a condition for a final decree so far as the parties came make it,3 but on account of the time taken by the court for deliberation,4 or the delay occasioned by motions, 5 no decree has been entered. 6 or when a decree has been announced by the court, but the clerk has failed or neglected to properly enter it, and some hardship would result thereby to one of the parties, the court will sometimes ordered a decree to be entered as of the time the party was legally entitled thereto.9 A party will not be entitled to the entry of a decree nunc pro tunc, if the failure to enter has been due to his own neglect; 10
- 1. The solicitor drawing the decree submits it to the opposing solicitor for his solicitor object to the decree as drawn, rt is submitted to the decree as drawn, it is submitted to the court for correction and approval. Whitney v. Belden, 4 Paige (N. Y.), 140; Crow v. Blythe, 3 Hawy. (N. Car.) 236; Stevens v. Coffeen, 39 Ill. 148; Schneider v. Seibert, 50 Ill. 285; Walker's Am. L., sec. 226.
 2. Story's Eq. Pl. sec. 403; Dexter v.

Arnold, 5 Mason (U. S.), 303.

In some States the decree is considered as enrolled at the end of the term, and the term is considered as continuing till the commencement of the next one. Nowland v. Glenn, 2 Md. Ch. 368; Leach

v. Jones, 11 R. I. 386.
The enrolment of the decree or its equivalent in American practice was necessary before a bill of review could be brought; before enrolment relief against a decree was afforded by a petition for rehearing, or by bill, or supplemental bill, in the nature of a bill of review. Story's Eq. Pl. (9th Ed.) sec. 403; Whitney v. Bank of U. S., 13 Pet. (U. S.) 6; Greenwich Bank v. Loomis, 2 Sandf. Ch. (N. Y.) 70; Wiser v. Blackly, 2 Johns. Ch. (N. Y.) 488; Standish v. Radley, 2 Atk. 178. See post, sub-title RELIEF AGAINST DECREES; also sub-title As EVIDENCE.

The mere failure of the judge or clerk to sign a decree actually rendered does not make it void. Hotchkiss v. Cutting, 14 Minn. 542; Jorgensen v. Griffin, 14 Minn. 466; Foutz v. Mann, 15 Neb. 172.

- 3. Freeman on Judg. (3d Ed.) §§ 57.59.
 4. Freeman on Judg. (3d Ed.) § 57. Campbell v. Mesier, 4 Johns. Ch. (N.Y.)
 - 5. Freeman on Judg. (3d Ed.) § 58.

6. The necessity for entering decrees nunc pro tunc arose largely from thoseapproval, upon receiving which it is cases where, after the case was subentered by the clerk. If the opposing mitted, one of the parties died, and mitted, one of the parties died, and no decree could bear date after his death. Freeman on Judg. (3d Ed.) sec. 57; Campbell v. Mesier, 4 Johns. Ch. (N.Y.) 334; Benson v. Wolverton, I C. E. Green (N. J.), 110; Durham v. Dalling, I C. E. Green (N. J.), 310; Bank of U. S. v. Weisiger, 2 Pet. (U. S.) 481. See also Emery v. Parrott 107 Mess vo. Weisiger, 2 Pet. (U. S.) Freeman on Judg. (3d Ed.) sec. v. Welsiget, 27 et. (C. S.) 461. See also Emery v. Parrott, 107 Mass. 104; Wood v. Keyes, 6 Paige (N. Y.), 478; Vroom v. Ditmore, 5 Paige (N. Y.), 528.
7. Freeman on Judg. (3d Ed.) sec. 61.
The weight of authority sustains the

rule that decrees nunc pro tune of this second class must be based on record evidence. Freeman on Judg. (3d Ed.) sec. 61; Hudson v. Hudson, 20 Ala. 364; Metcalf, 19 Ala. 319; s. c., 54 Am. Dec. 200; Metcalf v. Metcalf, 19 Ala. 319; s. c., 54 Am. Dec. 190. See also Gray v. Brignardello, I Wall. (U. S.) 621. The record evidence must be clear. Perkins v. Perkins, 27 Ala. 479. But see Freeman on Judg. (3d Ed.) sec. 63.

8. Freeman on Judg. (3d Ed.) sec. 56, and cases cited.

9. The time within which application could be made to have a decree entered nunc pro tunc seems to have been unlimited. Lawrence v. Richmond, J. & W. 241; Downe v. Lewis, 11 Ves. 601; Jesson v. Brewer, i Dick. 370 (79 years); Russel v. Tapping, 3 W. R. C. K.; Drummond v. Anderson, 3 Grant's Ch. (U. Can.) 152. But see Wetby v. Noston, 4 Y. & C. 266.

The court may order a decree entered nunc pro tunc on the application of a third person. Stoney v. Saunders, I Hayes & J. (Ir. Ex.) 341.

10. Freeman on Judg. (3d Ed.) secs. 60,

nor will such a decree be permitted to affect the rights of third parties who have acquired interest without notice of its rendition.

5. Amendments.—As a general rule a final decree cannot be amended after the term in which it is entered; 2 but some exceptions to this rule have obtained in some courts, at least in modern practice.3

The amendment must be for some clerical error.4 or for some matter which, if applied for on the hearing, would have been

granted as a matter of course.5

In England 6 and a number of American courts.7 the amendment must be based on some matter of record: in others amend. ments are authorized to be made on other satisfactory proofs.8

An amendment should be granted only after notice to the adverse party,9 except where it is for clerical misprision apparent of record. 10 The party seeking it should be guilty of no laches, 11 and the rights of third parties acquired in good faith before the amendment should be protected.12

Effect of Decrees. 13—(I.) IN TITLE.—It was formerly a rule in equity that a decree for a conveyance of real estate did not per se divest title.14 The court acted in personam by compelling the

61; Burnham v. Dalling, 1 C. E. Greene (N. J.), 310. See Ruckman v. Decker, 12 C. E. Greene (N. J.), 244.

1. Freeman on Judg. (3d Ed.) sec. 66; Dawson v. Scriven, I Hill Ch. (S. Car.) 177. See McConnell v. Smith, 23 Ill. 611; Foster v. Woodfin, 65 N. Car. 29.

Where the decree nunc pro tunc can be entered solely on record evidence no notice need be given the opposite party; but where it is entered on parol evidence notice should be given. Freeman on Judg. (3d Ed.) sec. 64.
2. Balio v. Wilson, 12 Martin (La.),

358; s. c., 13 Am. Dec. 376; Bramlet v. Pickett, 2 A. K. Marsh. (Ky.) 10; s. c., 12 Am. Dec. 350; Pope v. Hooper, 6

Neb. 178.

A decree is not amendable because the solicitor has omitted some clause that he intended to insert. Forquer v. Forquer, See also Grant v. Schmidt, 19 Ill. 68. 22 Minn. 1.

3. Pingree v. Coffin, 12 Gray (Mass.), 288; Danl. Ch. Pr. *1028.

In rare instances decrees actually enrolled have been amended. Danl. Ch. Pr. *1030, 1031; Thompson v. Goulding, 5 Allen (Mass.), 82; Clark v. Hall, 7 Paige 5 Alien (Mass.), 62; Clark v. Hall, 7 Paige (N. Y.), 382; Beekman v. Peck, 3 Johns. Ch. (N. Y.) 415.

4. Danl. Ch. Pr. *1029, 1030; Freeman on Judg. (3d Ed.), secs. 71, 72.

5. Freeman on Judg. (3d Ed.) sec. 70; Gardner v. Dering, 2 Edw. Ch. (N. Y.)

131; Ray v. Conner, 3 Edw. Ch. (N. Y.) 478; Rogers v. Rogers, I Paige Ch.

(N. Y.), 188; Sprague v. Jones, 9 Paige Ch. (N. Y.), 395; Jarmon v. Wiswall, 9 C. E. Greene (N. J.), 68; Dorsheimer v. Rosback, 9 C. E. Greene (N. J.), 33; Elliott v. Cochran, I Coldw. (Tenn.) 389, See also Jenkins v. Eldridge, I Wood. & M. (N. S.) 63.

Where the matter of the amendment would not have been granted as a matter. of course on the trial, the amendment will not be granted. Burns v. Mayor, 3

Tenn. Ch. 137.

When convenient the original decree may be amended. Danl. Ch. Pr. *1030. But the amendment is usually made a distinct order without making any change in the original decree. Clark v. Hall, 7 Paige Ch. (N. Y.) 382. See also subtitle RELIEF AGAINST DECREES, post.

6. Freeman on Judg. (3d Ed.) sec. 72.
7. Bramlet v. Pickett, 2 A. K. Marsh. (Ky.) 10; s. c., 12 Am. Dec. 350.
8. Freeman on Judg. (3d Ed.) sec. 72.
9. The matter of the amendment should be specified in the notice or petition. Freeman on Judg. (3d Ed.) sec.

10. Freeman on Judg. (3d Ed.) sec. 72a. 11. Rogers v. Rogers, I Paige Ch. (N. Y.) 188.

12. Freeman on Judg. (3d Ed.) sec. 74. 13. A decree by a divided court has the same effect as a decree by a unanimous court. Durant v. Essex Co., 8 Allen (Mass.), 103; s. c., 85 Am. Dec. 685.

14. Pomeroy Eq. Juris., sec. 1317; Proctor v. Ferebee, 1 Ired. Eq. (N. Car.) 143;

party to make a conveyance. This rule has been modified largely by statute, and in many States such a decree either operates directly to change the title, or the decree directs that, in default of a conveyance by the party, some officer of the court or commissioner specially appointed shall execute a deed.2

(II.) As EVIDENCE.—"A decree in the court of chancerv may be given in evidence on the same footing and under the same limitations as a verdict or judgment of a court of common law." 3

(III.) How FAR CONCLUSIVE.—(a) As to Persons.—It is a fundamental doctrine that every decree of a court within its juris-

s. c., 36 Am. Dec. 34; Winborn v. Gowell, 3 Ired. Eq. (N. Car.) 117; s. c., 40

Am. Dec. 456.

1. The court may still compel a conveyance where necessary, even where the decree generally operates as a conveyance. Young v. Frost, 1 Md. 403; Randall v. Pryor, 4 Ohio, 424.

A conveyance under a decree conveys no greater interest than the party has. Proctor v. Ferebee, 1 Ired. Eq. (N. Car.) 143; Burnley v. Stevenson, 2 Ohio St.

A decree cannot affect directly the title to property without the court's jurisdiction. But acting in personam the court may compel a party within its jurisdiction to convey such property in another jurisdiction. Brown v. Desmond, 100 Mass. 267; Pingree v. Coffin, 12 Gray (Mass.), 207; Pingree v. Comn, 12 Gray (Mass.), 304; Davis v. Parker, 14 Allen (Mass.), 94; Olney v. Eaton, 66 Mo. 563; Gardner z. Ogden, 22 N. Y. 332; Bailey v. Ryder, 10 N. Y. 363; Sutphen v. Fowler, 9 Paige (N. Y.), 280; Henry v. Doctor, 9 Ohio, 49; Willis v. Cowper, 2 Ohio, 124; Carrington v. Brentz, 1 McLean (U. S.), 167; Caldwell v. Carrington, 9 Pet. (U. S.) 86: Penn v. Lord Baltimore, 1 Ves. 444; Pom. Eq. Juris. sec. 135, 1318; Danl. Ch. Pr. *1032. A court of equity cannot decree the

sale of property in another State upon a petition of heirs. White v. White, 7 Gill. & J. (Md.) 208. Nor possession.

Roberdeau v. Rous, 1 Atk. 543.

While a decree per se can have no effect on the title to property in another State, it is entitled to be considered as record evidence of the equities between the parties. Burnley v. Stevenson, 24 Ohio St. 474.

2. King v. Bill, 28 Conn. 598; Hoffman v. Stigers, 28 Ia. 302; Gitt v. Watson, 18 Mo. 274; Taylor v. Boyd, 3 Ohio, 337; s. c., 17 Am. Dec. 603; Penn v. Hayward, 14 Ohio St. 302; Price v. Sisson, 2 Beasl. (N. J.) 168; Battle v. Bering, 7 Yerg. (Tenn.) 529.

A decree for specific property in lieu

of alimony may divest the title thereto. Whittier v. Whittier, 31 N. H. 452; Swett v. Swett, 49 N. H. 264.

The decree of a federal court does not divert the title to property even in those States where the decree of a State court Shephard v. Ross Co., 7 so operates.

Ohio, 271.

Under the statutes in many States a decree in partition operates to convey title, the conveyance dating generally from the filing of the report of the comfrom the filing of the report of the commissioners. Street v. McConnell, 16 Ill. 125; Young v. Frost, 1 Md. 403; Wright v. Marsh, 2 Q. Greene (Ia.), 110; Van Orman v. Phellps, 9 Barb. (N. Y.) 503; Young v. Cooper. 3 Johns. Ch. (N. Y.) 295; Dixon v. Warters, 8 Jones (N. Car.) 451; Swett v. Swett, 49 N. H. 264; Griffith v. Phillips, 3 Grant's Cas. (Pa.) 381; Allie v. Schmitz, 17 Wis. 169. Compare Smith v. Moore, 6 Dana (Ky.) 417. See also King v. Bill, 28 Conn. 598; Shotwell v. Lawson, 30 Miss. 27.

For digest of the statutes of the various States, see Pom. Eq. Juris.. sec, 1317.

3. 2 Ph. Ev. 60, note 278; Owens v. Dawson, I Watts (Pa.), 149; s. c., 26 Am. Dec. 49; Cameron v. Cameron, 15 Wis.

1; s. c., 82 Am. Dec. 652.

"A judgment can speak but by the record. A decree, in the absence of any statute or decree to the contrary, takes effect immediately after being pronounced by the court. Its enrolment adds nothing to its force nor to its competency as evidence." Freeman on Judg. (3d Ed.) sec. 39; Lynch v. Rome Gas-light Co., 42 Barb. (N. Y.) 591; Bates v. Delavan, 5 Paige Ch. (N. Y.) 303; Butler v. Lee, 3 Keyes (N. Y.) 73; Winans v. Dunham, 5 Wend. (N. Y.) 47. Compare Drummond v. Anderson, 3 Grant's Ch. (U. Can.) 151.

A decree and deed under it are admissible in evidence without the full record when used merely to show a link in a title. Masters v. Warner's Exr., 5 Gratt. (Va.) 168; s. c., 50 Am. Dec. 114. See

title JUDGMENTS.

diction and not on its face void is, in the absence of fraud, after the court has risen for the term, and after the period for new trials and other rehearings has elapsed, and likewise before this, except by these methods, conclusive between the parties.¹

Privies are also bound by a decree against the parties to the extent of their subsequently acquired estate or interest in the

matter in controversy.2

The real parties in interest in suit conducted in the name of nominal parties are also bound by a decree in the suit.³

1. A decree entered by consent as conclusive as one on hearing. Gifford v.

Thorn, I Stockt. (N. J.) 702.

While the general rule is as announced above as regards the effect of the decree between plaintiffs and defendants, a decree is not binding between co-defendants or co-plaintiffs, unless, in fact, they were adverse parties and their respective rights were passed on. Torrey v. Pind, 102 Mass. 355; Graham v. R. Co., 3 Wall. (U. S.) 704; Freeman on Judg. (3d Ed.) sec. 158.

Against Infants.—An infant is bound by an absolute decree to the same extent as an adult. Joyce v. McAvoy, 31 Cal. 273; Brown v. Lawson, 51 Cal. 616; Walsh v. Walsh, 116 Mass. 377; s. c., 17 Am. Rep. 162; Ralston v. Lahee, 8 Ia. 23; Story Eq. Pl. (9th Ed.) sec. 792; English v. Savage, 5 Oreg. 518. Compare Whitney v. Porter, 23 Ill. 445.

But a decree against an infant should

But a decree against an infant should provide for a day after his coming of age to show cause against it. Lockwood v. Stanley, I Del. Ch. 298; s. c., 12 Am. Dec. 97; Hanna v. Spoit's Heirs, 5 B. Mon. (Ky.) 362; s. c., 43 Am. Dec. 132; Harlan v. Barnes, 5 Dana (Ky.) 223; Lee v. Braxton, 5 Cal. (Va.) 459. This rule may be modified by statute. Hendricks v. McLean, 18 Miss. 32; Heath v. Ashley, 15 Mo. 393; Cannon v. Hemphill, 7 Tex. 184.

If no cause is shown against the decree in the time specified, it is made absolute. Collard v. Groom, 2 J. J. Marsh. (Ky.) 562; Harris v. Youman, I. Hoff. Ch. (N. Y.) 178; Brown v. Armistead, 6 Rand. (Va.) 594; Jackson v. Tur-

ner, 5 Leigh (Va.), 119.

A decree may be binding on a resident defendant while not binding on a non-resident co-defendant. Dearling v. Bank of Charleston, 5 Ga. 497; s.c., 48 Am.

Dec. 300.

For decree against unknown owner, see Van Dyke v. Johns, 1 Del. Ch. 93; s. c., 12 Am. Dec. 76; Cook v. Allen, 2 Mass. 461; Nash v. Church, 10 Wis. 303; Kane v. Rock River Co., 15 Wis. 179.

2. As a rule both the trustee and cestui que trust should be made parties, but a decree against the former will sometimes bind both. Field v. Flanders, 40 Ill. 470; Johnson v. Robertson. 31 Md. 476; N. J. F. Co. v. Ames, I Beasl. Ch. (N. J.) 507.

Remainder-men in esse or not in esse are generally bound by a decree against the person having the particular estate and the first remainder-man. Cheesman v. Thorne, I Edw. Ch. (N. Y.) 629; Mead v. Mitchell, 17 N. Y. 210; Nodine v. Greenfield, 7 Paige (N. Y.), 544; Campbell v. Watson, 8 Ohio, 498; Hopkins v. Hopkins, I Atk. 590; Wills v. Slade, 6 Ves. 498; Gaskell v. Gaskell, 6 Sim. 643; Story's Eq. Pl. (9th Ed.) secs. 144, 148, 161. Compare Downin v. Sprecher, 35 Md. 478.

A decree against an executor has been held to bind an administrator de bonis non. Manigalt v. Dear, I Bai. Eq. (S. Car.) 283. Compare Freeman on Judg.

(3d. Ed.) sec. 163.

A decree against an executor does not bind the heirs. Garnett o. Macon, 6 Call (Va.), 308. So a decree against heirs does not bind the personal representative or devisees. Tarleton's Admr. 2 Dana (Ky.) 454; Dale v. Rosevelt, I Paige Ch. (N.Y.) 35; Cowart v. Williams, 34 Ga. 167.

Assignees and alienees are bound.

Adams v. Barnes, 17 Mass. 365.

3. Freeman on Judg. (3d Ed.) sec. 174 et seq. A surety on an injunction bond is bound by the decree. Towle v. Towle, 46 N. H. 432; Chuch v. Barker, 18 N. Y. 463; Oelrichs v. Spain, 15 Wall. (U. S.) 211. But a surety on a guardian's bond was held only prima facie bound by a decree against the guardian. State v. Hall, 53 Miss. 647. Compare Stovall v. Banks, 10 Wall. (U. S.) 583.

Where the persons similarly interested in the subject-matter of a suit are so numerous that it is impracticable to make them all parties, one or more of them may sometimes maintain an action for all and obtain a decree binding on

Those who acquire the title to specific property which is the subject of litigation of one of the parties 1 to the controversy, pendente lite, are bound by the decree as to such property.2

Those who are not parties to a suit, nominal or real, nor privies of the parties, and who do not come within the operation of the

law of lis pendens, are not bound by the decree.3

all. Hurlbutt v. Butenof, 27 Cal. 50; all. Huriout v. Butenot, 27 Cal. 50; Shaw v. R. Co., 5 Gray (Mass.), 170; Kerr v. Blodgett, 48 N. Y. 66; Van Vechten v. Terry, 2 Johns. Ch. (N. Y.) 197; Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619; Varm v. Hargett, 2 Dev. & Bat. Eq. (N. Car.) 31; s. c., 32 Am. Dec. 689; Board, etc., v. M. P. Rd., 24 Wis. 127; Story Eq. Pl. (9th Ed.) secs. 94, 97, 131, 131a, 105, 106, 125, 130.

A decree of distribution of a common fund held not binding on a distributee without notice. Williams v. Gibbs, 17

How, (U. S.) 230.

1. Stuyvesant v. Hone, I Sandf. Ch. (N. Y.) 419. See also Gibler v. Trimble,

14 Ohio, 323.

2. Lis Pendens. - King v. Bill, 28 Conn. 593; Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566; Freeman on Judg. (3d Ed.) sec.

The property bound may be either real or personal. Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566.

The property must be definitely pointed out, or it will not be bound. Lewis v. Mew, I Strobh. Eq. (S. Car.) 180; Miller v. Sherry, 2 Wall. (U. S.) 237; Sugden on Vendors, 1045. See also Green v. on Vendors, 1045. Stayter, 4 Johns, Ch. (N. Y.) 39.

Lis pendens is notice of every material fact in issue. Center v. P. & M. Bank, 22 Ala. 743. And of facts so stated as to put a purchaser on inquiry. Lockwood v. Bates, I Del. Ch. 435. But not of implied equities between co-defendants. Bellamy v. Sabine, I Deg. & J. 566. See also Tyler v. Thomas, 25

Beav. 47.

Lis pendens is notice from the time the bill is filed and service had. Leitch v. Wells, 48 N. Y. 611; Kellogg v. Fancher, 23 Wis. 21. And the notice usually ends with the suit. Jackson v. Warren, 32 Ill. 331; Rosser v. Bingham, 17 Ind. 542; Ludlow v. Kidd, 3 Ohio, 541; Worsley v. Earl of Scarborough, 3 Atk. 392; Harvey v. Montague, I Vern. 122.

But there may be such delay in prosecuting a suit as to relieve purchasers of the notice of lis pendens. Ehrman v. Kendrick, t Met. (Ky.) 146. Where a bill is amended notice as to the facts
stated in the amendment begins from the Redf. (N. Y.) 262; Shattuck v. Bascom time of filing the amendment. Stone v. (N. Y.), 12 N. E. Rep. 283; Helphrey v.

Connelly, r Met. (Ky.) 654; Jones v. Lusk, 2 Met. (Ky.) 356; Clarkson v. Morgan, 6 B. Mon. (Ky.) 441. Compare Stoddard v. Myers, 8 Ohio, 203; Gibbon v. Dougherty, 10 Ohio St. 365. Whether a purchaser is bound when the original bill is dismissed without prejudice and another at once filed, is a disputed question. Ferrier v. Buzick, 6 Ia. 258; Clarkson v. Morgan, 6 B. Mon. (Ky.) 441; Bishop of Winchester v. Paine, 11 Ves. Ir. 200.

A purchaser after final decree, and before the filing of a bill of review, has been held bound by notice of lis pendens. Debell v. Foxworthy, 9 B. Mon. (Ky.) 228; Clarey v. Marshall, 4 Dana (Ky.), 95; Gore v. Stackpole, 1 Dow. 31. Compare Taylor v. Boyd, 3 Ohio, 338; Mc-Cormick v. McClure, 6 Blackf. (Ind.)

As to the effect of statutes requiring the filing of notice of lis pendens, see Freeman on Judg. (3d Ed.) sec. 212.

3. Lyon ν. Sandford, 5 Conn. 544; Brush ν. Fowler, 36 III. 58; Burlen ν. Shannon, 3 Gray (Mass.), 387; Smith ν. Claimants, 4 Nev. 254; Brainard ν. Cooper, 10 N. Y. 356; Winborn ν. Gorell, 3 Ired. Eq. (N. Car.) 117; s. c., 4 Am. Dec. 456; Needham ν. Brenner, 12 Jur. N. S. 434 and 14 W. R. 694.

A decree is not binding on a party who has been permitted to withdraw from the suit. Owens v. Alexander, 78 N. Car. 1.
A decree against a party in one capacity

is not binding on him in another capacity. Marshall v. Rough, 2 Bibb (Ky.), 628; Crenshaw v. Creek, 52 Mo. 101; Jones v. Blake, 2 Hill Ch. (S. Car.) 629. But he is bound by the decree when he is a party to the suit in both capacities. Corcoran v. C. C. Co. 94 U. S. 741.

A posthumous child not a party to the

suit held bound by the decree. Detrick v. Migatt, 19 Ill. 146; s. c., 68 Am. Dec.

A co-tenant having notice of the suit and beyond the court's jurisdiction held bound. Lessee of Pillsbury v. Dugan's Admr., 9 Ohio, 117; s. c., 34 Am. Dec.

(b) Res Judicata.—A final decree of a court of competent juries diction, when properly pleaded, is conclusive in another suit between the same parties and their privies, at law or in equity.4 as to the questions therein properly determined. and as to those questions which should have been litigated therein.6

Redick, 21 Nebr. 80: Gill v. Read, 5 R. I. 343; Guerin v. Danforth, 45 Ga. 493.

1. Must be final, Story Eq. Pl. (9th Ed.) sec. 791; Freeman on Judg. (3d Ed.) sec. 251.

A decree must stand till vacated or reversed, and a second decree entered while the first is still in force is nugatory.

Nuckolls v. Irwin, 2 Neb. 60.

2. Jurisdiction must be had. v. Calhoun, 45 Iowa, 557; Michel v. Kicks, 19 Kans. 578; s. c., 27 Am. Rep.

Insufficient publication notice does not give jurisdiction. Blight v. Banks, 6 T. B. Mon. (Ky.) 192; s. c., 17 Am. Dec. 136.

A decree cannot be entered against an infant defendant without service, though a guardian ad litem has been appointed. Coleman v. Coleman, 3 Dana (Ky.), 398; s. c., 28 Am. Dec. 86.

The recital of jurisdictional facts may be disproved. Ferguson v. Crawford, 70 N. Y. 253; s. c., 26 Am. Rep. 589. Compare Newcomb's Exr. v. Newcomb, II Bush (Ky.), 544; s. c., 26 Am. Rep. 228; Bronson v. Caruthers, 49 Cal. 375. See sub-title DECREES OF SISTER STATES.

3. See Story's Eq. Pl. (9th Ed.) secs.

754, 789; Freeman on Judg. (3d Ed.) secs. 282-284.

4. Maguire v. Tyler, 40 Mo. 406; Wilson v. Boughton, 50 Mo. 17; Kelsey v. Murphy, 26 Pa. St. 78; Evans v. Tatem, 9 S. & R. (Pa.) 261; s. c., 11 Am. Dec. 717; Stack v. Woodward, 1 N. & McC. (S. Car.) 328; Low v. Mussey, 41 Vt. 393; Western, etc., Co. v. V. C. C. Co., 10 W. Va. 250; Sibbald's Case, 12 Pet. (U. S.) 492; Bank of U. S. v. Beverley, I How. (U. S.) 148; Smith v. Kennochen. 7 How. (U. S.) 198; Hopkins v. Lee, 6 Wheat. (U. S.) 109.

Neither the purpose nor form of the second action need be the same. Freeman on Judg. (3d Ed.) secs. 254, 255.

5. Wilson v. Wilson, 45 Cal. 399; Bouvillian v. Bourg, 16 La. Ann. 363;

Foxcraft v. Barnes, 20 Me. 120; Fera v. Fera, 98 Mass. 155; Ihmsen v. Ormsby, 32 Pa. St. 200; Lee v. Kingsbury, 13 Tex. 68; Baxter v. Dear, 34 Tex. 174. See also Stilphen v. Hondlette, 60 Me. 447; Bliss v. Weil, 14 Wis. 35; s. c., 80 Am. Dec. 766.

The subject-matter of the second suit

need not be the same. Perkins v. Perkins. 16 Mich. 162: Freeman on Judg. (3d Ed.) sec. 253. Immaterial findings are not conclusive in another action. Woodgate v. Fleet, 44 N. Y. I. See also Gaviett v. Day, 2 McCord's Ch. (S. Car.) 27; s. c., 16 Am. Dec. 629. 6. Fischli v. Fischli, 1 Blackf. (Ind.)

o. Fischli v. Fischli, I Blackf. (Ind.) 360; s. c., 12 Am. Dec. 25; Tower v. White, 10 Paige (N. Y.), 395; Embury v. Conner, 3 N. Y. 511; s. c., 53 Am. Dec. 325; Le Guen v. Gouverneur, I Johns. Cas. (N. Y.) 436; s. c., 1 Am. Dec. 121; Maingalt v. Holmes, I Bai. Eq. (S. Car.) 283.

It is said, however, that a decree is binding as to matters which should have been litigated, and were not, only where the second action involves the same subject-matter. Freeman on Judg. (3d Ed.) sec. 253.

The decree must have been on the merits of the cause. Freeman on Judg.

(3d Ed.) secs. 260, 266,

Dismissal. - A simple decree of dismissal will be presumed to have been on the merits of the case, and will bar a future action for the same cause. Cochran v. Cowper, 2 Del. Ch. 27; Scully v. C., B. & Q. R., 46 Iowa, 528; Curts v. Bardstown, 6 J. J. Marsh. (Ky.) 526; Borrowscale v. Tuttle, 5 Allen (Mass.), 377; Foote v. Gibbs, I Gray (Mass.), 412; Foote v. Gibbs, I Gray (Mass.), 412; Glass v. Clark, 41 Ga. 544; Blizzard v. Nosworthy, 50 Ga. 514; Adams v. Cameron, 40 Mich. 506; Neafie v. Neafie, 7 Johns. Ch. (N. Y.) 1; s. c., 11 Am. Dec. 380; Wilcox v. Balger, 6 Ohio, 406; Kelsey v. Murphy, 26 Pa St. 78; Taylor v. Yarborough, 13 Gratt. (Va.) 183; Parrish v. Ferris, 2 Black (U. S.), 606; Hepburn v. Dunlop, I Wheat. (U. S.) 179. So if by consent. Peton v. Mott, 11 Vt. 148; s. c. 27 Am. Dec. 678.

If the decree expresses that the dismissal is "without prejudice," it does not bar another suit. Lang v. Waring, 25 Ala. 625; s. c., 60 Am. Dec. 533; Fisk v. Parker, 14 La. Ann. 491; Creeve v. Cleghorn, 13 Ind. 438; Thurston v. Thurston, 99 Mass. 39; English v. English, 12 C. E. Greene (N. J.), 579; Wanzer

v. Self, 30 Ohio St. 378.

It seems that in England a decree of dismissal may be shown not to have been on the merits. Longmead v. Maple, 18. C. B. N. S. 255; 11 Jur. N. S. 177.

(c) Decrees In Rem.—Where the court has jurisdiction of the res, its decree in rem upon the character or status of the subjectmatter is binding not only on the parties and their privies, but also upon all persons who might have asserted an interest therein.1

A decree of dismissal for want of proper parties is a bar, unless "without prejudice." Thompson v. Clay, 3 T. B. Mon. (Ky.) 359; s. c., 16 Am. Dec. 108.

A decree of dismissal for want of prose-

cution is not a bar. Story's Eq. Pl. (oth

Ed.) sec. 793.

An order dismissing a case on plaintiff's motion and payment of costs before In s motion and payment of costs before hearing is not a bar. Rosse v. Rust, 4 Johns. Ch. (N. Y.) 300; Cummins v. Bennett, 8 Paige (N. Y.), 79; Simpson v. Brewster, 9 Paige (N. Y.), 245; Walden v. Bodley, 14 Pet. (U. S.) 160; Conn v. Penn, 5 Wheat. (U. S.) 427.

Titles Not Bound .- A decree setting aside a deed does not conclude the party as to a title claimed from other sources. Beeson v. Cowley, 19 Mich. 103. And a decree does not bar a title subsequently acquired. Reed v. Calderwood, 32 Cal. 109; Avery v. Aikins, 74 Ind. 283; Tapley v. McPike, 50 Mo. 592; Richardson v. Cambridge, 2 Allen (Mass.), 122; Woodbridge v. Banning, 14 Ohio St. 330. Compare Short v. Prettyman, 1 Hous. (Del.) 334.

Partition. - The decree in partition was originally binding as to co-tenancy and all matters in issue, but title was not in issue. By statute the title is now generally in issue and bound by the decree. Oliver v. Montgomery, 39 Iowa, 601; Pierce v. Oliver, 13 Mass. 212; Forder v. Davis, 38 Mo. 115; McClure v. McClure, 14 Pa. St. 136; Whittemore v. Shaw, 8 N. H. 397; Reese v. Holmes, 5 Rich. Eq. (S. Car.) 540. See, further, Wright v. Dunning, 46 Ill. 271.

Foreclosure .- A general decree in foreclosure against defendants alleged in the bill as claiming some interest in the premises "as subsequent purchasers, or incumbrancers, or otherwise," will not divest their rights held paramount to the title of the mortgagor. Frost v. Koon,

30 N. Y. 444.

Divorce and Alimony .- A decree of divorce bars a subsequent action for alimony. McGee v. McGee, 10 Ga. 477; Chapman v. Chapman, 13 Ind. 396; Moore v. Moore, 18 La. Ann. 613; Adams v. Adams, 100 Mass. 365; Doyle v. Doyle, 26 Mo. 545; Lawson v. Shotwell, 27 Miss. 633; Peltier v. Peltier, Harr. (Mich.) 19; Parsons v. Parsons, 9 N. H. 309; Pomeroy v. Wells, 8 Paige (N. Y.), 406; Anshutz v. Anshutz, 16 N.

J. Eq 162; Rees v. Waters, 9 Watts (Pa.). oo. Compare Glover v. Glover. 16 Ala. 446; Galland v. Galland, 38 Cal. 265; Logan v. Logan, 2 B. Mon. (Ky.) 142; Macnamara's Case, 2 Bland (Md.), 566; Prather v. Prather, 4 Des. (S. Car.) 33; Almond v. Almond, 4 Rand. (Va.) 662; Covell v. Covell, L. R. 2 P. & D. 411. And a motion for alimony in the same cause is not barred by the decree for divorce. Prescott v. Prescott, 50 Me.

A second decree as to the subject-matter is binding on any party who fails to assert a former decree in the second action. Semple v. Wright, 32 Cal. 659;

Cooley v. Brayton, 16 Iowa, 10.

Merger.—A decree in equity merges the cause of action. People v. Beebe, I Barb. (N. Y.) 379. See Freeman on Judg. (3d Ed.) secs. 215, 230, 245; and titles JUDGMENTS and MERGER.

1. Probate Decrees. - A grant of probate or administration is in the nature of a decree in rem. Freeman on Judg. (3d

Ed.) sec. 608, and cases cited.

Decrees for the sale of real estate of lunatics and decedents are in rem. Latham v. Wiswall, 2 Ired. Eq. (N. Car.) 294; Wyman v. Campbell, 6 Port. (Ala.) 219.

The decree in rem of a probate court cannot be attacked collaterally. State v. McGlynn, 20 Cal. 233; Deslonde v. Darrington, 29 Ala. 92; Anderson v. Green, 46 Ga. 361; Moore v. Tanner, 5 T. B. Mon. (Ky.) 42; Roach v. Martin's Lessee, Mon. (Ky.) 42; Koach v. Martin's Lessee, I Harr. (Del.) 548; s. c., 27 Am. Dec. 746; Potter v. Webb, 2 Greenl. (Me.) 257; Parker v. Parker, II Cush. (Mass.) 524; Negro John v. Morton, I Gill & J. (Md.) 391; Spofford v. Smith, 59 N. H. 366; Sawyer v. Dozier, 5 Ired. L. (N. Car.) 97; Vanderpoel v. Van Valkenbergh, 6 N. Y. 190; Steele v. Rew, 50 Tex. 467; Conpolly v. Conpolly 22. Tex. 467; Connolly v. Connolly, 32 Gratt. (Va.) 657; Woodruff v. Taylor, 20 Vt. 65; Whicker v. Hume. 7 H. L. Cas.

At common law the probate of a will was not conclusive as to real estate. Bailey v. Stewart, 2 Redf. (N. Y.) 212: Rowland v. Evans, 6 Pa. St. 435; Tygart v. Peeples, 9 Rich. Eq. (S. Car.) 46; Tompkins v. Tompkins, 1 Story (U. S.), 547; Whicker v. Hume, 7 H. L. Caş.

But where courts of probate have jurisdiction of wills of real estate as well as

(IV.) LIEN OF DECREES. (For Liens on Decrees, and Assign. ments of Decrees, see JUDGMENTS.)—The decree of a court of

personalty, their decrees are binding. Judson v. Lake, 3 Day (Conn.), 318; Parker v. Parker, 11 Cush. (Mass.) 519; Brock v. Frank, 51 Ala. 85; Scott v. Calvit, 3 How. (Miss.) 148; Norvell v.

Lesueur, 33 Gratt, (Va.) 222.

And of the decrees of courts of probate generally, it may be said that within their proper jurisdiction they are as binding as decrees in courts of equity or judgments at law. Harris v. Colquitt, 44 Ga. 663; Castro v. Richardson, 18 Cal. 478; Gates v. Treat, 17 Conn. 392; Cummings v. Cummings, 123 Mass. 270; Johnson v. Beazley, 65 Mo. 250; Dayton v. Mintzner, 23 Minn. 393; Tibbitts v. Tilton, 24 N. H. 124; Womack v. Womack, 23 La. Ann. 351; Cole v. Leak, 31 Miss. 131; Simpson v. Norton, 45 Me. 281; Jones v. Chase, 55 N. Y. 234; Rudy v. Ulrich, 69 Pa. St. 177.

But by the weight of authority the actual death of the supposed decedent is necessary to give jurisdiction. Duncan v. Stewart, 25 Ala. 408; Wales v. Willard, 2 Mass. 120; Morgan v. Dodge, 44 N. H. 259; Peebles' Appeal, 15 S. & R. (Pa.) 42; Melia v. Simmons, 45 Wis, 334; Griffith v. Frazier, 8 Cranch (U. S.), 9; Allen v. Dundas, 3 T. R. 125. Compare Roderigas v. East River Sav. Inst., 63

N. Y. 460; s. c., 20 Am. Rep. 555. Without special statutory provision, the decrees of probate courts cannot be set aside by a court of equity. State v. McGlynn, 20 Cal. 225; Sever v. Russell, 4 Cush. (Mass.) 513; Gaines v. Chew, 2 How. (U. S.) 641; Broderick's Will, 21 Wall. (U. S.) 503; Holden v. Meadows, 31 Wis. 284; Allen v. McPherson, 1 Phillips, 146. Nor reversed by a court of common law on writ of error or certiorari. Dublin v. Chadbourn, 16 Mass. 441; Peters v. Peters, 8 Cush. (Mass.) 529. They may revoke their own decrees in the same manner as a court of equity. In re Fisher, 15 Wis. 567. But not to avoid the operation of the Statute of Limitations. Betts v. Shotten, 27 Wis. 667. Nor to impair vested rights. State v. Ramsey County, 19 Minn. 117. See also Broderick's Will, 21 Wall. (U. S.) 509; Worthington v. Gittings, 56 Md. 542; Holden v. Meadows, 31 Wis. 284, and sub-title Relief Against Decrees.

Divorce. —A decree of divorce, so far as it affects the status of the parties, is generally binding on all persons wherever the power of the court to annul the marriage is recognized. Marvin v. Collins,

48 Ill. 156; Barber v. Root, 10 Mass. 260; Baugh v. Baugh, 37 Mich. 59; s. c., 26 Am. Rep. 495; Patterson v. Gaines, 6 How. (U. S.) 550; Roach v. Garvay, 1 Ves. Sr. 157; Freeman on Judg. (3d Ed.) sec. 610. But if the power of the court to annul the marriage is not recognized in any county, the decree is not there binding. Rex v. Lolley, 2 Russ. & R. C. C. 237; Shaw v. Atty.-Gen'l, L. R. 2 P. & D. 156. See sub-title Foreign DECREES.

Admiralty.-The decree of a court of admiralty is generally conclusive as to the res the world over. Gelston v. Hoyt, 13 Johns. (N. Y.) 561; s. c., 3 Wheat. (U. S.) 246; The Fortitude, 7 Cranch (U. S.), 423; The Rio Grande, 23 Wall. (U. S.) 465; The Globe, 2 Blatchf. (U. S.) 427. It is conclusive against insurers. Croud-Bradstreet v. Neptune Ins. Co., 3 Sumn. (U. S.) 600; Ludlow v. Dale, I John. Cas. (N. Y.) 16; Whitney v. Walsh, I Cush. (Mass.) 29; s. c., 48 Am. Dec. 590, and notes. It is conclusive as to damages sustained by one vessel from another. Street v. Augusta Ins. Co., 12 Rich. (S. Car.) 13; Magoun v. New Eng. Ins. Co., 1 Story (U. S.), 157.

But the decree of a court of admiralty is not binding, if the court had not jurisdiction of the res or matter passed on. Rose v. Himely, 4 Cranch (U. S.), 241; Cheriat v. Foussat, 3 Binn. (Pa.) 270; Freeman on Judg. (3d Ed.) sec. 614.

It is not conclusive as to any fact not necessary to its decision, and not as to those perhaps, unless it expressly professes to have passed on them. Ocean Ins. Co. v. Frances, 2 Wend. (N. Y.)64; 1118. Co. v. Frances, 2 Wend. (N. Y.)04; s. c., 19 Am. Dec. 549; Freeman on Judg. (3d Ed.) sec. 618. See also Street v. Augusta, etc., Co., 12 Rich. L. (S. Car.) 13; s. c., 75 Am. Dec. 714; Maley v. Shattuck, 3 Cranch (U. S.), 458.

And while the decrees in rem of courts of admiralty have often been said to be binding on the world, some cases limit the doctrine to those persons who might have appeared to assert an interest. See Freeman on Judg. (3d Ed.) sec. 617; Thorne v. Southard, 2 Dana (Ky.), 475; s. c., 26 Am. Dec. 467; The Mary, 9

Cranch (U. S.), 126.

Fraud, etc.—Decrees in rem may be avoided for want of jurisdiction, or bearing for fraud. cause void by the local law or for fraud. See Freeman on Judg. (3d Ed.) sec.

612.

equity or admiralty for a sum certain is a lien on the lands of the debtor to the same extent and under much the same conditions as

a judgment at law.1

7. Relief against Decrees,—(I.) IMPEACHING COLLATERALLY.— When a decree has been obtained by the fraud of either of the parties, or by the collusion of both,2 or when for any reason it is erroneous and void,3 it may be impeached even in a collateral proceeding by any stranger to the decree who would be prejudiced thereby in regard to some pre-existing right were the decree given full credit and effect.4

Parties and their privies to a decree rendered by a court within its iurisdiction 5 cannot impeach it collaterally, even for fraud or collusion, but must proceed to obtain relief by appeal or some other direct method.6

(II.) REHEARING, BILL OF REVIEW, ETC.—The power of the court to set aside a decree during the term at which it was ren-

At any time after the term has ended, the court may discharge the enrolment and open a decree, when it has been entered without a hearing upon the merits by mistake, accident, surprise, negligence of solicitor, or under such circumstances as shall satisfy the

1. See Ward v. Chamberlain, 2 Black (U. S.), 430; Eames v. Germania Turn Verein, 74 Ill. 54; Colt v. Du Bois, 7 Neb. 391; Hamlin's Lessee v. Bevans, 7 Ohio 534, Talmin Science 2. Beauty, 7 Onto St. pt. 1, 161; s. c., 28 Am. Dec. 625; Danl. Ch. Pr. *1031-1043. See also Free-man on Judg. (3d Ed.) chap. 14, titles Judgments and Liens.

A decree for foreclosure and sale does not become a general lien until the sale has been made and the deficiency ascertained. and a decree docketed therefor. Winston v. Browning, 61 Ala. 80; Hershey v. Dennis, 53 Cal. 77; Bell v. Gilmore, 25 N. J. Eq. 104; Hays v. Miller, 1 Wash. Ter. 143; Linn v. Patton, 10 W. Va. 187.

It has been held that the lien of a mortgage is merged in the decree of foreclosure, and that the lien of the decree does not attach until the decree is docketed; from which it follows that a pur-chaser after the decree is rendered and before it is docketed takes the land freed from the encumbrance. People v. Beebe, Tom the encumbrance. People v. Beebe, I Barb. (N. Y.) 379; Gage v. Brewster, 31 N. Y. 218. Compare Hendershott v. Ping, 24 Iowa, 134; Stahl v. Roost, 34 Iowa, 476; Riley's Admr. v. McCord's Admr., 21 Mo. 285; DeWitt's Appeal, 76 Pa. St. 283; McCall v. Lenox, 9 S. & R. (Pa.) 310; Priest v. Wheelock, 58 Ill. 114. A decree for alimony in instalments is

not generally a lien on lands. Olin v. Hungerford, 10 Ohio, 268.

Originally a decree in equity created no lien. Lee v. Green, 6 De G. M. & G. 155.

Lien on Decrees. - See titles ATTORNEY ANL CLIENT, JUDGMENTS, and LIENS.

2. Freeman on Judg. (3d Ed.) secs. 336,

3. Freeman on Judg. (3d Ed.) sec.

4. Freeman on Judg. (3d Ed.) sec. 335; sub-title How Far Conclusive As to PERSONS, ante.

5. See Freeman on Judg. (3d Ed.) chap. 8; note to sub-title RES JUDICATA, ante.

6. Hanna v. Spotte's Heirs, 5 B. Mon. (Ky.) 362; s. c., 43 Am. Dec. 132; Ketchum v. White (Iowa), 33 N. W. Rep. 627; Miller v. Finn, 1 Neb. 254; Burford v. Rosenfield, 37 Tex. 42; Thacker v. Chambers, 5 Humph. (Tenn.) 313; Evans v. Spurgin, 6 Gratt. (Va.) 107; s. c., 52 Am. Dec. 105.

On appeal all the evidence reduced to writing is part of the record. Ferris v. McClure, 40 Ill. 99; Smith v. Newland, 40 Ill. 100.

A decree in admiralty is treated as nonexistent pending appeal. Souter v. Baymore, 7 Pa. St. 415; s. c., 47 Am. Dec. 415. See title APPEAL, vol., i, ante.

7. Carley v. Carley, 7. Gray (Mass.), 545; Doss v. Tyack, 14 How. (U. S.) 297. But in divorce cases particularly courts exercise their power with care, especially where the parties may have remarried. Davis v. Davis, 30 Ill. 180; Rouse v. Rouse v. Lewis, 15 Kan. 181; Whitney v. Whitney, 114 Mass. court in the exercise of a sound discretion that the decree ought to be set aside.1

After a decree has been entered upon a hearing of the merits of a cause, and before enrolment, and where the practice of enrolment has not been adopted, after the commencement of the next term, the decree may be set aside on petition for a rehearing by the parties or their privies in representation for errors of law apparent on the face of the decree, or other sufficient matter to alter or reverse it; 2 or a bill in the nature of a bill of review, or supplemental bill in the nature of a bill of review, will lie for the same purpose for new matter discovered since publication in the original cause.3

After enrolment or its equivalent, and within the time a writ of error lies at law, the decree may be set aside on bill of review brought by the parties or their privies in representation for errors of law apparent on the face of the decree, or for new matter discovered after publication.4

An original bill in the nature of a bill of review may be brought at the instance of any party in interest to impeach a decree for fraud, collusion, and the like; or, if the defendant is an infant, he may proceed "by a bill of review or supplemental bill in the nature of a bill of review, or he may proceed by original bill." 6

In some States the court will set aside a decree obtained by

fraud on a petition filed in the original case.7

1. Herbert v. Rowles, 30 Md. 271; Cawley v. Leonard, 28 N. J. Eq. 467; Smith v. Alton, 7 C. E. Green (N. J.), 572; Millspaugh v. McBride, 7 Pai. (N. Y.) 509; Beekman v. Peck, 3 Johns. Ch. (N. Y.) 415; Curtis v. Ballagh, 4 Edw. Ch. (N. Y.) 635; Carter v. Torrance, 11 Ga. 654; Erwin v. Vint, 6 Munf. (Va.) 267; Kemp v. Squires, 1 Ves. Sr. 205; Hargrave v. Hargrave, 6 E. L. & E. 11; Hargrave v. Hargrave, 9 E. L. & E. 14; Robson v. Cranwell, I Dick. 61; Danl. Ch. Pr. *1026-1028.

For error of the court, however, a decree will not be set aside after the term on motion. Freeman on Judg. (3d Ed.)

A consent decree cannot be corrected on appeal, writ of error, rehearing, etc. Armstrong v. Cooper, 11 Ill. 540; Turner v. Berry, 3 Gilm. (Ill.) 54.

These rules may be changed by statute.

See Freeman on Judg. (3d Ed.) chap. 7.

2. Story Eq. Pl. (9th Ed.) sec. 421.

3. Dexter v. Arnold, 5 Mason (U. S.), 303; Greenwich Bank v. Loomis, 2 Sandf. Ch. (N. Y.) 70; Story's Eq. Pl. (oth Ed.) See title BILL OF secs. 403, 421-425. REVIEW, vol. ii., ante.
4. Massie v. Graham, 3 McLean (U.

S.), 41; Gregor v. Molesworth, 2 Ves. 109; Danl. Ch. Pr. *1573-1585; Story's Eq.

Pl. secs. 404-420, 634-638. See title BILL OF REVIEW, vol. ii., ante.

5. Story's Eq. Pl. (9th Ed.) secs. 409, 426, 639, 794, 796; Danl. Ch. Pr. *1585; Shinkle v. Fletcher, 47 Ill. 216; Singleton v. Singleton, 8 B. Mon. (Ky.) 340; Wright v. Miller, I Sandf. Ch. (N. Y.) 103; Whittemore v. Coster. 3 Green; Ch. (N. I.) 428. Pratt v. Northam, 5 Marcham, Ch. (N. J.) 438; Pratt v. Northam, 5 Mason (U. S.). 95; Harwood v. Railroad Co, 17 Wall. (U.S.) 78; Lockwood v. Mitchell, 19 Ohio, 448; s. c., 53 Am. Dec. 439.

In some States an original bill may be brought to set aside a decree of divorce. Ex parte Smith, 34 Ala. 455; McQuigg v. McQuigg, 13 Ind. 294; McCraney v. McCraney. 5 Iowa, 232; Sandford v. Head, 5 Cal. 297. Compare Parrish v. Parrish, 9 Ohio St. 534; s. c., 75 Am. Dec. 482. See, further, Pendleton v. Galloway o Ohio 178; s. c. 24 Am. Dec. Dec. 452. See, further, Pendleton v. Galloway, 9 Ohio, 178; s. c., 34 Am. Dec. 434; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528; s. c., 49 Am. Dec. 189.

6. Richmond v. Tayleur, 1 P. Wms. 737; Brook v. Mostyn, 10 Jur. N. S. 554; 13 Beav. 457; Danl. Ch. Pr. *1585.

7. Summary proceedings in opening decrees on notice, in divorce proceedings particularly, have become settled practice in some States. State v. Whitcomb, 52: Iowa, 85; True v. True, 6 Minn. 315;

Bills to suspend or avoid the operation of decrees on the ground of inevitable necessity preventing a strict compliance with them are mentioned in the books.1

(III.) INJUNCTION.—Courts of equity will enjoin the decrees of other courts of inferior jurisdiction, subject to the general rules

governing relief against judgments at law.²
(IV.) REVERSAL OF DECREES.—The reversal of a decree restores the parties generally to their condition prior to its rendition.3 As between the parties, the successful one is entitled to a restitution in specie of the property the title to which changed under the decree.4 But the title of a purchaser at a judicial sale is not affected by a reversal of the decree.5

8. Enforcing Decrees. (For Satisfaction and Discharge, see ... JUDGMENTS.)—(I.) ACTION AT LAW.—"We lay it down as a general rule, that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount and nothing more." 6

Holmes v. Holmes, 63 Me. 420; Edson Holmes v. Holmes, 63 Me. 420; Edson v. Edson, 108 Mass. 590; Binsse v. Barker, 1 Green (N. J.), 263; Adams v. Adams, 51 N. H. 388; Singer v. Singer, 41 Barb. (N. Y.) 139; Boyd's Appeal, 2 Wright (Pa.), 241; Weatherbee v. Weatherbee, 20 Wis. 499; Crouch v. Crouch, 30 Wis. 667; Allen v. McClellan, 12 Pa. St. 328. Compare Greene v. Greene, 2 Gray (Mass.), 361; Parish v. Parish, 9 Ohio St.

The fraud must be specifically set out and the evidence clear. Gechter v. Gechter, 51 Md. 167; Lord v. Lord, 66 Me. 265; Groff v. Groff, 4 S. & R. (Pa.) 181; Johnson's Appeal, 9 Barr (Pa.), 416; Hopkins v. Hopkins, 39 Wis. 167. The application must be prompt. Lelancy v. Brownell, 4 Johns. (N. Y.) 136; Nichols v. Nichols, 10 C. E. Green (N. J.), 60. In the same court. De Graw v. De Graw, 7 Mo. App. 121. And in the same case. Edson v. Edson, 108 Mass. 590; Greene v. Greene, 2 Gray (Mass.), 361.

But in some States decrees for divorce are specially protected by statutory provisions. Gilruth v. Gilruth, 20 Iowa, 225; McQuigg v. McQuigg, 13 Ind. 294; Watkinson v. Watkinson, 12 B. Mon. (Ky.) 210; Moster v. Moster, 53 Mo. 326; Cox v. Cox, 19 Ohio St. 502; Owens v. Simms, 3 Coldw. (Tenn.) 544; Hopkins v. Hopkins, 40 Wis. 462. But where there are no special statutes, divorce decrees may be reheard as other decrees. Young v. Young, 17 Minn. 181; Dunn v. Dunn, 4 Pai. (N. Y.) 425. 1. Story's Eq. Pl. (9th Ed.) secs. 428a,

640.

2. But not where the equity interposed might have been relied on in the original suit. High on Inj. (2d Ed.) sec. 172; Moran v. Woodyard, 8 B. Mon. (Ky.) 537; Moore v. Hill, 59 Ga. 760; Ricker v. Pratt, 48 Ind. 73. Equity will rarely enjoin the decrees of a court of equal jurisdiction. Deaderick v. Smith, 6 Humph. (Tenn.) 138. But see Douglas v. Jovner. I Baxter (Tenn.), 32.
It will not enjoin its own decrees.

Greenlee v. McDowell, 4 Ired. Eq. (N. Car.) 481. Compare Montgomery v. Whitworth, I Tenn. Ch. 174; People v. Gilmer, 5 Gilm. (Ill.) 242. See, further, Bennett v. Brown, 56 Ga. 216; Robinson v. Davis, 3 Stockt. Ch. (N. J.) 302; s. c., 60 Am. Dec. 501.

3. The lower court will order money paid under a decree to be repaid when reversed. Gregory v. Litsey, 9 B. Mon. (Ky.) 43; s. c., 48 Am. Dec. 415; Fleming v. Riddick's Exr., 5 Gratt. (Va.) 272; s. c., 50 Am. Dec. 272.

4. Freeman on Judg. (3d Ed.) secs. 482, 483. Compare South Fork Canal Co. v. Gordon, 2 Abb. (U. S.) 479.

5. Freeman on Judg. (3d Ed.) sec. 484; Porter v. Robinson, 3 A. K. Marsh. (Ky.) 253; s. c., 3 Am. Dec. 153; Edmeston v. Lyde, I Pai. (N. Y.) 637; s. c., 19 Am. Dec. 454; Murphy v. Longworth, 14 Ohio St. 349. Compare Wambaugh v. Gates, 8 N. Y. 144. See, further, Dabney v. Manning, 3 Ohio, 321; s. c., 17 Am. Dec. 597; Taylor v. Boyd, 3 Ohio, 337; s. c., 17 Am. Dec. 597; Taylor v. Boyd, 3 Ohio, 337; s. c., 17 Am. Dec. 603; McCormick v. McClure, 6 Blackf. (Ind.) 446; s.c., 39 Am. Dec. 441.

6. Pennington v. Gibson, 16 How. Some courts will enforce decrees for a specific sum of money by

writ of scire facias.1

(II.) BILL IN EQUITY.—Where from the neglect of the parties or other causes it is impossible to carry a decree into effect as rendered, a court of equity will sometimes entertain a bill to enforce it.2

(III.) OTHER METHODS.—The English ecclesiastical courts

could enforce their decrees by excommunication.3

Courts of equity possess the power to enforce their decrees by appropriate methods: 4 sometimes by attachment and commitment for contempt; 5 by sequestration; 6 by execution; 7 and by taking away the privileges of the party in the case.8

(U. S.) 65; Post v. Neafie, 3 Cai. (N. Y.) 22; People v. Sturtevant, 9 N. Y. 263; Blair v. Wolf (Iowa), 33 N. W. Rep. 669; Warren v. McCarthy, 25 Ill. 95; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600; s. c., 20 Am. Dec. 179; Tilford v. Oakley, Hemp. (U. S.) 177; Frans v. Taren v. Hemp. (U. S.) 197; Evans v. Tatem, 9 S. & R. (Pa.) 252; s. c., 11 Am. Dec. 717. So of the decree of a surrogate's Dubois v. Dubois, 6 Cow. (N. Y.) court.

Actions at law on decrees did not lie Williams v. Preston, 3 J. J. originally. Marsh. (Ky.) 600; s. c., 20 Am. Dec. 197; Hugh v. Higgs, 8 Wheat. (U. S.) 697.

Domestic decrees are not enforceable at law in England. Carpenter v. Thornton, 2 B. & Ald. 52; Henly v. Soper, 8 B. & C. 16. But assumpsit will lie on a foreign decree. Sadler v. Robins, 1 Camp. 253; Henderson v. Henderson, 6 Ald. &

253; Henderson v. Henderson v. Akt. & El. N. S. 288; 13 L. J. Q. B. 274.

1. Chestnut v. Chestnut, 77 Ill. 346; Logan v. Cloyd, I A. K. Marsh. (Ky.) 201; Curtis v. Harm, 14 Ohio, 185; Jeffreys v. Yarborough, I Dev. Eq. (N. Car.) 506. This depends on statute, and the remedy has been denied as to decrees of courts

of probate. Kirby v. Anders, 26 Ala. 466; Hurst v. Williams, 42 Ala. 296.

2. Story's Eq. Pl. (9th Ed.) secs. 429, 432, 641; Danl. Ch. Pr. *1585, 1586. The decree of an inferior court of equity may be so enforced. Story's Eq. Pl. (9th Ed.) sec. 372. The court may enforce the decree as rendered, or modify it, or altogether refuse to give it any effect. Story's Eq. Pl. sec. 430; Hamilton v. Houghton, 2 Bligh, 169; Wadhams v. Gay, 73 Ill. 415.

Such a bill may be brought by a party, or by one claiming a similar interest, or by one whose rights cannot be determined till the decree is carried into effect. Story's Eq. Pl. (9th Ed.) secs. 429, 641.

A decree may be revived by a bill in the nature of a bill of revivor. Story's Eq. Pl. (9th Ed.) secs. 366-371, 385, 386.

See also Coombs v. Jordan, 2 Bland Ch. (Md.) 284; s. c., 22 Am. Dec. 236.
3. 2 Bish. M. & D. (6th Ed.) sec. 498.
4. Where it enters a decree on conditions, it should itself see that the conditions are fulfilled before enforcing the decree. Griffith v. Depew, 3 A. K. Marsh. (Ky.) 177; s. c., 13 Am. Dec. 141; Farmer v. Samuel, 4 Litt. (Ky.) 187; s. c., 14 Am.

Dec. 106.
5. Lube Eq. Pl. secs. 157, 158; Danl. Ch. Pr. *1032, 1042-1050, 1061-1063; Penn v. Hayward, 14 Ohio St. 302; Burn-ley v. Stevenson, 24 Ohio St. 474. See

ley v. Stevenson, 24 Onto St. 474. see Davis v. Headley, 22 N. J. Eq. 120.

6. Lube Eq. Pl. secs. 155, 157; Danl. Ch. Pr. *1050, 1061; Jones v. Boston Milling Corporation, 4 Pick. (Mass.) 407; s. c., 16 Am. Dec. 358; Pingree v. Coffin, 12 Gray (Mass.), 304; Shephard

Coffin, 12 Gray (Mass.), 304; Shephard v. Ross Co., 7 Ohio, 27 r.
7. Lube Eq. Pl. sec. 155; Danl. Ch. Pr. *1042, 1063, 1067; Van Ness v. Cantine, 4 Pai. (N. Y.) 55; Brockway v. Copp, 2 Pai. (N. Y.) 578; Patrick v. Warner, 4 Pai. (N. Y.) 397; Otis v. Foreman, 1 Barb. Ch. (N. Y.) 33; Bryson v. Petty, 1 Bland Ch. (Md.) 183; Bryson v. Petty, 1 Bland Ch. (Md.) 183; Battle v. Bering, 7 Yerg. (Tenn.) 529; Hall v. Dana, 2 Aik. (Vt.) 381; Colman v. Cocke, 6 Rand. (Va.) 618; McNair v. Ragland, 2 Dev. Ch. (N. Car.) 321; Bouslough v. Bouslough, 68 Pa. St. 495; Mansfield v. Ogle, 4 De G. & J. 38; Shaw v. Neale, 20 Beav. 157; Desty's Fed. Proc. 276.

Execution for the deficiency of a mortgage debt cannot issue until after sale and the determination of the deficiency. Desty's Fed. Proc. 310; Bank v. Emerson, 10 Pai. (N. Y.) 115; Cobb v. Thornton, 8 How. Pr. (N. Y.) 66. Execution may issue under a decree in a probate court. Stiles v. Smith, 5 Pai. (N. Y.) 135.

8. Cason v. Cason, 15 Ga. 405; Peel v. Peel, 50 Iowa, 521; McClung v. McClung, 40 Mich. 493; McCrea v. McCrea, 58 How. Pr. (N. Y.) 220.

They may also compel the giving of security for the payment of a money decree, or enjoin him from disposing of property, or by writ of ne exeat forbid his leaving the jurisdiction of the court.3

9. Decrees of Sister States.—The decrees of courts of sister States within their jurisdiction 4 "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from which they are taken." 5

1. Harper v. Rooker, 52 Ill. 370; Prather v. Prather, 4 Des. (S. Car.) 33; Reiffenstein v. Hooper, 36 U. C. O. B.

2. 2 Bish. M. & D. (6th Ed.) sec. 502; Greenland v. Brown, 1 Des. (S. Car.) 196; Ricketts v. Ricketts, 4 Gill (Md.), 105; Frakes v. Brown, 8 Blackf. (Ind.) 295. Compare Erissman v. Erissman, 25 Ill. 136. See also Lube Eq. Pl. sec. 159.

3. 2 Bish. M. & D. (6th Ed.) sec. 505. 4. A decree of divorce rendered in a State where both parties are domiciled is binding in every other State, though obtained for causes not recognized by the laws of the State where the marriage took place. Tolen v. Tolen, 2 Blackf. (Ind.) 407; s. c., 21 Am. Dec. 742; State v. Armington, 25 Minn. 29; Barber v. Root, In Mass. 265; Harding v. Allen, 9 Greenl. (Me.) 148; s. c., 23 Am. Dec. 549; Pawling v. Bird's Exrs., 13 Johns. (N.Y.) 192; Vischer v. Vischer, 12 Barb. (N. Y.) 640; Fellows v. Fellows, 8 N. H. 160.

It has been said that a decree of divorce obtained in a State where neither party obtained in a state where neither party is domiciled is binding elsewhere when both parties submitted to the court's jurisdiction. Kinnier v. Kinnier, 45 N. Y. 535; s. c., 6 Am. Rep. 132; Kerr v. Kerr, 41 N. Y. 272; Kirrigan v. Kirrigan, 2 McCarter (N. J.), 146. Compare Chase v. Chase, 6 Gray (Mass.), 157. See also Prosser v. Warner, 47 Vt. 667; s. c., 19

Am. Rep. 132.

A divorce obtained by a party going to a State other than that of his domicile expressly for that purpose, is fraudulent, and not binding in another State. Hood v. State, 56 Ind. 263; s. c., 26 Am. Rep. 21; 5 Cent. L. J. 35; Maguire v. Maguire, 7 Dana (Ky.), 181; Hanover v. Turner, 14 Mass. 227; s. c., 7 Am. Dec. 203; Sewall v. Sewall, 122 Mass. 156; Edwards v. Green, 9 La. Ann. 317; Litowitch v. Litowitch, 19 Kan. 451; s. c., 27 Am. Rep. 145; Greenlaw v. Greenlaw, 12 N. H. 200; McGiffert v. McGiffert, 31 Barb. (N. Y.)
69; People v. Baker, 76 N.Y. 78; Dorsey
v. Dorsey, 7 Watts (Pa.), 349; Hull v.
Hull, 2 Strobh. Eq. (S. Car.) 174; Irby v.
Wilson, 1 Dev. & Bat. Eq. (N. Car.) 568; Prosser v. Warner, 47 Vt. 667; Cooley's Const. Lim. *400.

The rule is the same though the State in which the divorce was granted is the one in which the marriage took place, the parties having subsequently changed their domicile. Harteau v. Harteau, 14 Pick. (Mass.) 181; s. c., 25 Am. Dec. 372.

Where the wife has a domicile in one State and the husband a domicile in another, a decree of divorce granted on constructive notice at the domicile of either is binding in any other State so far as the dissolution of the marriage status is concerned. Thompson v. State, 28 Ala. 12; Maguire v. Maguire, 7 Dana (Ky.). 181; Harding v. Alden, 9 Greenl. (Me.) 146; Mansfield v. McIntyre, 10 Ohio, 28; Hull v. Hull, 2 Strobh. Eq. (S. Car.) 174; Hubbell v. Hubbell, 3 Wis. 662. Compare Borden v. Fitch, 15 Johns. (N. Y.) 121; s. c., 8 Am. Dec. 225; Hoffman v. Hoffman, 46 N. Y. 30. See also Reel v. Elder, 62 Pa. St. 308.

As to alimony, costs, custody of children, etc., a divorce on constructive notice in another State is not binding. Turner v. Turner, 44 Ala. 437; Townsend v. Griffin, 4 Harr. (Del.) 440; Harding v. Alden, 9 Greenl. (Me.) 140; Lytle v. Lytle, 48 Ind. 200; Crane v. Meginnis, I G. & J. (Md.) 463; Jackson v. Jackson, I Johns. (N. Y.) 424; Prosser v. Warner,

47 Vt. 667.

The recital of facts necessary to give jurisdiction may be disproved in a collateral proceeding in another State. Aldrich v. Kinney, 4 Conn. 380; Sewall v. Sewall, 122 Mass. 156; s. c., 23 Am. Rep. 299; People v. Dowell, 25 Mich. 247; s c., 12 Am. Rep. 260; Pollard v. Baldwin, 22 Iowa, 328; Price v. Ward, 25 N. J. L. 225; Norwood v. Cobb, 15 Tex. 500; Rafe v. Heaton, 9 Wis. 328; Knowles v. Gas Light Co., 19 Wall. (U. S.) 58; 'Thompson v. Whitman, 18 Wall. (U. S.) 457.

5. Sec. 905, Rev. Stat. U. S.; sec. 1, art. 4, Const. U. S.

An interlocutory decree not being conclusive where rendered, is not conclusive in another State. Baugh v. Baugh, 4 Bibb (Ky.), 556; Brinkley v. Brinkley, 50 N. Y. 184; s. c., 10 Am. Rep. 460.
A decree enjoining a judgment is

conclusive in an action in another State

10. Foreign Decrees.—A decree free from fraud pronounced by a foreign court having jurisdiction of the cause and the parties will sustain an action in the courts of another country for a sum of money thereby ascertained to be due; or a bill in equity will lie to carry it into effect.2

DECREE.—(See also APPEAL; COSTS; EQUITY; JUDGMENT.)— The judgment or sentence of a court of equity or admiralty.3 The term is employed to distinguish a sentence or judgment of the

on the judgment. Dobson v. Pearce, 12 N. Y. 156; s. c., 62 Am. Dec. 152.

Equity will sometimes enforce the decrees of sister States. Fletcher v. Ferrell, 9 Dana (Ky.), 372; s. c., 35 Am.

Dec. 113.

The decrees of Federal courts have the same force when relied on in an action in another State as the decrees of State courts. Reed v. Vaughan, 15 Mo, 137;

1. Henley v. Soper, 8 B. & C. 16; Williams v. Preston, 3 J. J. Marsh. (Ky.)

Foreign decrees may be impeached collaterally for fraud or want of jurisdiction. Moseley v. Tuthill, 45 Ala. 621; s. c., 6 Am. Rep. 710; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600.

2. Martin v. Nicholls, 3 Sim. 458. As a bar, see Freeman on Judg. (3d Ed.)

A foreign decree of divorce where one of the parties is domiciled is binding probably in the United States. Freeman on Judg. sec. 605 c. And a decree of divorce pronounced by a court of competent jurisdiction where both parties are domiciled is, by the weight of authority, binding in any other country, regardless of the place of marriage. Conway v. Beazley, 2 Hag. Ec. 639; Blumenthal v. Tannenholz, 9 Rep. 52; Prosser v. War-

ner, 47 Vt. 667. Authorities on Decrees. - The only work bearing the special title is that of Seton. It is principally a book of forms. Heard's Daniell's edition (1884) is the best. Chancery Practice, Barbour's Chancery Practice, Freeman on Judgments (3d Ed.), Story's Equity Pleadings (9th Ed.), and Adams' Equity (7th Am. Ed.) are all very useful. Lube's Equity Pleadings and Barton's Suit in Equity state concisely the manner of obtaining, perfecting, and enforcing decrees. Seton on Decrees, 3 Danll. Ch. Pr., Curtis's Equity Precedents, and Dickinson's Chancery Precedents contain many valuable forms. For decrees in Admiralty, see Benedict's Admiralty (2d Ed.); and for decrees in probate practice, see Gary's Probate Law

and Dickinson's Probate Court Prac-

3. Bouvier's Law Dict.; 2 Daniell's Ch. Pr. 1192; McGarrahan v. Maxwell.

28 Cal. 75. "What is a decree in chancery? Like a judgment at law, it is the sentence pronounced by the court upon the matter of right between the parties; and this sentence is founded on the pleadings and proofs in the cause. None of the various orders which are so often made in the progress of the suit for time to answer or produce witnesses, for leave to amend, setting aside a default, or the like, have ever been or can, with the least degree of propriety, be called decrees within the meaning of that word as used in the constitution," etc. Rowley v. Van Benthuysen, 16 Wend. (N. Y.) 383; Wing v. Warner, 2 Doug. (Mich.) 290.

A judgment at law was either simply

for the plaintiff or simply for the defend-There could be no qualifications or modifications of the judgment. But such a judgment does not always touch the true justice of the cause or put the par-ties in the position which they ought to occupy. While the plaintiff may be entitled, in a given case, to general relief, there may be some duty connected with the subject of litigation which he owes to the defendant, the performance of which equally with the fulfilment of his duty by the defendant ought, in a perfect system of remedial law, to be exacted. This result was attained by the decree of a court of equity, which could be so framed and moulded, or the execution of which could be so controlled and suspended, that the relative duties and rights of the parties could be secured and en-forced. This capacity of moulding a decree to suit the exact exigencies of a particular case is indeed one of the most striking advantages which procedure in chancery enjoys over that at common law, and must have been one of the elements which contributed in no small degree to the origin and growth of equitable jurisprudence. Bispham's Equity, (4th Ed.) p. 8, § 7. court in a suit in equity, or in respect to the equitable branch of an action determined upon legal as contradistinguished from equitable principles—the term being employed not as a designation of something different from a judgment, but rather a judgment of a particular character.1

A decree is either interlocutory or final. The former is given on some plea or issue arising in the cause which does not decide the main question; the latter settles the matter in dispute, and has

the same effect as a judgment at law.2

1. "In the same manner we use the terms 'Fieri facias,' 'order of sale, and 'writ of restitution,' not as indicating writs differing from an execution, but as descriptive of certain kinds of writs. all of which are included in the generic term 'execution'-the writ issued for the enforcement of a judgment. Nor is it of any consequence whether the judgment consists of only one or of more than one entry. In ejectment, the plaintiff may be entitled to judgment for a part of the premises, and the defendant, who has stated an equitable defence, may be entitled to a judgment granting equitable relief for another part of the premises, but both determinations taken together constitute a judgment. A cause of action to restrain the commission of waste may. under our system of practice, be united with a cause of action in ejectment for the recovery of the possession of the premises threatened to be injured, and the two causes of action, together with the facts pleaded by the defendant, constitute the matters in controversy by the parties, and the final determination of the rights of the parties respecting those matters, whatever form it may assume, is the judgment. The judgment in ejectment and the 'decree' of injunction in this case constitute one judgment, and the defendants having appealed from the whole judgment, the 'decree' is necessarily included in the appeal." McGarrahan v. Maxwell, 28 Cal. 75.

A Former Decree in a suit in equity, between the same parties and for the same subject-matter, is also a good defence in equity, even although it be a decree merely dismissing the bill; if the dismissal is not expressed to be without prejudice. Cooper's Eq. Pl., ch. 5, pp. 269 to 271; Mitford Eq. Pl. by Jeremy, pp. 237 to 239; 2 Story Eq. J. (13th Ed.) §

1523.

Who Entitled to a Decree. -- ". . . It is a general rule that no person but a plaintiff can entitle himself to a decree. But in a bill for an account, if a balance is ultimately found in favor of the defend-

ant, he is entitled to a decree for such balance against the plaintiff. And for a like reason, although a default cannot ordinarily revive a suit which has not proceeded to a decree, yet in a bill for an account, if the plaintiff dies after an interlocutory decree to account, the defendant is entitled to revive the suit against the personal representative of the plaintiff." I Eq. Abr. 3 Pl. 5. Anon. 3 Atk. 691; Ludlow v. Simond, 2 Cain, Cas. Ev. 39; Lord Stowell v. Cole, 2 Vern. 219; Mr. Raithly's note, Harwood v. Schmedes, 12 Ves. 316; I Story Eq. J.

(13th Ed.) § 522.

Dignity of a Decree.—"A decree in equity is held of equal dignity and importance with a judgment at law. A decree upon a bill of this sort, being for the benefit of all creditors, makes them all creditors by decree upon an equality with creditors by judgment, so as to exclude from the time of such decree all preferences in favor of the latter." Thompson

v. Brown, 4 Johns. Ch. (N. Y.) 619; 1 Story Eq J. (13th Ed.) § 547. Court of Arches.—In the court of arches a suit is commenced by a process called a "decree," which is the same thing as a citation. Phillm, Ec. C. L. 1253.

2. All decrees and orders of the court

of chancery not capable of enrolment are interlocutory within the meaning of the statute limiting appeals. Jenkins v. Wild, 14 Wend. (N. Y.) 539. On a libel in personam for damages, if the court decrees that damages be recovered, and that commissioners be appointed to ascertain the amount thereof, no appeal will lie from such a decree until the commissioners have made their report, this not being a final decree. Chace v. Vasquez, II Cranch (U. S.), 429. Final Decree.—A

-Á final decree is that which is made when all the material facts in a cause have been ascertained, so as to enable the court of chancery to understand and decide on the merits of the case. Jacques v. M. E Church, 17 Johns. (N. V.) 548.

A final decree of a court of equity may

Decree Nisi, in English law. See note 1.

Decree in Legislation.—In some countries, as in France, some acts of the legislature or of the sovereign which have the force of law are called decrees.2

Decrees in Scotch Law.—See note 3.

DECREPIT.—Disabled, incapable or incompetent, from either physical or mental weakness or defects, whether produced by age or other causes, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength.4

be given in evidence in another suit, although such decree has not been formally enrolled. Bates v. Delavan, 5

Paire (N. Y.), 299.

An appeal from the final decree necessarily opens for consideration all prior orders or decrees, any way connected with the final decree. Atkinson v. Manks.

I Cowen (N. Y.), 691.

1. In matrimonial suits in the probate. divorce, and admiralty division of the English high court, every decree for dissolution or nullity of marriage is in the first instance a decree nisi, i.e., provisional, and cannot be made absolute until after the expiration of a certain time (generally six months), during which period any person is at liberty to show cause to the court why the decree should not be made absolute, by reason of its having been obtained by collusion, or of material facts not brought before the court; and on cause being so shown, the court deals with the case by making the decree absolute, or by reversing it, or by requiring further inquiry. It is not necessary to make a motion to have the decree made absolute. Rapalje & L. Law Dict.

2. As the Berlin and Milan decrees.

Bouv. Law Dict.

3. In Scotch Law.-A decree is the final judgment or sentence of court by which the question at issue between the parties is decided.

Decree in Absence.-A judgment by de-

fault or pro confesso.

Decree of Constitution .- Any decree by which the extent of a debt or obligation is ascertained. (The term is, however, usually applied especially to those decrees which are required to found a title in the person of the creditor in the event of the death of either the debtor or the original Bell Law Dict.)

Decree Dative. - The order of a court of probate appointing an administrator.

Decree of Forthcoming.-The decree made after an arrestment ordering the debt to be paid or the effects to be delivered up to the arresting creditor. Law Dict.

Decree of Locality.-The decree of a teind court allocating stipend upon different heritors. It is equivalent to the apportionment of a tithe rent charge,

Decree of Modification .- A decree of the teind court modifying or fixing a sti-

pend.

Decree of Registration .- A proceeding by which the creditor has immediate execution. It is somewhat like a warrant of attorney to confess judgment, I Bell Com. 1. 1. 4; Bouv. Law Dict.; Rapalje

& L. Law Dict.
4. "What meaning are we to give to the word decrepit? Words used in the Penal Code, except where specially defined by law, are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject-matter relative to which they are employed. Penal Code, Art. 10. Mr. Webster makes the word 'decrepit' a dependent of old age; that is, according to his definition, before a person can be decrepit old age must have supervened upon such person. He defines the word thus: 'Broken down with age; wasted or worn by the infirmities of old age, being in the last stage of decay; weakened by age.' This word is not de fined in the Code, nor do we find any definition of it in the law lexicographies. In our opinion, as used in article 496 of the Penal Code, and as commonly understood in this country, it has more comprehensive signification than that given it by Mr. Webster. We understand a decrepit person to mean one who is disabled, incapable, or incompetent, from either physical or mental weakness or defects, whether produced by age or other causes, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength. We think that, within the meaning of the word as used in the Code, a person may be decrepit

DEDICATE.—SEE DEDICATION.1

DEDICATION.—(See also EASEMENTS; HIGHWAYS.)

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(a) Restrictions, 417.

- (b) Alienation, 418. (c) Revocation and Reversion, 410.
 - (1) Revocation, 419.
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1. Definition and Origin.—(a) Dedication is the act of devoting or giving property for some proper public object in such manner as to conclude the owner.2

Dedication has also been defined as "an appropriation of land to some public use made by the owner of the fee, and accepted

for such use by or on behalf of the public." 3

(b) Origin of Dedications.—The principles of the law of dedication as now applied originated in the common law; there was no strictly

without being old; otherwise the use of the word in the Code would be tautology. It certainly was intended by the legislature that it should signify another state or condition of the person than that of old age." Hall v. State, 16 Tex. App. 11; s. c., 49 Am. Rep. 824; Bowden v. State,

2 Tex. App. 56.
1. "The statute, which is rather peculiarly worded, makes it an offence to steal brass fixed in any square, street or other place dedicated to public use or ornament; and I think that a churchyard is a place of that kind." Rex v. Blick, 4 Car. &

Payne, 378.

"It being a public market, the soil was dedicated to the public use." The Mayor, etc., v. Ward, i Wils. 110.

2. Hunter v. Sandy Hill, 6 Hill (N.

Dedication is an act by which the owner of the fee gives to the public for some proper purpose an easement in his lands. Curtis v. Keesler, 14 Barb. (N. Y.) 511. A dedication of property to public use

is a solemn appropriation which may be expressed either by a direct appropriation to such use, or may be implied from the acts of the owners. Williams v. Wiley, 16 Ind. 362.

A dedication of land for public purposes is simply a devotion of it, or of an easement in it, to such purposes by the owner, manifested by some clear declaration of the fact. Grogan v. Town of Hayward (C. Ct. of Cal.), 4 Fed. Rep.

Dedication is defined as appropriation of land by its owner for any general or public use, the owner reserving to himself no other rights in the soil than such as are perfectly compatible with the full exercise and enjoyment of the public use to which the property has been devoted. Bushnell v. Scott, 21 Wis. 451; s. c., 94 Am. Dec. 555.

3. Angell on Highways (3d Ed.), chap.

iii. § 132.

Speaking of the importance of the doctrine, Judge Dillon says: "That property may be dedicated to public use is a well-established principle of the common law. It is founded in public convenience, and has been sanctioned by the experience of ages. Indeed, without such a principle it would be difficult, if not impracticable, for society, in a state of advanced civilization, to enjoy those advantages which belong to its condition, and which are essential to its accommodation." See also New Orleans v. United States, 10-Pet. (U. S.) 662.

There may be a dedication for pious and charitable uses as well as for highways and other public easements. Cooper v. The Church, 32 Barb. (N. Y.) 222; Atkinson v. Bell, 18 Tex. 474; Fulton v.

Mehrenfeld, 8 Ohio St. 440.

analogous principle in the civil law. The recognition of the doc. trine of the dedication of easements to the public use first appears in two comparatively modern decisions,2 but has since been fully and frequently recognized as a familiar and undoubted principle of the law.3

(c) Classification.—Dedications of lands to public uses are divisible, according to the authorities, into two classes: (1) Statutory

dedications; (2) Common-law dedications.

Statutory Dedications .- Statutory dedications are made and only can be made in strict compliance with the statute, 4 and this compliance will dispense with the necessity of any assent or acceptance on the part of the public. Such a dedication vests an estate in the public by conveyance or grant. In common-law dedication there is no express grant to a grantee upon consideration, but it operates by way of an estoppel in pais of the owner rather than by a transfer of an interest in the land. But the application of the

1. Angell on Highways (3d Ed.), p. 146; Poth. Pand. de Just., lib. 43, tit. 8, art. 1.

2. Rex v. Hudson (1732), 2 Strange, 909; Lode v. Shepherd (1735), 2 Strange, 1004. See also Gowen v. Phila. Exch. Co., 5 W. & S. (Pa.) 141; Rugby, etc., v.

Merryweather, 11 East, 375, note.
3. "Since which time it has been frequently and fully recognized as a familiar and undoubted principle of the law, until, adapting itself to the increasing demands of public travel, what at first seemed scarcely more than a dictum has become an important branch of the law of highways, and a marked instance of the capacity of the system of law of which it is a part to meet the varying and evergrowing wants of society and govern its actions." Angell on Highways (3d Ed.) actions." Angell on Highways (3d Ed.) p. 146. See also Hunter v. Sandy Hill, 6 Hill (N. Y.), 407; Hobbs v. Lowell, 19 Pick. (Mass.) 405; Pomeroy v. Mills, 3 Vt. 279; Cincinnati v. White, 6 Pet. (U. S.) 431; Mosier v. Vincent, 34 Iowa,

4. Dillon on Mun. Corp., vol. ii. chap. 17, § 491, where the author cites numerous cases to show that where the statute requires that the plot describing the streets, alleys, commons, etc., shall be acknowledged before it is recorded, an acknowledgment is essential to a valid and effective dedication under the statute. Wisby v. Bonte, 19 Ohio St. 238; Fulton v. Mehrenfeld, 8 Ohio St. 440; Winona v. Huff, II Minn. II4; Schurmeier v. Railroad Co., 10 Minn. 59; s. c., 7 Wall. (U.S.) 272; State υ. Hill, 10 Ind. 219; Noyes υ. Ward, 19 Conn. 250; Des Moines υ. Hall, 24 Iowa, 234; Ragan υ. McCoy, 29 Mo. 356; Detroit v. Railroad Co., 23 Mich. 173; Mansur v. Haughey, 60 Ind. 364.

5. Wisby v. Bonte, 19 Ohio St. 238; Fulton v. Mehrenfeld, 8 Ohio St. 440; Baker v. St. Paul, 8 Minn. 436; Ragan v. McCoy, 29 Mo. 356; People v. Jones, 6 Mich. 176.

But an incomplete statutory dedication may become one at common law by acceptance by the public. Fulton v. Mehrenfeld, 8 Ohio St. 440.

6. Dillon on Mun. Corp., vol. ii. chap.
17, § 491, citing Fulton v. Mehrenfeld, 8
Ohio St. 440; Cincinnati v. White, 6 Pet.
(U. S.) 431; Town v. Clark, 9 Cranch,
292; Hunter v. Sandy Hill, 6 Hill (N. Y.),
407; Curtis v. Keesler, 14 Barb. (N. Y.),
521; Brown v. Manning, 6 Ohio, 298, and cases cited; Cincinnati v. Comrs., 7 Ohio, pt. i. 88; Schurmeier v. Railroad Co., 10 Minn. 59.

When lands are dedicated and enjoyed as such, and rights are acquired by individuals in reference to such dedication, the law considers it in the nature of an estoppel in pais. Mayor of Macon v. Franklin, 12 Ga. 239; Haynes v. Thomas, 7 Ind. 38; Mankato v. Willard, 13 Minn. 13. See also Noyes v. Ward, 19 Conn. 250; Cole v. Sprowl, 35 Me. 161; 2 Greenl. Ev. § 662; Denver v. Clements, 3 Col. 472.

Dedication of street does not operate as a grant, but as an estoppel. City of Dubuque v. Maloney, 9 Iowa, 451; s. c., 74 Am. Dec. 358.

Dedication works as an estoppel, and not as a grant. 67 Am. Dec. 231. When estoppel of owner to resume

rights over property he has intended to dedicate arises. 67 Am. Dec. 231. Washburne, in his work on Real Prop-

erty, p. 460*, states that the dedication of land rests on the doctrine of estoppel, the law considering it in the nature of doctrine of estoppel in pais to the principle of dedication has been severely criticised.1

It does not follow, however, that an acceptance by the public will not cure an incomplete statutory dedication, or that rights acquired under it by third persons will be impaired. In such cases it may operate as a common-law dedication.

While it is obvious that a statutory dedication may grant the fee of the land in trust for public uses, yet, unless prohibited by statute, the proprietor, in laying out a town or an addition thereto, may grant an easement simply, and reserve mineral rights, etc.³ As a rule, the statute itself must be consulted to determine the requisites and effects of dedication under any particular State law.

Common Law Dedications.—The incidents, requisites, proof, and effects of common-law dedication can be best considered under subsequent heads.4 It may be remarked here that the right to make common-law dedications is not usually precluded or abridged by statutory regulations providing for dedication in certain specific ways. 5

an estoppel in pais, and he cites as authorities for this conclusion Cincinnati v. White, 6 Pet. (U. S.) 431; Hobbs v. Lowell, 19 Pick. (Mass.) 405; Hunter v. Trustees, 6 Hill (N. Y.), 41; State v. Trask, 6 Vt. 355.

1. The application of the doctrine of estoppel in pais to the principle of dedication is severely criticised by Mr. Durfee in Angell on Highways. The learned writer says, "that if by estoppel in pais anything other than dedication be meant, this doctrine is not sanctioned by a single English decision; if dedication be meant, the use of the term 'estoppel,' in this connection, is only productive of confusion of ideas. . . . This doctrine of estoppel in pais, therefore, which occupies so prominent a place in a few American decisions, though it may furnish analogies for the guidance of the court and jury in presuming an intention to dedicate, is foreign to the principle on which dedication rests, and does but furnish an excrescence to mar the simplicity of the doctrine as established by English authority." Angell on Highways (3d Ed.), chap. iii., § 156.

2. Dillon on Mun. Corp., vol. ii. ch. 17, § 491; Fulton v. Mehrenfeld, 8 Ohio St. 440; Baker v. Johnson, 21 Mich. 319; Baker v. St. Paul, 8 Minn. 436; Banks v. Ogden, 2 Wall. (U. S.), 57; Sargeant v. Bank, 12 How. (U. S.) 371; Waugh v.

Leech, 28 Ill. 488.

Mere ineffectual attempt to effect statutory dedication creates no estop-pel in favor of the public; and to raise such an estoppel, it must ap-

pear that some act was done by the public subsequent to the making of the plat, and in reliance upon it, which would render it unjust for the proprietors afterwards to enforce a right of private ownership. Lee v. Lake, 90. Am. Dec. 220,

A plat which does not comply with the statute in force when made, and therefore incomplete as a statutory dedication, may be valid as a common-law dedication, and where sales of land are made with reference to such plat, the plat will operate as an estoppel. Maywood Co. et al. v. Village of Maywood (Illinois), 6 N. E. Rep. 866.

3. Dubuque v. Benson, 23 Iowa, 248; Noyes v. Ward, 19 Conn. 250; Manly v. Gibson, 13 Ill. 308; Peck v. Co., 8 R.

Dedicator may limit duration. Antones v. Eslava, 9 Port. (Ala.) 527. See also Des Moines v. Hall, 24 Iowa, 234; also Des Moines v. Hall, 24 Iowa, 234; Schurmeier v. R. Co., 10 Minn. 59; affirmed, 7 Wall. (U. S.) 272; Commis. v. Lathrop (1872), Kan.; Price v. Thompson, 48 Mo. 361; Rutherford v. Taylor, 38 Mo. 315.

4. The case of Cincinnati v. White, 6 Pet. (U. S.) 431, has been generally accepted and followed as a least increase.

accepted and followed as a leading case in defining the requisites and incidents of common-law dedication by many State courts. On this question see also Noyes. v. Ward, 19 Conn. 250, and Manly v.

Gibson, 13 Ill. 308.
5. Dillon on Mun. Corp., vol. ii. ch. 17, § 493; Sargeant v. Bank, 4 McLean (C. C.), 339.

In a leading case the following summary of the incidents of a common-law dedication is given: "In dedication no particular formality is necessary; it is not affected by the Statute of Frauds; it may be made either with or without writing by any act of the owner, such as throwing open his land to public travel, or platting it and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate; or an acquiescence in the use of his land for a highway, or his declared assent to such use, will be sufficient,—the dedications being proved in most if not all of the cases by matter in pais, and not by deed. The vital principle of the dedication is the intention to dedicate; and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. Time, therefore, though often a very material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If accepted and used by the public in the manner intended, the dedication is complete-precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use. Dedication, therefore, is a conclusion of fact to be drawn by the jury from the circumstances of each particular case; the whole question, as against the owner of the soil, being whether there is sufficient evidence of an intention on his part to dedicate the land to the public use as a highway."

2. Who May Dedicate,—(a) Generally.—The dedication must be by the owner or proprietor, and a mortgagor cannot make a good dedication as against the mortgagee, although as to all other persons he is regarded as the owner. Remaindermen are not bound

1. Harding v. Jasper, 14 Cal. 642. The difference between a statutory and

The difference between a statutory and a common-law dedication is that one vests the legal title to the ground set apart for public purposes in the municipal corporation, in trust for the public, while the other leaves the legal title in the original owner, charged with the same rights and interests in the public which it would have if the fee were in the corporation. Maywood Co. et al. v. Village of Maywood (Sup. Ct. of Ill.), 6 N. E. Rep. 866.

2. Dillon qualifies this proposition by the words, "or of an estate therein." Vol. ii. § 498. Angell states, "that it is a primary condition of every valid dedication that it shall be made by the owner of the fee." Angell on Highways (3d Ed.), p. 147. See also Hoole v. Atty.-Genl., 22 Ala. 190; Post v. Pearsall, 20 Wend. (N. Y.) III; Irwin v. Dixion, 9 How. (U. S.) 10; Post v. Pearsall, 20 Wend. (N. Y.) III; Lee v. Lake, 14 Mich. 12; Wood v. Veal, 5 B. & Ald. 454; Leland v. Portland, 2 Ore. 46; Baxter v. Taylor, 1 Nev. & M. 13; Fisk v. Havana, 88 Ill. 208; Venata v. Jones, 42 McLean (C. C.), 641.

Power of attorney to sell and convey gives agent no right to dedicate to public

use. Where power is express to dedicate, owner is estopped to deny act of agent. Wirt v. McEnery, 6 Am. & Eng. Corp. Cas. 105.

One occupying government land cannot dedicate a way across it, nor can a way across it be acquired by prescription. Smith v. Smith, 34 Kan. 203.

rion. Smith v. Smith, 34 Kan. 293.

Plat of village on which is marked "Public Square," executed, acknowledged, and recorded by one who did not own the property at the time, can have no effect as a dedication under a statute providing for the making, acknowledging, and recording of town plats by the proprietors, even though he afterwards became the owner, in the absence of subsequent circumstances estopping him from asserting the invalidity of the plat. Lee v. Lake, 90 Am. Dec. 220.

3. 2 Smith Lead. Cas. 95; Detroit v.

3. 2 Smith Lead. Cas. 95; Detroit v. Railroad Co., 23 Mich. 173. As to dedication by agent of owner, see U. S. Chicago, 7 How. (U. S.) 185; Barclay v. Howell's Lessee, 6 Pet. (U. S.) 498. It would seem to be a question of authority. Brown v. Manning, 6 Ohio, 298. See also, as to administrators, Logansport v.

Dunn, 8 Ind. 378.

by the acts of the owner of a particular estate. Dedication may he presumed against married women.² There can, of course, be no dedication during a tenancy, however long, unless from the fact of notice or otherwise the concurrence of the landlord may be presumed or shown.3 A corporation may dedicate unless the act be inconsistent with its charter and objects: 4 so also a trustee.5 and equally the equitable owner.6

(b) Parties.—The parties to the dedication are the proprietor and the public. The gift inures immediately to the public, and is

limited only by the wants of the community at large.

A mere stranger without authority cannot, of course, dedicate lands any more than he could deed them. Bushell v. Scott, 21 Wis, 457; Kyle v. Logan, 87

1. Dedication by owner of particular estate does not affect remaindermen, 67

Am. Dec. 231.

But if the mortgagee assents to the dedication he will be bound as those claiming under him. Hoole v. Attorney-General, 22 Ala. 190. See also Gentleman v. Soule, 32 Ill. 271; Bushnell v. Scott, 21 Wis. 451.

A mortgagor cannot dedicate land for street so as to prejudice rights of mortgagee. Mere silence of mort-gagee will not prevent him or purchaser at foreclosure sale from setting

up their right to the property so dedicated. City of Moberly v. McShane, 7 Am. & Eng. Corp. Cas. 405.

2. Schenley v. Com., 36 Pa. St. 29; Ward v. Davis, 3 Sandf. (N. Y.) 502. As to dedication by married women, see also Todd v. Railroad Co., 19 Ohio St. 514. And it has been held that dedication will cut out dower. Gwynne v. Cin., 3 Ohio, 25; Moore v. Mayor, 8 N. Y. 110; s. c., 59 Am. Dec. 475 and note; Mankato v. Meagher, 17 Minn. 243.

As to whether dower is defeated by dedication, the authorities differ. That it is so defeated, see Duncan v. Terre

Haute, 85 Ind. 106. Contra, see Semar v. Canaday, 53 N. Y. 304.

3. Rex v. Barr, 4 Camp. 16; Davis v. Stephens, 7 Carr. & Payne, 570; Angell on Highways (3d Ed.), p. 148. Schenley v. Com., 36 Pa. St. 29; State v. Atherton, 16 N. H. 203.

A trespasser, or even a tenant, cannot grant a valid easement over the land of the owner. Gentleman v. Soule, 32 Ill. 271; s. c., 83 Am. Dec. 264.

4. Canal Co. v. Hull, I Man & Gr. 392; Macon v. Franklin, 12 Ga. 239; Wright v. Victoria, 4 Texas. 375; Boston v. Lecraw, 17 How. (U. S.) 420; State v. Woodward, 23 Vt. 92; Green v. Canaan, 29 Conn. 157; San Francisco v. Calderwood, 31 Cal. 585; Gall v. Cin., 18

Ohio St. 563.

5. Rex v. Leake, 5 B. & Adolph, 460: Prudden v. Lindsley, 29 N. J. Eq. 615. 6. City of Cincinnati v. White, 6 Pet. (U. S.) 431; Williams v. Society, 1 Ohio St. 478; Wright v. Tukey, 3 Cush. (Mass.)

7. Angell on Highways (3d Ed.), p. 150; Cincinnati v. White, 6 Pet. (U. S.) 431; Post v. Pearsall, 22 Wend. (N. Y.) 425; State v. Wilkinson, 2 Vt. 480; New Orleans v. U. S., 10 Pet. (U. S.) 662; Williams v. Society, 1 Ohio St. 478; Kennedy

v. Jones, 11 Ala. 63.

The public is an ever existing grantee capable of taking dedications for public uses, and its interests are a sufficient

consideration to support them. Warren v. Jacksonville, 15 Ill. 236.
The interests of those beneficially entitled to easements, dedications of a public or charitable nature, will not be permitted to lapse for want of a person to take legal title. Vick v. Mayor of

The owner of land may without deed dedicate it to public uses. Rector v. Hartt, 8 Mo. 448. Or without a donee to take the title. Lessee v. M'Candless,

7 Ohio, 135.

The dedication of property to public uses in cities and towns does not require that they be incorporated. New Orleans v. U. S., 10 Pet. (U. S.) 662. Olcott v. Banfill, 4 N. H. 537.

Where land is dedicated by a commonlaw dedication, and there is no municipal body with authority to make formal acceptance of the same, an acceptance by the public, by actual use of the property dedicated for the purpose for which the dedication was made, will be sufficient. Maywood Co. et al. v. Village of Maywood (Illinois), 5 N. E. Rep. 866.

On a statutory dedication prior to the creation of a municipal body empowered to receive it, the fee remains in abeyance until such a corporation is formed, when it immediately vests in the corporation. On a common-law dedication under such

3. What Constitutes Dedication.—(a) Nature of Generally—Intent. The question whether land has been dedicated to public use is one of intent. No particular form is necessary to make a dedication; a grant is not required; it may be made by parol, and proved by parol; all that is necessary is the assent of the owner, and the fact that it has been used by the public. The intention

circumstances the fee remains in the dedicators, subject to the uses for which it was dedicated, and on the formation of the municipality the uses of the public vest in the municipality. Maywood Co. et al. v. Village of Maywood (Illinois), 6 N. E. Rep. 866.

1. Biddle v. Ash, 2 Ashm. (Pa.) 211; Marcy v. Taylor, 19 Ill. 634; Mayor of Macon v. Franklin, 12 Ga. 239; Hall v. McLeod, 2 Metc. (Ky.) 98; Institute v. How, 27 Mo. 211; Oswald v. Grenet, 22 Tex. 94.

A clear intent is all that is necessary. President v. Indianapolis, 12 Ind. 620.

As to what amounts to a dedication of land to the public, and the nature and extent of a dedication. Dummer v. Jersey City, 20 N. J. L. 86.

Any acts clearly showing an intent to

dedicate are enough. Harding v. Jasper,

14 Cal. 642.

How intent to dedicate to public use must be signified. Heirs of David v. City of New Orleans, Livandois v. City of New Orleans, 16 La. Ann. 404; s. c.,

79 Am. Dec. 586.

To sustain dedication, intention of owner to dedicate as well as an actual appropriation of the property by the public for the uses to which it is dedicated, must be shown. Bushnell v. Scott, 21 Wis. 451; s. c., 94 Am. Dec. 555.

Dedication is founded upon intention. Hall v. McLeod, 2 Met. (Mass.) 98; O'Neill v. Annett, 3 Dutch. Eq. (N. J.) 291; s. c.,

72 Am. Dec. 364.

What sufficient evidence of intention to dedicate. Sarpy v. Municipality No. 2, 9 La. Ann. 597; s. c., 61 Am. Dec. 221.

Dedication cannot be made out without clear intent to dedicate on the part of the proprietor, and an acceptance of the property by the public. Lee v. Lake, 90 Am. Dec. 220.

Dedication to public use is not established where there is neither grant nor assent shown. Heirs of David v. City of New Orleans, Livandois v. City of New Orleans, 16 La. Ann. 404; s. c., 79 Am.

Dec. 586.

To constitute sufficient dedication there must be the intention on the part of the owner to make the gift, and also an acceptance. The owner's intention may be manifested in writing, by declarations, or by acts. Gentleman v. Soule, 83 Am Dec. 264.

Dedication is a matter of intention. A statutory dedication vests the legal title in the municipal corporation for the public, while a common-law dedication leaves it in the original owner. A plat which does not fully meet the statutory requirement may be good as a common-law dedication. Maywood Co. v. Village, 13 Am. & Eng. Corp. Cas. 506; Zinc Co. v. La Salle, 14 Am. & Eng. Corp. Cas. 376.

In order to constitute a dedication for a public highway there must be an intention to dedicate by the owner, clearly and unequivocally shown, and an acceptance by the public. Mere evidentiary facts tending to show a dedication do not of themselves constitute the dedication. Shellhouse v. State (Indiana), 2 N. E.

Rep. 484.

The question of the fact, form, and extent of dedication of land to public use is one of intention, and is for the jury; and where a plan of land bordering on a river, platted into streets and lots, shows one of the streets extended to the bank of the river, and then, spanning the river in a direct line with the street, lines marked "Bridge," the question whether or not the owner intended that the street should extend to the middle of the stream, and the further question whether he intended that the lines of the street should run directly over the river, or, anticipating accretions to the bank, intended that the dedication should be in the direction of a line drawn at right angles with the then bank, so as to deflect the original course of the street, are questions for the jury. City of Elgin v. Beckwith et al. (Illinois), 10 N. E. Rep. 558.

Establishment by dedication is a question.

tion of fact. Eastland v. Fogo, 58 Wis.

Assent of owner and use of land for purpose intended is all that is necessary. Heirs of David v. City of New Orleans, 16 Livandois v. City of New Orleans, 16 La. Ann. 404; s. c., 79 Am. Dec. 586. No particular form or ceremony is

necessary. Heirs of David v. City of New Orleans, Livandois v. City of New Orleans, 16 La. Ann. 404; s. c., 79 Am.

Dec. 586.

Realty may be dedicated verbally.

to dedicate is absolutely essential, and it should clearly and satisfactorily appear: 1 animus dedecendi is the vital principle, and time. though often material, is not an essential ingredient.

It is not essential that the legal title should pass out of the owner,3 nor that there should be any grant of the use or easement to take the fee: 4 nor is a deed or writing necessary to constitute

Hall v. McLeod, 2 Met. (Ky.), 98; s. c.,

74 Am. Dec. 400.

Land may be dedicated to public use without deed or other writing, but the intent to dedicate should be clear, and the acts or circumstances relied on to establish such intention should be unequivocal and convincing. Morrison v.

Marquardt, 92 Am. Dec. 440.

A dedication may be made by grant or other written instrument, or it may be evidenced by acts and declarations without writing. No particular form is requisite to the validity of a dedication. It is merely a question of intention. It may be made by a survey and plat alone, without any declaration, oral or on the plat, when it is evident from the face of the plat that it is the intention of the proprietor to set apart certain grounds for the use of the public. Maywood County v. Village of Maywood, 6 N. E. Rep. 866.

Laying out town and exhibiting plan by United States Government, when amounts to. City of Dubuque v. Maloney, 9 Iowa, 451; s. c., 74 Am. Dec.

Where owners of land in common, by mutual agreement, divide it into blocks, with streets, and then, by agreement, partition the blocks among themselves, each taking a number of blocks in severalty, there is a common-law dedication by each of the streets, based on a valuable consideration moving from the other owners, and such dedication is irrevocable. Town of Lake View v. Lebahn (Illinois), 9 N. E. Rep. 269.

Declaration of purpose of road by deed that it should be "open to use of public at large for all manner of purposes in all respects as a common turnpike road," but subject to payment of tolls, not a dedication. Austerberry v. Corporation of Oldham (Eng. Ch. D.), 9 Am. & Eng.

Corp. Cas. 323.

Rule for testing dedication to be inferred from a plan. Heirs of David v. City of New Orleans, Livandois v. City of New Orleans, 16 La. Ann. 404; 79 Am.

Dec. 586

1. Dillon, vol. ii. § 499; Irwin v. Dixion, 9 How. (N.Y.) 10; Logansport v. Dunn, 8 Ind. 378; Remington v. Mil. lerd, 1 R. I. 93; Cincinnati v. White, 6 Pet. (U. S.) 435; Wilson v. Sexon, 27 Iowa, 15; Detroit v. Railroad, 23 Mich. 173. "The doctrine of all the Mich. 173. "The doctrine of all the authorities," says Judge Potts in Smith v. State, 3 Zab. (N. J.) 712, "is that the intention to dedicate land to the public use is of the very essence of the act, but this intention may be proved as a fact or inferred from circumstances. v. Murchie, 3 Munf. (Va.) 358.

As to what proof has been held suffi-

cient in particular cases to establish dedication as against the original prov. Alburger, I Whart. (Pa.) 469; State v. Wilkinson, 2 Vt. 480; Abbott v. Mills, 3 Vt. 521; State v. Woodward, 23 Vt.

A dedication to public use may be shown from declarations of owner. Mc-Kee v. St. Louis, 17 Mo. 184; Buchanan v. Curtis, 25 Wis. 99; Evansville v. Evans, 37 Ind. 229; State v. Catlin, 3 Vt. 530; McKee v. Perchment, 69 Pa. St. 342; Chapin v. State, 24 Conn. 236.

As to declarations of deceased surveyor

admitted as part of the res gestæ. Barclay v. Howell's Lessee, 6 Pet. (U.S.) 498; Birmingham v. Anderson, 40 Pa. St.

2. Angell on Highways (3d Ed.), § 142; Woodyer v. Hadden, 5 Taunt. 125; Poole v. Huskinson, 11 M. & W. 827; Jarvis v. Dean, 3 Bing. 447; British Museum v. Finnis, 5 Carr. & Payne, 460; Barroclough v. Johnson, 4 Adolph. & Ellis, 99; Cole v. Sprowl, 35 Me. 161; In re thirty-second Street, 19 Wend, (N.Y.) 128; Proctor v. Lewiston, 25 Ill. 153; Bissell v. Railroad Co., 23 N. Y. 61; Gwynn v. Homan, 15 Ind. 201; Eby v. Bates, 5 Wis. 467; Brown v. Worcester, 13 Gray (Mass.), 31; Ragan v. McCoy, 29 Wis. 356; Morse v. Ranno, 32 Vt. 600. It may be valid without lapse of time. Oliver v. Co., 3 Houst. (Del.) 267; Parrish v. Stephens, I Ore. 59. But if a single act be relied on, it must be of unequivocal character. Logansport v. Dunn, 8 Ind. 378.

3. Lade v. Shepherd, 2 Stra. 1004; Dubuque v. Maloney, 9 Iowa, 450; Beatty v. Kurtz, 2 Pet. (U. S.) 266; Kelsey v. King, 33 How. Pr. (N. Y.) 39; New Orleans v. U. S., 10 Pet. (U. S.) 662.

4. McConnell v. Lexington, 12 Wheat.

a valid dedication: 1 nor is any specific length of possession required.2 As against the original owner, the intent to dedicate must be made clear, and this intention is to be gathered from acts and declarations explanatory thereof, in connection with all the circumstances which surround and throw light upon the subject in each particular case, and not merely from what the owner may testify as to his real intention in relation to the matter.3

(b) Evidence to Prove Dedication.—The question of the intent to dedicate is the paramount one in all cases of disputed dedication There are countless authorities which turn upon the conclusiveness of the circumstances in each case.4 There are, however, a few

(U. S.) 582; Town of Pawlet v: Clark, 9 Cranch (U. S.), 292; Winona v. Huff, 11 Minn. 114; Doe v. Jones, 11 Ala. 63; Klinkener v. School District, 1 Jones (Pa.), 444; Pella v. Scholte, 24 Iowa, 283; Waugh v. Leech. 28 Ill. 488; Bryant v. McCandless, 7 Ohio, Pt. II. 135; Mayor v. Company, R. M. Charlt. (Ga.) 342; Vick v. Vicksburg, 1 How. (Miss.) 379.

379.
1. Barclay v. Lessees, 6 Pet. (U. S.)
409; Skeen v. Lynch, I Rob. (Va.) 186;
State v. Catlin, 3 Vt. 530; McKee v. St.
Louis, 17 Mo. 184; Post v. Pearsall, 22
Wend. (N.Y.) 425; Hunter v. Sandy Hill,
6 Hill (N. Y.), 407; Dummer v. Jersey
City, 20 N. J. L. 86.
2. Noyes v. Ward, 19 Conn. 250;
Jarvis v. Dean, 3 Bing. (N. Car.) 447;
State v. Marble, 4 Ired. L. (N. Car.) 447;
Saulet v. N. O., 10 La. Ann. 81; State v.

Saulet v. N. O., 10 La. Ann. 81; State v. Cantlin, 3 Vt. 530; Barclay v. Howell's Lessee, 6 Pet. (U. S.) 498; Fisher v. Beard, 32 Iowa, 346; Evansville v. Evans, 37 Ind. 229; Denning v. Roome, 6 Wend. (N. Y.) 651; Dillon on M. C., vol. ii. c. 17, § 494. 3. Columbus v. Dahn, 36 Ind. 330;

Morgan v. Railroad Co., 96 U. S. 716.
4. See Notes to Angell on Highways (3d Ed.), chap. iii. pp. 158-176; Dillon on Mun. Corp., vol. ii. chap. xvii., and cases cited in the notes thereto.

A deed or particular form of grant is not necessary to a dedication; it is enough that there is an intent fairly apparent upon which there has been a public user. State v. Trask, 6 Vt. 355; s. c., 27 Am. Dec. 554, and note, 558; Skeen v. Lynch, I Rob. (Va.) 186; Vick v. Vicksburg, I Miss. (How.) 379.

Any acts clearly showing an intention to dedicate are enough. The case is not within the Statute of Frauds. Harding v. Jasper, 14 Cal. 643; Godfrey v. City of Alton, 12 Ill. 29; Gamble v. St. Louis, 12 Mo. 617.

The question of dedication is one of mixed law and fact, and the circumstances of each case should be submitted Alford v. Ashley, 17 Ill. to the jury. 363; Rees v. Chicago, 38 Ill. 322,

Evidence in pais to show dedication of a street should be submitted to the jury; but in regard to a dedication by plat, it is the province of the court to decide whether the law has been complied with in making the plat, and if it is sufficient. the court may properly charge the jury that it is sufficient evidence of a dedication. State v. Schwin (Wis.), 26 N. W. Rep. 568.

The width of a highway to which the public is entitled by prescription is de-termined by the actual use of it, and is a question for the jury. Davis v. Clinton

City Council, 58 Iowa, 389.

The question whether the dedication of a street is complete, as against the owners of the soil, is one for the jury; but where the facts are undisputed, their sufficiency to warrant the conclusion that the street was adopted as a public highway, is a question of law. James Kennedy et al. v. Mayor and City Council of Cumberland (Maryland), 7 Cent. Rep. 409.

Where acts alone are relied on to prove assent of owners of land to its dedication for a public road, they must be such as to clearly manifest an intention to dedicate, and the public must have acted upon them in a manner indicating acceptance. Graham v. Hartnett, 10 Neb. 517.

An owner of an uninclosed and unimproved lot, who passively acquiesces in its use by the public for a street, does not thereby dedicate it to the public for a Tucker v. Conrad, 103 Ind. 349.

A dedication of a street must be proved. It is not to be presumed from slight and inconclusive evidence. Manchester v.

Hoag, 66 Iowa, 649.
Evidence of dedication of land for street must be cogent, persuasive, and not contradictory. Unless it comes up to this standard, it should not be submitted to jury. Landis v. Hamilton, 4 Am. & Eng. Corp. Cas. 491.

general rules or conditions which the courts have recognized as proving a dedication. Thus the building of a street on land by the owner, and the use thereof for several years by the public, has been held to make a dedication. As to the effect of the lapse of time wherein the street or road has been used with the acquiescence of the owner, the cases vary somewhat. It cannot be said to be covered by a fixed limit, but twenty years' user has been held sufficient evidence of dedication without further proof. From public use, either with the actual or implied assent of the owner, the law will presume a dedication.

Burden of proving dedication of land for street is on town, where town avers it. Mason City S. & M. Co. v. Town of Mason, 7 Am. & Eng. Corp. Cas. 426.

Dedication may be shown by parol, but when made by a banking and trust company, some act of the board of directors must be shown, and the board can only act as a board; individual directors have no authority to act; the dedication operates in part by way of estoppel, and may be indefeasible as to lot-owners; acceptance is necessary; it may be revoked by subsequent sale. Schuman v. Homestead, I Cent. Rep. 914.

1. Miles v. Rose, 5 Taunt. 795; Chapin

1. Miles v. Rose, 5 Taunt. 795; Chapin v. State, 2, Conn. 236; Lade v. Shepherd, 2 Sta. 1004; Green v. Oakes, 17 Ill. 249; Connehand v. Ford, 9 Wis. 240;

Rex v. Lloyd, I Camp. 260.

2. No particular length of time is necessary to acquire rights by user; the period of the Statute of Limitation, or a less time, with other circumstances, is in general prima facie evidence of such rights. State v. Trask, 6 Vt. 355; Irwin v. Dixion, 9 How. (U. S.) 10; Woodyer v. Hodden, 5 Taunt. 125; s. c., 2 Smith Lead. Cases, 176. See also Parrish v. Stephens, 1 Ore. 59.

Although the law may not require the lapse of any particular time to authorize the inference of a dedication to the public use, there must be evidence that the owner offered it for public or common use, and designed to do so. Dwinel v. Barnard, 28 Me. 554. See also McMannis v. Butler, 51 Barb. (N. V.) 436; Lownsdale v. Portland, 1 Ore. 397;

Wyman v. State, 13 Wis. 663.

With circumstances of publicity, enjoyment of user by the public for six years is evidence from which the assent of the owner may be prima facie inferred. Regina v. Patrie, 30 Eng. L. & E. 207. But Angell states that the recent decisions in America seem to require the lapse of at least twenty years, if dedication is to be presumed without some other clear and unequivocal manifestation of

intention; and he cites as authorities on this point. Hoole v. Atty.-Genl., 22 Ala. 190; Noyes v. Ward, 19 Conn. 250; State v. Thomas, 4 Harr. (Del.) 568; State v. Hill (N. Y.), 587; Penquite v. Lawrence, 11 Ohio N. S. 274; Epler v. Niman, 5 Ind. 459; Lewiston v. Proctor, 27 Ill. 414; Jackson v. Smiley, 18 Ind. 247; Dodge v. Stacy, 39 Vt. 560. See also Stevens v. Nashua, 46 N. H. 192; Conway v. Jefferson, 46 N. H. 521; Doe v. Mehrenfield, 1 Disney (Ohio), 151.

In another leading English case, uninterrupted user for eight years was considered sufficient proof of dedication without reference to the intention of the owner. Rugby Charity v. Merryweather, II East, 375. But in Woodyer v. Hadden, 5 Taunt. 126, Lord Mansfield held that evidence that a street had been opened and partly paved for nineteen years was not proof of dedication. To the same effect is British Museum v. Fennis, 5 Carr. & Payne, 460; State v. Calais, 48 Me. 456; Chicago v. Thompson, 9 Ill. App. 524; Chicago v. Johnson, 98 Ill. 618; Cyr v. Madore, 73 Me. 53.

And it has been held that no conclusive presumption arises from the public use of a road, that it has been dedicated as a public highway. Bigelow v. Hillman, 37

Me. 52.

An uninterrupted use of a street by the public for at least twenty years is necessary to establish a public highway by user. Such use for any less period will not suffice. James Kennedy et al. v. Mayor and City Council of Cumberland (Maryland), 7 Cent. Rep. 400.

The mere use by the public of a road for four years,—of a road opened by private parties,—without any action of the town authorities in laying out, recording, improving, or accepting it, will not constitute it a public highway. In re Rebuilding Bridge across Shawangunk Kill, etc. (N. Y.), 3 N. E. Rep. 679.

3. From use with the assent of the

3. From use with the assent of the owner the law presumes a dedication, the use being for such a length of time that

Public user and acquiescence of owner for twenty years or more would undoubtedly be sufficient evidence of an intention to dedicate, even without any other proof of such intention; 1 but where the dedication is based on the bare fact of user, it has been held

the public accommodation and private rights might be materially affected by an interruption of the enjoyment. Mayor v. Franklin, 12 Ga. 239; Case v. Favier, 12 Minn. 89; Cady v. Conger, 19 N. Y. 256.

Dedication from use and implied consent must be based on a clear intent, and the acts and circumstances relied on to establish it must be unequivocal and convincing. Morrison v. Marquardt, 24 Iowa, 35. For acts and declarations sufficient to raise inference of dedication, see Ward v. Davis, 3 Sandf. (N. Y.) 502; Wiggins v. Tallmadge, II Barb. (N. Y.) 457; Pott v. School Directors, 42 Pa. St. 132; Dodge v. Stacy, 39 Vt. 558.

Dedication of land for a public highway may be presumed against a married woman from the fact of its long continued use as such by the public during a lease, and her omission to resume her rights as the reversioner for four or five years after the expiration of the term. Twenty one years' adverse enjoyment is not necessary to perfect the presumption of dedication. Schenley v. Commonormal control of the contr

wealth, 36 Pa. St. 29.

From public user for more than thirty years the jury may infer a grant to the public. Habersham v. Canal Co., 26 Ga. 665; Irwin v. Dixion, 9 How. (U. S.)

10.

A dedication of property for public uses may be inferred from facts and circumstances which leave no reasonable doubt upon the mind of the intention of the owner to make such dedication. Pickett v. Brown, 18 La. Ann. 560.

Parol proof of the actual location of a road, travelled, recognized, and worked upon as a highway, is admissible to raise a presumption of dedication. Louk v.

Woods, 15 Ill. 256.

Where a public road runs across private property, and is used by the public as a common road without interruption for twenty years, the owner acquiescing in such user, the law presumes the dedication of the ground upon which the road runs to the use of the public for such purpose. Green v. Oakes, 17 Ill. 249; Johnson v. Stayton, 5 Harr. (Del.) 448; Jackson v. Smiley, 18 Ind. 247; Gould v. Glass, 19 Barb. (N. Y.) 179; Woolard v. McCullough, 1 Ired. L. (N. Car.) 432; Askew v. Wynne, 7 Jones L. (N. Car.) 22; Lemon v. Hayden, 13 Wis. 159;

Wyman v. State, 13 Wis. 663. But see State v. Thomas, 4 Harr. (Del.) 568.

To establish a highway by presumption or user, there must be an actual public use, general, uninterrupted, and continual, for ten years, under claim of right. State v. Green, 41 Iowa, 693. Or a long usage, such as to show that the public accommodation required it as a highway, and that it was the intention of the owner to dedicate it. Cemetery v. Meninger, 14 Kan. 312; Hading v. Town of Hale, 61 Ill. 192. Even if the evidence is not conclusive, the jury may presume an intent from other evidence, coupled with long user by the public. Jarvis v. Dean, 3 Bing. 447; Louk v. Woods, 15 Ill. 256; State v. Hill, 10 Ind. 219; Hobbs v. Lowell, 19 Pick. (Mass.) 405; Bartlett v. Bangor, 67 Me. 460.

The dedication of a way to public use may be presumed from nineteen years' use with the owner's consent. Carr v.

Kolb, 99 Ind. 53.

The existence of a legal public roadover the premises of a private person may be shown by user alone, but in such case the user must have been with the knowledge of the owner, and have continued the length of time necessary to bar an action to recover the title to land; but where the user is of wild uninclosed prairie land, the rule inferring dedication does not apply. Graham v. Hartnett, 10-Neb. 517.

Neb. 517.

1. Post v. Pearsall, 22 Wend. (N. Y.)
425; State v. Trask, 6 Vt. 355; 3 Kent
Com. p. 451; Angell on Highways, p.
159; Lemon v. Heyden, 13 Wis. 159;
Denning v. Roome, 6 Wend. (N. Y.) 61;
Green v. Oakes, 17 Ill. 249; Askew v.
Wynne, 7 Jones L. (N. Car.) 22; Habersham v. Co., 26 Ga. 665; Rex v. Lloyd,
I Camp. 260; Larned v. Larned, 11 Met.
(Mass.) 421; Hobart v. Plymouth, 100
Mass. 158; Maxwell v. Bank, 3 Bosw.
(N. Y.) 124; Commonwealth v. Cole, 26
Pa. St. 187.

In Connecticut, the existence of a highway may be shown by prescription. Ely v. Parsons (Connecticut), 10 Atl. Rep.

499.

Forty years' use of a private way by the public, and the erection of buildings on the way, may justify a presumption of a dedication to public use. Porter v. Attica, 33 Hun (N. Y.), 605.

From the use of a village street as a.

that it becomes necessary to show that the user was adverse, that is, with claim of right, and that the claim and user were uninter-

rupted for the required time.1

The mere act of surveying land into lots, streets, and squares by the owner will not amount in itself to a dedication; 2 yet a sale of land with reference to such plat, map, or plan, whether recorded or not, will amount to an immediate and irrevocable dedication of such streets, etc., so far as the owner is concerned.3

public street for forty years, it being one of the principal streets of the village, the fact that during all that time a sidewalk had been laid out and used, the assumption of jurisdiction over it by the village, the laying of water-mains through it, and the placing of curb-stones along the sidewalk, at the expense of the village, it may be inferred that the street has become a legal public street by dedication. Pomfrey v. Village of Saratoga Springs, 34 Hun (N. Y.), 607.

may be inferred that the street has become a legal public street by dedication. Pomfrey v. Village of Saratoga Springs, 34 Hun (N. Y.), 607.

1. Dillon on Mun. Corp.vol. ii. sec. 500; Remington v. Millerd, I. R. I. 93; Thayer v. Boston, 19 Pick. (Mass.) 511; Talbott v. Grace, 30 Ind. 389; Keyes v. Tait, 19 Iowa, 123; Detroit v. Co., 23 Mich. 173; Green v. Oakes, 17 Ill. 249; Smith v. State, 3 Zab. (N. J.) 130, 712. See also Onstott v. Murray, 22 Iowa, 457, where the conflict in the cases is reviewed.

Dedication of a way to the public cannot be established by mere proof of long-continued user. Torres v. Falgoust, 37 La. Ann. 407.

La. Ann. 497.

2. United States v. Chicago, 7 How.

(U. S.) 185.

3. Dillon on Mun. Corp. chap. xvii. \$ 503; Angell on Highways, \$ 149; United States v. Chicago, 7 How. (U. S.)

185.

By laying off, platting, and recording streets of a given width, the private proprietors dedicate the same to the public, at least so far as dedication depends upon their action. Boyer v. State, 16 Ind. 451; Railroad Co. v. Moye. 39 Miss. 374; Gamble v. St. Louis, 12 Mo. 617; Hannibal v. Draper, 15 Mo. 634; Pôpe v. Town of Union, 18 N. J. Eq. 282; Matter of Twenty-ninth Street, 1 Hill (N. Y.), 189; Matter of Thirty-second Street, 19 Wend. (N. Y.) 128; Opening of Thirty-ninth Street, 1 Hill (N. Y.), 191; Bissell v. Railroad Co., 23 N. Y. 61; Rives v. Dudley, 3 Jones Eq. (N. Car.) 126. See also Dubuque v. Benson, 23 Iowa, 248; Alves v. Henderson, 16 B. Mon. (Ky.) 131; Lebanon v. Warren Co., 9 Ohio, 80.

The right to have all the streets re-

The right to have all the streets referred to in the plan remain public becomes vested in the purchaser. Winona

v. Huff, 11 Minn. 114; Huber v. Gazley, 18 Ohio, 18; 2 Smith's Lead. Cas. 181; Rowan v. Portland, 8 B. Mon. (Ky.) 232; Logansport v. Dunn, 8 Ind. 378; Dubuque v. Maloney, 9 Iowa, 450; Moale v. Baltimore, 5 Md. 314. See also Underwood v. Stuyvesant, 19 Johns. (N. Y.) 181; Howard v. Rogers, 4 Har. & J. (Md.) 278.

As to effect of a sale of lots with reference to a map or plat describing such lots as bounded by streets laid on such plat. Rowan v. Portland, 8 B. Mon. (Ky.) 232; County v. Newport, 8 B. Mon. (Ky.) 232; Stone v. Brooks, 35 Cal. 489; Cook v. Burlington, 30 Iowa, 94; Fisher v. Beard, 32 Iowa, 346; Schenley v. Com., 36 Pa. St. 62; Davis v. Sabita, 63 Pa. St. 90; McKee v. Perchment, 69 Pa. St. 342; Doe v. Attica, 7 Ind. 641; Wyman v. New York, 11 Wend. (N. Y.) 487; Livingston v. New York, 8 Wend. (N. Y.) 85; Portland v. Whittle, 3 Ore. 126; McKenna v. Commissioners, Harp. (S. Car.) 381; Barclay v. Howell's Lessee, 6 Pet. (U. S.) 498.

Dedication of street, by plat, complete on conveyance of lots with reference to plat, though plat be not properly certified for records, held, to go to centre of such street as extended. Hurley v. Mississippi & Rum River Boom Co., 9 Am. & Eng. Corp. Cas. 353; Detroit v. Railroad Co., 23 Mich. 173; Evansville v. Evans, 37 Ind. 229; Baker v. Johnston, 21 Mich. 319; Hawley v. Baltimore, 33 Md. 270; West Cov. v. Freking, 8 Bush (Ky.), 121; Arrowsmith v. N. Orleans, 24 La. Ann.

As to the intention of dedication to be inferred from method of platting, etc., see Commonwealth v. Alburger, 1 Whart. (Pa.) 469; Penny Pot Landing v. Phil., 16 Pa. St. 79; Com. v. McDonald, 16 S. & R. (Pa.) 390; McLaughlin v. Stevens, 18 Ohio, 94; Tront v. Davenport, 18 Iowa, 179; Cook v. Hillsdale, 7 Mich. 115; Baker v. Johnston, 21 Mich. 319; Perrin v. Railroad Co., 36 N. Y. 120; Van Valkenburgh v. Milwaukee, 30 Wis. 338.

The acknowledging and recording of a town plat is the highest evidence of the dedication of the streets and alleys marked on it. Waugh v. Leech, 28 Ill. 488: People v. Brooklyn, 48 Barb. (N.

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But a map is no evidence of dedication of a square without evidence that the donors either made, recognized, or assented to it as correct. Leland v. Port-

land, 2 Ore. 46.
A plat of an addition to a town not executed, acknowledged, and recorded in conformity with the laws of Illinois, operates in that State as a dedication of the streets to public use, but not as a conveyance of the fee of the streets to the muwall. (U. S.) 57. See also Belleville v. Stookey, 23 Ill. 441; Rogan v. McCoy, 29 Mo. 356. But see Putnam v. Walker, 37 Mo. 600.
The words "grand square" marked on a

square on a town plat do not necessarily imply a dedication thereof to the public. Extrinsic evidence must be resorted to to fix their meaning. Pella v. Scholte, 24

Iowa, 283.

Intention to dedicate to public use must be signified in a manner not liable to doubt or misconstruction, by some-thing more than symbols of uncertain import or fanciful adornment, with which it has pleased the draughtsman to decorate a plan of property. David v. New

Orleans, 16 La. Ann. 404.

The publishing of a map by the owner of ground proposed to be made the site of a town does not conclude him to any extent. It is only when lots are sold with reference to such plat that other rights intervene. When that occurs, the dedication becomes effectual as to those grounds which are devoted to public use. Logansport v. Dunn, 8 Ind. 378. See also Doe v. Attica, 7 Ind. 641; Bedinger v. Whitamore, 2 J. J. Marsh. (Ky.) 552, as to effect of announcements by proprietor and indications on maps, etc.

As to admissibility of maps and plans as evidence of dedication determined in cases depending on particular facts. Rowans v. Portland, 8 B. Mon. (Ky.) 232; People v. Beaubier, 2 Dougl. (Mich.) 256; Winona v. Huff, 11 Minn. 114; Jersey City v. Canal Co., 12 N. J. Eq. 547; Aikin v. Lithgoe, 7 Rich. L. (S. Car.) 435; Sanborn v. Railroad Co., 16 Wis. 19; Yates v. Judd, 18 Wis. 118.

A dedication of streets to public use may be presumed from a recorded plat not acknowledged as required by statute.

Shea v. Ottumwa, 67 Iowa, 39.
Upon an issue as to whether College Street, in the city of Portland, Oregon, extends through block No. 138, by virtue of a dedication made by the original owner of the premises, who platted a tract, including the block, as a part of the city, held, that although the record of the plat shows that at some time a line. since erased, was drawn across block 138 thus representing College Street as running through the block, yet the testimony of witnesses and the appearance of the record itself satisfactorily demonstrate that the line was drawn by mistake in recording the plat, and was erased at the time, and that the erasure was not the result of a fraudulent alteration, made since. Smith v. City of Portland (Circuit Ct., D. Oregon), 30 Fed. Rep. 734.
Respecting the dedication of a street

to public use by making and recording a plat on which it is designated, see Fuller v. Town of Dover (Del.), 6 Atl. Rep. 633; Donohoo v. Murray (Wis.), 22 N. W. Rep. 167; Quinn v. Anderson (Cal.), 11 Pac. Rep. 747 and note; San Leandro v. Le Breton (Cal.), 13 Pac. Rep. 405.

Where a plat indicates by appropriate lines and figures the existence of a street or way, this amounts to a dedication. though there be no formal words of dedication, and the space be not expressly designated as a street. Indianapolis v. Kingsbury, 101 Ind. 200.

An explanatory note on a town plat, inconsistent with the plat and its courses and distances, must give way to them.

Hunter v. Eichel, 100 Ind. 463.

A recorded town plat showed streets and also an inclosed space marked "C" extending, on the plat, from one street to another. Held, that abutters on this space could not contend that it was a street. Robinson v. Coffin, 2 Wash. (C. C.) 251.

As the statute requires no particular form of acknowledgment, the form used in acknowledgments of deeds need not necessarily be followed. State v. Schwin,

65 Wis. 207.

Where the plat, relied on under the Wisconsin statute to show the dedication of a street in a village, is recorded as an addition to and extension of a former plat, the former plat may be referred to on the question of location. State v. Schwin, 65 Wis. 207.

Acts by the owner of land equivalent to an unequivocal recognition of a plat recorded by him after conveying a lot embraced therein, are sufficient to constitute a dedication to the public of a street marked on the plat.

Topeka, 34 Kan. 277.

Where the proprietor of land lays out the same into building lots, with streets and alleys between them, and makes and records a plot thereof, he thereby dediThe dedication of a street in a town or city may be inferred from public documents of an ancient date which refer to it as existing, or from deeds or other papers of those who deny its existence.¹

The rule is thus stated: "Where the owner of urban property, who has laid it off into lots, with streets, avenues, and alleys intersecting the same, sells his lots with reference to a plot in which the same is so laid off, or where, there being a city map in which the land is so laid off, he adopts such map by sales with reference thereto, his acts will amount to a dedication of the designated streets, avenues, and alleys to the public." 2

There may be a dedication of government lands, but the evidence from which consent to user will be inferred must be more than usually clear to be conclusive in such cases.³ The strictness of this rule is mainly based upon the fact that such lands are usually wild and unfenced, free to public access, and therefore it is not readily to be presumed that any special dedication can be intended. The same principle is applied to waste or unfenced land,

cates such streets and alleys to public use; and both the lot-holders and the citizens generally are entitled to use the same. J. Alexander Fulton v. Town of Dover (Delaware), 6 Cent. Rep. 848.

Dedication may be effected by sale of lots upon faith of the dedication; a mere survey of land into lots and blocks is not sufficient; it may be complete with acceptance by the public, but to charge the public with the duty of repair, acceptance is necessary; where the animus dedicandi is established, user need not be shown; the public interest is a sufficient consideration. Schuchman v. Homestead (Pa.), I Cent. Rep. 914.

The failure to record a dedication of land to the public is important only as it concerns the naked legal title which the record would have vested in the designated parties in trust for the purposes intended. Cass Co. v. Banks, 44 Mich.

Filing Plat.—The act of filing a plat and selling lots upon the tract as fronting upon a street marked upon such plat, is a dedication of such street. Gregory v. Lincoln, 13 Neb. 352.

Where the owner of a tract of land divides it into streets and building lots, and conveys the lots according to a plan which shows them to be on streets, he thereby dedicates such streets to public use. In re Pearl Street (Pa.), 2 Cent.

Rep. 308.

Where the owner of land lays it out into blocks and lots upon a map, and designates certain portions thereof to be used as streets, parks, and squares, an implied covenant arises as appurtenant to lots granted with reference to such

plan, not to use the portions so devoted to the common advantage, although not of such a nature as to give rise to public rights by dedication, otherwise than in the manner indicated by such map. George G. Lennig, Appt., v. Ocean City Association, Respt., 4 Cent. Rep. 808.

1. Kennedy v. Jones, 11 Ala. 63; Kettle v. Pfeiffer, 22 Cal. 485; Mayor v. Franklin, 12 Ga. 239; Westfall v. Hunt, 8 Ind. 174; Commonwealth v. Alburger, I Whart. (Pa.) 469.

2. The learned author cites in support of this proposition the following cases, which will be found to sustain the principle so laid down: Irwin v. Dixon, 9 How. (U. S.) 10; In re Seventeenth Street, 1 Wend. (N. Y.) 262; In re Lewis Street, 2 Wend. 472; Livingston v. Mayor, 8 Wend. (N. Y.) 85; Wyman v. Mayor, 11 Wend. (N. Y.) 487; In re Furman Street, 17 Wend. (N. Y.) 649; In re Thirty-second Street, 19 Wend. (N. Y.) 128; In re Thirty-ninth Street, 1 Hill (N. Y.), 191; People v. Lambier, 5 Denio (N. Y.), 9; Chapman v. Gordon, 29 Ga. 250; Badeau v. Mead, 14 Barb. (N. Y.) 328; Bridge v. Bachman, 66 N. Y. 261; Fox v. Union Sugar Refinery, 109 Mass. 292; Field v. Manchester, 32 Mich. 279; Bartlett v. Bangor, 67 Me. 460; Jersey City v. Canal Co., 1 Beasley (N. J.), 547; Godfrey v. Alton, 12 Ill. 29.

3. Harper v. Charlesworth, 4 B. & Cress. 574; Boston v. Lecraw, 17 How. (U. S.) 426; Phipps v. State, 7 Blackf. (Ind.) 512; Bigelow v. Hillman, 37 Me. 52; Russel v. State, 3 Coldw. (Tenn.) 119. But see Regina v. East Mark, 11 Ad. & El. N. S. 876; Requa v. Patrie, 30 Eng. L. & E. 2075; Rex v. Edmonton, 1 M. & Rob. 24

belonging to private individuals. In this, as in every case, the intent to dedicate must be evidenced either by direct or overt act. or by such acquiescence in the user as will support an inference of intention to dedicate. If, therefore, the circumstances or environment of a particular case or class of cases are such as to render weak the inference of dedication to be derived from user, the courts are cautious in allowing such intention to be assumed. Thus, intention to dedicate will be more readily presumed in regard to urban than country, and in regard to well settled or frequented country than in regard to wild, wood, waste, or unfrequented land.1

It would seem that the dedication will be more readily presumed as against the owner or proprietor in the interest of the public than where the owner is interested in proving a dedication; in the

latter case he will be held to strict proof.2

1. Angell on Highways (3d Ed.), p. 175. See also Hutto v. Tindal, 6 Rich. (S. Car.) See also Hutto v. Tindal, 6 Rich. (S. Car.) 396; State v. Thomas, 4 Harr. (Del.) 568; Wyman v. State, 13 Wis. 663; Worth v. Dawson, 1 Sneed (Tenn.), 59; Scott v. State, 1 Sneed (Tenn.), 629; Harding v. Jasper, 14 Cal. 643. Compare Reiner v. Stuber, 20 Pa. St. 458; Stacey v. Miller, 14 Mo. 478; Badeau v. Mead, 13 Barb. (N. Y.) 328; Hewins v. Smith, 11 Metc. (Muss.) 241; Rees v. Chicago 28 11, 222. (Mass.) 241; Rees v. Chicago, 38 Ill. 322; Onstott v. Murray, 22 Iowa, 457; Dawes v. Hawkins, 10 C. B. 875.

The fact that the land over which a way by dedication is claimed is uninclosed woodland, tends greatly to weaken the presumption of an intention to dedicate, derived from public user; but such intention being a question of fact, the finding of the trial court upon that point is conclusive in Connecticut, where the supreme court of errors has no power to revise any error in the weighing of evidence. Ely v. Parsons (Connecticut), 10

Atl. Rep. 499.

Where lands are uninclosed and unimproved, no length of time of travel across it by the public without interference by the owner will raise the presumption that he has dedicated it as a public highway. Peyton v. Shaw, 15 Ill. App. 192.

Where a parish was bound to repair a public way the fact that no repairs had been made by it on a certain road was evidence that it had not been dedicated. Davis v. Stephen, 7 Carr. & Payne, 570. But see Rex v. Mellor, 1 B. & Adol. 32, and Rex v. St. Benedict, 4 B. & Adol. 477. In a celebrated English case, Barraclough v. Johnson, 8 Ad. & El. 99, where, by the terms of a private agreement between a company and the inhabitants of a hamlet a road was to be thrown open upon certain conditions, to be kept by both parties, and having been in use for eight-

een years was closed because of a dispute, the jury found, under direction of the court, that there was no dedication. and on a motion to set aside the verdict. Denman, C. J., refusing the motion, said: "A dedication must be made with an intention to dedicate; the mere acting so as to lead persons into the supposition that a way is dedicated, does not amount to a dedication if there be an agreement that explains the transaction." And Patterson, J., in con-curring, said: "There must be a clear intention to dedicate in order to constitute a dedication. I do not mean to say that if the owner of land allows the public a right of way for a series of years, his saying once or twice during that time 'This is not a public way,' without taking any further steps about it, should be such indication as to prevent the user by the public being referred to dedica-tion, but even then the question would be one for the jury." See also Marcy v. Taylor, 19 Ill. 634.

The presumption arising from a thirtyyear user has been held to be rebutted by the facts that the owner paid taxes, stored lumber on the land, and exercised other acts of ownership. Irwin v. Dixon, 9 How. (U. S.) 10.

The making a plat representing a way, with an intention to record the same, does not amount to a dedication. Bailey v.

Copeland, Wright (Ohio), 150.

2. Where leaving land open to the public may be referred to the owner's private convenience, it will not be construed a dedication. Biddle v. Ash, 2 Ashm. (Pa.) 211; Gowen v. Phila. Exchange Co., 5 W. & S. (Pa.) 141.

A license to the inhabitants of a local neighborhood to use a path as a favor is no evidence of a dedication to the rublic, no use or acceptance by the public or

(c) Evidence to Rebut a Dedication.—Since dedication is the joint effect of an intention or appropriation of land and an acceptance by the public, no presumption of dedication can be made where circumstances exist which negative the presumption of intention.

Any act or course of action adopted by the owner with the evident purpose of rebutting the intent to dedicate will be, when established, conclusive to that end. A very common method is to put a gate or bar across the road, either keeping the same regularly there or erecting such gate, etc., at stated or irregular intervals, with the clear intent of express reserved control or ownership of the highway and consequent non-dedication.2

recognition by the county court being shown. The establishment of a highway by dedication must be cautiously admitted. Worth v. Dawson, I Sneed (Tenn.), 50. And the mere consent of a party that a road be made over his land, it not being surveyed or laid out, is no dedication of a particular line. Scott v. State, I Sneed (Tenn.), 629.

1. Public ground was used as street; for sixteen or seventeen years it was vacant and unoccupied, and the municipal authorities made but slight street improvements. The owner of the land having fenced it in, held, that the facts did not justify an inference of public dedication. Herhold et al. v. City of Chicago, 6 Am. & Eng.

Corp. Cas. 110.

Covenant in partition deed as to mutual right to use certain streets laid down on city plan, construed not to amount to public dedication. City was therefore bound to compensate property-owners on subsequent opening of street. Mayor, etc., of Baltimore v. White et al., 7 Am.

& Eng. Corp. Cas. 304.

Acts of a landowner held insufficient to indicate dedication in the particular cases depending upon them. Bachelder v. Wakefield, 8 Cush. (Mass.) 243; Tegarden v. McBean, 33 Miss. 283; Knowles v. Nichols, 2 R. I. 198; Simmons v. Mumford, 2 R. I. 172; Atty-Gen v. Marriant Ca. 4 Gray (Mass.) 26. Merrimark Co., 14 Gray (Mass.), 586; Pitcher v. New York C. R. Co., 5 Sandf. (N. Y.) 587; Heaston v. Commissioners, 2 Ind. 420; Pello v. Scholte, 21 Iowa, 463; Holdane v. Coldspring, 21 N. Y. 474; Church v. Scolte, 2 Iowa, 27; Grant v. Davenport, 18 Iowa, 179; Cook v. Hillsdale, 7 Mich. 115; Carpenter v. Gwynn, 35 Barb. (N. Y.) 395.

As to what acts will repel the presumption of dedication arising from owner's knowledge of the use by the public, see Durgin v. Lowell, 3 Allen (Mass.), 398; Skeen v. Lynch, 1 Rob. (Va.) 186.

A mere unnumbered triangular space in a plat bounded by streets, without user by public or other evidence of public right, held not to establish a dedication of such space as a common. Oswald v. Grenet, 15 Tex. 118. See also New York v. Stuyvesant, 17 N. Y. 34.

The fact that a triangular piece of land lying near the intersection of two streets laid out on a plan is colored green affords no evidence of an intention that it shall remain open to the public, it being delineated as lying without and not within the street lines, and there being nothing on the plan but the coloring to support the theory of a dedication. Nor do the the theory of a dedication. Nor do the facts that for many years the land was treated by the owners as if it were to be kept open, and that it was not taxed, show a dedication. Attorney-General v. Whitney, 137 Mass. 450.

In a lease to the city of certain property the same was described by reference to other streets bounding it. contended that the reference to other streets amounted to a dedication of such streets as far as owned by the lessor. Held, that this presumption was repelled by the facts that the lessor at the time of the lease was and continued to actively resist the city's claim of dedication, and that such description was necessary in order to identify the lands as the same lands which the city was authorized by ordinance to lease. Mayor and City Council of Baltimore v. Glenn (Maryland), 10 Atl. Rep. 70. Permission to use wharf is not dedica-

tion. O'Neill v. Annett, 3 Dutch. (N. J.). 291; s. c., 72 Am. Dec. 364.

The mere removal of his fence by a landowner, so as to leave a strip of land vacant, does not deprive him of any right or interest in or control over such strip, in the absence of any gift or dedication of it, or decisive act of his showing an intent to give or dedicate it to the public for a street, and of an acceptance by the public. Rozell v. Andrews (New York), 8 N. E. Rep. 513.

2. See Angell on Highways (3d Ed.), §

4. Effect of Dedication.—It is perfectly clear that when lands are dedicated and enjoyed as such, and rights are acquired by either individuals or the public by virtue of such dedication, the former owners are precluded from revoking such dedication. And hoth

152 Commonwealth v. Newbury, 2 Pick. (Mass.) 51; State v. Strong, 25 Me. 297; Carpenter v. Gwynn, 35 Barb. (N.Y.) 395; Proctor v. Lewiston, 25 Ill. 153; 2 Smith Lead. Cases (5th Am. Ed.), 203. See also Roberts v. Karr, 1 Campb. 262, n.; Lethbridge v. Winter, I Campb. 262, n. But the keeping of a gate is not necessarily conclusive, as the grant may have been made reserving that privilege. Davies v. Stephens, 7 Carr. & Payne, 570.

The maintenance of a gate or fence at any time will rebut the inference of an intent to dedicate. Stone v. Jackson, 32 Eng. Law & Eq. 349; Bowers v. Co., 4 Cush. (Mass.) 332; State v. Trask, 6 Vt. 355; Bowman v. Wickliffe, 15 B. Mon. (Ky.) 84; Hall v. McLeod, 2 Metc. (Ky.) 98; Cyr v. Madore, 73 Me. 53; Bedinger v. Bishop, 70 Ind. 244; Hall v. Baltimore,

56 Md. 187.

Where private rights were acquired on the faith that a strip of land was dedicated as a street, public improvements were made, and conveyances made recognizing it as a street, held, that the swinging a gate across it would not rebut an implied dedication. Indianapolis v. Indianapolis v. Kingsbury, 101 Ind. 200.

1. Mayor v. Franklin, 12 Ga. 239; Haynes v. Thomas, 7 Ind. 38; Mankato v. Willard, 13 Minn. 13; Leffler v. Burlington, 18 Iowa, 361.

Dedication will preclude the party making the appropriation from reasserting any right over the land, at least so long as it remains in public use, although there may never arise any grantee capable of taking the fee. Kennedy v. Jones, 11 Ala. 63; Proctor v. Lewiston, 25 Ill. 153; Indianapolis v. Croas, 7 Ind. 9; Cole v. Sproul, 35 Me. 161; Adams v. Cole v. Sproul, 35 Me. 101; Adams v. Saratoga R. Co., 11 Barb. (N. Y.) 414; Arkenburgh v. Wood, 23 Barb. (N. Y.) 360; Abbott v. Mills, 3 Vt. 529; State v. Conklin, 3 Vt. 530; Hunter v. Sandy Hill, 6 Hill (N. Y.), 407; Penny Pot Landing v. Phil., 16 Pa. St. 79.

After a long lapse of time, one who

has opened a public street which has been accepted, improved, and used, cannot close it because of the non-performance of an oral condition imposed at the time of opening it. Port Huron v.

Chadwick, 52 Mich. 320.

A grant of lands upon a public street as a boundary will be referred to such street as opened and used. O'Brien v. King, 5 Cent. Rep. 665.

Where land is dedicated for particular public use only, the dedicator retains all rights not inconsistent with the particular public use. Stevenson v. Chattanooga, 4 Am. & Eng. Corp. Cas. 503.

Dedication is irrevocable where property is set apart for public use, and private rights have been acquired. Sarpy v. Municipality No. 2, 9 La. Ann. 507:

s. c., 61 Am. Dec. 221.

In an action to recover damages by the owner of land against a municipality for damages for the taking of the land for a street, a reference to the street as a boundary in a deed to private parties held not to operate as a dedication so as to prevent the recovery of damages, The right to damages did not accrue until the street was opened. Easton Borough v. Rinck (Pa.), 7 Cent. Rep. 192.

And where such lots and streets dedicated by plat are afterwards included in an old and adjoining town by extending the corporate limits thereof, no proceedings by the corporate authority for the condemnation of any of said streets are necessary; they are already public streets by the prior dedication. Fulton v. Town of Dover (Del.), 7 Cent. Rep. 848.

A party dedicated street, the city authorities verbally promising to open a certain drain. They failed to do so. Held, nevertheless, the street having remained open for a long time, that party could not close it. Costs were denied to city in this case. City of Port Huron v. Chadwick, 7 Am. & Eng. Corp. Cas. 402.
Title of lands cannot be acquired by

adverse possession after same have been dedicated as public street. City of Visalia.
v. Jacob, 6 Am. & Eng. Corp. Cas. 115.
One who publishes a map of his land,

dividing it into lots and streets, and sells lots, is presumed to have dedicated the streets to the public, and if a house is built on one of them, he cannot sue for the land so occupied. Harrison v. Augusta Factory, 73 Ga. 447.

One who sells and conveys lots according to a plan showing them to be on streets, dedicates the streets to public use; and not only can the purchaser of the lots abutting thereon assert them to be public streets, but all others in the general plan have the same right. Re Pearl Street, 111 Pa. St. 565.

Where, by an instrument not under seal, property has been dedicated to a public use as a wharf, and possession been taken by the public, a subsequent taking of the premises under the right of eminent domain does not amount to a waiver of the dedication; and ejectment will not lie to recover the property, although the proceedings to condemn under the right of eminent domain were Moses v. St. Louis Sectional invalid. Dock Co., 84 Mo. 242.

In case of variance between the plat and survey of a town site, the lines actually run must control, and as to the purchaser are conclusive. Holst v.

Streitz, 16 Neb. 249.

If the owner of land plats the same into lots and streets, and sells a lot designated upon such plat for a consideration affected by its location upon a street, also marked upon such plat, he is estopped, although the plat is not re-corded, from depriving the purchaser of the use of such street. Donohoo v. Murray, 62 Wis. 100.

A dedication of a portion of land for a private alley is a dedication of it to the use of the persons who shall thereafter become owners of the lots included in the plat, but not to the use of the owners of land situated elsewhere. Cihak

v. Kleke, 17 Ill. App. 124.

When he who has made such a dedication has conveyed a central strip of thirtythree feet to a railroad company for railroad purposes, a conveyance afterwards made of land along such a highway will pass all the title the grantor has under The circumthe street to its centre. stance that the grantor does not own all the land in the centre will not restrict the conveyance to the line of the street. Beasley, C. J., dissents. Ayers v. Penna. R. Co. (N. J.), 3 Cent. Rep. 885. Where the owner of land conveys lots

according to a description and a plan which shows them to be upon streets, he thereby dedicates them to public use, and his grantees cannot afterwards claim damages for their opening. Not only can the purchasers of lots abutting thereon assert this character, but all others in the general plan may assert the same. Trutt v. Spotts, 87 Pa. St. 339, and Transue v. Sell, 14 Wkly. Notes Cas. 397, followed. In re Opening Pearl Street (Pa.), 5 Atl. Rep. 430.

But see In re Brooklyn Street, 21 Wkly. Notes (Pa.), 57, where it was held that a vendor who in making a deed of land to a purchaser refers, as a boundary, to a street laid out on the city plan, but not opened, does not thereby dedicate so much of his land as lies within the street limits to the public and thus deprive himself of a right to compensation when

his land is actually taken for the opening of said street

A street was opened and dedicated to the public use, after which one of the complainants purchased a portion of the land over which the street extended, taking a deed therefor with full cove-nants of warranty, and completely ob-structed the street by making deep excavations for its road, and by laving its tracks. Held, that the complainants are estopped from claiming that any portion of the said street was dedicated. South Branch R. Co. v. Parker (N. J.), 5 Atl. Rep. 641.

Condemnation .- A person having laid out an addition to a town: and having had a map or plat of the same, with a description of the streets and alleys therein, recorded; and having sold lots to different individuals by deeds referring to this recorded plat; and afterwards this addition, by act of assembly, having been taken within the corporate limits of said town; and the town authorities having decided to open a portion of one of the streets as described on the recorded plat, but on which no lots had been sold by the proprietor, held, that the said town authorities had the power to open and improve the same without any condemnation proceedings, as it had been already dedicated to the public use by the proprietor. Fulton v. Town of by the proprietor. Fulton v. Town of Dover (Del.), 6 Atl. Rep. 633.

The owners of a piece of land platted

it into numbered lots, with intersecting streets, which plat was duly recorded. Held, that a grantee of one of the lots, by a deed in which reference was made to the plat, and which bounded the lot by the streets designated in the plat, was entitled to a right of way over such streets, as appurtenant to the lot; and this without reference to who might be the owner of the fee in the street. Chapin

v. Brown (Rh. Is.), 10 Atl. Rep. 639.

Dedication of land for public purposes is irrevocable when third parties have been induced to act upon it, and part with value in consideration of it, although it has not been formally accepted by the public authorities. Grogan v: Town of Hayward (C. C. Cal.), 4 Fed. Rep. 161.

Dedication of Land for Public Purposes-Adverse Occupation.-No one can acquire by adverse occupation, as against the public, the right to a street or square dedicated to public uses. Hoadley v. City of San Francisco, 50 Cal. 265; People v. Pope, 53 Cal. 437; Grogan v. Town of Hayward (C. C. Cal.), 4 Fed. Rep. 161.

the public and individuals in whom such rights may have vested are entitled to legal and equitable remedies to protect or enforce the same.1 Land granted or dedicated to the use of a town is removed from commerce and individual appropriation.2

Where an easement in lands is dedicated to public use, the public have no right in the land inconsistent with such use, and can-

not convey it away.3

For purposes strictly public, there cannot be a dedication to a

limited portion of the public.4

While it may be generally stated that a dedication is often merely an inference from circumstances which go to show intent. it is always open to rebuttal by evidence which goes to negative such intent; 5 but where an owner of land has once authorized a fair presumption of an intent to dedicate by his own acts or failure to act, it has been held, in a celebrated English case, that he will not be allowed to make evidence to rebut such presumption of an intent to dedicate by any subsequent act.6

5. Acceptance.—(a) Necessity of Acceptance.—Where a dedication is not made in accordance with statutory provisions, it would seem

1. Dummer v. Jersey City, 20 N. J. L. 86; Leclerq v. Gallipolis, 7 Ohio, Pt. I. 217; Reinker v. School Directors, II Pa. St. 444.

Where grantee of public land dedi-cates it to public use in a city, under a statute providing that the land so dedicated shall be held in the corporate name in trust, to and for the uses and purposes set forth and expressed or intended, he does not thereby deprive himself or subsequent purchasers of the title to the land. but merely such estate or interest therein as the purposes of the trust require; and the land cannot be taken for any other use or subjected to any greater burden or servitude than that expressed in the dedication without compensation being made to the owner. If an additional burden is imposed which works a special injury, he has the right to have it enjoined. Schurmeier v. St. Paul, etc., R., 88 Am. Dec. 59.

Lewis v. San Antonio, 7 Tex. 288.
 Pomeroy v. Mills, 3 Vt. 279; Mayor

v. Franklin, 12 Ga. 239; Alves v. Henderson, 16 B. Mon. (Ky.) 131.

Dedication of land to public use carries only an easement; it will not sustain ejectment. A bona fide purchaser without notice, of lands previously dedicated to public use, acquires a good title. Schuman v. Homestead, 1 Cent. Rep. 914.

Dedication by city of portion of waterfront for public use as free dock is merely the grant of an easement; and the right of entry and possession, subject to the easement, remains in the city. San Francisco v. Calderwood, 91 Am. Dec. 542.

A dedication of real property to public use as a levee or landing on the bank of a navigable water implies and vests in the public a right to use the same without a grantee being named or in existence; and it rests with the legislature, as the representative of the public, to regulate such use, and to promote the same by improving the premises directly, or through the agency of the municipal corporation within whose limits the same are situated or otherwise. Coffin p, City of Portland (C. C. Dist. Oreg.), 27 Fed. Rep. 412.

Public lands may have all improvements necessary to benefit the purpose they are dedicated to. If land be dedicated to the public for a special use, and the erection of buildings thereon will the better adapt the premises to such particular use, the erection of the building would be no injury to adjacent property-owners for which they would be entitled to any redress or relief. Evidence must be very clear to establish the contrary. An agreement not to build on those lands must be clearly proven to warrant the court in restraining the defendants from building thereon. Lennig v. Ocean City Assn., 2 Atl. Rep. 611.

4. There cannot be a dedication to a limited portion of the public. An intention to dedicate, without acceptance by the public, is of no effect. Trerice v. Barteau, 54 Wis. 99. 5. Angell on Highways (3d Ed.), p.

6. Canal Co. v. Hall, I Mon. & Gr. 392.

that acceptance by the public is necessary to complete the dedication so far as any responsibility on the part of the public is concerned. It has been shown that dedication may be complete as against the proprietor without any formal acceptance on the part of the public, but in order to charge the municipality or local district with the duty to repair, or to make it liable for injuries for

An abutting lot-owner, whose title extends only to the middle of a highway forty feet in width, cannot maintain an action for damages for an unlawful obstruction eleven feet wide, caused by the construction of a railroad embankment on the opposite side, the only effect of which is to render access to his property more difficult and inconvenient, and to force the travel nearer to his lot, no physical invasion of shown. Indiana, B. & W. R. Co. v. Eberle (Indiana), 11 N. E. Rep. 467.

A conveyance of land along such a

highway, prior to the designation of a portion for railroad purposes, will pass the grantor's title to the centre of the street, subject to the public easement, and the reserved right to devote to use for railroad purposes. Ayers v. Penna. R. Co. (New Jersey), 3 Atl. Rep. 885.

R. Co. (New Jersey), 3 Atl. Rep. 885.

1. San Francisco v. Calderwood, 31 Cal. 585; Bridge Co. v. Bachman, 66 N. V. 261; Church v. Hoboken, 33 N. J. L. 22; Pierpoint v. Harrisville, 9 W. Va. 215; Denver v. Clements, 3 Col. 472; Parsons v. Atlanta University, 44 Ga. 529; Summers v. State, 51 Ind. 201; White v. Smith, 37 Mich. 291; Sandford v. Meriden, 52 Miss. 383; Derby v. Alling, 40 Conn. 410; Kennedy v. Len. 23 Minn. 513; Carter v. Portland. Van, 23 Minn. 513; Carter v. Portland, 4 Ore.: 339.

Where statutory dedication has been made, and the requirements of the statute as to recording plat, etc., complied with, no acceptance is necessary. Baker v.

St. Paul, 8 Minn, 491.

Where an owner intends to dedicate the land as a highway, the public must accept it in order to constitute it a highway. To constitute such acceptance it is not necessary that it should be manifested in any particular form; user for sufficient time, and to sufficient extent as to show that public convenience required it as a highway, is sufficient. Eastland v. Togo, 27 N. W. Rep. 159; Hurley v. Miss., etc., Boome Co., 9 Am. & Eng. Corp. Cas. 353.

A dedication of land to a village as a "public square" must be accepted within

a reasonable time, or the offer will be considered as withdrawn. Fifty years is not a reasonable time. Cass Co. v.

Banks, 44 Mich. 467.

The fact that an individual lays out a street through his land and dedicates it to the public use does not impose upon the county or municipality the duty of improving or keeping it in repair. There must be an acceptance of the dedication before this duty can arise. Kennedy v. Cumberland (Md.), 7 Cent. Rep. 409.

Dedication without acceptance does not: make a public street. People of New York v. Agnes Loehfelm, 2 Cent. Rep.

A mere offer on the part of the State todedicate a portion of a certain creek and street to a city as an open canal, if the city will deepen and improve in a certain. way, is not a complete dedication before acceptance by the city and completion of Before acceptance the improvements. Before acceptance or work done the State may recall its offer. People v. Williams, 64 Cal. 498.

Land dedicated for a highway does not, ipso facto, become a highway, and will not become one until the proper municipal authority has accepted it. Booraem v. North Hudson County R. Co., 39 N. J.

Eq. 465.

A private alley dedicated by the owners. to a public use does not thereby become a public highway, unless accepted by the municipal authorities. Ex parte Pitts-burgh Alley, 104 Pa. St. 622.

Iowa Code, § 527, declares that before a street or alley dedicated shall be deemed public the city council must accept and confirm the dedication by special ordi-Held, that a mere adoption of a report of a committee recommending the acceptance was not such an acceptance and confirmation as the law requires. Laughlin v. Washington, 63 Iowa, 652.

Ordinance passed by city council, setting apart water-lot to the public as a. free dock, is a mere offer to dedicate, and the public acquires no right to the easement until it has been accepted and used by the public in the manner intended. San Francisco v. Calderwood, 91 Am.

Dec. 542.

City cannot accept dedication of land for street on condition that street shall be extended at expense of neighboring pro-Whether such dedicator shall prietors. be assessed for benefits from extension, depends on terms of charter, and not on suffering a street or highway to be or remain defective, there must be an acceptance of the dedication; which acceptance must be by the proper or authorized public authorities.¹ It may be made at any time during the continuance of the gift, and before the tender is withdrawn.²

(b) Proof of Acceptance.—Any formal act of the responsible body implying acceptance is available as proof of such acceptance 3 but the decisions do not seem to be uniform as to whether an acceptance may be inferred from evidence of user of the way by the public at large. The English rule seems to be that if there has been an acceptance by the public, there is no necessity for a formal act of acceptance by the parish. The rule in the United States does not seem to be settled, though perhaps the weight of authority establishes the doctrine that a highway cannot be established unless the dedication is accepted by proper public authorities, charged with its repair. It has been said that the principles of the common law authorize the gift, estop the giver from recalling it, and presume an acceptance by the public where it has been shown to be of common convenience and necessity, and therefore beneficial to them. For the purpose of showing that it is beneficial, an express acceptance by the town or other corporation within whose limits it is situated and who are liable for its repairs, the reparation of it by the officers of such corporation or a tacit acquiescence in the public use of it, is important; and so are the acts of individuals, such as giving it a name by which it becomes generally known, recognizing it upon maps and in directions, using it as a descriptive boundary in deeds of the adjoining land, or as a reference for locality in advertisements of property, and any other acts which recognize its usefulness and tend to show

agreement of parties: St. Louis v. Meier, 4 Am. & Eng. Corp. Cas. 488.

1. 2 Dillon on Mun. Corp. § 503; State v. Trask, 6 Vt. 355; Comm. v. Fisk, 8 Metc. (Mass.) 238; Noyes v. Ward, 19 Conn. 250; Cincinnati v. White, 6 Pet. (U. S.) 431.

2. Simmons v. Cornell, 1 R. I. 519. See also Crocket v. Boston, 5 Cush. (Mass.) 182; Baker v. Johnston, 21 Mich. 319; Long v. Battle Creek, 39 Mich. 323.

3. Angell on Highways (3d Ed.), § 157.

4. Rex v. Leake, 5 B. & Adol. 469.
See also Regina v. Patrie, 30 Eng. Law & Eq. 207; Canal Co. v. Hall. I Man. & Gr. 392, and Rex v. Lyon, 5 Dow. & Ry. 499. But see the earlier cases, Gleesburne Bridge Case, 2 W. Bl. 685; Rex v. West Ridings, 2 East, 342; Rex v. Parrish, 4 B. & Adol. 447; Rex v. Mellor, I B. & Adol. 32; Rex v. Cumberworth, 2 B. & Adol. 108.

5. 2 Dillon on Mun. Corp. § 505. Hobbs v. Lowell, 19 Pick. (Mass.) 405. In this case the court held there had

been an acceptance by the town, so the question was not fairly decided. In a subsequent case it was decided by the same court, that if there had been any doubt of the necessity of acceptance by the town, it was settled by the act of 1846, c. 203. Bowers v. Co., 4 Cush. (Mass.) 332.

The same rule has been adopted without a statute in New Jersey. Holmes v. Jersey City, I Beasl. (N. J.) 299. Also in New York. Oswego v. Canal Co., 2 Selden (N. Y.), 257; Badeau v. Mead, 14 Barb. (N. Y.) 328; Clements v. West Troy, 16 Barb. (N. Y.) 251; Requa v. Rochester, 45 N. Y. 129.

The same rule has been followed in Virginia. Kelly's Case, 8 Gratt. (Va.) 632. And the tendency is in the same direction in Vermont. Page v. Weathersfield, 13 Vt. 424; Blodget v. Royalton, 14 Vt. 288.

In Maine, it has been held that a surveyor has no power to accept a dedication, and repairs made by him did not

an approval of the gifts of the members of the community immediately cognizant of it; but the principal evidence of its beneficial character will be the actual use of it as a highway without objection, by those who have occasion to use it for that purpose." 1

Numerous decisions have adopted the principle that acceptance by the required authorities may be presumed from long user by the public as one mode by which such acceptance may be legally

evidenced.2

Unless the method of acceptance by the local body is prescribed by statute, it does not seem that any particular or formal proceedings are necessary; the acceptance may be implied by any of its acts which recognize the road as a public highway.3

constitute such acceptance. State v. Wilson, 42 Me. 9; State v. Bradbury, 40 Me. 154; Manberry v. Standish, 56 Me.

The question is undecided in Indiana.

Mansur v. State, 60 Ind. 357.

1. Green v. Town of Canaan, 20 Conn. The use is required to be of such duration that the public interest and private rights would be materially impaired if the dedication were revoked and the use discontinued. San Francisco v.

Canavan, 42 Cal. 541.

The Municipal Corporation Act of Ohio provides that a city cannot be charged with the duty of repairing streets dedicated, unless its assent to the dedication be given. Wisby v. Bonte, 19

Ohio St. 238.

2. In order to constitute a dedication of land for a highway, the road must be made and accepted by the public. Acceptance is usually proved by public use and enjoyment. Curtiss v. Hoyt, 19 Conn. 154; David v. Municipality, 14 La. Ann. 872; Muzzey v. Davis, 54 Me. 361; Oswego v. Canal Co., 6 N. Y. 257; State v. Carver, 5 Strobh. (S. Car.) 217; Baker v. Clarke, 4 N. H. 380; Com. v. Belding, 13 Met. (Mass.) 10; Hemphill v. Boston, 8 Cush. (Mass.) 195; Hayden v. Attleborough, 7 Gray (Mass.), 338. See also able discussion of the subject by Justice Beck in Manderschid v. Dubuque, 29 Iowa, 73; Cole v. Sprowle, 35 Me. 161; State v. Town, 1 R. I. 49; Manly v. Gibson, 13 Ill. 308; Taylor v. Bailey, Wright (Ohio), 646; Boyer v. State, 16 Ind. 451; Dodge v. Stacey, 39 Vt. 560; Chicago v. Johnson, 98 Ill. 618; Ross v. Thompson, 18 Ind. 62 Programs and Programs Thompson, 78 Ind. 90; Browne v. Bowdoinham, 71 Me. 144; Baldwin v. Herbst, 54 Iowa, 168; Cook v. Harris, 61 N. Y. 448; Fairfield v. Morey, 44 Vt. 239; Stone v. Brooks, 35 Cal. 489; Kyle v. Logan, 87 Îll. 64.

To constitute dedication of property

for street there must be acceptance by the public. This may be shown by long exclusive uses for public purposes, or by official recognition of constituted authorities. Landis v. Hamilton, 4 Am. & Eng. Corp. Cas. 491; Haldamer v. Cold Spring, 23 Barb. (N. Y.) 103; State v. New Boston, 11 N. H. 407. Mere user alone, there being no dedication and no other facts to indicate an acceptance, will not make a public highway unless it continues for the full statutory period. Jennings v. Tisbury, 5 Gray (Mass.), 73; State v. Bradbury, 40 Me. 154.

3. People v. Jones, 6 Mich. 176; Remington v. Millerd, 1 R. I. 93; State v. Carver, 2 Strobh. (S. Car.) 217; Green v. Convon, 29 Conn. 157; Gibbs v. Larrabee, 37 Me. 506; Tegarden v. McBean, 33 Miss. 283; Sampson v. Justices, 5 Gratt. (Va.) 241; Jersey City v. State, 1 Vroom (N. J.), 521; State v. Johnson, 11
Ired. L. (N. Car.) 647; Town v. Lithgoe,
7 Rich. (S. Car.) 435; Com. v. Belding,
13 Met. (Mass.) 10; Blodgett v. Royalton,
17 Vt. 41; Detroit v. Railroad Co., 23 Mich. 173; Shortle v. Minneapolis, 19 Minn. 308; Parsons v. Trustees, 42 Ga. Sandford v. Meriden, 52 Miss. 383; Hobart v. Plymouth, 100 Mass. 159; Hiner v. Jeanpert, 65 Ill. 428; Morgan v. Lombard, 26 La. Ann. 462; Cook v. Harris, 61 N. Y. 448.

Mere travel by the public is not evidence of acceptance. Forbes v. Balensiefer, 74 Ill. 184; Sharp v. Mynatt, 1 Lea (Tenn.), 375. And acceptance will not be presumed where not beneficial to public. Railroad v. New Haven, 46 Conn. 257. On acceptance by twenty years' user, see Bartlett v. Bangor, 67

Me. 460.

In Michigan, it has been decided that acceptance of a plat by the proper authorities was essential. Baker v. Johnston, 21 Mich. 319.

6. Purpose of Dedication,—Dedication by the common law was confined to the purpose of highways; but in this country the doctrine has a wider application, and its limit has been judicially defined to extend to public squares, common lots, burying-grounds. school lots, and lots for church purposes, and pious and charitable uses generally, and in many cases where the use was either expressly or from the necessity of the case limited to a small portion of the public.2

Public Squares were very early recognized as a legitimate public use. and the same rules of law are applicable to the dedication of

public squares as to the dedication of highways.3

The fact that vacant land within the city limits laid out by the owner into lots and streets is assessed by the city as "Shriver's Addition," is of no weight in determining this question of acceptance; nor is any weight to be attached to the fact that the city had repaired other streets in this addition which were laid out and opened at the same time. Kennedy v. Cumberland (Md.), 7 Cent. Rep.

Acceptance by the public of streets dedicated may be shown in pais by user by the public; as by travel over the street, and by acts of the public officers in repairing and keeping them up. Such user and maintenance need not be over the entire length of the street. An error in the assessment of a lot adjacent to a street dedicated by a common-law dedication, by which error the area of such street is included in the adjacent lot, and taxes are levied and collected on the same, will not defeat such dedication, nor rebut the presumption of acceptance. Town of Lake View v. Lebahn (Ill.), 9 N. E. Rep. 269.

The occupation of streets by the public for two or three weeks is not a sufficient user to establish an acceptance of their dedication. Laughlin v. Washington City,

63 Iowa, 652.

The acceptance by the City of Cumberland of its amended charter of 1848 did not operate as an acceptance or adoption of streets previously laid out within the city limits and dedicated to the public by Kennedy v. Cumberland the owners.

(Md.), 7 Cent. Rep. 409.
An open square in a town may be dedicated to the public by its owner, and a formal acceptance by the town is not necessary to make the dedication com-plete. Acceptance will be presumed if the gift is beneficial, and user is evidence that it is beneficial. No particular length of time is necessary to make a dedication binding. A benefit from the laying out of a highway is not prevented from beingspecial by the fact that the estates on the opposite side of the way are benefited in a like manner. It is otherwise, however. if the benefit is common to all lands in. the vicinity. Abbott v. Cottage City (Mass.), 10 East. Rep. 61.

1. Baker v. Johnston, 21 Mich. 319; Post v. Pearsall, 22 Wend. (N. Y.) 425. 2. Mowry v. City of Providence, 10-

R. I. 52.

R. I. 52.

3. Price v. Thompson, 48 Mo. 363; Mankato v. Willard, 13 Minn. 23; Mowry v. Providence, 10 R. I. 52; Hunter v. Sandy Hill, 6 Hill (N. Y.), 407; New Orleans v. U. S., 10 Pet. (U. S.) 714, For school purposes. Potter v. Chapin. 6 Paige (N. Y.), 639; School District v. Heath, 6 Pac, C. L. J. 898.

Public buildings and churches and other purposes. New Orleans v. U. S., 10 Pet. (U. S.) 712; Hunter v. Sandy Hill, 6 Hill (N. Y.), 411; O'Neill v. Annett, 27 N. J. L. 290; Beatty v. Kurtz, 2 Pet. (U. S.) 566; McConnell v. Lexington, 12: Wheat. (U. S.) 582; Railroad Co. v. Schurmeier, 7 Wall. (U. S.) 272; Godfrey v. City of Alton, 12 Ill. 29.

v. City of Alton, 12 Ill. 29.

The law of dedication as applied to public squares will be found set out in the following leading cases: Commonwealth v. Alburger, I Whart. (Pa.) 469; Com. v. Rush, 14 Pa. St. 186; Com. v. Bowman, 3 Penn. 203; Baird v. Rice, 63 Pa. St. 489; Alton v. Co., 12 Ill. 38; Xiques v. 489; Alton v. Co., 12 Ill. 38; Xiques v. Bujac, 7 La. Ann. 499; Langley v. Galliopolis, 2 Ohio St. 107; New York v. Stuyvesant, 17 N. Y. 34; Commissioners v. Dayton, 17 Minn. 260; State v. Cantlin, 3 Vt. 530; Cincinnati v. White, 6 Pet. (U. S.) 431; Baker v. Johnston, 21 Mich. 319; Winona v. Huff, 11 Minn. 114; Doe v. Attica. 7 Ind. 641: Pearsal v. Post, 20 Wend. (N. Y.) 111; Huber v. Gazley, 18 Ohio, 18; State v. Atkinson, 24 Vt. 448; Carter v. City of Portland, 4 Ore. 339; Hoadley v. San Francisco, 50 Cal. 265; Warren v. Lyons, 22 Iowa, 6

Dedication of Bridges.—In most particulars, the questions which arise in the dedication of bridges are similar to those which are met in the dedication of highways; but in the case of a way, the public may either use it or leave it unused, while if a bridge is erected in a public way, it must either be used or indicted as a nuisance: hence it is that more than ordinary user is held requisite in order to fasten acceptance of a bridge upon the public. would seem as if the element of public utility must be shown in addition to user; 1 and this public utility must not be simply collateral to a private purpose.² And where permission to make a cut, or otherwise interfere with a highway, in such a manner as to make a bridge necessary, the care of the bridge so erected cannot be thrown on the public.3

7. Limits and Qualifications. — (a) Restrictions.—Property dedicated to public use may be said to be restricted to the use for which it was fairly intended to be dedicated; although this rule is construed to include such uses as are consistent with or necessary to the principal use.4

351; Price v. Plainfield, 40 N. J. L.

Where land has been dedicated to public use as a burying-ground, and accepted and used for that purpose, the legislature has no power to destroy the trust or authorize the municipality to occupy the grounds for any other purpose. The fact that no interments have been made in the burial-ground for more than fifty vears, does not authorize a presumption that the trust has ceased. The fact that. owing to neglect, the ground has become a nuisance, will not authorize the municipality to abate it by destroying its identity as a burial-ground. Stock v. Newark (N. J.), 11 East. Rep. 113.

The occupants of a river front in Oregon dedicated a strip of ground on the river, within the limits of a town laid out by them, as a public levee, and so designated it on the plat of the survey. Held, that the public had a vested right in it as a landing-place. Coffin v. Portland, 27

Fed. Rep. 412.

In 1850 the occupants of the Portland land claim dedicated a strip of ground on the river, within the limits of the town they had laid out thereon, as a public levee, and so designated it on the plat of the survey. *Held*, that the intent and understanding was to dedicate the property to public use as a landing-place for the use of water-craft, and the transfer of freight and passengers to and from the river. Coffin v. Portland, 27 Fed. Rep.

1. Rex v. West Ridings, 2 W. Blackst. 685; 2 Ro. Abr. 368. But see Rex v. Kent, 2 Maule & S. 513; King v. West

Ridings, 2 East, 342.

The fact that a bridge has been used for a considerable time is prima facie evidence that it is not a nuisance. v. Devon, r R. & M. 144; Rex v. Buknol, 6 Mod. 151; State v. Campton, 2 N. H. 513; Rex v. Lancashire, 2 B. & A. 813; Williams v. Cunningham, 18 Pick. (Mass.) 312.

2. Longley v. Galliopolis, 2 Ohio St. 107; Baker v. Johnston, 21 Mich. 319; Hutchinson v. Pratt, 11 Vt. 402, in which case the court defines the difference between public squares and highways. See also remarks of Gibson, C. J.; in Com. v. Bowman. 3 Pa. St. 203; Baird v. Rice, 63 Pa. St. 489. For definition of square,

see Church v. Hoboken, 33 N. J. Law, 13.
3. Rex v. Inhabitants, 14 East, 319;
Cambridge v. Railroad Co., 7 Metc. (Mass.) 70; Rex v. Kerrison, 3 M. & S.

4. Warren v. Grand Haven, 30 Mich. 24; Bayard v. Hargrove, 45 Ga. 342; City v. Hinkson, 87 Ill. 587; Price v. Thompson, 48 Mo. 361; Rutherford v. Taylor, 38 Mo. 315; Warren v. Lyons, 22 Iowa,

The dedication of land for camp-meeting purposes and its use for dwellingtents will not entitle an adjoining landowner to restrain the erection of small cottages thereon, as obstructions to the circulation of air and ocean view. dedication of land for camp-meeting purposes does not in itself preclude the use of it in any particular way consistent with the object of the dedica-

If dedicated property be put to a use foreign to that contemplated by the intention and purpose of the dedication, then not only the dedicator but any property-owner will have his remedy in equity to enforce the proper use and inhibit an improper one.1

(b) Alienation.—When property is once dedicated for public use a municipal corporation or other trustee for the public or other limited class of beneficiaries cannot extinguish such public use nor alien the land, nor can it be made liable for the debts of a municipality.2

tion. If the erection of buildings thereon will the better adapt the premises to such particular use, the erection of the buildings will be no injury to adjacent property-owners for which they will be entitled to any redress or relief. Lennig v.

Ocean City (N. J.), 3 Cent. Rep. 68.

The designation of land on a town plat as "Market Square" held not to so conclusively show the owner's intention that it be used for market purposes as to defeat the dedication, if the town failed to so use it. Scott v. Des Moines, 64

Iowa, 438.

A dedication of land for public use as a highway may be made subject to a right to designate a portion thereof for use for railroad purposes; and, when such portion has been designated and devoted to railroad purposes, the public use will be suspended, and remain suspended so long as that portion is devoted to such poses. Ayers v. Penna. R. Co. J.), 3 Atl. Rep. 885. purposes.

The presumption in regard to a street, in the absence of evidence, is that the public has acquired an easement only for highway uses in the land embraced in the street, and that the fee remains in the original owner. A dedication of land for street purposes does not authorize the legislature to permit the construction of a steam railroad thereon without making compensation to the owner of the fee. Fanning v. Osborne (N. Y.), 3 Cent. Rep. 453.

Dedication for highway is not fulfilled by converting land into site for market. Heirs of David v. City of New Orleans, Livandois v. City of New Orleans, 16 Louisiana Annual, 404; s. c., 79

Am. Dec. 586.

The presumption of dedication by uninterrupted user cannot give rise to a right in the general public to use the land of another on a navigable river as a landing-place and place of deposit of wood and other articles for an indefinite time, though part of the land so used was a public road running through plaintiff's land. Thomas v. Ford, 63 Md. 346; s. c., 52 Am. Rep. 513.

The owner of land bordering on streets in a city duly platted has no right to mine coal underlying such streets. Salle v. Matthiessen & Hegeler Zinc Co.

16 Ill. App. 69.

1. Atty.-General v. Goodrich, 5 Grant Rep. (Can.) 402; Guelph v. Canada Co., 4 Grant (Can.), 654; Price v. Church, 4 Ohio, 515; Brown v. Manning, 6 Ohio, 298; Le Clerq v. Galliopolis, 7 Ohio, Pt. I., 217; Board v. Edson, 18 Ohio St. 221: Hardy v. Memphis, 10 Heisk. (Tenn.) 127; Harris v. Elliott, 10 Pet. (U. (U. S.) 498; County v. Newport, 12 B. Mon. (Ky.) 538.

Interference with Such Public Use-Right of Citizen to Join in Asking an Injunction.-Residents of such a municipality have a common interest with each other, and with the village itself, in preventing any obstruction to the use of a public square, and may be properly joined with the village as complainants. Maywood Co. et al. v. Village of Maywood (Ill.), 6 N. E. Rep. 866.

2. Price v. Thompson, 48 Mo. 363; Alton v. Co., 12 Ill. 60; Church v. Hobo-ken, 33 N. J. L. 13; Augusta v. Perkins, 3 B. Mon. (Ky.) 437; Hart v. Burnett, 15 Cal. 580; Board v. Edson, 18 Ohio St. 221; Seebolt v. Shitler, 34 Pa. St. 133; President v. Indianapolis, 12 Ind. 620; Warren v. Lyons, 22 Iowa, 351; Brooklyn Park Commrs. v. Armstrong, 45 N. Y. 234; Alves v. Henderson, 16 B. Mon. (Ky) 131.
The inability of councils to sell public

squares without authority from the legislature is fully gone into and defined in Com. v Rush, by Gibson, J., 14 Pa. St. 186; Commonwealth v. Alburger, 1

Whart. (Pa.) 469.

But where an absolute fee passes, it would seem that the sovereignty can authorize a sale, but not a local corporation. Van Ness v. Washington, 4 Pet. (U. S.) 232; Brooklyn Park Commrs. v. Armstrong. 3 Lans. (N. Y.) 429.

In the case of the County Commissioners v. Lathrop, o Kansas, 453, the

(c) Revocation and Reversion.—(I) Revocation.—Unless the rights of third persons have intervened, the law is clear that before a dedication has been accepted it may be revoked.1 But a good dedication cannot be made with the expressed reservation of the right to revoke.2

(2) Abandonment and Reversion.—The earlier doctrine of the common law established the principle that there could be no abandonment or loss of a public right by mere nonuser.3 latter decisions, however, have departed from the strictness of the

ancient rule.4

It may therefore be stated as a general rule, that while dedicated land does not exactly revert because there has often been no alienation, the public being invested with certain public rights inconsistent with the exercise of private right, those private rights are suspended of necessity; but if the public right is abandoned the former incompatibility of enjoyment ceases, and as an equally necessary conclusion, the suspended private right revives.⁵

court has gone so far as to say that the legislature, as representing the public, can consent to the alienation of dedicated land where private rights have not intervened. And where the public has simply an easement, and the fee remains in the owners or abutters, the legislature cannot by law divest this fee by a law. John and Cherry Streets, 19 Wend. (N. Y.) 659; Woodruff v. Neal, 28 Conn. 168.

By the civil law the public have the fee in ground dedicated to public use. Renthrop v. Boury, 4 Martin (La.), 97; Doe v. Jones, II Ala. 63. See New sovereign cannot alien them. See New Orleans v. U. S., 10 Pet. (U. S.) 661, where Justice McLean examines the law of

France and Spain.

In Louisiana, it has been held that the legislature has the power to sanction the sale of all public property and to change the destination of public places in the interests of the public, when they deem those interests require it. Mayor v. Hopkins, 13 La. 326; New Orleans v. U. S.,

10 Pet. (U.S.) 661.

As to the general question of the power of a municipal corporation to sell public places with the consent of the sovereign power, the law will be found carefully examined and laid down in the following leading cases: New Orleans v. U. S., 10 Pet.(U.S.)662; Warren v. Lyons, 22 Iowa, 351; Bell v. Railroad Co. (dissenting opinion by Black, C. J.), 25 Pa. St. 161; Herbert v. De Valle, 27 Ill. 448; Hart v. Burnett, 15 Cal. 580; Payne v. Treadwell, 16 Cal. 222; Grogan v. San Francisco, 18 Cal. 590.

1. San Francisco v. Carnarvan, 42 Cal. 541; Bridges v. Wyckoff, 67 N. Y. 130.

2. Rex v. Ward, Cro. Car. 266, pl. 66;

Payne v. Partridge, I Salk. 12, pl. 1; Locks & Canals v. Railroad Co., 104 Mass. 1; Weld v. Hornby. 7 East, 195; Rex v. Montague, 4 B. & C. 604. 3. "Evidence to prove a highway," says

Hosmer, C. J., in Beardslee v. French, 7 Conn. 125, "often consists in showing that the public have used and enjoyed the road; and the uninterrupted use of it for a considerable space of time affords a strong presumption of a grant. On the other hand, the nonuser of an easement of this kind for many years is prima facie evidence of a release of the right to the person over whose land the highway once ran; and although the precise limit of time in respect of the public, in such cases, has not been established, there can be no doubt but that the desertion of a public road for nearly a century is strong presumptive evidence that the right of way is extinguished." See also Commissioners v. Taylor, 2 Bay (D. C.). 282; Cutter v. Cambridge, 6 Allen (Mass.), 20; Fox v. Hart, 11 Ohio, 414; Rowan's Executors v. Portland, 8 B. Mon. (Ky.)

4 Knight v. Heaton, 22 Vt. 480; Hil-

5. Ringht 2. Heaton, 22 vt. 400, Hillory v. Walker, 12 Vesey, 139.

5. Cooper v. Detroit, 42 Mich. 584; Fairfield v. Williams, 4 Mass. 427; U. S. v. Harris, 1 Sumner, 21; Leonard v. Adams, 119 Mass. 366; Railroad Co. v. Patch, 28 Kan. 470; Hicks v. Ward. 69 Me. 436; Neville Road Case, 8 Watts (Penn.), 172; Barclay v. Howell, 6 Pet. (U.S.) 498. See also Reilly v. Racine, 51 Wis. 526; Davies v. Hubner, 45 Iowa, 574; State v. Culver, 65 Mo. 607; Stout v. Co., 83 Ind. 466. In Texas, it was held that by the abandonment of a road as a highway. the land covered by that highway, accord-

DEDICATION OR ABANDONMENT' OF AN INVENTION is the gratuitous conferring by an inventor of the benefit of his invention upon the public.² The intention³ of the inventor so to do must be expressly declared or indicated by his acts,4 and abandon-

ing to the civil law, became vacant public domain, subject to entry, and did not belong, as at common law, to proprietors whose lands were bounded by the road.

Mitchell v. Bass, 33 Tex. 259.

Authorities for Dedication.—A general view of the law of dedication will be found in Dovaston v. Payne, 2 Smith's Lead. Cases, 90, and notes thereto. It is well considered in Angell on Highways, (3d Ed.) chap. iii., by Mr. Durfee, and admirably treated by Judge Dillon in chap. xvii. vol. ii. of his work on Municipal Corporations; Washburne on Easements; Washburne on Real Property; Wellbeloved on Highways.

1. Abandonment is a dedication to the public. American Leather Co. v. American Tool Co., 4 Fish. Pat. Cas. (C. C. U. S.) 284; s. c., I Holmes (C. C. U. S.),

2. Kendal v. Winsor, 21 Howard (U. S.), 328; American Leather Co. v. American Tool Co., 4 Fish. Pat. Cas. (C. C. U. S.) 284; s. c., I Holmes (C. C. U. S.), 503; Seymour v. McCormick, 2 Blatch. (C. C. U. S.) 240; s. c., 16 How. (U. S.) 480.

3. Kendal v. Winsor, 21 Howard (U. S.), 328. Abandonment question of fact. Pennock v. Dialogue, 2 Peters (U. S.), 1; Johnson v. Fassman, 5 Fish. Pat. Cas.

(C. C.) 471.

4. Delay in Applying for Patent. - Mere delay not unreasonable is not abandonment. Webster v. Carpet Co., 5 O. G. (U. S. Pat. Of.) 522; I Bann. & Arden Pat. Cas. (C. C. U. S.) 84. Nor forbearance to apply during progress of experiments, invention yet being imper-Works, 9 O. G. (Pat. Off. U. S.) 408; Agawam Co. z. Jordan, 7 Wall. (U. S.) 583; Sewell z. Jones, 91 U. S. 171; s. c., 9 O. G. (U. S. Pat. Of.) 428. Intention of delay question of fact. One cannot lie by for years and then take out a patent, but may practise it during that time to improve it. Morris v. Huntingdon, I Paine (C. C. U. S.), 348; Shaw v. Cooper, 7 Peters (U. S.), 292; Treadwell v. Bladen, 4 Wash. (C. C. U. S.) 703; Goodyear v. Mathews, I Paine (C. C. U. S.), 200; McMillen, v. Barrelay v. Fish. Pair 300; McMillan v. Barclay, 5 Fish. Pat. Cas. (C. C.) 189; Locomotive Truck Co. v. Railroad Co., 6 O. G. (Pat. Off. U. S.) 927; s. c., I Bann. & Ard. Pat. Cas. 470. The inventor having himself used the

invention publicly, not in way of experiment but for gain, abandoned his invention. Bell v. Daniels, I Fish. Pat. Cas. (C. C. U. S.) 372; s. c., I Bond (C. C. U. S.) 212. Neglect to apply for two years, invention being complete, is abandonment. Blandy v. Griffiths, 3 Fish. Pat. Cas. (C. C.) 609. Lapse of time does not per se constitute abandonment: almost always other causes give complexion to it to excuse it or give it conclusive effect. In the absence of colorable circumstances there is no delay which ought to be considered abandon-Andrews v. Carmen, 13 Blatch. ment. Andrews v. Carmen, 13 Blatch, (C. C. U. S.) 307; s. c., 9 O. G. (Pat. Off. U. S.) 1011; s. c., 2 Bann. & Ard. Pat. Cas. (C. C. U. S.) 277; Hutchinson v. Everett, 35 O. G. (Pat. Off. U. S.) 1110. A delay of more than two years in making application for a patent after an experimental use by the inventor of the particular invention will under certain circumstances cause a presumption of dedication or abandonment. Beedle v. Bennett, 39 O. G. (Pat. Off. U. S.) 79. For circumstances in which delay before application caused abandonment, see Conparamon caused abandonment, see Consolidated Fruit Jar Co. v. Wright, 12 Blatch. (C. C. U. S.) 149; s. c., 6 O. G. (Pat. Off. U. S.) 327; s. c., 94 U. S. 92; s. c., 1 Bann. & Ard. Pat. Cas. (C. C. U. S.) 25 U. S.) 320.

Delay after Application for but before Grant of Patent-When Abandonment. Patentee cannot be held accountable for delay in Patent Office. It is only when parties show by their acts that they have not done what they could have done that abandonment is presumed. Sayles v. Chic. & N. W. R. Nor is it abandonment when delay is caused by refusal of commissioner to grant the patent. Rich v. Lippincott, 2 Fish. Pat. Cas. (C. C.) 1. Where invention was allowed to lie dormant in the Patent Office twenty years without attempt to renew, abandonment presumed. Woodbury Planing Machine Co. v. Keith, 101 U. S. 479. Five years. Carleton & Atwood, 2 A. L. R. (U. S.) 129. Thirteen. Pope Manufacturing Co. v. Margua, 15 Fed. Rep. 400. Delay in Patent Office beyond control of inventor not abandonment. Jones v. Sewell, 3 Cliff. (C. C. U. S.) 563. If the application is rejected the applicant is obliged to take an appeal from the commissioner or file a bill in equity in the proper court or

otherwise proceed in a reasonable time. If he does not, he is presumed to have abandoned his invention, and his mere statement of his intention, not to abandon will not rebut this presumption. Marsh v. Commissioner, 5 Fish. Pat. Cas. (C. C. U. S.) 610. The application filed is conclusive evidence of intention not Involuntary deto abandon invention. lays, mistakes of public officers, or delays of courts not caused by laches of applicant, do not cause abandonment. Adams v. Jones, r Fish. Pat. Cas. (C. C. U. S.) For other circumstances under 527. which abandonment after application presumed, see Gates v. Benson, 3 A. L. T. R. (U. S.) 113.

For other circumstances where abandonment after application not presumed. see Howe v. McNeal, 15 Blatch. (C. C.) 103; Henry v. Stove Co., 2 Bann. & Ard. Pat. Cas. (C. C.) 221; Howard v. Church, 2 Bann. & Ard. Pat. Cas. (C. C.) 457; Goodyear Co. v. Willis, 1 Bann. & Ard.

Pat. Ćas. (C. C.) 568.

Acquiescence in Public Use by Others .-At common law the right of property in an invention passed from the inventor as soon as it went into public use with his consent. Wilson v. Rousseau, 4 How. (U. S.) 646; s. c., I Blatch. (C. C. U. S.) 3; American Leather Co. v. American Tool Co., 4 Fish. Pat. Cas. (C. C. U. S.) 284; Dudley v. Mayhew, 3 N. Y. 9. It is the acquiescence in the known user by the public, not the extent of the user, that If the patentee works abandonment, wishes to abandon his exclusive right in a qualified manner or for a qualified trade, he should give notice to that effect. Wyeth v. Stone, I Story (C. C. U. S.), Wyeth v. Stone, I Story (C. C. U. S.), 273. Merely making or selling an invention or putting it into public use within two years is not abandonment. Seymour v. McCormick, 2 Blatch. (C. C. U. S.) 240; s. c., 16 How. (U. S.) 480; Pitts v. Hall, 2 Blatch. (C. C. U. S.) 229. Abandonment may be caused by use by inventor of his own machine two years previous to patent. McMillan v. Barclay, 5 Fish. Pat. Cas. (C. C. U. S.) 189. Public sale or use must be before application for patent to cause abandon-Ryan v. Goodwin, 3 Sumner (C. C. U. S.), 514. Public sale or use must be in the ordinary way of business, and not for mere experiment, to cause abandonment; may be made by inventor himself; if not made by him, need not be for two years before application. American Leather Co. v. American Tool Co., 4 Fish. Pat. Cas. (C. C. U. S.) 284. When the knowledge of the invention is surreptitiously obtained and communicated to the public, no presumption of abandonment of invention can arise, but an acquiescence in such use will lay foundations for such resumption. Shaw v. Cooper, 7 Pet. (U. S.) 292; Kendall v. Winsor, 21 How. (U. S.) 322. Page v. Bowers, I O. G. (Pat. Off. U. S.) 905. Surreptitious construction probably would not cause abandonment. Andrews v. Hovey, 42 O. G., 1285. Experimental use, however long continued, not abandonment. Sinclair v. Backus, 17 O. G. 1503.

An allowance of an invention to go into public use between caveat filed and application is abandonment. Bell v. Daniel, I Fish. Pat. Cas. (C. C.) 372. The use of an invention by the special permission of the inventor by a few persons to test its utility, or for any such purpose, or any such acts of peculiar indulgence which may fairly consist with a clear intention to hold the exclusive privilege, is not an abandonment. lus v. Silsby, 4 Mason (C. C.), 108. an invention is in public use or on sale at a date more than two years before the application for a patent upon it, it will be conclusive evidence of an abandonment. Detweiler v. Voege, 8 Fed. Rep. 600; Barker v. Jones, 11 Fed. Rep. 597; Andrews v. Hovey, 16 Fed. Rep. 387. Unless made two years prior to application, not conclusive evidence. Hatch. v. not conclusive evidence. Hatch v. Moffitt, 15 Fed. Rep. 252; Sickles v. Mitchell, 3 Blatch. (C. C.) 548. By "putting on sale," abandonment. Kells v. McHenry, 20 O. G. 1663. Permitting invention to go into public use before application is an abandonment. v. Page, 3 N. H. 477; McClurg v. Kingsland, I How. (U. S.) 202; Pennock v. Dialogue, 4 Wash. (C. C.) 538. Particular circumstances in which dedication may be inferred through public use. See Session v. Guilbert, 9 Blatch. (C. C.) 185; Cooper v. Mathews, 8 Law Rep. 413; Worley v. Loker Tobacco Co., 104 U.S.

No use of invention, pending an application therefor, with inventor's consent, works abandonment. Dental Vulcanite Co. v. Weatherly. 2 Cliff. (C. C.) 255; s. c., 3 Fish. Pat. Cas. (C. C.) 87. Sale of invention after application by inventor is not abandonment. Ryan v. Goodwin, 3 Sumner (C. C. U. S.), 514; Howe v. Newton, 2 Fish. Pat. Cas. (C. C. U. S.) 531. But if an inventor, after rejection of his application, allows it to sleep in the Patent Office, and sees his invention go into public use, he may be deemed to have abandoned it. Planing Machine Co. v. Keith, 101 U. S. 479;

ment or dedication once made is irrevocable, and invalidates any patent previously or subsequently granted.² (See also PATENT_ APPLICATION FOR: REISSUE OF.)

DEDUCT.—See note 3.

DEDUCTION (in Maritime Law).—The allowance on the cost of repairing a damage to the ship by the extraordinary operations of the perils of navigation, the renovated part being presumed to he better than before the damage.4

DEEDED.—Anything transferred by deed.⁵

s. c., 17 O. G. (Pat. Off. U. S.) 1031; s. c., 4 Bann. & Ard. 400. Where an inventor withdraws all his papers from patent office, and permits his invention to go into notorious public use, he abandons it. Bevin v. E. Hampton Bell Co., 5 Fish. Pat. Cas. (C. C. U. S.) 23; s. c., 9 Blatch. (C. C. U. S.) 50.

Abandonment After Patent,-After the issue of a patent the abandonment must be shown to be positive, actual, and intentional, or by such gross laches as indicates unmistakably an intention to abandoned the invention to the public. Johnson v. Farnum, 5 Fish. Pat. Cas. (C. C.) 471; s. c., 2 O. G. (U. S. Pat. Off.) 94; Bell v. Daniels, I Fish. Pat. Cas. (C. C.) 372; s. c., I Bond (C. C.), 212. The patentee may let his patent lie un-Pitts v. used without abandoning it. wemple, 2 Fish. Pat. Cas. (C. C.) 10; s. c., 1 Biss. 67. Not bound to construct his invention. Wheeler v. Clipper Co., 6 Fish. Pat. Cas. (C. C.) 1; s. c., 10 Blatch. (C. C.) 127; 2 O. G. (Pat. Off. U. S.) 442; Broadnax v. Cent. Stock Yard & Transit Co., 5 Bann. & Ard. Pat. Cas. (C. C.) 67; s. c. 4 Fed. Rep. 214. Cas. (C. C.) 609; s. c., 4 Fed. Rep. 214. If prevented by poverty from making machine or using rights, inventor does not abandon. Hoffhead v. Brantt, 3 Fish. Pat. Cas. (C. C.) 218; Gray v. James, I Pet. (C. C.) 394; s. c., I Robb. Pat. Cas. 120.

1. Fruit Jar Co. v. Bellaire St. Co., 27 Fed Rep. 377; American Hide and Leather Co. v. American Tool and Machine Co., 4 Fish. Pat. Cas. (C. C.) 284; Pennock v. Dialogue, 2 Pet. (U. S.) I. 2. Revised Statutes of the U. S., sec.

4886.
3. "To deduct quarterly from each of my said two sons' quarterly dividends from my estate, twenty per cent of their said indebtedness, etc." Simes' Estate, 2

Pa. Co. Ct. 294.

4. "It is a general custom, in adjusting losses on the vessel, to deduct one third of the expense of labor and new materials in repairing or replacing parts of the ves-sel injured or destroyed by the perils in-

sured against on account of the new or repaired part being better than the old. The deduction is not made by some underwriters on copper sheathing during the first voyage. A particular stipulation has been introduced into some forms of policy, that, instead of the allowance of a third for new, the expense of re-coppering shall be subject to the deduction of 2½ per cent for each month after the 2½ per cent for each month after the vessel has been coppered, etc." I Phil. Ins. (4th Ed.) p. 32, § 50. "The ordinary allowance made is one third of new for old, as also a deduction of \$150 for the waist planks." Fisk v. Ins. Co., 18 La. Ann. 79; Brook v. Com. Ins. Co., 21 Pick. (Mass.) 464; Depeau v. Ocean Ins. Co., 5 Cow. (N. Y.) 96; Leavenworth v. Dale, I Caine (N. Y.), 573. "Without any deduction on account

"Without any deduction on account of taxes.' Binns v. Hudson, 5 Binn.

(Pa.) 506.
"The 'deductions' referred to are deductions to be made from wages to be paid, such as advances, money furnished during the voyage, supplies from the slopchest, etc. The expenses occasioned by a desertion are not treated by the act as 'deductions' to be allowed the master." Stevenson v. Hare, 2 Sawy, (C. C.)

5. Where a written instrument testamentary in its character, and executed as such, but which had been duly recorded as a deed, used the terms, "give, grant and convey," and spoke of the property as "deeded" and "bequeathed," on the question as to whether it was a will or a deed the court held that the material inquiry was as to the effect and operation which the maker intended it to have, and that if his intention was that it should not take effect until after his death it was testamentary in its nature, and could only operate as a will, -Brickell, J., saying: There cannot be any particular importance attached to the word 'deeded,

though in popular acceptance it signifies a transfer by deed, found in the concluding clause of the instrument." Jordan v.

Jordan's Admr., 65 Ala. 301.

DEEDS OF CONVEYANCE,—(See also Acknowledgments, Boundaries, etc.)

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A. THE REQUISITES OF A DEED.—1. Definition of a Deed.—A deed, as defined by Lord Coke, is a writing sealed and delivered by the party thereto, and contains a contract, executory or executed. In this connection only deeds of conveyance are to be discussed. At common law, before the enactment of the Statute of Frauds. signing was unnecessary. But since then, signing is one of the most important requisites.1

2. Requisites, what are the.—The following may be stated as including all the essentials of a deed of conveyance: a sufficient writing; proper parties, grantor and grantee; a thing to be granted; a consideration: execution, including signing, sealing, attestation, and acknowledgment; delivery and acceptance; registration.

3. A Sufficient Writing, what Constitutes. — It seems to be the accepted opinion of the authorities that in order to be valid a deed must be written on paper or parchment, the only reasons assigned for the rule being that a writing on any other material would not be so durable, and would be more capable of erasure and alteration.2 But it is difficult to see how this objection can have any greater effect than to make the use of other materials than paper or parchment inadvisable.3

The deed must contain every statement necessary to make up all the requisites of the deed, for parol evidence is not admissible to supply any defects or omissions.4 But any mistakes in rhetoric

1. 3 Washb. Real Prop. 239; Co. Lit. 171b; Tiedeman on Real Prop. § 786; Van Santvoord v. Sandford, 12 Johns. Van Santvoord v. Sandford, 12 Johns. (N. Y.) 198; Hutchins v. Byrnes, 9 Gray (Mass.), 367; Taylor v. Morton, 5 Dana (Ky.), 365; Hammond v. Alexander, 1 Bibb (Ky.), 333.

2. 3 Washb. Real Prop. 240; Co. Lit. 35b; 2 Bl. Com. 297; Warren v. Lynch, 5 Johns. (N. Y.) 240; 1 Broom & Hadley Com. 724; 2 Greenl. Cruise, 325; Boone Real Prop. § 278.

3. A deed on stone or metal is not even objectionable on the score of liability of erasure. Tiedeman Real Prop.

§ 788.

4. 3 Washb. Real Prop. 266; Boardman v. Reed, 6 Pet. (U. S.) 345; Deery v. Gray, 10 Wall. (U. S.) 270; Peck v. Mallams, 10 N. Y. 630; Andrews v. Todd, 50 N. H. 565; Hill v. Mowry, 6 Gray (Mass.), 551; Fenwick v. Floyd, 1 Har. & G. 172; Thomas v. Turney, 1 Har. & G. 437.

or grammar, or orthography, will not vitiate the deed, as long as the intention can be gathered from the instrument.1

It is generally held to be necessary to the validity of the deed that it shall be completed in all its essential parts before it is delivered. Any additions after delivery cannot give life to a deed that is otherwise invalid.2 But it is a disputed question, whether a deed may be delivered to an agent to be filled up, and by him to be delivered to the grantee. On the ground that the agent cannot make a legal delivery of an instrument under seal, without a power of attorney under seal, many of the cases hold that there must be in such a case a delivery to the grantee by the grantor himself.3 On the other hand, many cases uphold the contrary doctrine that an agent may make a lawful delivery of a deed by parol authority. and hence such an agent may be given a deed to fill up blanks with directions to deliver it to the grantee; or it may be delivered to the grantee, with the parol authority to fill up the blanks.4

4. Alterations and Interlineations.—Lord Coke states that in ancient times an erasure or interlineation would make the deed invalid at whatever time it was made.⁵ But this is not the law now, and was not even in the days of Lord Coke. But in order that erasures or interlineations may be permitted to modify the construction of a deed, they must be made before the delivery of the deed.6 According to some of the authorities, the presumption of law is that the alteration or interlineation was made after delivery; according to other authorities, there is no presumption

267; Bashford v. Pearson, 9 Allen (Mass.), 387; Bragg v. Fessenden, 11 Ill. 544; Smith v. Fellows, 9 Jones & S. 36; David-son v. Cooper, 11 M. & W. 793; Enthoven

v. Hoyle, 13 Com. B. 373.
3. Hibblewhite v. McMorine, 6 Mees. & W. 200; Davidson v. Cooper, 11 M. & W. 794; Burns v. Lynde, 6 Allen (Mass.), W. 794; Burns v. Lynde, 6 Allen (Mass.), 305; Bashford v. Pearson, 9 Allen (Mass.), 388; Vose v. Dolan, 108 Mass. 159; Chauncey v. Arnold, 24 N. Y. 330; Preston v. Hull, 23 Gratt. (Va.) 605; Ingram v. Little, 14 Ga. 174; Gilbert v. Anthony, 1 Yerg. (Tenn.) 69; Williams v. Crutcher, 6 Miss. 71; Viser v. Rice, 33 Tex. 130; Cross v. State Bank, 5 Ark. 525; Cummings v. Cassily, 5 B. Mon. (Ky.) 74; Conover v. Porter, 14 Ohio, 450; Simms v. Harvey, 19 Iowa, 290; People v. Organ, 27 Ill. 29; Mans v. Worthing, 3 Ill. 26; Upton v. Archer, 41 Cal. 85; s. c., 10 Am. Rep. 153; Vanderen, 1 Dall. (U. S.) 67; Galland v. 424

1. 3 Washb. Real Prop. 240; Shrewsbury's Case. 9 Rep. 48; Walters v. Bredin. 70 Pa. St. 237; Shep. Touch. 55.
2. Tiedeman Real Prop. § 789; Burns v. Lynde, 6 Allen (Mass.), 305; Duncan v. Hodges, 4 McCord (S. Car.), 239; Burns v. McDaniel, I Hill (S. Car.), v. Ballou, 47 Iowa, 188; s. c., 29 Am. 267; Bashford v. Pearson, o Allen (Mass.)

v. Ballou, 47 Iowa, 188; s. c., 29 Am. Rep. 470.

4. Inhabitants, etc., v. Huntress, 53 Me. 90; McDonald v. Eggleston, 26 Vt. 161; Drury v. Foster, 2 Wall. (U. S.) 24; Wiley v. Moore, 17 Serg. & R. (Pa.) 435; Field v. Stagg. 52 Mo. 534; s. c., 14 Am. Rep. 435; Van Etten v. Evanson, 28 Wis. 33; s. c., 9 Am. Rep. 886; Devin v. Himer, 29 Iowa, 301; Owen v. Perry, 25 Iowa, 412; Cooper v. Page, 62 Me. 192; Bridgeport Bank v. Railroad Co., 30 Conn. 231; Gourdin v. Commander, 6 Rich. (S. Car.) 497; Schintz v. McManamy, 33 Wis. 299.

of law in respect to the matter, and the burden of proof is on the party relying upon the deed. Perhaps the best rule is that the erasures and interlineations are presumed to have been made before delivery, unless peculiar circumstances on the face of the deed would indicate the contrary. But in any event, it is a question of fact for the jury to determine when, and with what purpose, the erasure or alteration was made.2 The safer plan is to note the erasure or interlineation in or above the attestation clause. in order to show that it was made before delivery.

As a general proposition no subsequent alteration of a deed, not even its destruction, can affect in any way the title to the property which had passed by the delivery of the deed.³ But a fraudulent alteration of the covenants of a deed, if material, will destroy all actions upon them in favor of the person who made the alterations.4 If a deed is destroyed and mutilated without the fault of the grantee, he may in equity compel the grantor to execute a second deed for him; or he may prove the contents of the deed by parol evidence, after showing the innocent destruction of the deed. (See Alteration of Instruments.)

5. Proper Parties.—The Grantor.—To make a valid deed of conveyance, there must be a competent grantor, He must own the property and have the capacity to convey it. All owners of prop-

Pa. St. 180; Cole v. Hills, 44 N. H. 227; White v. Haas, 32 Ala. 432; Craft v.

White v. Haas, 32 Ala. 432; Craft v. White, 36 Miss. 455; Provost v. Gratz, I Pet. (U. S.) C. C. 365.

1. Ely v. Ely, 6 Gray (Mass.), 439; Wilde v. Armsby. 6 Cush. (Mass.) 314; Kaights v. Clements, 8 A. & E. 215; Beaman v. Russell, 20 Vt. 205; Jackson v. Osborn, 2 Wend. (N. Y.) 555; Herrick v. Malin, 22 Wend. (N. Y.) 388; Comstock v. Smith 26 Mich. 266 v. Smith, 26 Mich. 306.

2. "As a general rule, if any presumption at all is indulged, the law will presume that the alteration was made before, or at least contemporaneous with. the signing of the writing, unless peculiar circumstances are patent upon its face; and even then the whole question is one for the jury to settle upon the facts, when and where, and with what intent. the alteration was made." McCormick v. Fitzmorris, 39 Mo. 34; Mathews v. Coalter, 9 Mo. 705. See also Sirrine v. Briggs, 31 Mich. 443; Bailey v. Taylor, 11 Conn. 531; Farnsworth v. Sharp. 4 Sneed (Tenn.), 55; Trowel v. Castle, 1 Roberts v. Unger, 30 Cal. 678; Maybee v. Sniffin, 2 E. D. Smith (N. Y.), 1; s. c.. 16 N. V. 560; Howard v. Colquhon, 28

Tex. 134.

5. King v. Gilson, 32 III. 354.

6. Wallace v. Harmstad, 44 Pa. St.

8. Davis, v. Cooper, 11 M. & W. 800; 492; Shaumberg v. Wright, 39 Mo. 125-

Jackman, 26 Cal. 85; Paine v. Edsell, 19 Bolton v. Carlisle, 2 H. Bl. 263; Roe v. Bolton v. Carlisle. 2 H. Bl. 263; Roe v. York, 6 East, 86; Hatch v. Hatch, 9 Mass. 367; Dana v. Newhall, 13 Mass. 498; Chessman v. Whittemore. 23 Pick. (Mass.) 231; Lewis v. Payn, 8 Cow. (N. Y.) 71; Nicholson v. Halsey, 1 Johns. Ch. (N. Y.) 417; Jackson v. Chase, 2 Johns. (N. Y.) 84; Baynor v. Wilson, 6 Hill (N. Y.), 469; Rifener v. Bowman, 53 Pa. St. 318; Fletcher v. Mansur, 5 Ind. 267; Wood v. Hildebrand, 46 Mo. 284; s. c., 2 Am. Rep. 513; Jackson v. Jacoby, o. Cow. Rep. 513; Jackson v. Jacoby, 9 Cow. (N. Y.) 125. But a deed altered by the husband after its execution by the wife, without her authority, makes the deed invalid. Stone v. Lord, 80 N. Y. 60. See Prettyman v. Goodrich, 23 Ill.,

See Freityman v. Cooper, 11 Mees. & W. 800; Deems v. Phillips, 5 W. Va. 168; Woods v. Hildebrand. 46 Mo. 284; s. c., 2 Am. Rep. 513. See Withers v. Atkinson, 1 Watts (Pa.), 237; Cleaton v. Chambliss, 6 Rand. (U. S.) 86; Letcher v. Bates, 6 J. J. Marsh. (Ky.) 524; s. c., 22 Am. Dec. 92; Den v. Wright. 2 Halst. 175; s. c., 11 Am. Dec. 546; Warring v. Tonn. 531; Farnsworth v. Sharp. 4 22 Ahr. Dec. 92, Deth v. Wight. 2 Hands. Sneed (Tenn.), 55; Trowel v. Castle, 1 175; s. c., 11 Am. Dec. 546; Warring v. Keb. 227; Huntington v. Finch, 3 Ohio Williams, 8 Pick. (Mass.) 322; Huntst. 445; Stoner v. Ellis, 6 Ind. 152. See ington v. Finch, 3 Ohio St. 445; Lewis Roberts v. Unger, 30 Cal. 678; Maybee v. Payn, 8 Cow. (N. Y.) 71; Bliss v. McIntyre, 18 Vt. 466.

erty have the power to convey it, except those who are under a legal disability. The persons under disability are infants, persons non compotes mentis, and married women.

6. Persons under Disability as Grantors.—a. Infants and Insane Persons.—The deeds of infants and insane persons are generally held to be voidable, and not void. But if the insane person, or any other person on account of mental deficiencies, is placed under guardianship, his deed made while under guardianship will be absolutely void.2 What degree of sanity is sufficient to enable one to make a valid deed is a very difficult question. The mental disturbance must be so great that the person cannot understand the nature and consequences of his act. Any impairment of his mental faculties, short of complete disability to comprehend the character of the transaction, will not invalidate the deed of conveyance.3 An habitual drunkard is not incompetent to execute a valid deed on account of his condition,4 unless the habitual drunkenness has so impaired his mental faculties as to disable him from understanding the nature and consequences of his deed of conveyance.5 This can only be true when the habitual drunkard is allowed to retain control over his property. If he is placed under guardianship, and his property put into the charge of a curator, his deeds would or should be void, like the deeds of insane persons who are under guardianship.

The deeds of both infants and insane persons, being voidable, may be ratified or disaffirmed, in the case of infants on coming of

1. 2 Kent's Com. 236; Tiedeman Real Prop. § 792; 3 Washb. Real Prop. 249, 250; Williams Real Prop. 66; 2 Bla. Com. 291; Zouch v. Parsons, 3 Burr. 1794; Tucker v. Moreland, 10 Pet. (U. S.) 58; Irvine v. Irvine, 9 Wall. (U. S.) 626; Hovey v. Hobson, 53 Me. 451; Kendall v. Lawrence, 22 Pick. (Mass.) 540; Wait v. Maxwell, 5 Pick. (Mass.) 217; Arnold v. Richmond Iron Works, 1 Gray (Mass.), 434; Howe v. Howe, 99 Mass. 98; Roof v. Stafford, 7 Cow. (N. Y.) 180; Kline v. Beebe. 6 Conn. 494; Richardson v. Boright, 9 Vt. 368; Eaton v. Eaton, 37 N. J. L. 507; s. c., 18 Am. Rep. 717; Wallace v. Lewis, 4 Harr. (N. J.) 75; Doe v. Abernathy, 7 Blackf. (Ind.) 442; Babcock v. Bowman, 8 Ind. 110; Miller v. Lingerman, 24 Ind. 387; Breckenridge v. Ormsby, I. J. Marsh. (Ky.) 245; Phillips v. Green, 3 A. K. Marsh. (Ky.) 11; Myers v. Sanders, 7 Dana(Ky.),524; Robinson v. Weeks,56 Me. 106; Jackson v. Gumaer, 2 Cow. (N. Y.) 552. But if the infant's deed is without consideration, it is absolutely void, and not voidable. Swafford v. Ferguson, 3 Lea (Tenn.), 292; s. c., 31 Am. Rep. 639. See, as to deeds of infants, Harner v. Dipple, 31 Ohio St. 72; s. c., 29 Am.

Rep. 496. In New York, Pennsylvania, and Oregon the deed of the insane person is declared to be void in any event. Van Deusen v. Sweet, 51 N. Y. 384; Matter of Desilver, 5 Rawle (Pa.), 111; Farley v. Parker, 6 Oreg. 105; s. c., 25 Am. Rep. 504. But see Roof v. Stafford, 7 Cow. (N. Y.) 180; Bool v. Mix, 17 Wend. (N. Y.) 119; Ingraham v. Baldwin, 9 N. Y. 45.

Y. 45.
2. Wait v. Maxwell, 5 Pick. (Mass.) 217;
s. c., 16 Am. Dec. 391; Griswold v.
Butler, 3 Conn. 231; Pearl v. McDowell,
3 J. J. Marsh. (Ky.) 658.
3. Dennett v. Dennett, 44 N. H. 538;

3. Dennett v. Dennett, 44 N. H. 538; Doe v. Prettyman. I Houst. (Del.) 339. The monomania of the grantor on some subject foreign to the subject-matter of the deed, as, for example, on religion, will not invalidate the deed. Burgess v. Pollock, 53 Iowa, 273; s. c., 36 Am. Rep. 218.

Pollock, 53 Iowa, 273; s. c., 36 Am. Rep. 218.

4. Gardner v. Gardner, 22 Wend. (N. Y.) 526; Peck v. Cary, 27 N. Y. 9. See Donelson v. Posey, 13 Ala. 752; Eaton v.

Perry, 29 Mo. 96.

5 Van Wyck v. Brasher, 81 N. Y. 260.
See Freeman v. Statto, 8 N. J. Eq. 814;
Warnock v. Campbell, 25 N. J. Eq. 485;
Belcher v. Belcher, 10 Yerg. (Tenn.) 121.

age, and in that of lunatics when they are restored to mental sanity. It is not necessary for the insane person or infant to restore the consideration in order to disaffirm the deed.2

The act of ratification or disaffirmance need not be as formal as the ordinary release of an outstanding title; all that is required is, that the acts must clearly indicate the intention to ratify or disaffirm the deed, as the case might be.3 Whether mere acquiescence in the possession by the grantee will work a ratification of the deed, is a doubtful question. Some courts hold that the infant can disaffirm only within a reasonable time after reaching his majority, and the insane person after restoration to mental health.4 But the contrary position is taken by the other courts, that mere acquiescence does not operate as a ratification, unless it has been so long continued as to bar the right of action under the Statute of Limitations.5

b. Married Women as Grantors.—The deeds of married women. according to the common law, unless they are also executed by their husbands, are absolutely void; and if, after the death of the husband or after divorce, the wife should attempt by a second deed to ratify the first deed, it will be valueless, unless the second deed can operate as a primary and independent conveyance. 6 At com-

1. The infant cannot by any act during his minority disaffirm his deed. A second conveyance of the same property during the minority is no disaffirmance of the first deed. Tiedeman Real Prop. § 792; first deed. Tiedeman Real Prop. § 792; 3 Washb. Real Prop. 250; Emmons v. Murray, 16 N. H. 385.

2. 2 Kent's Com. 236; Hovey v. Hob-Son, 53 Me. 453; Gibson v. Soper, 6 Gray (Mass.). 279; Richardson v. Boright, 9 Vt/368; Wallace v. Lewis, 4 Harr. (N. J.) 75; Cresinger v. Welch, 15 Ohio, 156; Babcock v. Bowman, 8 Ind. 110; Green v. Green, 60 N. Y. 553; s. c., 25 Am.

Rep. 233.
3. Howe v. Howe, 99 Mass. 98. An oral acknowledgment of the validity of the deed, the acceptance of the consideration, or the acceptance of a lease, would be sufficient to establish a ratification. Irvine v. Irvine, 9 Wall. (U. S.) 618; Bond v. Bond, 7 Allen (Mass.), 1; Ferguson v. Bell, 17 Mo. 347; Dana v. Coombs, 6 Me. 89; Boody v. McKenney, 23 Me. 524. See Robbins v. Eaton. 10 N. H. 561; Wheaton v. East, 5 Yerg. (Tenn.) 41. So also would an entry, the institution of a suit, or a subsequent conveyance be a sufficient disaffirmance. Tucker v. Moreland, 10 Pet. (U. S.) 75:
Bond v. Bond, 7 Allen (Mass). 1; Jackson v. Carpenter, 11 Johns. (N. Y.) 541:
Jackson v. Burchin, 14 Johns. (N. Y.) 512;
Drake v. Ramsey, 5 Ohio, 253:
Black v. Hills, 36 Ill. 379. An infant's deed will also be binding upon him if, after coming of age, he permits the purchaser to make costly improvements upon the land. Davis v. Dudley, 70 Me. 236; s. c., 35 Am. Rep. 318. See also Highley v. Barron, 49 Me. 103; Wallace v. Lewis, 4 Harr. (N. J.) 75; Gillespie v. Bailey, 12 W. Va. 70; s. c., 29 Am. Rep. 445; Thompson v. Strick-

29 Am. Kep. 445; Thompson 4. Land, 52 Miss. 574.

4. Robbins v. Eaton, 10 N. H. 561; Emmons v. Murray, 16 N. H. 385; Jackson v. Carpenter, 11 Johns. (N. Y.) 539; Bostwick v. Atkins, 3 N. Y. 58; Kline v. Beebe, 6 Conn. 506; Richardson v. Boright, 9 Vt. 371; Wallace v. Lewis, 4 Harr. (N. J.) 75; Wheaton v. East, 5 Yerg. (Tenn.) 41; Hartman v. Kendal, 4 Ind. 403; Sims v. Everhardt, 102 U. S.

5. Irvine v. Irvine, 9 Wall. (U.S.) 618; Hovey v. Hobson, 53 Me. 453; Drake v. Ramsey, 5 Ohio, 253; Cresinger v. Welch, 15 Ohio, 156; Davis v. Dudley. 70 Me. 236; s. c., 35 Am. Rep. 318; McMurray v. McMurray, 66 N. Y. 175; Moore v. Abernethy, 7 Blackf. (Ind.) 442; Vaughan v. Parr. 20 Ark. 600; Huth v. Railway, etc.,

Co., 56 Mo. 202.
6 Zouch v. Parsons, 3 Burr. 1805;
Allen v. Hooper, 50 Me. 374; Hatch v. Bates, 54 Me. 139; Lowell v. Daniels, 2 Gray (Mass.), 161; Concord Bank v. Bellis, 10 Cush. (Mass.) 277; Dow v. Jewell, 18 N. H. 355; Davis v. Andrews, 30 Vt. 681; Perrine v. Perrine, 11 N. J. Eq. 144; Harris v. Burdock, 4 Harr. (N.

mon law the only mode of conveying the married woman's estate was by levying a fine. Later, in England, by statute 3 and 4 Wm. IV. ch. 74, a joint conveyance by husband and wife of the wife's property, when properly acknowledged, will pass a good title to the purchaser.² In the United States, fines and common recoveries were never recognized as modes of conveyance, and it became at an early day the custom, sometimes sanctioned or adopted by statute, for married women to convey their lands by deed, in the execution of which the husbands joined.3

In some of the States, the statutes lay down certain requirements in the execution of deeds by married women, and these requirements must be strictly observed in order to make a valid deed; if there is any deviation from them, the deed will be void.4 The wife's name must appear in the body of the deed, so that it will appear on the face that she is the grantor; merely signing the deed, without the deed running in her name, will not make it her con-

vevance.5

J.) 66; Lefevre v. Murdock, Wright due influence. Albany Fire Ins. Co. v. (Ohio), 205; Baxter v. Bodkin, 25 Ind. 172; Bay, 4 N. Y. 9; Dundas v. Hitchcock, Bressler v. Kent, 61 Ill. 426; s. c., 14 Am. 12 How. (U. S.) 256; Elliott v. Pearce, Bressler v. Kent, 61 Ill. 426; s. c.,14 Am. Rep. 67; Cope v. Meeks, 3 Head (Tenn.), 388; Goodright v. Straphan, Cowp. 201; Warner v. Crouch, 14 Allen (Mass.), 163; Dunham v. Wright, 53 Pa. St. 167; Ezelle

v. Parker, 41 Mo. 520.

1. Tiedeman Real Prop. § 794: 3 Washb. Real Prop. 252; Williams Real Prop. 229,

2. Williams Real Prop. 230. Later, by statute 37 and 38 Vict. ch. 78, the married woman, when holding lands as a trustee, may convey as freely as a single woman.

Williams Real Prop. 232.

Williams Real Prop. 232.

3. Fowler v. Shearer, 7 Mass. 14; Lithgow v. Kavanagh, 9 Mass. 161; Gordon v. Haywood, 2 N. H 402; Jackson v. Gilchrist, 15 Johns. (N. Y.) 110; Davey v. Turner, 1 Dall. (U. S.) 11; Lloyd's Lessees v. Taylor, 1 Dall. (U. S.) 17; 3 Washb. Real Prop. 252; Williams Real Prop. 231, Rawle's note; 4 Kent's Com. Prop. 231, Rawle's note; 4 Kent's Com. 152, 154; Allen v. Hooper. 50 Me. 374. See Richardson v. Wyman, 62 Me. 280; s. c., 16 Am. Rep. 459; Maloney v. Horan, 49 N. Y. 111; s. c., 10 Am. Rep. 335; Ridgeway v. Masting. 23 Ohio St. 294; s. c., 13 Am. Rep. 251.

4. Hepburn v. Dubois, 12 Pet. (U. S.) 375; Elwood v. Black, 13 Barb. (N. Y.) 50; Askew v. Daniel, 5 Ired. Eq. (N. Car.) 321; Reaume v. Chambers, 22 Mo. 36: Mariner v. Saunders. 10 III. 112.

50; Askew v. Daniel, 5 Ired. Eq. (N. 105; Cox v. Wells, 7 Blackf. (Ind.) 410; Car.) 321; Reaume v. Chambers, 22 Mo. Stearns v. Swift, 8 Pick. (Mass.) 532. 36; Mariner v. Saunders, 10 Ill. 113; But it will be sufficient if the husband

20 Ark. 508; Askew v. Daniel, 5 Ired. Eq. (N. Car.) 321; Doe v. Fridge, 3 Mc-Lean (C. C. U. S.), 245; Applegate v. Gracy, 9 Dana (Ky.), 214; Scott v. Pur-cell, 7 Blackf. (Ind.) 66; Barton v. Morris, 5 Ohio, 408; Garrett v. Moss, 22 Ill. 363; Lyon v. Kain, 36 Ill. 370; Bours v. Zachariah, 11 Cal. 281; Sanders v. Bolton, 26 Cal. 408. In other States the privy examination is not required to accompany the acknowledgment, and in some of the States the conveyance of husband and wife may be by separate deeds. 4 Greenl. Cruise, 19, note; 3 Washb. Real Prop. 254, 255; 2 Kent's Com. 150-154; Shepherd v. Howard, 2 N. H. 507;

Lawyer v. Slingerland, 11 Minn. 458.
5. Dundas v. Hitchcock, 12 How. (U. S.) 256; Agricultural Bank v. Rice, 4 How. (U. S.) 225; Lithgow v. Kavanagh, 9 Mass. 173; Lufkin v. Curtis, 13 Mass. 223; Dodge v. Nichols, 5 Allen (Mass.), 548; Raymond v. Holden, 2 Cush. (Mass.) 264; Melvin v. Prop'rs of Locks and Canals, 16 Pick. (Mass.) 137; Learned v. Cutler, 18 Pick. (Mass.) 9; Frost v. Deering, 21 Me. 156; Whiting v. Stevens, 4 Conn. 44; Cincinnati v. Newhall, 7 Ohio St. 37; Purcell v. Goshorn, 17 Ohio. Garrett v. Moss, 22 Ill. 363; Morrison v. Merly signs the deed; it is not neceswilson, 13 Cal. 498. It is usually required that she be examined privately by a notary public, and the deed acknowledged by her to be her free and voluntary act, and not the result of her husband's unact, and not her husban

The foregoing statements have no reference to the sole and separate property of a married woman. Her sole and separate property is an equitable estate, the legal title to which is in some other person as trustee. In respect to her sole and separate estate. in England and in most of the States the married woman is treated as a single woman, and can, in the absence of a restraining clause, convey that estate as freely as if she were single. In a number of the States, however, the English rule has been discarded, and it is there maintained that the married woman has no power over her separate estate, except what is expressly granted or reserved to her in the deed of settlement.2 But it is held that in all such cases the conveyance by the married woman of her separate estate passes only her equitable title, unless her trustee joins in the con-

The married women's property rights have in all of the States of late been considerably modified by statute, in some of them the entire common law on the subject being abolished, and married women given the same independent power of control over their lands and other property as a single woman.⁴ It is a doubtful question whether under such statutes the husband's courtesy will be barred

by the sole conveyance of the wife.5

83; Ingoldsby v. Juan, 12 Cal. 564. In some States it is provided that the husband's signature is not necessary to the validity of the deed, if he has been imprisoned or has deserted her. Needham

v. Judson, 101 Mass. 161.

1. Fettiplace v. Gorges, 1 Ves. 46; Rich v. Cockrell, 9 Ves. 99; Wagstaff v. Rich v. Cockrell, 9 Ves. 99; Wagstaff v. Smith, 9 Ves. 520; Sturgis v. Corp., 12 Ves. 190; Major v. Lansley, 2 Russ. & My. 357; Essex v. Atkins. 14 Ves. 542; Dyett v. No.Am. Coal Co., 20Wend. (N. Y.) 570; s. c., 7 Paige Ch. 1; Powell v. Murray, 2. Edw. Ch. 636; Gardner v. Gardner, 22 Wend. (N. Y.) 526; Yale v. Dederer, 18 N. Y. 269; Imlay v. Huntington, 20 Conn. 175; Frary v. Booth, 4 Am. Law Reg. (N. S.) 441, and note; Leaycraft v. Hedden, 3 Green Ch. 551; Wyly v. Collins, 9 Ga. 223; Cooke v. Husbands, 11 Md. 492; Chew's Adm'rs v. Beall, 13 Md. 348; McCroan v. Pope, 17 Ala. 612; Collins v. Larenburg, 19 17 Ala. 612; Collins v. Larenburg, 19 Ala. 685; Coleman v. Woolley, 10 B. Mon. (Ky.) 320; Hardy v. Van Harlingen, 2 Ohio St. 208; Whitesides v. Cannon. 23 Mo. 457; Segoud v. Garland, 23 Mo. 547; Frazier v. Brownlow, 3 Ired. Eq. (N. Car.) 237; Newlin v. Freeman, 4 Ired. Eq. (N. Car.) 312 But, unless the grantor expressly provides that the mar-ried woman shall take her separate estate free from the husband's courtesy, he can claim it in her separate estate, and in order to bar the courtesy he must join in the conveyance of her estate. Tillinghast v. Coggeshall 7 R. I. 383; Nightingale v. Hidden, 7 R. I. 115; Sartill v. Robeson, 2 Jones Eq. (N. Car.) 510; Carter v. Dale, 3 Lea (Tenn.), 710; s. c., 31 Am. Rep. 660; Stokes v. McKibbin, 13 Pa. St. 207; Cochran v. O'Hern, 4 Watts & S. (Pa.) 95; Rigler v. Cloud, 14 Pa. St. 361; Clark v. Clark, 24 Barb. (N. Y.) 582; Pool v. Blaikie, 53 Ill. 495; Hearle v. Greenback, 3 Atk. 716; Bennett v. Davis, 2 P. Wms. 316.

2. Ewing v. Smith, 3 Desau. (S. Car.) 417; Reed v. Lamar, 1 Strobh. Eq. (S. Car.) 27; Calhoun v. Calhoun, 2 Strobh. (S. Car.) 231; Maywood v. Johnson, 1 Hill Ch. (S. Car.) 228; Lancaster v. Dolan. Rawle (Pa.), 231; Wallace v. Coston, 9 Watts (Pa.), 137; Thomas ω. Folwell, 2 Whart. (Pa.) 11; Patterson v. Robinson, T Casey (Pa.), 81; Metcalf v. Cook, 2 R. I. 355; Williamson v. Beekham, 8 Leigh (Va.), 20; Morgan v. Elam, 9 Yerg. (Tenn.) 375; Marshall v. Stephens, 8 Humph. (Tenn.) 159; Doty v. Mitchell, 9 Smed. & M. (Miss.) 447; Montgomery v. Agricultural Bank, 10 Smed. & M. (Miss.) 567.
3. Tiedeman Real Prop. § 93; 7 Washb.

Real Prop. 331; Williams Real Prop. 224, Rawle's note; White v. Hulme, I Bro. C. C. 16; Brandon v. Robinson, 18 Ves. 434; Tullett v. Armstrong, 1 Beas. (N. J.) 1; Scarborough v. Bowman, 1 Beas.
(N. J.) 34.
4. Tiedeman Real Prop. § 94.

5. In New York it is held that the hus-

- 7. Fraud and Duress.—The deed must be the voluntary act of the grantor. If, therefore, the grantor has been induced by fraud or compelled by threats of violence to make the deed, he may avoid it upon restoring the consideration within a reasonable time after the discovery of the fraud, or his removal from the threatened danger. The courts differ in their expressions concerning what amount of duress is necessary to make the deed voidable.2 Perhaps the best rule for ascertaining what constitutes legal duress is that laid down by the supreme court of the United States, viz.: "Unlawful duress is a good defence if it includes such a degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness." 3 Delay in avoiding the deed may be dangerous to the interest of the grantor. on account of possible intervening rights of third persons; 4 but the acceptance of the benefits of the conveyance, or any other act. will not constitute a ratification of the conveyance, unless at the time the danger is removed.⁵ But the duress must have been by or at the instigation of the grantee, except when the grantor is a married woman. In that case, the duress of her husband will avoid the deed.?
- 8. Proper Parties as Grantees.—All persons are capable of taking real estate as grantees, including corporations and the persons who

band's courtesy is barred, although he does not join in the conveyance. Yale v. Dederer, 22 N. Y. 460; Hatfield v. Sneden, 54 N. Y. 287. In Massachusetts it is held that he must join in the conveyance in order to bar his courtesy. Beal v. Warren, 2 Grav (Mass.), 458; Willard v. East-

ren, 2 Grav (Mass.), 455; William v. Eastham, 15 Gray (Mass.), 334; Campbell v. Bemis, 16 Gray (Mass.), 487.

1. 2 Bla. Com. 291; Tiedeman Real Prop. § 796; 3 Washb. Real Prop. 260; Worcester v. Eaton, 13 Mass. 371; Bassett v. Brown, 105 Mass. 551; Fisk v. Stubbs 20 Ala 225; Deputy v. Staple.

Stubbs, 30 Ala. 335; Deputy v. Staple-ford, 19 Cal. 302.

2. It is generally held that no duress, short of that which raises the apprehension of loss of life, limb, or personal liberty, will be sufficient to avoid the deed. Evans v. Gale, 18 N. H. 401; Baker v. Morton, 12 Wall. (U. S.) 150; Watkins v. Baird, 6 Mass. 506; s. c., 1 Am. Dec. 170; Miller v. Miller, 68 Pa. St. 486. While it is elsewhere held that the deed of a married woman will be void if she signed under the threat of abandonment by her husband, and in another case under a threat of criminal prosecution against her husband. Eddie v. Slimmons, 26 N. Y.
12; Topley v. Topley, 10 Minn. 460. It is also held that a father may avoid a mortgage which was procured under a

threat of criminal prosecution of his son. Harris v. Carmody, 131 Mass. 51. But a mere threat to sue for property will not be a sufficient duress. Harris v. Tyson, 24 Pa. St. 347. See Snyder v. Braden, 58 Ind. 143. Nor will mere advice, persuasion, or influence support the claim of duress. Barrett v. French, 1 Conn. 354 (6 Am. Dec. 241). See Atlee v. Backhouse. 3 Mees. & W. 642.

3 United States v. Huckabee, 16 Wall,

(U.S) 423.

4. Doolittle v. McCullough, 7 Ohio St. 299; Murphy v. Paynter, 1 Dill. 333; 259, Mathy
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 250, Waldo,
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333; Taylor v. Jaques, 106 Mass. 201. See Bissett v. Bissett, 1 Har. & McH.

6. Talley v. Robinson, 22 Gratt. (Va.) 888; Green v. Scranage, 19 Iowa, 461. 7. Eddie v. Slimmons, 26 N. Y. 12; Brooks v. Berryhill, 20 Ind. 97; Tapley v. Tapley, 10 Minn. 458; Kocourek v. Marak, 54 Tex. 201 (38 Am. Rep. 623). See also McClintock v Cummins, 3 Mc-Lean (C. C. U. S.), 158; Remington v. Wright, 43 N. J. L. 451; Koehler v. Wilson, 40 Iowa, 183; State v. Brantley, 27 Ala. 44: Lefebvre v. Dutruit, 51 Wis. 326; s.c., 37 Am. Rep. 833.

are under a legal disability. But, as a matter of course, if the conveyance to a person under a legal disability is subject to the performance of a covenant or condition, the acceptance of the deed will not in such a case impose any binding obligation to perform the condition or covenant. The failure to perform could only work a forfeiture of the estate.

It seems, in respect to married women, that at common law the husband's assent to the conveyance was necessary to make the conveyance to her valid; and that his assent will be binding upon

the wife and upon her heirs after her death.2

The statutes of mortmain in England prohibit corporations from taking lands by purchase, unless specially authorized. But these statutes are not recognized as a part of the common law in this country, except in Pennsylvania. But in many of the States it is customary to limit the amount of real property which a corporation may hold, and the State may confiscate whatever lands it acquires above the statutory limit.³

It is also the rule of the common law that aliens cannot be grantees, i.e., that if an alien should take lands by purchase, his title, though good against all the world except the State, may be defeated, and be escheated to the State, by the institution of the proper suit.⁴ In this country, the disability of alienage has been almost everywhere removed by statute,⁵ but the common-law rule

still exists in some of the States.6

1. 3 Washb. Real Prop. 267; Sutton v. Cole, 3 Pick. (Mass.) 332; Melvin v. Proprietors, etc., 16 Pick. (Mass.) 167; Concord Bank v. Bellis, 10 Cush. (Mass.) 278; Peavey v. Tilton, 18 N. H. 152; Spencer v. Carr, 45 N. Y. 410; Mitchell v. Ryan, 3 Ohio St. 387; Rivard v. Walker, 39 Ill. 473; Cecil v. Beaver, 28 Iowa, 241.

2. Co. Lit. 3a; Butler v. Baker, 3 Rep. 26; Whelpdale's Case, 5 Rep. 119; Melvin v. Proprietors, 16 Pick. (Mass.) 167; Foley v. Howard, 8 Clarke (Iowa), 36. Lord Coke maintains that the assent of the husband does not prevent an avoidance of the deed by the wife after his

death. Co. Lit. 3a.

3. But the law is not violated where the value of the land held by a corporation exceeds the limit by a rise in the value of the land after its purchase. This was the case of Bogardus v. Trinity Church, 4 Sandf. Ch. (N. Y.) 633. The property, when acquired by the church, yielded an income of £30, and by the remarkable rise in the value of real estate in the city of New York the income was increased, at the time that the suit was brought, to \$300,000.

4. Apthorp v. Backus, Kirby, 407; s. c., I Am. Dec. 26; Jackson v. Adams, 7 Wend. (N. Y.) 368; Goodrich v. Russell.

42 N. Y. 177; Wadsworth v. Wadsworth, 12 N. Y. 376; Mooers v. White, 6 Johns. Ch. (N. Y.) 365; Vermont v. Boston, etc., R. Co., 25 Vt. 433; Fox v. Southack, 12 Mass. 143; Montgomery v. Dovion, 7 N. H. 475; Elmendorff v Carmichael, 3. Litt. 472; s. c., 14 Am. Dec. 86; Fairfax v. Hunter, 7 Cranch (U. S.) 619; Gouverneur v. Robertson, 11 Wheat. (U. S.) 332. But upon the death of the alien purchaser, it seems that the title of the State becomes perfect, without the institution of any action for having the land declared escheated to the State. Goodrich v. Russell, 42 N. Y. 177; Crane v. Reeder, 21 Mich. 24; s. c., 4 Am. Rep. 430.

5. In some of the States, the right to hold lands is granted by the statute only to resident aliens; but in others, as in Massachusetts, Kentucky, and New York, non-resident aliens may also take lands by descent. Lumb v. Jenkins, 100 Mass. 527; Goodrich v. Russell, 42 N. Y. 177; Eustache v. Roadaquest. 11 Bush (Ky.), 42. In New York, also, an alien wife may take by purchase or by descent if her husband is a citizen. Luhrs v. Eimer, 80 N. Y. 171.

6. See Sands v. Lynham, 27 Gratt. (Va.) 291; s. c., 21 Am. Rep. 348; Crane 7 Reeder, 21 Mich. 24; s.c., 4 Am. Rep. 430

For the grant of an immediate estate in possession, the grantee must be in esse, and the deed may be avoided by showing that the grantee came into being after the delivery of the deed. But it is not necessary for the grantee to be in esse, if his estate is a con-

tingent remainder or other future estate.2

9. Parties Named in the Deed.—It is also necessary that the parties, grantor and grantee, should be sufficiently described in the deed.3 A deed is void which does not in some way point out the grantor and grantee.4 The usual method of describing a person is by giving his name in full; but this is not the only method. Any other description would suffice which would distinguish him from all others, as, for example, where one is described by his office or by his relation to other persons.5

Although a deed to a fictitious person is void, 6 vet if the deed with the fictitious name be actually delivered to a person as grantee, it will be a good conveyance, for the fictitious name becomes by adoption the name of the true grantee. A person can have more than one name. As long as the party intended may be identified under the name given in the deed, any mistake in his name, or the use of different names in different parts of the deed, is not fatal to the deed.8 But, as a general rule, the Christian or given name must be given as well as the surname. If the surname is alone given, the deed is usually held to be void for uncertainty.9

1. Tiedeman Real Prop. § 797; Hulick v. Scovil, 4 Ill. 191; Miller v. Chittenden,

2 Iowa, 368.

2. Hall v. Leonard, I Pick. (Mass.) 27; Morris v. Stephens, 46 Pa. St. 200; Huss v. Stephens, 51 Pa. St. 282; 3 Washb.

Real Prop. 266, 267.

3. See Hoffman v. Porter, 2 Brock. 156; Hornbeck v. Westbrook, 9 Johns. (N. Y.) 73: Finch's Case, 6 Rep. 65; Newton v. McKay, 29 Mich. 1: Middleton v. Findle, 25 Cal. 80; Boone v.

Moore, 14 Mo. 420.

4. Chase v. Palmer, 29 Ill. 366.

5. A grant to the heirs of A, A being dead, is good, for it is possible to ascerrain who are the heirs of A. Hogan v. Page, 2 Wall. (U. S.) 607; Ready v. Kearsley, 14 Mich. 225; Cook v. Sinnamon, 47 Ill. 214; Boone v. Moore, 14 Mo. 420. A deed to "the wife of A" is good although the name of the wife is good although the name of the wife is not given. Den v. Hay, I N. J. 174. See Scanlan v. Wright. 13 Pick. (Mass.) 523. A grant to A and his partners has also been held to be good as to the partners not named. Hoffman v. Porter, 2 Reach v. 76. Morse v. Corporator v. V. Brock. 156; Morse v. Carpenter, 19 Vt. 613. Contra, Arthur v. Weston, 22 Mo. 378. It is held, on the other hand, that a deed to a partnership by name is not good unless the full names of the partners are given. Beaman v. Whitney, 20

Me. 413. See Chamberlain v. Bussey, 5 Me. 164. But in all such cases the partners named will take the estate as trustees for the firm. Beaman v. Whitney, 20 Me. 413; Moreau v. Safferans, 3 Sneed (Tenn.). 595. See Murray v. Blackledge, 71 N. Car. 492; McCauley v. Fulton, 44 Cal. 358. See also, generally, Dr. Ayray's Case, 11 Rep. 20; Finch's Case, 6 Rep. 65; Shaw v. Loud, 12 Mass. 447. 6. Muskingum Turnpike v. Ward, 13

Ohio, 120.

7. David v. Williamsburg. etc., Ins. Co., 83 N. Y. 265; s. c., 38 Am. Rep. 418; Petition of Snook, 2 Hilt. (N. Y.) 536.

8. Boothroyd v. Engles, 23 Mich. 21; Tostin v. Faught, 23 Cal. 237; Middleton v. Findla, 25 Cal. 80; Jackson v. Root, 18 Johns. (N. Y.) 60.

9. Fanshawe's Case, F. Moore, 229; Jackson v. Corey, 8 Johns. (N. Y.) 388; Hornbeck v. Westbrook, 9 Johns. (N. Y.) 74. See Irwin v. Longworth, 20 Ohio, 581. But it has been held that where the given name is left blank, but the intended grantee is in possession of the deed, he may show aliunde that he was the person intended. Fletcher v. Mansur, 5 Ind. 269. See Zaun v. Haller, 71 Ind. 136; s.c., 36 Am. Rep. 193; Morse v. Carpenter, 19 Vt. 615. But the law only knows one given or Christian name; if the grantor or grantee has two, one only need be given in the deed. A failure to give the middle name, or a mistake in calling the person senior when he is the junior of that name, will not affect the validity of the deed. The true party may be shown by parol evidence in every such case of doubt.¹

It is as necessary to name in the deed the person or persons who are to take the equitable or beneficial interest under the deed, as the one to whom the legal title is conveyed. And it is also necessary for the grantees of future estates to be named in the deed,

although the deed need not be delivered to them.3

10. A Thing to be Conveyed.—There must, of course, be some interest in land to be conveyed by the deed, and it must be sufficiently described therein in order to admit of easy identification. It is generally held that the conveyance of any freehold interest in land requires a deed, that is, an instrument under seal. It cannot be conveyed by a simple writing.4 Not only is it held that estates in the land itself can only be conveyed by deed, but also every incorporeal interest of a freehold character issuing out of the land, such as easements, rights of commons, or profits à prendre, mineral and other deposits.⁵ It is a much-discussed question whether the conveyance of standing trees requires a deed; i.e., that the title to them cannot pass except by the formal deed of conveyance. held by some of the English cases,6 that if the sale contemplates the immediate removal of the trees, it is not necessary that it be done by a deed or any other writing, since such a transaction can and should be considered as a sale of chattels rather than of an interest in the lands. But the American courts generally hold that standing trees are "a part of the inheritance, and can only become personalty by actual severance, or by severance in contemplation

1. Games v. Styles, 14 Pet. (U. S.) 322; Dunn v. Games, 1 McLean (U. S.), 321; Franklin v. Tallmadge, 5 Johns. (N. Y.) 84.

2. German Association v. Scholler, 10

Minn, 331.

3. Hornbeck v. Westbrook, 9 Johns. (N.Y.) 73; Hunter v. Watson, 12 Cal. 363. A grant to trustees of an unincorporated association would give the estate to the trustees named in their individual right. Austin v. Shaw, 10 Allen (Mass.), 552; Brown v. Combs, 29 N. J. L. 36; Tower v. Hale, 46 Barb. (N. Y.) 361; Den v. Hay, 21 N. J. L. 174.

4. 3 Washb. Real Prop. 341. Mr. Washburn, on the page referred to, says that "since the Statute of Frauds (20 Charles II. chap. 3) a deed has been required in order to convey a freehold in, to, or out of any messuages, manors, lands, tenements, or hereditaments." The Statute of Frauds only requires the

conveyances of such and other interests in land to be put into writing, but does not require a deed. The law is unchanged by the statute, and, contrary to the prevailing opinion, a deed is only required where the interest conveyed is an incorporeal hereditament, or where there is no consideration acknowledged or proven. See Tiedeman's Real Prop., § 783, for a full discussion of this question.

5. Tiedeman Real Prop. § 799; 3 Washb. Real Prop. 341.

6. Smith v. Surman, 9 B. & C. 561; Evans v. Roberts. 5 B. & C. 829; Marshall v. Green, 33 L. T. Rep. (N. S.) 404; Bostwick v. Leach, 3 Day (Conn.), 476. But in Rodwell v. Phillips. 9 Mees. & W. 505, contra, the court say: "It must be admitted, taking the cases altogether, that no general rule is laid down in any one of them that is not contradicted by some other."

A Thing to be Conveyed.

of law as the effect of a proper instrument in writing." 1 The sale of standing trees is a two-fold contract. It includes a sale of the trees when severed from the land, which is necessarily executory. and a license to go upon the land and remove them. The only vested interest in the land which the vendee has before a severance of the trees has been made, is the license to go upon the land and sever them; and being an interest in the land, it is revocable unless granted by a proper instrument of conveyance. If the license is for a definite time, it being then a leasehold interest, it can be conveyed by a simple writing.2 But if the license is for an indefinite time, it is a freehold interest and requires a deed to grant it.3 Standing trees, and other things connected with or affixed to the soil, certainly pass with the conveyance of the freehold, unless expressly excepted.4 If, therefore, a sale of standing trees is made with a parol license to enter and cut them, the subsequent conveyance of the freehold by the licenser without reservation would work a revocation of the license, and the title to the trees would pass with the land to the vendee of the land. The only remedy the licensee would have would be an action for damages for the breach of his executory contract.5

Some of the courts are inclined to treat the sale of annual crops as the sale of a chattel; and this is undoubtedly true, if the crop is understood to be a chattel interest in lands, since the license, to enter and attend to and to harvest the crop, is only for a year or for less than a year. Being a chattel interest, a deed is not re-

quired to pass title; any writing will suffice.6

It is also a general rule at common law, that there cannot be a

1. Slocum v. Seymour, 36 N. J. 139; 1. Slocum v. Seymour, 36 N. J. 139; Trull v. Fuller, 28 Me. 548; Green v. Armstrong, 1 Denio (N. Y.), 550; McGregor v. Brown, 10 N. Y. 117; Vorebeck v. Roe, 50 Barb. (N. Y.) 305; Claflin v. Carpenter, 4 Metc. (Mass.) 580; Parsons v. Smith, 5 Allen (Mass.), 580; Giles v. Simonds, 15 Gray (Mass.), 441; Delaney v. Root, 99 Mass. 548; Poor v. Oakman, 104 Mass. 316; White v. Foster. Oakman, 104 Mass. 316; White v. Foster, 102 Mass. 378; Buck v. Pickwell, 27 Vt.

2. That is, in those States in which leases are not required to be under seal. Thus, in Missouri, where a general statute requires the conveyance of every kind of interest in lands to be by deed, the sale of standing trees must always be under seal in order to pass an immediate

title to the trees.

3. Klap v. Draper, 4 Mass. 266; Green v. Armstrong, i Denio (N.Y.). 554; Kingsley v. Holbrook, 45 N. H. 313; Howe v. Batchelder, 49 N. H. 208; Sterling v. Baldwin, 42 Vt. 308; Pattison's Appeal, 61 Pa. 81, 207. 61 Pa. St. 297.

4. Bracket v. Goddard, 54 Me. 313; Noble v. Bosworth, 19 Pick. (Mass.) 314; Mott v. Palmer, 1 N. Y. 564; Goodrich v. Jones, 2 Hill (N. Y.), 142; Teshaw v. Ebberson, I Pa. St. 726; Cook v. Whiting, 16 Ill. 481. Chancellor Kent maintains that growing crops do not pass with tains that growing crops do not pass with the grant of the land. 4 Kent Com. 468; Smith v. Johnston, I Pa. St. 471. See Foote v. Colvin, 3 Johns. (N. Y.) 216; Kittredge v. Wood, 3 N. H. 503; Turner v. Reynolds, 23 Pa. St. 199; Chapman v. Long, 10 Ind. 465; McIlvaine v. Harris, 20 Mo. 467. 20 Mo. 467.

5. Whitmarsh v. Walker, I Metc. (Mass.) 313; Giles v. Simonds, 15 Gray

(Mass.), 411.

6. Crosby v. Wadsworth, 6 East, 202; 6. Crosby v. Wadsworth, 6 East, 202; Waddington v. Bristow, 2 B. & P. 452; Warwick v. Bruce, 2 M. & S. 205; Evans v. Roberts. 5 B. & C. 836; Whipple v. Foote, 2 Johns. (N. Y.) 418; Stewart v. Doughty, 9 Johns. (N. Y.) 108; Austin v. Sawyer, 9 Cow. (N. Y.) 40; Green v. Armstrong, 1 Denio, 554; Powell v. Rich, 31 Ill. 469; Graff v. Fitch, 58 Ill. 377. grant of a mere possibility, unless appurtenant to a vested estate.1 But the rule must be taken with the qualification, that if a deed with covenant of warranty is given, conveying only a possibility, when the possibility becomes a vested estate, the grantor will be estopped from denying the title of his grantee to the land.2

11. The Consideration.—It is sometimes stated as a general proposition that a consideration, either good or valuable, is necessary to be acknowledged or proved, in order to pass the title to real estate. But without qualification and explanation, this statement is both incorrect and misleading. All common-law conveyances. properly so-called, which operate by transmutation of possession, or as grants, such as feoffments, releases, etc., and modern statutory conveyances, where the statute does not expressly provide otherwise, no consideration is needed to pass the legal title to the land; and, except in the case of a fee granted by a common-law conveyance, the equitable estate will also pass without a consideration acknowledged or proved.3 In every case, a common-law convevance passes the legal title without a consideration; but if the estate granted is a fee simple, since it is presumed under the doctrine of resulting uses that a man will not part with the beneficial interest in real property without receiving some consideration therefor, the use or equitable interest therein results to the grantor, and the Statute of Uses draws the legal seisin or title out of the grantee and revests it in the grantor.4 But this is only a disputable presumption, which may be rebutted either by an ex-

1. Fulwood's Case, 4 Rep. 66; Davis v. Hayden, 9 Mass. 519; Trull v. Eastman, 3 Metc. (Mass.) 121; Jackson v. Catlin, 2 Johns. (N. Y.) 261; Dart v. Dart, 7 Conn. 255; Bayler v. Commonwealth, 40 Pa. St. 37; Tiedeman Real Prop. § 800; 3 Washb. Real Prop. 348. But the rule is not enforced now so rigidly as formerly. Thus the deed of an heir apparent, conveying lands belonging to his ancestor at the time, is held to attach in equity to the lands, when they have descended to the heir upon the death of the ancestor. Stover v. Eycleshimer, 46 Barb. (N. Y.) 84; Trull v. Eastman, 3 Metc. (Mass.) 121. So, also, has been sustained the grant by a soldier of bounty lands, to be thereafter allotted to him by the government. Jackson v. Wright, 14 Johns. (N.

2. Tiedeman Real Prop. §§ 727, 728; Smith v. Moodus Water Co., 35 Conn. 400; Clark v. Baker, 14 Cal. 629: Fairlittle v. Gilbert, 2 T. R. 187; Jackson v. Murray, 12 Johns. (N. Y.) 201; Pike v. Galvin, 29 Me. 183; Doe v. Dowdall, 3 Houst. 380; Reeder v. Craig, 3 McCord (S. Car.), 411; French v. Spencer, 21 How. (U. S.) 228; Washabaugh v. Entricken, 34 Pa. St.

74.
3. Green v. Thomas, 11 Me. 318;
Laberee v. Carlton, 53 Me. 212; Boynton v. Rees, 8 Pick. (Mass.) 332; Smith v. Allen, 5 Allen (Mass.), 458; Rogers v. Hillhouse, 3 Conn. 398; Winans v. Peebles, 31 Barb. (N. Y.) 380; Taylor v. King, 6 Munf. (Va.) 358; Den v. Hanks, 5 Land. (Ca.) 358; Den v. Hanks, 5 Land. Ired. (N. Car.) 30; Doe v. Hurd, 7 Blackf. (Ind.) 510; Thompson v. Thompson, 9 Ind. 331; Pierson v. Armstrong, I Clarke (Iowa), 282; Perry v. Price, I Mo. 553; Jackson v. Dillon, 2 Overt. 261. Where a deed can operate both as a commonlaw conveyance, and as a conveyance under the Statute of Uses, the absence of a consideration will not prevent it from operating as a common-law conveyance. Cheney v. Watkins, I Harr. & J. 527; Den v. Hanks, 5 Ired. (N. Car.) 30; Poe v. Domec, 48 Mo. 48; Perry v.

95, For v. Dolliet, 48 Mo. 48, Ferry v. Price, I Mo. 553.

4. Tiedeman Real Prop. § 443; 2 Washb. Real Prop. 393; I Spence Eq. Jur. 451; 2 Bl. Com. 331; Lloyd v. Spillett, 2 Atk. 150; 2 Pom. Eq. Jur. § 981; Osborn v. Osborn, 26 N. J. Eq. 385.

press declaration that the grantee shall have the equitable interest1 or by other facts appearing in the deed.2

It is different with conveyances operating under the Statute of Uses, such as the bargain and sale, covenant to stand seised, and lease and release. Since these conveyances depend upon the rules of equity for their validity, and a court of equity never interferes to enforce a contract, unless it is based upon a sufficient consideration, in all three of these conveyance a consideration is necessary. in order to raise in the grantee the use which the Statute of Uses is to execute into a legal estate. In a bargain and sale, and in lease and release, a valuable consideration is necessary, while a good consideration will be sufficient to support the covenant to stand seised.3

In every case, where a consideration is required, it is not necessary that the consideration be actually passed to the grantor, if the receipt of a proper consideration is acknowledged by him in the deed. But it must be acknowledged in the deed, or it must be proved aliunde to have actually passed to the grantor.4 But, while parol evidence is inadmissible to contradict the acknowledgment of

1. As where in the habendum clause it is declared that the lands shall be held "unto and to the use of" the grantee. I Spence Eq. Jur. 449, 511; 2 Bl. Com. 329; Lloyd v. Spillett, 2 Atk. 159; Bac. Law Tracts, 317; Co. Lit. 23a; Tudor Lead. Cas. 258; I Prest. Est. 191, 195; Pibus v. Mitford, I Ventr. 372; Tipping v. Cozzens, I Ld. Raym. 33; Volgen v. Yates, 5 Selden, 223; Farrington v. Barr, 36 N. H. 88; Sir Edw. Clerc's Case, 6 Rep. 17; Kenniston v. Leighton, 53 N. H. 311; Graves v. Graves, 9 Foster (N. H.), 129; Sprague v. Woods, 4 Watts & S. (Pa.) 192; Walker v. Walker, 2 Atk. 68; Lampleigh v. Lampleigh, I P. Wms. 112; St. John v. Benedict, 6 Johns. Ch. (N. Y.) 116; Capen v. Richardson, 7 Gray (Mass.), 370; Altham v. Anglesea, 11 Mod. 210; Boyd v. McLean, I Johns. (Mass.), 370; Annian v. Angiesca, 11 Mod. 210; Boyd v. McLean, 1 Johns. Ch. (N. V.) 582; Peabody v. Farbell, 2 Cush. (Mass.) 232; Adams v. Savage, 2 Salk. 679; Rawley v. Holland, 2 Eq. Cas. Abr. 753; Roe v. Popham, Dougl. (Mich.) 25.

2. Thus, where the estate was less than a fee simple, there was no resulting use, and consequently no need of a consideration, as the duties and liabilities attached to an estate for life, for years, and in tail, were considered a sufficient consideration to prevent the use resulting to the grantor. I Prest. Est. 192; I Cruise Dig. 376; I Spence Eq. Jur. 452; 2 Washb. Real Prop. 396; Tud. Lead. Cas. 258; Tiedeman Real Prop. § 443
3. Goodspeed v. Fuller, 46 Me. 141;

Jackson v. Florence, 16 Johns. (N. Y.)
47; Jackson v. Caldwell, I Cow. (N. Y.)
622; Jackson v. Delancey, 4 Cow. (N. Y.)
427; Okison v. Patterson, I Watts & S. (Pa.) 395; Boardman v. Dean, 34 Pa. St. 252; Cheney v. Watkins, I Harr. & J. 527; Den v. Hanks, 5 Ired. (N. Car.) 30; Wood v. Beach, 7 Vt. 522; Young v. Ringo, I B. Mon. (Ky.) 30; Webb, 20 Ala. 606; Kinnebrew v. Kinnebrew, 35 Ala. 636.

4. Jackson v. Alexander, 3 Johns. (N. Y.) 434; Jackson v. Pike, 9 Cow. (N. Y.) 69; Jackson v. Leek, 19 Wend. (N. Y.) 69; Jackson v. Leek, 19 Wend. (N. Y.)
339; Jackson v. Schoonmaker, 2 Johns.
(N. Y.) 230; Wood v. Beach, 7 Vt. 522;
White v. Weeks, 1 Pa. St. 486; Den v.
Hanks, 5 Ired. (N. Car.) 30; Toulmin v.
Austin, 5 Stew. & P. 470; Young v.
Ringo. I B. Mon. (Ky.) 30; Squire v. Harder, 1 Paige (N. Y.), 494; Bank of U. S. v.
Houseman. 6 Paige (N. Y.), 526; Titcomb v. Morrill, 10 Allen/(Mass.), 15;
Wilkinson v. Scott, 17 Mey. (Mass.), 15; comb v. Morrill, 10 Allen/(Mass.), 15; Wilkinson v. Scott, 17 Mass. 257; Griswold v. Messenger, 6 Pick. (Mass.) 517; Bragg v. Geddes, 93 Ill. 39; Bartlett v. Bartlett, 14 Gray (Mass.), 277; Gerry v. Stimpson, 60 Me. 186; Wilt v. Franklin, 1 Binn. (Pa.) 518; Boyd v. McLean, 1 Johns. Ch. (N. Y.) 582; Farrington v. Barr, 36 N. H. 86; Miller v. Wilson, 15 Ohio 108; Philbrook v. Delano, 29 Me. 410; Maigley v. Haner, 9 Johns. (N. Y.) 341; Shepherd v. Little, 14 Johns. (N. Y.) 210; Morse v. Shattuck, 4 N. H. 229; Gould v. Linde, 114 Mass. 36; Graves v. Graves, 29 N. H. 129; Cairns v. Colburn, 104 Mass. 274. burn, 104 Mass. 274.

consideration, in order to invalidate the deed between the grantor and grantee, 1 yet the acknowledgment is only prima facive evidence of the character and amount of the consideration. The amount and kind of consideration acknowledged is presumed to be the consideration agreed upon; but it may be shown by parol evidence, in an action to recover the consideration, that a different kind or

amount of consideration had been agreed upon.2

12. Voluntary and Fraudulent Conveyances.—Although a consideration may not be necessary to make a valid conveyance, as between the parties and their privies, the question presents a different phase in respect to the creditors of the grantor. Under statutes in England and in all of the States of the American Union, if a conveyance of lands is made without a substantial valuable consideration, while the grantor is in debt, unless it be to a wife or child, that is, where there is not even a good consideration between the parties, the conveyance is in any case void as against existing creditors. But in a voluntary conveyance to a wife or child, if at the time of conveyance sufficient property was left in the hands of the grantor to amply secure existing creditors, the conveyance will nevertheless be good. But if the grantor is insolvent then it may be avoided by existing creditors.

1. Trafton v. Hawes, 102 Mass. 541; Wilkinson v. Scott, 17 Mass. 257; Ballard v. Briggs, 7 Pick. (Mass.) 537; Basford v. Pearson, 9 Allen (Mass.), 303; Goodspeed v. Fuller, 46 Me. 141; Bassett v. Bassett, 55 Me. 127; Rockwell v. Brown, 54 N. Y. 213; Murdock v. Gilchrist, 52 N. Y. 246; Calloway v. Hearn, 1 Houst. 620; Mendenhall v. Parish, 8 Jones L. (N. Car.) 108; Lowe v. Weatherley, 4 Dev. & B. (N. Car.) 212; Kimball v. Walker, 30 Ill. 511; Lake v. Gray, 35 Iowa, 462; Kumler v. Ferguson, 7 Minn. 442; Coles v. Soulsby, 21 Cal. 47; Rhim v. Ellen, 36 Cal. 362. The recital of the consideration in a deed is only conclusive as to the fact that there was a consideration to the deed. Goodspeed v. Fuller, 46 Me. 141; Bassett v. Bassett, 55 Me. 127; Pierce v. Brew, 43 Vt. 295; Beach v. Packard, 10 Vt. 96; Paige v. Sherman, 6 Gray (Mass.), 542; Wilkinson v. Scott, 17 Mass. 257; Murdock v. Gilchrist, 52 N. Y. 246; Grout v. Townsend, 2 Denio (N. Y.), 335; Morris Canal v. Ryerson, 27 N. J. L. 467; Parker v. Foy, 43 Miss. 260; Rabsuhl v. Lack, 35 Mo. 316; Kimball v. Walker, 30 Ill. 511; Rockhill v. Spraggs, 9 Ind. 30; Lawton v. Buckingham, 15 Iowa, 22; Harper v. Perry, 28 Iowa, 63; Irvine v. McKeon, 23 Cal. 475.

2. Pierce v. Brew, 43 Vt. 295; Drury v. Tremont, etc., Co.. 13 Allen, 171; Paige v. Sherman, 6 Gray (Mass.), 511; Miller v. Goodwin, 8 Gray (Mass.), 542;

Morris Canal v. Ryerson, 27 N. J. L. 467; Parker v. Foy, 43 Miss. 260; Toulmin v. Austin, 5 Stew. & P. 410; Rabsuhl v. Lack, 35 Mo. 316; Lawton v. Buckingham, 15 Iowa, 22; Harper v. Perry. 28 Iowa, 63; Goodspeed v. Fuller, 46 Me. 141; Bassett v. Bassett, 55 Me. 127; Beach v. Packard, 10 Vt. 96; Wilkinson v. Scott, 17 Mass. 257; Murdock v. Gilchrist, 52 N. Y. 246; Grout v. Townsend, 2 Denio (N. Y.), 335; Callaway v. Hearn, 1 Houst. (Del.) 610; Mendenhall v. Parish, 8 Jones L. (N. Car.) 108; Lowe v. Weatherley, 4 Dev. & B. (N. Car.) 212; Kimball v. Walker, 30 Ill. 511; Rockhill v. Spraggs, 9 Ind. 30; Kumler v. Ferguson, 7 Minn. 442; Irvine v. McKeon, 23 Cal. 475; Rhim v. Ellen, 36 Cal. 362.

Ellen, 36 Cal. 362.

3. Sexton v. Wheaton, 8 Wheat. 229; Hinde's Lessee v. Longworth, 11 Wheat. 199; Lerow v. Wilmarth, 9 Allen, 386; Reade v. Livingston, 3 Johns. Ch. 500; Salmon v. Bennett, 1 Conn. 525; Washband v. Washband, 27 Conn. 424; Doe v. Hurd, 7 Blackf. 510; Mercer v. Mercer, 29 Iowa, 557; Bullitt v. Taylor, 34 Miss. 708; Potter v. Gracie, 58 Ala. 303; s. c., 29 Am. Rep. 548; Campbell v. Whitson, 68 Ill. 240; s. c., 18 Am. Rep. 553; Bongars v. Block, 81 Ill. 186; s. c., 25 Am. Rep. 276; Catheart v. Robinson, 5 Pet. 264; Babcock v. Eckler, 24 N. Y. 623; Dunlap v. Hawkins, 59 N. Y. 340; Beal v. Warren, 2 Gray, 447; Rockhill v.

Spraggs, 9 Ind. 32.
4. Lerow v. Wilmarth, 9 Allen, 386;

Subsequent creditors have no interest in such conveyances, and cannot avoid them unless they have been made with an actual fraudulent intent, and then they may be avoided by subsequent as

well as by existing creditors.1

13. Operative Words of Conveyance.—It is also a requisite of an effective deed of conveyance that it contain what are termed operative words of conveyance, i.e., words which indicate the intention of the grantor to transfer his estate or interest in the land, in whole or in part. The deed in general use in all the States contains ordinarily the words "give, grant, bargain, and sell," and this deed may be construed as a primary or secondary conveyance, a commonlaw conveyance, or one under the Statute of Uses, according as one or the other construction would best effectuate the intention of the parties.2 Not only is this the rule, but it is not even necessarv to use the technical operative words of any kind of conveyance, although it is advisable to do so, in order to remove every doubt as to the validity of the conveyance. Any words will be sufficient, if they clearly manifest the intention to transfer the estate.³ In like manner, it would not be fatal to the validity of the deed if the operative words are in the past, instead of in the present tense-for example, "has given and granted," instead of "do give and grant;" but it is the prevailing custom in most parts of this country to use both tenses, viz., have given and granted,

Pomeroy v. Bailey, 43 N. H. 118; Van Wyck v. Seward, 6 Paige, 62; Baker v. Bliss, 39 N. Y. 70; Posten v. Posten, 4 Whart. 42; Miller v. Pearce, 6 Watts & S. 101; Gridley v. Watson, 53 Ill. 193; Bridgeford v. Riddel, 55 Ill. 261; Pratt v. Myers, 56 Ill. 24; Stewart v. Rogers, 25 Iowa, 395; Baldwin v. Tuttle, 23 Iowa, 74.

Bridgelota v. Ridder, 55 In. 201, Fract v. Myers, 56 Ill. 24; Stewart v. Rogers, 25 Iowa, 395; Baldwin v: Tuttle, 23 Iowa, 74.

1. Thacher v. Phinney, 7 Allen, 150; Beal v. Warren, 2 Gray, 447; Trafton v. Hawes, 102 Mass. 541; Lormore v. Campbell, 60 Barb. 62; Stone v. Myers, 9 Minn. 311; Marston v. Marston, 54 Me. 476; Parkman v. Welch, 19 Pick. 231; Coolidge v. Melvin, 42 N. H. 521; Redfield v. Buck, 35 Conn. 329; Paulk v. Cooke; 39 Conn. 566; Van Wyck v. Seward, 6 Paige, 62; Savage v. Murphy, 34 N. Y. 508; Case v. Phelps, 39 N. Y. 164; Williams v. Davis, 69 Pa. St. 21; Pratt v. Myers, 56 Ill. 24; Bridgeford v. Riddel, 55 Ill. 261; Bullitt v. Taylor, 34 Miss. 740; Herschfeldt v. George, 6 Mich. 466.

2. Tiedeman Real Prop. § 782. See also Roe v. Traumarr, 2 Smith Lead. Cas. 288; Smith v. Frederick, 1 Russ. 86; Haggerston v. Hanbury, 5 B. & C. 101; Gibson v. Minet, 1 H. Bl. 569; s. c., 3 T. R. 481; Pray v. Pierce, 7 Mass. 381; Marshall v. Fisk, 6 Mass. 24; Russell v. Coffin, 8 Pick. 143; Jackson v. Beach, 1 Johns. Cas. 401; Rowletts v.

Daniel, 4 Munf. 473; Tabb v. Baird, 3 Call, 475; Cox v. Edwards, 14 Mass. 492; Brewer v. Hardy, 22 Pick. 376; Trafton v. Hawes, 102 Mass. 533; Barrett v. French, 1 Conn. 354; Cheney v. Watkins, 1 Harr. & J. 527; Okison v. Patterson, 1 Watts & S. 395; Emery v. Chase, 5 Me. 232; Bryan v. Bradley, 16 Conn. 474; Adams v. Guerard, 29 Ga. 676.

3. Ror v. Traumarr, 2 Smith Lead Cas. 288; Shove v. Pincke, 5 T. R. 124; Marden v. Chase, 32 Me. 229; Lynch v. Livingston, 8 Barb. 463; Ivory v. Burns, 56 Pa. St. 300; Folk v. Varn, 9 Rich. Eq. 303; Young v. Ringo, I B. Mon. 30; McKinney v. Settles, 31 Mo. 541. Thus. in Folk v. Varn, 9 Rich. Eq. 303, the grant was to A and his heirs, provided if A died in his minority without issue, then the property was to go to the issue of B; the word "go" was held sufficient, in connection with the previous grant, to pass the estate to the issue of B. In Adams v. Steer, Cro. Jac. 210, the word "alien" was held to be sufficient to pass an estate in reversion, where the deed could not operate as a bargain and sale, for the want of enrolment. But, on the other hand, a deed, in which the only words of conveyance were "sign over," was held to be invalid. McKinney v. Settles, 31 Mo. 541.

and do hereby give and grant, although the past tense is mere sur-

plusage.1

14. Execution—What Constitutes.—By the execution of a deed are here meant the various formalities required by law for the completion of it, which include signing, sealing, attestation, and

acknowledgment.

15. Power of Attorney.—A deed may be executed by the grantor himself, or by an agent duly authorized to act for him. But in order to enable an agent to execute a deed for his principal, he must have a power of attorney under seal, the fundamental rule of agency being that the power must be of the same grade of instrument as that which the agent is to execute.² This is not only the rule in regard to ordinary agencies, but it applies also to the general agency of partners in a partnership. Without an express authority granted by a power of attorney under seal, the conveyance by one partner of partnership lands, although in the name of the partnership, will pass only his interest or share in the property. And a subsequent ratification, to be effective, must also be by an instrument under seal.³

It is the settled rule in some of the States that a married woman cannot make a valid power of attorney, authorizing the conveyance of her lands, although the power is jointly executed with her husband, and is acknowledged in the manner prescribed by statute for the deeds of married women.⁴ But the power of the wife to convey her land by a duly appointed agent has been expressly recognized by statute in some of the States, and in others it seems to be taken for granted that she may execute a valid power of attorney.⁵ It is, however, generally held that a power of attorney

1. Tiedeman Real Prop. § 803; 3 Washb. Real Prop. 378; Pierson v. Arm-

strong, I Iowa, 202.

2. Livingston v. Peru Iron Co., 9 Wend. 522; Hanford v. McNair, 9 Wend. 54; Stetson v. Patten, 2 Me. 358; Montgomery v. Dorion, 6 N. H. 250; Tappan v. Redfield, 5 N. J. Eq. 399; Kime v. Brooks, 9 Ired. 219; Doe v. Blacker, 27 Ga. 418; Smith v. Dickenson, 6 Humph. 261; Plummer v. Russel, 2 Bibb, 17; Rhode v. Louthain, 8 Blackf. 413; Moore v. Pendleton, 16 Ind. 181; Videau v. Griffin, 21 Cal. 389. This statement must be qualified by the remark that, if it is executed by the agent in the presence of the principal, it is constructively the manual act of the principal, and needs no power of attorney under, seal. Ball v. Duntersville, 4 T. R. 313; King v. Longnor, 4 B. & Ad. 647; Frost v. Deering, 21 Me. 156; Burns v. Lynde, 6 Allen, 309; Gardner v. Gardner, 5 Cush. 483; Wood v. Goodridge, 6 Cush. 117; McKay v. Illoodgood, 9 Johns. 285; Kime v. Brooks, 9 Ired. 219; Videau v. Griffin, 21 Cal. 392.

3. Pars. on Partnership, 369; 3 Washb. Real Prop. 262. In *Iowa* a parol ratification is held to be sufficient to effectuate the conveyance by one partner. Haynes v. Seacrest, 13 Iowa, 455.

4. Allen v. Hooper, 50 Me. 373; Holladay v. Daily, 19 Wall. 609; Sumner v. Conant, 10 Vt. 9; Earle v. Earle, 1 Spen. 347; Kearney v. Macomb. 16 N. J. Eq. 189; Lewis v. Coxe, 5 Harr. 401. See Dawson v. Shirley, 6 Blackf. 531. In Toulmin v. Heidelberg, 32 Miss. 268, it was held that the deed by the husband's attorney, conveying the wife's lands, was void, although it was executed and acknowledged by her in proper form.

5. Roarty v. Mitchell. 7 Gray, 243; Gridley v. Wynant, 23 How. 503; Weisbrod v. Chicago, etc., R. Co., 18 Wis. 41; Wilkinson v. Getty, 13 Iowa, 137; Koch v. Briggs, 14 Cal. 262; Dow v. Gould, 31 Cal. 646. In Hardenberg v. Larkin, 47 N. Y. 113, it was held that the common law did not permit a married woman to appoint an attorney, but that she was then permitted to do so in the State of New York by statute. In Dawson v.

executed by a feme sole will be revoked by her subsequent

In respect to the manner in which the deed must be executed by the agent, the law is extremely technical. In the execution the act must appear to be that of the principal, and the deed must also show through whom the principal acts. If the premises are in the name of the agent as grantor, the deed cannot operate as the deed of the principal, although the agent signs the deed as agent by name, and the deed contains a recital of his authority.2 It has been held that a recital in the deed, that it was executed by the grantor by attorney, makes it unnecessary to add the agent's name to the signature.3 But the general rule is that the names of both the principal and the agent must appear in the signature.4

The authority of the agent must be exercised during the lifetime of the principal. His death revokes all powers of attorney for the

sale and conveyance of lands.5

16. Signing.—Under the Saxon rule, deeds were required to be subscribed with the sign of the cross, but did not have to be sealed. After the Norman Conquest sealing became a requisite, but signing of all kinds ceased to be required. To a late day deeds have

Shirley, 6 Blackf. 531, it was held that a married woman could not acknowledge

her deed by attorney

her deed by attorney.

1. 3 Washb. Real Prop. 259; 2 Kent's Com. 645; Judson v. Sierra, 22 Tex. 365.

2. 3 Washb. Real Prop. 277; Copeland v. Mercantile Ins. Co., 6 Pick. 198; Squier v. Morris, 1 Lans. 282; Townsend v. Smith, 4 Hill, 351; Martin v. Flowers, 8 Leigh, 158; Briggs v. Partridge, 7 J. & Sp. 339; Elwell v. Shaw, 16 Mass. 42; Townshend v. Corning, 23 Wend. 439; Barger v. Miller, 4 Wash. C. wenu, 439; Barger v. Miller, 4 Wash, C. C. 280; Harper v. Hampton, I Harr. & J. 709; Echols v. Cheney, 28 Cal. 160; Morrison v. Bowman, 29 Cal. 352; Binley v. Mann, 2 Cush. 337; McDonald v. Bear River Co., 13 Cal. 235; Carter v. Chandson, 21 Ala. 72; City of Providence v. Miller, 11 R. L. 271; S. 2. 22 Am. Page 1. 271; S. 2. 22 Am. Page 2. 23 Am. Page 2. 23 Am. Page 2. 24 Am. Page 2. 24 Am. Page 2. 24 Am. Page 2. 24 Am. Page 2. 25 Am. Pa v. Miller, 11 R. I. 271; s. c., 23 Am. Rep. 453. The deed must show in some part 453. The deed must show in some part that it was executed by an agent. Wood v. Goodridge, 6 Cush. 117; Northwestern Distillery Co. v. Brant, 69 Ill. 658 (18 Am. Rep. 631); Butterfield v. Beall, 3 Ind. 203; Doe v. Blacker, 27 Ga. 418; Hunter v. Miller, 6 B. Mon. 612; Thurman v. Comerca at Wood co.; Thurman v. Comerca at Wood co.; Thurman v. Comerca at Wood co.; man v. Cameron, 24 Wend. 90; Haile v. Mass. 561 (8 Am. Rep. 36).

3. Devinney v. Reynolds, 1 Watts &

S. 328. 4. Elwell v. Shaw, 16 Mass. 42; Wood τ Goodridge, 6 Cush. 117; Thurman v. Cameron, 24 Wend. 90. In Maine it is

held that the principal's name need not appear in the signature, if it appears in the recitals that he is the grantor. Inhabitants, etc. v. Clark, 68 Me. 87 (28 Am. Rep. 22). The proper mode of signing is A (principal), by B (agent); and there are some authorities which hold that no other signature will be a good execution. But the better opinion is that, where the deed purports in terms to be the act of the principal, and the signature is B (agent) for A (principal), or B as the attorney of A, and the like, it will be a valid execution. Wilkes v. Back, 2 East, 142; Mussey v. Scott, 7 Cush. 216; Jones v. Carter, 4 Hen. & M. 196; Doe v. Blacker, 27 Ga. 418; Butterfield v. Beall, 3 Ind. 208; Wilburn v. Larkin. 3 Blackf. 55; Hunter v. Miller, 6 B. Mon. 612; Martin v. Almond, 25 Mo. 313; Wilkinson v. Getty, 13 Iowa, 157. But it seems that in every case the deed must purport to be sealed with the seal of the princi-(agent) for A (principal), or B as the atto be sealed with the seal of the principal. Elwell v. Shaw, 16 Mass. 42; Wood v. Goodridge. 6 Cush. 117; Thurman v. Cameron, 24 Wend. 90.

5. Harper v. Little, 2 Me. 14; Stetson v. Patten, 2 Me. 358; Bergen v. Bennett, 1 Carnes Cas. 15; Hunt v. Rousmaniere, 2 Mason, 249; Wilson v. Troup, 2 Cow. 236; Mansfield v. Mansfield, 6 Conn. 562;

230, Mansheld v. Mansheld, o Conin. 325, Ferris v. Irving, 28 Cal. 648.
6. 3 Washb. Real Prop. 270; Co. Lit. 1716; Van Santvoord v. Sandford, 12 Johns. 198; Hutchins v. Byrne, 9 Gray, 367; Hammond v. Alexander, 1 Bibb, 333; Taylor v. Morton, 5 Dana, 365; 2

been recognized as valid without signing, but in most of the States, if not in all, signing is now necessary. The Statute of Frauds requires every instrument of conveyance coming within its operation to be signed. If the statute requires written instruments to be subscribed, they must be signed at the end. But otherwise the signature in any part of the paper will suffice.

Where the grantor is unable to write his name, another may at his request and in his presence sign for him, and by affixing a mark

to the signature the grantor can adopt it as his own.2

17. Sealing —According to the early common law, after the Norman Conquest, in consequence of the fact that very few persons could then even write their names, sealing was the only certain means of indicating the intention of the grantor to convey the estate to another. Although it has now become a mere formality, it is still held to be indispensable in most of the States, possibly in all except Louisiana, Kentucky, Iowa, Alabama, Kansas, and Texas, where by statute seals have been abolished.³ It is not necessary that the seal be referred to in the attestation clause, if the seal is actually affixed, although it is usual to make such a reference.4 It is not necessary for the party to affix the seal himself: it may be done by another with his consent.⁵

Bl. Com; 309; Williams Real Prop.

1. Sicard v. Davis, 6 Pet. 124; Hutch-Bennington, 19 Vt. 232; Elliott v. Sleeper, 2 N. H. 529; McDill v. McDill, I Dall. 64; Plummer v. Russell, 2 Bibb, 174; Chiles v. Conley, 2 Dana,

2. Baker v. Dening, 8 Ad. & El. 94; Truman v. Lose, 14 Ohio St. 154. But if the signing is done in the presence of the grantor, and by his procuration, the mark is not necessary, and the deed is held to be lawfully executed, although it is not shown that the grantor is disabled from signing himself. Ball v. Duntersville, 4 T. R. 313; Frost v. Deering. 21 Me. 156; Gardner v. Gardner, 5 Cush. 483; Wood v. Goodridge, 6 Cush. 117; Burns v. Lynde, 6 Allen, 309; McKay v. Bloodgood, 9 Johns. 285; Kime v. Brooks, 9 Ired. 219; Videau v. Griffin, 21 Cal. 302. In one case it was held that where a wife signed her husband's name to a deed in his absence, and he afterwards acknowledged it as his deed, and delivered it to the grantee, the subsequent acknowledgment and delivery consututed a ratification, or rather an adoption. of the signature as his own, and that the deed was properly executed. Bartlett 71.

Drake, 100 Mass, 175 3 3 Washb, Real Prop. 271: Shelton v. Armor, 13 Ala. 647; Simpson v. Mus dan.

3 Kans. 172; Swartz v. Ballou. 47 Iowa, 188; s. c., 29 Am. Rep. 470; Pierson v. Armstrong, I Clarke (Iowa), 293. The word "deed" means an instrument under seal, and, except in those States in which seals have been abolished by statute, no instrument can be called a deed without being sealed. Warren v. Lynch, 5 Johns. 239; Jackson v. Wood, 12 Johns. 5 Johns, 239; Jackson v. Wood, 12 Johns. 13; Jackson v. Wendell, 12 Johns. 355; Wadsworth v. Wendell, 5 Johns. Ch. 224; Underwood v. Campbell, 14 N. H. 393; Taylor v. Glaser, 2 Serg. & R. 502; Cline v. Black. 4 McCord, 431; Davis v. Brandon, 1 How. (Miss.) 154; Alexander v. Pollk of Miss 737; Davis v. Brandon, 1 How. Miss. 154; Alexander v. Polk, 39 Miss. 737; Deming v. Bullitt, 1 Blackf. 241; McCabe v. Hunter, 7 Mo.

355; Davis v. Judd, 6 Wis. 85.
4. State v. Peck, 53 Me. 299; Bradford v. Randall, 5 Pick. 496; Mill Dam Foundry v. Hovey, 21 Pick. 417; Taylor v. Glaser, 2 Serg. & R. 502.

5. Koehler v. Black River, etc., Co., 2 Blackf. 715; Elwell v. Shaw, 16 Mass. 42; Co. Lit. 6a; 3 Washb. Real Prop. 272. One seal may be adopted as the seal of all the parties to the deed. Bradford v. Randall, 5 Pick. 496; Tasker v. Bartlett, 5 Cush. 309; Warren v. Lynch, 5 Johns. 239; McKay v. Bloodgood, 9 Johns. 285; Atlantic Dock Co. v. Leavett, 54 N. Y. 35; Lambden v. Sharp, 9 Humph. 224; Davis v. Burton. 3 Scam. 144; Townsend v. Hubbard. 4 Hill, 451; Bradford v. Randull, 5 Pick. 496.

The law is not uniform in respect to what constitutes a sufficient sealing. At common law an impression upon wax or some other tenacious substance was required. Although the common-law seal is to some extent still required in some of the States.2 in the majority of the States any kind of an impression upon the paper will be sufficient, such as a scroll, with "L. S." or "seal" written in it.3

The seal of a corporation should be affixed to the deed by the

officer having the charge of it.4

18. Attestation.—Another general requisite is that the deed be executed in the presence of two or more witnesses, who sign the deed in attestation of the execution. At common law, witnesses were not required, and this is still the rule in some of the States 5 but, generally, the witnesses are required in the United States. sometimes only one, but usually two.6

It is not necessary that the grantor should execute the deed in

496; Tasker v. Bartlett, 5 Cush. 359; Perrine v. Cheeseman, 6 Halst. 174; s. c., 19 Am. Rep. 388; Adams v. Kerr, 1 Bos. & Pul. 360.

2. See Pillow v. Roberts, 13 How. 473; Carter v. Burley, 9 N. H. 558; Bates v. B. & N. Y. Cent. R. Co., 10 Allen, 254; Farmers', etc., Bank v. Haight, 3 Hill,

8. Warren v. Lynch, 5 Johns. 239; Williams v. Starr, 5 Wis. 549; McRaven v. McGuire, 9 Smed. & M. 34; Comerford v. Cobb, 2 Fla. 418; Michener v. Kenny, Wright, 459; Long v. Ramsey, I Serg. & R. 72; United States v. Coffin, Bee (Adm.) 140; Connolly v. Goodwin, 5 Cal. 220; Burton v. Le Roy, 5 Sawy. 510. The scroll is a good seal in Arkansas, Connecticut, Delaware, Florida, Michigan, Wisconsin, Minnesota, Oregon, Missouri, Ohio, Texas, Illinois, Mississippi, Georgia, Indiana, Maryland, North Carolina, Pennsylvania, and South Carolina, and perhaps others. 3 Washb. Real Prop., 274, 275. In Turner v. Field, 44 Mo. 382, the supreme court of Missouri held that a piece of colored paper, attached to the deed by mucilage, would be sufficient. It has, however, been held that a scroll is not a good seal, unless the attestation clause contains a recital of the fact of sealing. Cromwell v. Tate, 7 Leigh, 301. But see Ashwell v. Ayres, 4 Gratt. 283; Comerford v. Cobb. 2 Fla. 498; McGuire v. McRaven, 9 Sned. & Arentacky, the deed without proper attestation is held to be good as between the parties. Stone v. Ashley, 13 N. H. 38; Hastings v. Cutler, 24 N. H. 481; Kings-of the fact of sealing. Cromwell v. Tate, v. Croghan, 2 J. J. Marsh, 429. But see, contra. Crane v. Reeder, 21 Mich. 24 (44). The fact of with the contract of the deed without proper attestication is held to be good as between the parties. Stone v. Ashley, 13 N. H. 38; Hastings v. Cutler, 24 N. H. 481; Kings-of the fact of sealing. Cromwell v. Ayres, v. Croghan, 2 J. J. Marsh, 429. But see, contra. Crane v. Reeder, 21 Mich. 24 (44). The fact of the fact M. 34. It is held in Mississippi that an sota, a deed with one subscribing witness, instrument will be treated as sealed where when two are required, will be sufficient

1. 3 Inst. 169; Warren v. Lynch, 5 Supervisors, 58 Miss. 483 (38 Am. Rep. Johns. 239; Bradford v. Randall, 5 Pick. 338). A slit in a parchment with a rib-496; Tasker v. Bartlett, 5 Cush. 359; bon through it will not constitute a seal.

Duncan v. Duncan, I Watts, 322.

4. Jackson v. Campbell, 5 Wend. 575.

5. 2 Bl. Com. 307; Dale v. Thurlow, 12

Metc. 157; Thatcher v. Phinney, 7 Allen, 149; Craig v. Pinson, Cheves, 273; Menley v. Zeigler, 23 Tex. 88; Long v. Ramsey, 1 Serg. & R. 73; Wiswall v. Ross, 4 Port. 321; Ingram v. Hall, 1 Hayw.

6. Clark v. Graham, 6 Wheat. 577; Merwin v. Camp, 3 Conn. 35; Coit v. Starkweather, 8 Conn. 289; Winsted Sav. Bank v. Spencer, 26 Conn. 195; Stone v. Ashley, 13 N. H. 38; Hastings v. Cutler, 24 N. H. 481; Kingsley v. Holbrook, 45 N. H. 320; Craig v. Pinson, Cheves, 272; Patterson v. Pease, 5 Ohio, 119; Richardson v. Bates, 8 Ohio St. 261; Fitzhugh v. Croghan, 2 J. J. Marsh, 420; Wilkins v. Wells, 8 Smed. & M. 325; Shirley v. Fearne, 33 Miss. 653; Chandler v. Kent, Minn. 525; Ross v. Worthington, II Minn. 443; Kentucky Bank v. Jones, 59 Ala. 123; Crane v. Reeder, 21 Mich. 24 (4 Am. Rep. 430); Genter v. Morrison, 31 Barb. 155. In New Hampshire and Kentucky, the deed without proper attesevidence establishes the intent to seal, to support an action for specific perform-but there must be something more than a ance in equity. Day v. Adams, 42 Vt. mere recital. McCarley v. Tippah Co. 520; Ross v. Worthington, 11 Minn. 438. the presence of the witnesses, if he subsequently acknowledges its execution to the witnesses, when they write their names in attestation of the execution.1

19. Reading of the Deed, When Necessary.—Unless the grantor or grantee requests the deed to be read, when it is executed, the reading is not a requisite, and neither can avoid the deed. on the plea of ignorance of the contents.² But if either party requests the deed to be read, it must be read, and if it is read falsely, or the

reading is refused altogether, the deed will be void.3

20. Acknowledgment or Probate.—(See also ACKNOWLEDGMENTS.) -As a general rule, it is not necessary to the validity of a deed that it should have a certificate of acknowledgment or probate attached to it.4 But in most of the States, in order that the deed may be recorded, and the record furnish constructive notice of the contents of the deed to subsequent purchasers, it must be acknowledged or probated before an officer duly authorized to take such acknowledgments or probates, and the deed must contain a certificate to that effect.⁵ Acknowledgment of the deed is in some States required to be made by the grantor, and in other States one of the witnesses must prove the deed by his affidavit or sworn certificate.

The officer who takes the acknowledgment cannot be interested

execution of the deed, and are not permitted to express opinions concerning the mental capacity of the grantor. Dean v. Fuller, 40 Pa. Št. 474.

2. Hartshorn v. Day, 19 How. 223; Kimball v. Eaton, 8 N. H. 371; Truman v. Lore, 14 Ohio St. 155; Manser's Case,

2 Rep. 3.

3. Hallenbeck v. Dewitt, 2 Johns. 404; Jackson v. Hayner, 12 Johns, 473; Manser's Case, 2 Rep. 3; Henry Pigott's Case, 11 Rep. 276; Souverbye v. Arden, 1 Johns. Ch. 252; Jackson v. Croy, 12 Johns, 429; Withington v. Warren, 10 Metc. 424; Taylor v. King, 6 Munf. 358. But in case it is read falsely, the innocent party may nevertheless hold the fraudulent party liable on the deed. 2 Greenl. Cruise, 328; Rex v. Longuor, I Nev. & M. 576.

4. Gibbs v. Swift, 12 Cush. 393; Blain v. Stewart, 2 Iowa, 383; Lake v. Gray, 30 Iowa, 415 (35 Iowa, 459); Doe v. Naylor, 2 Blackf. 32; Stevens v. Hampton, 46 Mo, 408; Ricks v. Reed, 19 Cal. ** Gibbs v. Swift, 12 Cush. 393; Blain v. Stewart, 2 Iowa, 383; Lake v. Gray, 30 Iowa, 415 (35 Iowa, 459); Doe v. Naylor, 2 Blackf. 32; Stevens v. Hampton, 46 Mo. 408; Ricks v. Reed, 19 Cal. 571. In Ohio, the certificate is necessary to pass title, and in New York and Texas an unacknowledged deed is not good against subsequent purchasers and incumbrancers. Smith v. Hunt, 13 Ohio, 260;

1. Parke v. Mears, 2 B. & P. 217; Genter v. Morrison, 31 Barb. 155; Raggen Jackson v. Phillips. 9 Cow. 113. Wit- v. Avery, 63 Barb. 65; Wood v. Chapin, 13 Jackson v. Phillips, 9 Cow. 113. Wit. v. Avery, 63 Barb. 65; Wood v. Chapin, 13 nesses to deeds, unlike the witnesses to a N.Y. 509; Morse v. Salisbury, 48 N.Y. 636; will, are merely intended to attest the Menley v. Zeigler, 23 Tex. 93. Perhaps, in all the States, the acknowledgment by a married woman is absolutely required to make the deed valid. See Bruce v. Perry, II Rich. 121; McBryde v. Wilkinson, 29 II Rich. 121; McBryde v. Wikinson. 29
Ala. 662; Perdue v. Aldridge, 19 Ind. 290;
Steffey v. Steffey, 19 Md. 5; Grove v.
Todd, 41 Md. 633 (20 Am. Rep. 76);
Gebb v. Rose, 40 Md. 387; Hepburn v.
Dubois, 12 Pet. 345; Mariner v. Saunders,
5 Gilm. 113; Bruce v. Wood, 1 Met. 542;
Drury v. Foster, 2 Wall. 24; Beal v. Harmon, 38 Mo. 435; Constantine v. Van Winkle, 2 Hill, 240; Platt v. Battels, 28 Vt. 685; Churchill v. Monroe, I R. I.

5. 3 Washb. Real Prop., 314; Carpenter v. Dexter, 8 Wall. 582; Thomas v. Le Baron, 8 Met. 355; Sterlien v. Daley, 37 Mo. 483; Catlin v. Washburn, 3 Vt. 25; Clark v. Troy, 20 Cal. 219; Stubbs v. Kohn, 64 Ala. 186; Chamberlain v. Sparter, and Hun. 467; Anderson v. Ducas

in the conveyance, but it is no objection if he is related to the parties.1

A proper certificate should show that the officer has complied with all the substantial requirements of the statute.² And the taking of an acknowledgment is so far a judicial act as to be generally held to be conclusive against subsequent purchasers as to the facts therein stated.³ But as between the parties, the certifi-

1. Beaman v. Whitney, 20 Me. 413; Withers v. Baird, 7 Watts, 227; Stevens v. Hampton, 46 Mo. 408; Wilson v. Traer, 20 Iowa, 233; Kimball v. Johnson, 14 Wis, 683; Groesbeck v. Seeley, 13 Mich. 345; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474. As a matter of course the husband cannot take his wife's acknowledgment. In most of the States the wife must be examined separate and apart from the husband, to ascertain if it was her free and voluntary deed. Etheridge v. Forebee, 9 Ired. 312; Bryan v. Stump, 8 Gratt. 241; Elliott v. Piersoll, I McLean, 13; Meriam v. Harsen, 2 Barb. Ch. 232. The separate acknowledgment is no longer required in New York or Massachusetts. N. Y. Laws of 1880, ch. 30; White v. Groves, 107 Mass. 325; s. c., 9 Am. Rep. 28. The acknowledgment taken by an officer without the limits of territory in which he is authorized to act is void and of no effect. Share v. Anderson, 7 Serg. & R. 43; s. c.. 10 Am. Dec. 41; Lynch v. Livingston, 8 Barb. 463; s. c., 6 N. Y. 422; Jackson v. Humphrey, I Johns. 598; Jackson v. Colden, 4 Cow. 280; Thurman v. Cameron, 24 Wend. 91; Howard Mut. L. Ass'n v. McIntyre, 3 Allen, 572; Harris v. Burton, 4 Harr. 66. See Gittings v. Hall, I Har. & J. 14; s. c., 2 Am. Dec. 502. But see Odiorne v. Mason, 9 N. H. 502. But see Odiorne v. Mason, 9 N. H. 24; Learned v. Riley, 14 Allen, 109, in which it was held that a justice of the peace could take acknowledgments outside of his county. A United States judge, when authorized by State law to take acknowledgments, may take and certify to them in any part of the United States. Moore v. Vance, I Ohio, 12.

2. Chandler v. Spear, 22 Vt. 388; Wood v. Cochrane, 39 Vt. 544; Tully v. Davis, 30 Ill. 108; Jacoway v. Gault, 20 Ark. 190; Bryan v. Ramirez, 8 Cal. 461. The certificate is liberally construed. Ingraham v. Grigg, 13 Smed. & M. 22; Morse v. Clayton, 13 Smed. & M. 373; Crowley v. Wallace, 12 Mo. 143; Angier v. Schiefelin, 72 Pa. St. 106 (13 Am. Rep. 659). Neither the place nor the date of the acknowledgment need be stated in the certificate. The place and date in such a case will be presumed to be when and where

the deed was executed. Brooks v. Chaplin, 3 Vt. 281 (23 Am. Dec. 200); Galusha v. Sinclear, 3 Vt. 394; Rackleff v. Norton, 19 Me. 274. See Fuhrman v. London, 13 Serg. & R. 386 (15 Am. Dec. 608); Pierce v. Brown, 24 Vt. 165; Robertson v. Sullivan, 2 Yerg, 108. The official title of the officer must appear in the certificate. Johnson v. Haines, 2 Ohio, 55 (15, Am. Dec. 533); Cassell v. Cooke, 8 Serg. & R. 268 (II Am. Rep. 610). But see Van Ness v. Banks, 13 Pet. 7; Pierce v. Hakes, 23 Pa. St. 231. The certificate must state that the officer knew the person appearing before him to be the one whose name appears in the deed, and that he acknowledged the deed to be his act for the purposes therein mentioned. Jackson v. Osborn, 2 Wend. 555 (20 Am Dec. 649). See Thurman v. Cameron, 24 Wend, 87. An acknowledgment by one of two or more grantors has been held to be sufficient. Shaw v. Poor, 6 Pick. 86; Catlin v. Ware, o Mass. 218.

3. Bissett v. Bissett, I Har. & McH. 211; Hartley v. Frosh, 6 Tex. 208; Mc-Neeley v. Rucker, 6 Blackf. 391; Graham v. Anderson, 42 III. 514; Hester v, Glasgow, 79 Pa, St. 79 (21 Am. Rep. 461); Singer Mfg. Co. v. Rook, 84 Pa. St. 442 (24 Am. Rep. 204); Miller v. Wentworth, 82 Pa. St. 280; Williams v. Baker, 71 Pa. St. 476. And this is true, also, in respect to the certificate of acknowledgment by a married woman. White v. Graves, 107 a married woman. White v. Glaves, 107 Mass, 325 (9 Am. Rep. 38); Kerr v. Russell, 69 Ill. 666 (18 Am. Rep. 634); Singer Mfg. Co. v. Rook, 84 Pa. St. 442 (24 Am. Rep. 204); Johnstone v. Wallace, 53 Miss. 331 (24 Am. Rep. 699). Where the certification of the company of the certification of the certificat icate of the married woman is for any reason defective, it cannot be subsequently amended, unless the omission relates to an unimportant fact. Angier v. Schieffelin, 72 Pa. St. 106 (13 Am. Rep. 659); Merritt v. Yates, 71 Ill. 636 (22 Am. Rep. 128). The certificate of acknowledgment is conclusive against subsequent purchasers, even though it is tainted with fraud. Williams v. Baker, 71 Pa. St. 476. See Kerr v. Russell, 69 Ill. 666 (18 Am. Rep. 634); Ridgley v. Howard, 3 Har. & McH.

But in some of the States the certifi-

cate may be shown by parol evidence to be tainted with fraud or duress. 1 and that there was no acknowledgment at all. 2

21. Delivery and Acceptance.—The last requisite of a deed is its. delivery by the grantor and its acceptance by the grantee. These acts are as essential to the validity of a deed as signing or sealing. The deed has no effect until delivery and acceptance.³ But when the deed is once delivered, the title is beyond the control of the grantor, and no act can affect it except where, under the registration laws, the grantee has failed to record the deed, and the grantor makes a second conveyance of the land to an innocent purchaser. or where the estate granted is one upon condition, and the grantor enters for the breach of the condition.4

The deed must be completed before delivery.⁵ Although the

cate of acknowledgment is only prima facie evidence of its own genuineness as well as of the facts therein stated. Jackson v. Schoonmaker, 4 Johns. 161; Jackson v. Hoyner, 12 Johns. 472; Hall v. Patterson, 51 Pa. St. 289; Borland v. Welesth as Johns. Walrath, 33 Iowa, 130; Dodge v. Hollins-

Walrath, 33 Iowa, 130; Dodge v. Hollinshead. 6 Minn. 26; Annan v. Folsom, 6 Minn. 500; Edgerton v. Jones, 10 Minn. 420; Landers v. Bolton, 26 Cal. 406.

1. Eyster v. Hathaway, 50 Ill. 522; Williams v. Baker, 71 Pa. St. 482; Graham v. Anderson, 42 Ill. 514; Bissett v. Bissett, 1 Har. & McH. 211; Hartley v. Frosh. 6 Tex. 208, Miller v. Wentworth, 82 Pa. St. 280; Johnson v. Van Velsor, 43 Mich. 208. See Wannell v. Kern, 57 Mo. 478; Williams v. Robson, 6 Ohio St. 510; Van Orman v. McGregor, 23 Iowa, 300; Hourtenne v. Schnoor, 33 Mich. 274; Hourtienne v. Schnoor, 33 Mich. 274; Hays v. Hays, 5 Rich. 31.
2. Smith v. Ward, 2 Root, 378 (1 Am.

Dec. 80).

Jec. 80).

3. Goddard's Case, 2 Rep. 4b; Younge v. Gibbeau, 3 Wall. 641; Fairbanks v. Metcalf, 8 Mass. 230; Jackson v. Dunlap, 1 Johns. Cas. 114; Church v. Gilman, 15 Wend. 656; Fisher v. Hall, 4th. N. H. 421; Cook v. Brown, 34 N. Y. 476; Johnson v. Farley, 45 N. H. 510; Stiles v. Brown, 16 Vt 563; Fletcher v. Mansur, 5 Ind. 267; Hulick v. Scovill, 9 Ill. 175; Overman v. Kerr. 17 Jowa. 486. 175; Overman v. Kerr, 17 Iowa, 486; Fisher v. Beckwith, 30 Wis. 55 (11 Am. Rep. 546). As long as the deed remains in the possession of the grantor, and even when the deed has been stolen, and the property passes into the hands of an innocent purchaser, or it falls into the possession of the grantee in any other way than by the consent of the grantor, and with the intention to pass the title, the title is still in the grantor, and no one can acquire title from the grantee. Thoroughgood's Case, 9 Rep. 136; Chamber-lain v. Staunton, 1 Leon. 140; Cutts v.

York Co., 18 Me. 190; Mills v. Gore, 20. Pick. 28; Methodist Church v. Jaques, 1 Johns. Ch. 456; Roberts v. Jackson. 1 Wend. 478; Black v. Lamb, 12 N. J Eq. 108; Hadlock v. Hadlock, 22 Ill. 388; Fisher v. Beckwith, 30 Wis. 55 (II Am. Rep. 546); Jones v. Jones, 6 Conn. 111 (16 Am. Dec. 35); Rulledge v. Montgomery, 30 Ga. 641; Critchfield v. Critchfield, 24 Pa. St. 100; Armstrong v. Stovall, 26. Miss. 275; Brown v. Brown, 66 Me. 316. The United States patent is a title by record, and therefore it is not necessary for the patent to be delivered to the patentee in order to pass title. United States. v. Schurz, 102 U. S. 378, 397.
4. Shelton's Case, Cro. Eliz. 7: Souv-

erbye v. Arden, I Johns. Ch. 255; Younge v. Moore, I Strobh. 48; Connelly v. Doe, 8 Blackf. 320; Somers v. Pumphrey, 24 Ind. 240. See Prutsman v. Baker, 30. Wis. 644; s. c., 11 Am. Rep. 592. And though the delivery was made by the grantor through the fraudulent misrepresentations of the grantee, or through some mistake of fact or law, if the delivery was an intentional act it passes the title, and can only be divested by an equitable proceeding. If the property is in the mean time conveyed to an innocent pur-chaser; he acquires an indefeasible title. Berry v. Anderson, 22 Ind. 41. The title also passes, although both parties believed that the title would not pass by the delivery of that deed. Henchliffe v. Hin-

man, 18 Wis. 138.

5. Burns v. Lynde, 6 Allen, 305; Mc-Kee v. Hicks, 2 Dev. 379. But, except in the case of the deeds of married women, the certificate of acknowledgment or probate may be added after delivery, although a delivery will not be presumed to have been made before the date of the acknowledgment. People v. Snyder, 41 N. Y. 402; Darst v. Bates, 51 Ill. 439;

Bianchard v. Tyler, 12 Mich. 339.

date is not necessary to the validity of the deed, 1 if the deed contains a date, it will be presumed that the deed was executed and delivered on that day. But if it was in fact delivered on some other day, this may be shown by evidence aliunde, and the deed will take effect only from the actual day of delivery.3

The deed must also be delivered during the lifetime of the

grantor.4

The acceptance by the grantee is equally essential; and where the acceptance is not proven, and the facts do not justify the presumption of law that the grantee has accepted, the title does not pass.⁵ But the acceptance is always presumed, if the deed is found in the possession of the grantee.⁶ If there are several grantees, the deed may be delivered to them individually, at the

1. Goddard's Case, 2 Rep. 4b; Mitchell v. Bartlett, 51 N. Y. 453; Jackson v. Bard, 4 Johns. 230; Jackson v. Schoonmaker, 2 Johns. 234; Elsey v. Metcalf, 1 Denio, 323; Cutts v. York Co., 18 Me. 190; Harrison v. Phillips Academy, 12 Mass. 455; McKinney v. Rhoades, 5 Watts, 343; Smith v. Porter, 10 Gray, 67; Geiss v. Odenheimer, 4 Yeates, 278; Swan v. Hodges, 3 Head, 254; Colquhoun v. Atkinson, 6 Munf. 550; Thompson v. Thompson, 8 Ind. 333; Banning v. Edes, 6 Minn, 402; Savery v. Brownv. Edes, 6 Minn. 402; Savery v. Browning, 18 Iowa, 249; Lyon v. McIlvain, 24

ing, 18 Iowa, 249; Lyon v. McIivain, 24 Iowa, 15.

2. Osbourne v. Rider, Cro. Jac. 135; Blake v. Fash, 44 Ill. 302; County of Henry v. Bradshaw, 20 Iowa, 355; Mc Kinney v. Rhodes, 5 Watts, 343; Woodman v. Smith, 37 Me. 25.

3. Lee v. Insurance Co., 6 Mass. 219; Mitchell v. Bartlett, 51 N. Y. 453; Jackson v. Bard, 4 Johns. 230; Elsey v. Metcalf, I Denio, 323; Cutts v. York Co., 18 Me 100: Harrison v. Phillips Academy, Me. 190; Harrison v. Phillips Academy, 12 Mass. 455; Smith v. Porter, 10 Gray, 67; Geiss v. Odenheimer, 4 Yeates, 278; Colquhoun v. Atkinson, 6 Munf. 550; Savery v. Browning, 18 Iowa, 249; Lyon v. McIlvain, 24 Iowa, 15; Breckenridge v. Todd, 3 Mon. 52 (16 Am. Dec. 83); Banning v. Edes, 6 Minn. 402; Gardiner v. Collins, 3 Mason, 398; Harris v. Norton, 16 Barb. 264; Genter v. Morrison, 31 Barb. 155; Meech v. Fowler, 14 Ark.

31 Bard. 155; Meech v. Fowler, 14 Ark. 29; Sweetzer v. Lowell, 33 Me. 446.
4. Shoenberger v. Zook. 34 Pa. St. 24; Jackson v. Leek, 12 Wend. 107; Jackson v. Phipps, 12 Johns. 421; Fisher v. Hall, 41 N. Y. 423; Fay v. Richardson, 7 Pick. 91; Woodbury v. Fisher, 20 Ind. 388. But there may be an acceptance by the grantee after the grantor's death; Thatcher v. St. Andrew's Church, 37 Mich 264; Foster v. Mansfield, 3 Met. 412; McLean v. Nelson, I Jones L. 396; Goodell v. Pierce, 2 Hill, 659. But see Fisher v. Hall, 41 N. Y. 416; Prutsman v.

Baker, 30 Wis. 644; s. c., 11 Am. Rep. 592.
5. Rogers v. Cary, 47 Mo. 232; Younge v. Guilbean, 3 Wall. 636; Jackson v. Phipps, 12 Johns. 421; Wilsey v. Dennis, Phipps, 12 Johns. 421; winsey v. Belluis, 44 Barb. 359; Fonda v. Sage, 46 Barb. 123; Hatch v. Bates, 54 Me. 140; Maynard v. Maynard, 10 Mass. 456; Baker v. Haskell, 47 N. H. 479; Jones v. Bush, 4 Harr. 1; Pennel v. Weyant, 2 Harr. 4 Harr. 1; Pennel v. Weyant, 2 Harr. 501; Mitchell v. Ryan. 3 Ohio St. 377; Kingsbury v. Burnside, 58 Ill. 310; Ward v. Winslow, 4 Pick. 518; Stewart v. Redditt, 3 Md. 67; Corner v. Baldwin, 16 Minn. 172; Best v. Brown, 25 Hun, 223. See Com. v. Jackson, 10 Bush, 151 Listil accordance with a restaurance of the state Until acceptance by the grantee, the property is subject to the claims of the creditors of the grantor, who have levied upon the property after a tender of delivery; Parmelee v. Simpson, 5 Wall. 86; Derry Bank v. Webster, 44 N. H. 268; Johnson v. Farley, 45 N. H. 509; Elmore v. Marks, 39 Vt. 538; Woodbury v. Fisher, 20 Ind. 389; Jackson v. Cleveland, 15 Mich. 101; Day v. Griffith, 15 Iowa, 103. If the grantor tenders the deed, and the grantee declines to accept,. the title remains in the grantor unaffected by the tender. Tompkins v. Wheeler, 16 Pet. 119; Derry Bank v. Webster, 44 N. H. 268; Johnson v. Farley, 45 N. H. N. H. 208; Johnson v. Farley, 45 N. H.
509; Cole v. Gill, 14 Iowa, 529; Read v.
Robinson, 6 Watts & S. 329; Peavey v.
Tilton, 18 N. H. 152; Xenos v. Wickham, 14 C. B. (N. S.) 474; Welsh v.
Sackett, 12 Wis. 243.
6. Chandler v. Temple, 4 Cush.
285; Newlin v. Beard, 6 W. Va. 110;
Southern Life Co. w. Cole 4 Fla.

Southern Life Ins. Co. v. Cole, 4 Fla. 350; Jones v. Swayze, 42 N. J. L. 279. See Goodwin v. Ward, 6 Baxt. 107; Little v. Gibson, 39 N. H. 505; Morris v. Henderson, 37 Miss. 501; Roberts v. Swearingen, 8 Neb. 363.

same time or on different days, but the grantor may declare the delivery of the deed to one to be equivalent to a delivery to all.1

When the deed is found in the possession of the grantee, a delivery is presumed to have been made by the grantor;2 but the presumption may be rebutted by showing that the possession of the deed had been obtained without the consent of the grantor, or without his intention to make a delivery.3 The intention always controls the determination of what constitutes a sufficient delivery. and it may be manifested by acts or by words, or by both, in the most informal manner. But either acts or words, manifesting the intention, must be present, in order to constitute a good deliverv.4 But the deed need not be actually delivered, if the grantor intends the execution to have the effect of a delivery, and the parties act upon this presumption.⁵ Delivery will be presumed from the fact that the deed was executed before the witnesses, and declared to he delivered in their presence.6

1. Hannah v. Swarner, 8 Watts, 9; Tewksbury v. O'Connell, 20 Cal. 69. Where the deed conveys conditional limitations and remainders, the delivery to the tenant of the particular tenant is always considered as constituting a delivery to the tenants of these future estates. Phelps v. Phelps, 17 Md. 134; Folk v. Varn, 9 Rich. Eq. 303.

2. Ward v. Lewis, 4 Pick. 518; Chandler v. Temple, 4 Cush. 285; Cutts v. York

Co., 18 Me. 190; Canning v. Pinkham, I N. H. 353; Clark v. Ray, I Harr. & J. 319; Southern Life Ins. Co. v. Cole. 4

319; Southern Life Ins. Co. v. Cole, 4
Fla. 359; Houston v. Stanton, 11 Ala.
412; Ward v. Ross, 1 Stew. (Ala.) 136;
Green v. Yarnall, 6 Mo. 326.

3. Johnson v. Baker, 4 B. & Ald. 440; Adams v. Frye, 3 Met. 109;
Ford v. James, 2 Abb. Pr. 162; Roberts v. Jackson, 1 Wend. 478; Black v. Lamb, 12 N. J. Eq. 116; Black v. Shreve, 13 N. J. 457; Den v. Farlee, 1 N. J. 279; Little v. Gibson, 39 N. H.
505; Williams v. Sullivan, 10 Rich. Eq.
217; Morris v. Henderson, 37 Miss. 501; Wolverton v. Collins, 34 Iowa, 238. Wolverton v. Collins, 34 Iowa, 238.

4. Thus the grantor may direct the grantee to take the deed lying upon the table, and if the grantee takes it, there will be a good delivery. So, also, will it be a good delivery if the grantor throws the deed upon the table, with the intention that the grantee shall take it, though nothing be said to indicate the intention. Souverbye v. Arden. I Johns. Ch. 253; Scrigham v. Wood, 15 Wend. 545; Penn-sylvania Co. v. Dovey. 64 Pa. St. 260; Stewart v. Weed, II Ind. 92: Mills v. Gore, 20 Pick. 28; Methodist Church v. Jacques. I Johns. Ch. 456; Williams v. Snillivar. 10 Rich. 217. Sullivan, 10 Rich. 217.

5. Walker v. Walker, 42 Ill. 311: Rogers v. Carey, 47 Mo. 235. Thus, leaving the deed to be recorded will be a good delivery if done with the knowledge of the grantee, and with the evident or expressed intention the evident or expressed intention that the title is to pass to the grantee. Parmelee v. Simpson, 5 Wall. 86; Elmore v. Marks, 39 Vt. 538; Pennsylvania Co. v. Dovey, 64 Pa. St. 260; Foliy v. Vantuyl, 9 N. J. 153; Cooper v. Jackson, 4 Wis. 549; Jackson v. Cleveland, 15 Mich. 101; Somers v. Pumphrey, 24 Ind. 240; Jackson v. Leek, 12 Wend. 107; Jackson v. Phipps, 12 Johns. 418; Jackson v. Richards, 6 Cow. 617; Stillwell v. Hubbard, 20 Wend. 44; Mills v. Gore, 20 Pick. 28; Hedge v. Drew, 12 Pick. 141; Parker v. Hill. 8 Met. 447; Berkshire Mut. Fire Ins. Co. v. Sturgis, 13 Gray, 177; Hawks v. Pike, 105 Mass. 560; Hatch v. Bates. 54 Me. r39; Porter v. Buckingham, 2 Harr. 197; Boody v. v. Buckingham, 2 Harr. 197; Boody v. Davis, 20 N. H. 140; Boardman v. Dean, 34 Pa. St. 252; Baldwin v. Maultsby. 5 Jred. 505; Oliver v. Stone, 24 Ga. 63; Denton v. Perry. 5 Vt. 382. See Robinson v. Gould, 26 Iowa, 63; Cecil v. Beaver, 28 Iowa, 241. But the intention to have the registration operate as a deto have the registration operate as a delivery must be proved. Maynard v. Maynard, 10 Mass. 456: Jackson v. Phipps, 12 Johns. 418; Elsey v. Metcalf, I Denio. 326; Pennel v. Weyant, 2 Harr. 501; Jones v. Bush, 4 Harr. I.

6. Moore v. Hasleton, 9 Allen, 106; Howe v. Howe, 99 Mass. 98. But if, after execution, the deed is retained by the grantor for any purpose, such as security for the payment of the purchasemoney, which indicates that the transact

money, which indicates that the transaction is not yet complete, delivery will not

But in order that any acts may constitute a good delivery, the grantor must part with his entire control of the deed; that is delivery must be absolute and unconditional. There will not be a good delivery if the deed is handed over to the grantee or third person conditionally, with the right to the grantor to resume possession of it if the condition is broken. This is only possible in the case of an escrow. Where the grantor is a corporation, noth, ing more is usually required to make a good delivery than the proper execution of the deed by the officers of the corporation, unless the corporation appoint an agent to make an actual delivery of the deed, when the actual delivery will be required.2

But where the grantee is a corporation, the deed must be delivered to some duly authorized agent, in order that its accept-

ance by him may bind the corporation.3

Although once held to be doubtful, it is now fully settled that a deed may be delivered to a third person for the grantee; and if subsequently assented to by the grantee, it will be as good a delivery as if it had been made directly to him.4

The knowledge and assent of the grantee are just as necessary

be presumed from its execution. Jackson v. Dunlap, I Johns. Cas. 114.

v. Dunlap, I Johns. Cas. 114.

1. Cook v. Brown, 34 N. H. 476; Phillips v. Houston, 5 Jones L. 3c2; Dearmond v. Dearmond, 10 Ind. 191; Somers v. Pumphrey, 24 Ind. 240; Rivard v. Walker, 39 Ill. 413; Prutsman v. Baker, 30 Wis. 644 (11 Am. Rep. 592); Jacobs v. Alexander. 19 Barb. 243; Fitch v. Bunch, 30 Cal. 213. A delivery, subject to the right of recalling the deed, would not pass title, although the grantor should die without recalling it. Brown v. Brown. die without recalling it. Brown v. Brown, die without recalling it. Brown v. Brown, 66 Me. 316; Prutsman v. Baker, 30 Wis. 644 (11 Am. Rep. 592). But see Woodward v. Camp, 22 Conn. 461; Belden v. Carter, 4 Day 66 (4 Am. Dec. 185); Hathaway v. Payne, 34 N. Y. 106.

2. 3 Washb. Real Prop. 287, 288; Co. Lit. 22 n., 36 n.; Derby Canal v. Wilmott,

9 East, 360.
3. Western R. v. Babcock, 6 Met.

4. Doe v. Knight. 5 B. & C. 671; Hatch v. Bates, 54 Me. 139; Hatch v. Hatch, 9 Mass. 307; Marsh v. Austin. 3 Met. 412; O'Kelly v. O'Kelly, 8 Met. 439; Ruggles v. Lawson, 13 Johns. 285; Church v. Gilman, 15 Wend. 656; Boody v. Davis, 20 N. H. 140; Buffum v. Green, 5 N. H. 71; Belden v. Carter, 4 Day, 66; s.c., N. H., 71; Belden v. Carter, 4 Day, 66; s. c., 4 Am. Dec. 185; Stephens v. Rinehart, 72 Pa. St. 440; Stephens v. Huss, 54 Pa. St. 26; Wesson v. Stevens, 2 Ired. Eq. 557; Phillips v. Houston, 5 Jones L. 302; Cloud v. Calhoun, 10 Rich. Eq. 358; Oliver v. Stone, 24 Ga. 63; Mallett v. Page, 8 Ind. 364; Stewart v. Weed, 11 Ind. 92; Mitchell v. Ryan, 3 Ohio St.

382; Morrison v. Kelly, 22 Ill. 626; Kingsbury v. Burnside, 58 Ill. 310; Cooper v. Jackson, 4 Wis. 553; Cecil v. Beaver, 28 Iowa, 241. But the grantor must part with his entire control of the deed. A delivery to a stranger of a deed to be delivered to the grantee at the direction of the grantor, or unless countermanded, does not pass any title. Prestman v. Baker, 30 Wis. 644; Phila. W. & B. R. v. Howard, 13 How. 334; Worralli v. Munn, 1 Seld. 229; Graves v. Dudley, 20 N. Y. 76; Parker v. Parker, 1 Gray, 20 N. Y. 70; Parker v. Parker, I. Glay, 409; Berry v. Anderson, 22 Ind. 39; Black v. Shreve, 13 N. J. 459; Howe v. Dewing, 2 Gray, 476; Dyson v. Bradshaw, 23 Cal. 528; Cook v. Brown, 34 N. H. 476; Phillips v. Houston, 5 Jones L. 302; Millett v. Parker, 2 Met. (Ky.) 613; Shrillett v. Parker, 2 Met. (Ky.) 613; Shriley v. Ayres, 14 Ohio, 310; Fitch v. Bunch, 30 Cal. 213. But the law does not presume, when a deed is handed toa third person, that it has been done with the intention of passing title to the grantee. In order to make such an act a. delivery to the grantee, the intention of the grantor must be expressed at the time in an unmistakable manner. But there is no need of any formal words or Church v. Gilman, 15 declarations. Wend. 656; Souverbye v. Arden, I Johns. Ch. 255; Maynard v. Maynard, 10 Mass. 456; Tibbals v. Jacobs, 31 Conn. 428; Folk v. Varn, 9 Rich. Eq. 303; Mitchell v. Ryan, 3 Ohio St. 377; Cecil v. Beaver, 28 Iowa, 240. Where the deed is mailed at the request of the grantee, the deposit of it in the post-office is a good delivery... McKinney v. Rhoades, 5 Watts, 343. in this mode of delivery, as in the delivery or tender of the deed to the grantee himself; and until acceptance, the delivery is inoperative and no title passes.1

Delivery and acceptance are "mutual and concurrent acts," and unless the delivery is an open and continuing one, the deed cannot be accepted by the grantee at some subsequent time.2

But the grantee's acceptance will be presumed, when he is aware

of the conveyance, and it is positively beneficial to him.3

But where the grantee is under legal disabilities, as in the case of infant grantees, and perhaps married women, the presumption of assent becomes a rule of law, and knowledge of the conveyance and of its delivery is not essential.4

The confidential relation existing between the grantee and the person who receives the deed often makes the reception of the deed by the third person equivalent to the acceptance by the grantee himself, as in the case of an acceptance by a parent of a deed for an infant child,5 or by a husband for the benefit of his wife. The husband's assent is binding upon her even after his death 6

But, ordinarily, the presumption of law, in respect to the assent of the grantee, is not conclusive; and if it be shown that he positively dissents, of course no title passes."

1. Young v. Guilbean, 3 Wall. 636; Jackson v. Bodle, 20 Johns. 184; Wilsey v. Dennis, 44 Barb. 359; Bullitt v. Taylor, 34 Miss. 741; Mallett v. Page, 8 Ind. 364; Boardman v. Dean, 34 Pa. St. 252; Derry Bank v. Webster, 44 N. H. 268; Jackson v. Phipps, 12 Johns. 422; Somers v. Pumphrey, 24 Ind. 243; Berkshire Mut. Fire Ins. Co. v. Sturgis, 13 Gray, 177; Dike v. Miller, 24 Tex. 417; Mitchell v. Ryan, 3 Ohio St. 386; Mills v. Gore, 20 Pick. 28; Stillwell v. Hubbard, 20 Wend. 44. In New Hampshire it is held that a deed is revocable by the

It is held that a deed is revocable by the granter after delivery, as long as the grantee does not accept it. Derry Bank v. Webster, 44 N. H. 268; Johnson v. Farley, 45 N. H. 509.

2. Jackson v. Dunlap, I Johns. Cas. II4; Jackson v. Bodle, 20 Johns. 187; Church v. Gilman, 15 Wend. 656; Canning v. Pinkham, I N. H. 353; Buffum v. Green 5 N. H. 71; Hullek v. Scovil v. Green, 5 N. H. 71; Hulick v. Scovil, 9 Ill. 177. But if the delivery is open and continuing, the subsequent acceptance will complete the delivery, so as to pass the title to the grantee, although the grantor may have died in the mean while. Hatch v. Hatch, 9 Mass. 307; Foster v. Mansfield, 3 Met. 412; O'Kelly v. O'Kelly, 8 Met. 439; Stephens v. Huss, 54 Pa. St. 26; Shaw v. Hayward, Cush. 175; Mather v. Corless, 103 Mass. 568. But see State Bank v. Evans, 3 Green, 155.

3. Robinson v. Gould, 26 Iowa, 93; Cecil v. Beaver, 28 Iowa, 241. But an acceptance will not be presumed as long as the grantee is ignorant of the conveyas the granter is ignorant of the convey ance. Maynard v. Maynard, 10 Mass. 456; Prestman v. Baker, 30 Wis. 644; Baker v. Haskell, 47 N. H. 479; Thompson v. Lloyd, 49 Pa. St. 128. And if questioned, it must be shown that the was made; Hulick v. Scovil, 9 Ill. 177; Walker v. Walker, 42 Ill. 311; Bensley v. Atwill, 12 Cal. 231.

Delivery and Acceptance.

4. Baker v. Haskell, 47 N. H. 479; Spencer v. Carr, 45 N. Y. 410; Gregory v. Walker, 38 Ala. 26; Rivard v. Walker. 39 Ill. 413; Cecil v. Beaver, 28 Iowa, 241; Mitchell v. Ryan, 3 Ohio St. 387; Peavey v. Tilton, 18 N. H. 152; Concord

Bank v. Bellis, 10 Cush. 378.
5. Baker v. Haskell, 47 N. H. 479;
Souverbye v. Arden, 1 Johns. Ch. 255;
Jaques v. Methodist Church, 17 Johns.
577; Gregory v. Walker, 38 Ala. 26;
Bryan v. Wash, 6 Ill. 557; Morrison v.
Vally 22 Ill 612: Rogers v. Carey 47. Kelly, 22 Ill. 612; Rogers v. Carey, 47 Mo. 236; Cloud v. Calhoun, 10 Rich.

Mo. 236; Cloud v. Camoun, 10 Klen. Eq. 362.

6. Butler & Baker's Case, 3 Rep. 26; Melvin v. Proprs., etc., 16 Pick. 167; Foley v. Howard, 8 Clarke (Iowa), 36.

7. Peavey v. Tilton, 18 N. H. 152; Townson v. Tickell, 3 B. & Ald. 36; Young v. Guilbean, 3 Wall. 641; Tompkins v. Wheeler, 16 Pet. 119; Read v.

22. Escrows.—An escrow is a deed, which is delivered to a third person, to be held by him until a certain event happens, and then to be delivered to the grantee, and to become void and of no effect if the event does not happen. In order to be an escrow, it must be delivered to a stranger: nothing but an absolute delivery can be

made directly to the grantee. (See Escrow.)

Whether a delivery, conditional in character, to a stranger shall operate as an escrow or as a grant in præsenti, depends upon the intention of the parties, as manifested by their words and acts. If the deed is handed to a stranger, with instructions that the delivery of the deed shall depend upon the happening of an uncertain event. it is an escrow; but if it be delivered to a stranger with instructions that it shall not be delivered until a future day, as, for example, until the death of the grantor, it is said to be a grant in præsenti.2

The importance of distinguishing escrows from other deeds conditionally delivered to a third person lies in this fact: Escrows can only operate from the time when the condition is performed. A delivery before the performance of the condition will not have

the effect of passing the title to the grantee.3

In an escrow no title passes until the second delivery; 4 yet for

Robinson, 6 Watts & S. 329; Fonda v. Sage, 46 Barb. 109; Welsh v. Sackett, 12 Dikes v. Miller, 24 Tex. 423.

1. Fairbanks v. Metcalf, 8 Mass. 230;

1. Fairbanks v. Metcalt, 8 Mass. 230; Ward v. Lewis, 4 Pick. 520; Gilbert v. N. A. F. Ins. Co., 23 Wend. 43; Worrall v. Munn. 6 N. Y. 229; Black v. Shreve, 13 N. J. 458; Lawton v. Sager, 11 Barb. 349; Moss v. Riddle. 5 Cranch, 351; Cin., W. & Z. R. Co. v. Iliff, 13 Ohio St. 249; M. & Ind. Plank Road Co. Onio St. 249; M. & Ind. Flank Koad Co. v. Stevens, 10 Ind. 1; State v. Chrisman, 2 Ind. 126; Foley v. Cowgill, 5 Blackf. 18; Blake v. Fash, 44 Ill. 305: Jane v. Gregory, 42 Ill. 416; Herdman v. Bratton, 2 Harr. 396; Fireman's Ins. Co. v. McMillan, 29 Ala. 160. See Bibb v. McMillan, 29 Ala. 160. See Bibb v. Reid, 3 Ala. 88. But if the delivery to the grantee is merely for the purpose of having it delivered immediately to a third person to hold as an escrow, the delivery to the grantee would not vest the title in him, since the intention was to the contrary. Murray v. Stair, 2 B. & C. 82; Jackson v. Sheldon, 22 Me. 569; Gilbert v. N. A. Fire Ins. Co., 23 Wend. 43; Simonton's Estate, 4 Watts, 180; Den v. Partee, 2 Dev. & B. 530. But see Fairbanks v. Metcalf, 8 Mass. 239; Braman v. Bingham, 26 N. Y. 483.

2. Foster v. Mansfield, 3 Met. 414; Cook v. Brown. 34 N. H. 465; Tooley v. Dibble, 2 Hill, 641: Braman v. Bing-ham, 26 N. Y. 483; Hathaway v. Payne.

34 N. Y. 106; Price v. Ft. W. & C. R.
Co., 34 Ill. 13.
3. Fairbanks v. Metcalf, 8 Mass. 230; Souverbye v. Arden, 1 Johns. Ch. 240; Hinman v. Booth, 21 Wend, 267; People v. Bostwick, 32 N. Y. 450; Stiles v. Brown, 16 Vt. 563; Smith v. So. Royal-Brown, 16 Vt. 563; Smith v. So. Royalton Bk., 32 Vt. 341; Black v. Shreve, 13 N. J. 458; Jackson v. Sheldon, 22 Me. 569; Blight v. Schenck, 10 Pa. St. 285; Berry v. Anderson, 22 Ind. 40; Illinois Cent. R. Co. v. McCullagh, 59 Ill. 170; Chipman v. Tucker, 38 Wis. 43; s.c., 20 Am. Rep. I. In Rhodes v. Gardiner, 30 Me. 110, it was held that sufficient title passed by such an unauthorized delivery in order to give a good title to an innocent purchaser from the grantee. But see, contra, Harkreader v. Clayton, 56 Miss. 383; s.c., 31 Am. Rep. 369; Chipman v. Tucker, 38 Wis. 43; s.c., 20 Am. Rep. 1.
4. Frost v. Beekman, 1 Johns. Ch. 297; James v. Vanderheyden, 1 Paige, 385.

Pope, 47 Ga. 445; Hinman v. Booth, 21 Wend. 267; Jackson v. Rowland, 6 Wend. 666 (22 Am. Dec. 557); Dyson v. Bradshaw, 23 Cal. 528. As soon as the condition is performed, the grantee is entitled to the deed, and the depositary is thereafter the agent or bailee of the grantee. Prestman v. Baker, 30 Wis. 644 (11 Am. Rep. 592); Couch v. Meeker, 2 Conn. 302 (Am. Dec. 274). And, although the deed after its delivery many purposes, after the second delivery, the deed relates back to the first delivery, and takes effect nunc pro tunc. This is the case when the doctrine of relation is necessary on account of some intervening obstacle, which would otherwise invalidate the deed. as

where the grantor dies before the second delivery.1

23. Registration.—In all of the States of the Union laws have been passed requiring deeds of conveyance to be recorded in books kept by a public officer for the use of the public. The recording of a deed is not essential to its validity; it is only required in order to furnish to a subsequent purchaser the ready means of investigating the title, and to charge him with constructive notice of the contents of all recorded deeds. An unrecorded deed is postponed to the claims of a subsequent purchaser who pays value for the land and takes a deed to it without notice. But it can be enforced against the parties to the deed, and also against any subsequent purchaser who takes his deed without a valuable consideration or with notice of the unrecorded deed.2 But in order that the record may be constructive notice of the deed and its contents the deed must possess all the requisites of a valid deed, and must be one required or permitted by law to be recorded.3

to the third person can only be recalled by the grantor for default in the performance of the condition, -Worrall v. Munn, 6 N. Y. 229; Millett v. Parker, 2 Met. (Ky.) 608; Wright v. Shelby R. Co., 16 B. Mon. 4, -the premises so far continue to be the property of the grantor that they can be levied upon by the grantor's creditors, and their attachments before the second delivery will take precedence to the title of the grantee. Frost v. Beekman, I Johns. Ch. 297; Jackson v. Catlin, 2 Johns. 248; Jackson v. Rowland, 6 Wend. 666.

1. Ruggles v. Lawson, 13 Johns. 285; Jackson v. Rowland, 6 Wend. 666; Jackson v. Rowland, 6 Wend. bob; Shirley v. Ayres, 14 Ohio, 307; Price v. Ft. W. & C. R., 34 Ill. 34; Evans v. Gibbs, 6 Humph. 405; Hall v. Harris. 5 Ired. Eq. 303; Frost v. Beekman, 1 Johns. Ch. 257; Jackson v. Catlin, 2 Johns. 248; Hatch v. Hatch, 9 Mass. 307; Carr v. Hoxie. 5 Mason, 60; Parryman's Case, 3

2. Hill v. Epley, 31 Pa. St. 335; Barney v. McCarty, 15 Iowa, 514; Galland v. Jackman, 26 Cal. 87; Shotwell v. Harri-Son. 22 Mich. 410; Dixon v. Lacoste, I Smed. & M. 107; Wilkins v. May, 3 Head, 176; Maupin v. Emmons, 47 Mo. 306; Patterson v. Delaronde, 8 Wall. 300; Morrison v. Kelly, 22 III. 610; Jamaica Pond v. Chandler, 9 Allen, 169; Speer v. Evans, 47 Pa. St. 144; Belk v. Massey, 11 Rich. 614; Ellison v. Wilson, 36 Vt. 67. Any actual notice of an unrecorded deed, sufficient to put a reasonably prudent man on his inquiry, will give the unrecorded deed priority over a subsequently recorded deed; Earle v. Fish, 103 Mass. 492; Trull v. Bigelow, 16 Mass. 496; Stephens v. Morse, 47 N. H. 433; Murphy v. Nathans, 46 Pa. St. 512; King v. Gilson, 32 Ill. 654; Sicard v. Davis, 6 Pat. 124; Irvin v. Smith. 17 Ohio, 226; Van Rensselaer v. Clark, 17 Wend. 25; Jackson v. Leek, 19 Wend. 339; Corliss v. Corliss, 8 Vt. 373; Wells v. Morrow, 38 Ala. 125; Martin v. Quattlebaum, 3 McCord, 205; Rogers v. Jones, 8 N. H. 264; Burkhalter v. Ector, 25 Ga. 55; Ricks v. Reed, 19 Cal. 571; Lillard v. Rucker, 9 Yerg. 64; Dixon v. Doe, 1 Smed. & M. 70; Givan v. Doe, 7 Blackf. 210: Applegate v. Gracy, 9 ent man on his inquiry, will give the un-7 Blackf. 210: Applegate v. Gracy, 9 Dana, 224; Hopping v. Burnham, 2 Greene (Iowa), 39; Fitzhugh v. Barnard, 12 Mich. 110. And notice after the delivery of the second deed, but before the payment of the consideration, has been held sufficient to give priority to the first ur recorded deed. Blanchard v. Tyler, 12 Mich. 339.
3. De Witt v. Moulton, 17 Me. 418; Shaw

v. Poor, 6 Pick. 88; Blood v. Blood, 23 Pick. 80; Graves v. Graves, 6 Gray, 391; Isham v. Bennington Co., 19 Vt. 230; Peck v. Mallams, 10 N. Y. 518; Carter v. Champion, 8 Conn. 549; Meighen v. Strong, 6 Miss. 177; Kerns v. Swope. 2 Watts, 75; McKean v. Mitchell, 35 Pa. St. 269; Bossard v. White, 9 Rich. Eq. 483; Harper v. Barsh. 10 Rich. Eq. 149; Harper v. Tapley, 35 Miss. 510; Hern-

If a deed has been properly recorded it may be used as evidence in most of the States without any further proof of its execution.1

The record is constructive notice to only subsequent purchasers claiming from and under the grantor either as grantee, mortgagee. or attaching creditor. It is not notice to those who claim independently of the grantor or acquire their interest from the grantor by a prior deed.2 It has been held,3 although contradicted by other cases,4 that a purchaser from the heir cannot claim precedence for his recorded deed over the unrecorded deed from the ancestor, on the ground that since the unrecorded deed was a good conveyance against the ancestor, nothing descended to the heir which he could convey.

If one has a recorded deed which has priority over a prior unrecorded deed, the holder of the recorded deed acquires an absolute title, which he can convey over to those who have notice of the prior unrecorded deed.⁵ So, also, if the recorded deed is to one who has notice of the prior deed, although in his hands the recorded deed does not have precedence, his grantee without notice

don v. Kimball, 7 Ga. 432; Burnham v. Chandler, 15 Tex. 441; Stevens v. Hampton, 46 Mo. 408; Bishop v. Schnei-Wilcox, 20 Wis. 529; Pringle v. Dunn, 37 Wis. 449 (19 Am. Rep. 772); Stewart v. McSweeney, 14 Wis. 468. In Musgrove v. Bouser, 5 Oreg. 313 (20 Am. Rep. 737), the supreme court of Oregon held that the record of a deed not properly admitted to record furnishes constructive notice of its contents to all who have actually seen the record. It is also a rule that the record must have been properly made, in order to furnish constructive notice to subsequent purchasers; and it has been held in Wisconsin and Iowa, though denied in other States, that the record without an index of the deed furnishes no notice. Pringle v. Dunn, 37 Mis. 449 (19 Am. Rep. 772); Barney v. McCarty, 15 Iowa, 522; Whatley v. Small, 25 Iowa, 188; Bishop v. Schneider, 46 Mo. 472 (2 Am. Rep. 553); Schell v. Stein, 76 Pa. St. 398 (18 Am. Rep. 416); Chatham v. Bradford, 50 Ga. 327 (15 Am. Rep. 692); Mut. Life Ins. Co. v. Dake, 87

692); Mut. Lite Ins. Co. v. Dake, o, N. Y. 257.

1. Younge v. Guilbeau, 3 Wall. 640; Houghton v. Jones, I Wall. 702; Carpenter v. Dexter, 8 Wall. 532; Ball v. McCawley, 29 Ga. 355; Hutchinson v. Rust. 2 Gratt. 394; Doe v. Prettyman. I Houst. 339; Samuels v. Borrowscale, 2014 Mass. 2027. Simpson v. Mundy, 3 104 Mass 207; Simpson v. Mundy, 3 Cans 181; Young v. Ringo, 1 B. Mon. 30: Clark v. Trov. 20 Cal. 219; Fell v. Young 63 Ill. 106; Sanders v. Bolton. 26 Cal. 405; Hinchliffe v. Hinman, 18 Wis. 135; Toulmin v. Austin, 5 Stew. & P.

410. And in some of the States a certified copy of the record is made original evidence in establishing the claim of title from one grantor to another. Samuels v. Borrowscales, 104 Mass. 207; Harvey v. Mitchell, 31 N. H. 582; Farrar v. Fessenden, 39 N. H. 268; Dixon v. Doe, 5 Blackf. 106; Bogan v. Frisby, 36

Miss. 178.
2. Tilton v. Hunter, 24 Me. 35; Shaw v. Poor, 6 Pick. 85; Bates v. Norcross, 14 Poor, o Pick. 85; Bates v. Norcross, 14 Pick. 224; Flynt v. Arnold, 2 Met. 619; Doe v. Beardsley, 2 McLean, 412; Whittington v. Wright, 9 Ga. 23; Miller v. Bradford, 12 Iowa, 18; Crockett v. Maguire, 10 Mo. 34; Losey v. Simpson 3 Stockt. Ch. 246; Ely v. Wilcox, 20 Wis. 530; George v. Wood, 9 Allen, 80; Holley v. Hawley, 39 Vt. 532. Generally an unrecorded deed will be good against subsequently attaching creditors as well subsequently attaching creditors, as well as against subsequent purchasers with notice. But in several of their States, under their local law, a deed must be recorded to be good against creditors. Guerrant v. Anderson, 4 Rand. 208; Lillard v. Rucker, 9 Yerg. 64; Ring v.

Gray, 6 B. Mon. 368.

3. Hill v. Meeker, 24 Conn. 211; Hancock v. Beverly, 6 B. Mon. 532; Harlan v. Seaton, 18 B. Mon. 312.

4. Earl v. Fiske, 103 Mass. 491; Powers

v. McFerron, 2 Serg. & R. 47; McCulloch v. Endaly, 3 Yerg. 346; Youngblood v. Vastine, 46 Mo. 239; Kennedy v. North-

rup, 15 Ill. 148.
5. Lowther v. Carlton, 2 Atk. 139; Trull v. Bigelow, 16 Mass. 406; Bumpus v. Platner, I Johns. Ch. 219; Bell v. Twilight, 18 N. H. 159.

would acquire the paramount title. But if the prior unrecorded deed is recorded before the conveyance by the grantee of the second deed, the purchaser from the second grantee will be charged with notice of the late record of the prior deed.1

Not only is the record constructive notice of the recorded deed and of its contents, but it will also be notice of all other deeds and their contents, to which reference is made in the recorded deed.2

No one can take advantage of the record for the purpose of giving his deed priority over another unrecorded deed, who has not paid a substantial valuable consideration therefor, and he must show by extraneous evidence that it has been paid.3

In the absence of special rules, a priority acquired by the regis-

tration takes effect from the date of the record.4

But in some of the States the recording law provides that if a deed is recorded within the time allowed by law, it relates back to the time of delivery of the deed, and has priority over a subsequently executed deed which has been previously recorded. The time allowed for recording varies with the different States. If in these States a deed has been recorded after the expiration of the time allowed by law, the record gives constructive notice from the time of the record, but does not relate back to the time of delivery.5

B. THE COMPONENT PARTS OF A DEED, -24. Deeds of Indenture and Deeds-poll.—Deeds are of two kinds, deeds of indenture and deedspoll. A deed of indenture is a deed consisting of as many parts or duplicates as there are parties. Originally, these parts, or duplicates, were written on the same piece of paper or parchment, and for the purpose of identifying the several parts they were cut apart

1 Thus, if A gives an unrecorded deed to B, and a second recorded deed to same land to C, but C knows of the unrecorded deed to B, because of his knowledge C cannot claim priority over B; but if C conveys to D, who has no actual notice of B's title, D can claim priority over B. unless B has his deed recorded before C unless B has his deed recorded before C conveys to D. Flynt v. Arnold, 2 Met. 619; Trull v. Bigelow, 16 Mass. 406; Adams v. Cuddy, 13 Pick. 460; Bracket v. Ridlon, 54 Me. 434; Hagthorp v. Hook, I Gill & J.270; Baylis v. Young, 51 Ill. 127.

2. White v. Foster, 102 Mass. 375; Gilbert v. Peteler, 38 N. Y. 165; Aeer v. Westcott, 46 N. Y. 384; Cambridge Valley Bank v. Delano. 48 N. Y. 326; Hamilton v. Nutt. 34 Conn. 501; Baker v. Matcher. 25 Mich. 53.

v. Matcher, 25 Mich. 53.
3. Boone v. Chiles, 10 Pet. 211; Watkins v. Edwards, 23 Tex. 447; Parker v. Foy, 43 Miss. 260; Maupin v. Emmons. 47 Mo. 304; Bishop v. Schneider, 46 Mo. 472 (2 Am. Rep. 533); Shotwell v. Harrison, 22 Mich. 410.

4. 4 Kent's Com. 457; Cushing v. Hurd,

4 Pick. 252; Goodsell v. Sullivan, 40 Conn. 83. And the date of the record is taken at the time when the deed was deposited for registration. Den v. Richman, I Green (N. J.), 52; Nichols v. Reynolds, I R. I. 30; Horsley v. Garth. 2 Gratt. 471; Bigelow v. Topliff, 25 Vt. 274; Warnock v. Wightman, I Brev. 331; 274; Warnock v. Wightman, 1 Diev. 331, Hine v. Robbins, 8 Conn. 347; Gill v. Fauntleroy, 3 B. Mon. 177; Kessler v. State, 24 Ind. 315; Quirk v. Thomas, 6 Mich. 76; Harrold v. Simonds, 9 Mo. 326; Davis v. Ownsby, 14 Mo. 175; McRaven v. McGuire, 9 Smed. & M. 34; Diebes v. Vong 10 Ala 265; McCabe Dubose v. Young, 10 Ala. 365; McCabe v. Gray, 20 Cal. 509.

5. McRaven v. McGuire, 9 Smed. & M. 39; Leger v. Doyle, 11 Rich. L. 109; Anderson v. Dugas. 29 Ga. 440; Lightner v. Mooney. 10 Watts, 407; Souder v. Morrow, 33 Pa. St. 83; Den v. Richman, 1 Green (N. J.), 43; Mallory v. Stodder, 6 Ala. 801; Helms v. O'Bannon, 26 Ga. 132; Belk v. Massey, 11 Rich L. 614; Northrup v. Brehmer, 8 Ohio, 392; Poth v. Anstatt, 4 Watts & S. 307.

The Premises-Appurtenants

in an irregular line, somewhat resembling the teeth of a saw, instar dentium, some word having been written over the proposed line of severance. It is from this quaint and obsolete method of execution that the name indenture is derived. It was also formerly the custom for each party to execute only one and a different part, and the part executed by the grantor was called the original: while that which was executed by the grantee was called the coun-But it is now customary for all the parties to execute terbart. each part.1

The object of a deed-poll is to transfer the grantor's property. and therefore he alone executes it. There is but one copy of a

deed-poll.2

Deeds-poll are usually written in the first person, while deeds of indenture are in the third person, but it is by no means a requisite distinction.³ Indeed the distinction between the two deeds is of no practical value, except that, where the grantee assumes an obligation by the deed, at common law the action for the breach of the obligation will vary according to the character of the deed; if a deed of indenture, it will be the action of assumpsit, and if a deed-poll, the action of debt or covenant.4 But in the so-called Code states, all distinction has passed away with the abolition of all forms of actions.5

25. Component Parts of a Deed.—As stated by Lord Coke, they consist of the premises, habendum, tenendum, reddendum, condition, warranty, and covenants. It is advisable to follow the form and order here prescribed, but this is not essential, and the deed will be valid if it contains all the requisites already discussed, it

matters not how irregularly it might be arranged.6

26. The Premises.—The term premises is given to all that part of a deed which precedes the habendum clause, and generally includes the names of the parties, the recitals which may be necessary to an explanation of the deed and of its operation; the consideration, and receipt of the same; the operative words of conveyance description of the thing granted, and, if it is a deed of indenture, the date.7 But it is not necessary for all of these things to appear in the premises, if they appear elsewhere in the deed.8

27. Appurtenants.—Whatever belongs to the thing granted as parcel thereof, such as houses, fixtures, mines, crops, easements,

1. 3 Washb. Real Prop. 311; Co. Lit. 229a. Butler's note, 140; Dyer v. Sanford, 9 Met. 395; Dudley v. Sumner, 5 Mass. 438.

2. 3 Washb. Real Prop. 311; Dyer v. Sanford, 9 Met. 395; Giles v. Pratt, 2 Hill (S. Car.), 439.
3. Tiedeman Real Prop. § 824; Hallett

v. Collins, 10 How. 174; Hipp v. Hackett,

4. Goodwin v. Gilbert, 9 Mass. 510; Nugent v. Riley, I Met. 117; Newell v. Hill, 2 Met. 180; Hinsdale v. Humphrey, 15 Conn. 431; Johnson v. Massy, 45

Vt. 419; Maule v Weaver, 7 Pa. St.

5. Atlantic Dock Co. v. Leavett, 54

8. Atlantic Book Co.

N. Y. 34.
6. Tiedeman Real Prop. § 825; Co.
Lit 6a, 7a; 4 Kent's Com. 461; Roe v.
Traumarr, Willes. 682.
7. Tiedeman Real Prop. § 826; 3

Washb. Real Prop. 366.

8. All the parts of the premises have been already discussed in preceding paragraphs, except the description of the thing granted. For the description of real estate in conveyances, see BOUNDARIES.

and everything else that constitutes a part of the realty, will pass with the grant of the land, unless expressly reserved. All such things are included under the name of appurtenants.1 Whether a certain right is appurtenant, depends upon the condition of the land at the time of the conveyance, and how far the right is necessary to the complete enjoyment of the property. If, therefore, certain easements are enjoyed by the grantor in connection with the land, they will pass with the land to the grantee. And even where the servient estate is also his property, the equitable easement arising from the subservience of one piece of land to the other will pass to the grantee of the latter tract of land, if it is essential to his full enjoyment of the land granted.2

Although land cannot be said to pass as appurtenant to land, if the land expressly granted does not admit of a reasonable enjoyment without some adjacent land, which has been used constantly

with the land granted, it will pass as parcel.3

28. Exception and Reservation.—An exception to a grant withdraws from the operation of the conveyance some part or parcel of the thing granted, which but for the exception would have passed to the grantee under the general description. The part excepted is already in existence, and is said to remain in the grantor. A reservation is the creation, in behalf of the grantor, of some new

1. Farrar v. Stackpole, 6 Me. 154; N. Y. 102; Wilcoxon v. McGhee, 12 Ill. Bracket v. Goddard, 54 Me. 313; Goodrich v. Jones, 2 Hill, 142; Cook v. Whiting, 16 Ill, 481; Powell v. Rich, 41 Ill. 466; Noble v. Bosworth, 19 Pick. 314; Allen v. Scott, 21 Pick. 25; Esty v. Car-Daniels v. Pond, 31 Pick. 367; Ferhaw v. Ebberson, 1 Pa. St. 726; Turner v. Ebberson, 1 Pa. St. 726; Turner v. Too Mass: 414; Whitney v. Olney, 3 v. Ebberson, I Pa. St. 726; Turner v. Reynolds, 23 Pa. St. 199; Kittredge v. Wood. 3 N. H. 503; Foote v. Colvin, 3 Johns. 216; Mott v. Palmer, I N. Y. 564; Austin v. Sawyer, 9 Cow. 40; Mc-llvaine v. Harris, 20 Mo. 457; Chapman v. Long, 10 Ind. 465; Tripp v. Hasceig, 20 Mich. 254; Bond v. Coke, 71 N. Car. 97; Ring v. Billings, 51 Ill. 475; Baker v. Jordan, 3 Ohio St. 438; Weatherbee v. Ellison, 19 Vt. 379; Lewis v. Lyman, 22 Pick. 436; Fay v. Muzzey, 13 Gray, 53; Plant v. James, 5 B. & Ad. 791; Harris v. Elliott, 10 Pet. 25; Philbrick v. Ewing, 97 Mass. 133; Kent v. Wait, 10 Pick. v. Elliott, 10 Pet. 25; Phildrick v. Ewing, 97 Mass. 133; Kent v. Wait, 10 Pick. 138; Pope v. O'Hara, 48 N. Y. 455; Jackson v. Hathaway, 15 Johns. 447; Pickering v. Stapler, 5 Serg. & R. 107; Murphy v. Campbell, 4 Pa. St. 484; Whalley v. Tompson, 1 B. & P.

Tiedeman Real Prop. § 662.

3. Woodman v. Smith, 53 Me. 81; Allen v. Scott, 21 Pick. 25; Esty v. Carrier, 98 Mass. 501; Webster v. Potter, 105 Mass. 414; Whitney v. Olney, 3 Mason, 282; Davis v. Handy, 37 N. H. 65; Thompson v. Banks, 43 N. H. 540; Mixer v. Reed, 25 Vt. 254; Voorhies v. Burshard, 55 N. Y. 102; Blaine's lessee v. Chambers, 1 Serg. & R. 169; Swartz v. Swartz, 4 Pa. St. 353; Murphy v. v. Swartz, 4 Pa. St. 353; Murphy v. Campbell, 4 Pa. St. 480; Avon Co. v. Campbell, 4 Pa. St. 480; Avon Co. v. Andrews, 30 Conn. 476; Wilson v. Hunter, 17 Wis. 687; Bacon v. Bowdoin. 22 Pick. 401; Webber v. Eastern R. Co., 2 Met. 147; Blake v. Clark, 6 Me. 436; Moore v. Fletcher, 16 Me. 66; Jackson v. Hathaway, 15 Johns. 447; Biddle v. Littlefield, 53 N. H. 508. But where an easement over the adjacent land would provide for the grapuse of reconcility. provide for the grantee a reasonably satisfactory enjoyment of the land granted, the freehold in the soil will not pass; the grantee would in such a case acquire only an easement therein; Stetson v. Daw, 16 Gray, 373; Cox v. James, 45 N. Y. 562; Munn v. Worrall, 53 N. Y. acquire only an easement therein, Siction 2. Brigham v. Smith, 4 Gray, 297; son v. Daw, 16 Gray, 373; Cox v. James, Richardson v. Bigelow, 15 Gray, 156; 45 N. Y. 562; Munn v. Worrall, 53 N. Y. James v. Plant, 5 A. & E. 749; Prestcott v. White, 21 Pick. 343; Hapgood v. Brown, 102 Mass. 453; Rackley v. 164; Leavitt v. Fowle, 8 N. H. 97; Sprague, 17 Me. 281; Woodman v. Graves v. Amoskeag Co., 44 N. H. 464; Smith, 53 Me. 81; Thompson v. Banks. Peck v. Smith, 1 Conn. 103; Owen v. 43 N. H. 540; Voorhies v. Burshard, 55 Field, 102 Mass. 104. right issuing out of the thing granted, something which did not exist, as an independent right, before the grant.1

A reservation can only be made to the grantor, and must issue out of the land granted. It cannot be reserved to a stranger or out of another estate, although an attempted reservation out of another's estate may operate as an independent grant to the grantor in a deed of indenture executed by both parties.2

If an exception is repugnant to the original grant it is void. Thus, if there be a specific grant of twenty acres of land, the exception of one acre will be repugnant to the grant, and therefore void. But if the grant is of a tract of land, and the quantity is mentioned only incidentally, an exception of one or two acres is not repugnant, since the intention of the grantor then is not to convey the specific quantity mentioned, but the tract of land less the one or two acres.3

- 29. Habendum and Tenendum.—The habendum and tenendum clause is that which follows the words "to have and to hold." Originally, that is, under the feudal system, this clause defined the quantity of interest or the estate which the grantee is to have in the property granted, and the tenure upon or under which it was to be held. Since the practical abolition of the various feudal tenure, the only object of the clause is to state the character of the grantee's estate. But although the words of limitation usually appear in the habendum as an independent clause of the deed, it is not necessary that they should, if they appear in some other part, as in the premises. 4 So unimportant is the habendum, that
- 1. Greenleaf v. Birth, 6 Pet. 302; Pettee v. Hawes, 13 Pick. 323; Hurd v. Curtis, 7 Met. 110; Dyer v. Sanford, 9 Met. 395; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 321; Dennis v. Wilson, 107 Mass. 591; Richardson v. Palmer, 38 N. H. 212; Emerson v. Mooney, 50 N. H. 316; Bridger v. Pierson, 45 N. Y. 601; Westpoint Co. v. Reymert, 45 N. Y. 707; Munn v. Worrall, 53 N. Y. 46; Whitaker v. Brown, 46 Pa. St. 197; Karmuller v. Krotz, 18 Iowa, 357. A reservation is in the nature of a grant to the grantor, and requires 1. Greenleaf v. Birth, 6 Pet. 302; Petof a grant to the grantor, and requires the same formal words of limitation as in the direct grant to the grantee. But an the direct grant to the grantee. But an exception does not require words of limitation. Seymour v. Courtenay, 5 Burr. 2814; Clapp v. Draper, 4 Mass. 266; Jamaica Pond v. Chandler, 9 Allen, 170; Putnam v. Tuttle, 10 Gray, 48; Curtis v. Gardner, 13 Met. 461; White v. Foster, 102 Mass. 378; Stockbridge Iron Roster, 102 Mass. 378; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 321; Keeler v. Wood, 30 Vt. 242; Emerson v. Money, 50 N. H. 316; Bean v. Coleman, 44 N. H. 542; Hornbeck v. Westbrook, 9 Johns. 73; Wheeler v. Brown, 46 Pa. St. 197; Smith v. Ladd, 41 Me. 314; Randall v. Randall, 59 Me. 339. A res-

ervation properly appears in the reddendum clause, while the exception is properly incorporated in the premises, and constitutes a part of the description. But this is a mere matter of form, and is not essential or important in determining whether a clause creates an exception or

2. Dand v. Kingscote, 6 M. & W. 174; Pettee v. Hawes, 13 Pick. 322; Dyer v. Sanford, 9 Met. 395; Corning v. Troy Iron Co., 40 N. Y. 209; Bridger v. Pier-son, 45 N. Y. 601; Westpoint Iron Co. v. Reymert, 45 N. Y. 707; Hill v. Lord, 48

Me. 95.

8. Shep. Touch. 79; Cutter v. Tufts,
Snow. 4 Pick. 3 Pick. 272; Spragge v. Snow, 4 Pick. 54. And where a part or parcel of the land granted is excepted, not only that specific right or estate remains in the grantor, but every other right which is present. appurtenant thereto, and which is necessary to the reasonable enjoyment of the same. Dand v. Kingscote, 6 M. & W. 174; Howard v. Wadsworth, 3 Me. 471; Sanborn v. Hoyt, 24 Me. 118; Pettee v. Hawes, 13 Pick. 322; Allen v. Scott, 21 Pick. 25. 4. 3 Washb. Real Prop. 366, 367, 436,

Co. Litt. 6a; Kenworthy v. Tullis, 3 Ind. 96.

if it is hopelessly repugnant to the limitations appearing in the premises, it will be ineffectual to control the terms of the premises.1 But if by any fair construction the premises and habendum may be reconciled so that both can stand, effect will be given to both.2 The habendum cannot serve to pass any other parcel than those which are described in the premises, nor to change the grantees or their interests in any way whatever, unless, perhaps, express reference is made in the premises to the intended operation of the habendum.3

The habendum clause also contains, as a general rule, the declarations of the uses and trusts, subject to which the grantee is to hold the estate conveyed. But the declaration may appear in

any other part of the deed and be equally effective.4

30. Reddendum.—This is the clause which contains the reservations and follows the habendum. The subject of reservations, and their points of difference from exceptions, have been already discussed.5

- 31. Conditions.—In an orderly deed, the next clause is the one which contains the conditions which are annexed to the estate granted.6 It is also very common to incorporate the conditions in the same clause with the covenants, by the use of the phrase "Provided and it is hereby agreed between the parties," or words of similar import. The word "provided" makes whatever follows a condition, and the words "it is hereby agreed," etc., make the following language a covenant.
- 32. Covenants.—Except when they are united with conditions in the same clause, as explained in the preceding paragraph, the next clause of the deed contains the covenants.7
- 33. The Attestation.—The final clause of a deed is the attestation clause, which contains words witnessing the execution of the deed

1. Flagg v. Eames. 40 Vt. 23; Nightingale v. Hidden. 7 R. I. 118; Tyler v. Moore, 42 Pa. St. 376; Walters v. Breden, 70 Pa. St. 237.

2. Thus, if the limitation in the premises is general, and in the habendum it is specific, or vice versa; as, for example, the limitation in one part is to A. and his heirs generally, and in the other part the estate is limited to A. and the heirs of his body, the two descriptions of the estate are not necessarily contradictory, and the specific limitation will prevail over the general limitation. In such a case the estate granted would be an estate rail. Berry v. Billings, 44 Me. 423; Sumner v. Williams, 8 Mass. 162; Jamaica Pond v. Chandler, 9 Allen, 168; Ford v. Flint, 40 Vt. 382; Manning v. Smith, 6 Conn. 292; Moss v. Sheldon, 3 Watts & Conn. 292; Moss v. Sheldon,

Cro. Jac. 564; Hafner v. Irwin, 3 Dev.

& B. 434; Moss v. Sheldon, 3 Watts & S. 162; Tyler v. Moore, 42 Pa. St. 374. If the premises convey a joint estate, without special description of the character of the estate, but in the absence of special limitations the estate would be a joint-tenancy, a special limitation of the estate in the habendum as a tenancy in common would prevail over the general description in the premises. . So also, if the premises fail to give the name of the grantee, it may be supplied by the habendum, and the deed will be as effective as if the name had appeared in the premises. Tiedeman Real Prop. § 826; 3 Washb. Real Prop. 366.

4. Nightingale v. Hidden, 7 R. I. 118; Washb. Real Prop. 440; Tiedeman

Real Prop. § 844.

5. See ante, under title of EXCEPTION AND RESERVATION, § 28 of same article.

6. What are valid conditions, see title CONDITIONS.

7. For a discussion of "Covenants," including covenants of title, see title COVENANTS.

DEEM-DEEMED-DEEPEN-DEEPENING.

by the parties, and if witnesses are required, calling the attention to the fact that the deed has been "signed, sealed and delivered" in the presence of the requisite number of witnesses.

DEEM—DEEMED.—Used in the sense of, held, adjudged, declared.¹ It is also used in the ordinary sense of to think, to suppose, to hold the opinion.²

DEEPEN—DEEPENING.—To make deeper, to sink lower.3

1. Thus when the question arose under section 2 of the Act of February 10, 1855 (U. S. Rev. St. § 1994), which reads as follows: "Any woman who is now, or may hereafter be, married to a citizen of the United States, and might herself be lawfully naturalized, shall be deemed a citizen,"—as to whether the United States, circuit court had jurisdiction of a suit begun by an alien woman, married to a citizen of the United States, against her husband's administrators, in giving judgment for the defendant the court, Deady, D. J., said: "The phrase, 'shall be deemed a citizen,' in section 1994, Rev. St., or as it was in the Act of 1855, shall be deemed and taken to be a citizen. while it may imply that the person to whom it relates has not actually become a citizen by the ordinary means or in the u-ual way, as by the judgment of a competent court, upon a proper application and proof, yet it does not follow that such person is on that account practically any the less a citizen. The word 'deemed' is the equivalent of 'considered' or 'iudged:' and therefore whatever an act of Congress requires to be 'deemed' or 'taken' as true of any person or thing, must, in law, be considered as having been duly adjudged or established concerning such person or thing, and have force and effect accordingly. When, therefore, Congress declares that an alien woman shall, under certain circumstances, be 'deemed' an American citizen, the effect, when the contingency occurs, is equivalent to her being naturalized directly by an act of Congress, or in the usual mode thereby prescribed." Leonard v. Grant, 5 Fed. Rep. II. See also AD-People, 25 Am. Rep. 148.

Where a prisoner was charged with

Where a prisoner was charged with having fraudulently registered at a registry of voters for an election for representatives in Congress, he being at the time disqualified as a voter by reason of having been convicted of felony, the said conviction being for the commission of a statutory offence created under the laws of the United States, the court, Benedict, J., on demurrer to the indictment discharged the accused, because the laws of the State of New York excluded

from the right of suffrage only such persons as "shall have been convicted of an infamous crime, deemed by the laws of this State a felony, against the contention that the word 'deemed' implied an intention to include all crimes presenting the feature designated by the laws of the State as the characteristic of a felony, namely, a liability to be punished by death or by imprisonment in a State prison."

U. S. v. Barnado, 14 Blatchf. (U. S.) 74. 2. Thus in Kentucky, Holt, J., in holding that while, as to useful trades and employments, the power of a municipal corporation to license does not ordinarily include the power to tax, yet where useful occupations are, in this regard, placed upon the same footing as those which serve for amusement only, and the municipal charter provides that, in granting such licenses, the common council "shall charge such sum or sums of money as they shall deem fit and reasonable," they are authorized to use the power to license as a means of taxation, if they see proper to do so, said: "It is urged that the words 'as they shall deem fit and reasonable' must be construed to mean 'as are fit and reasonable;' and authorize the imposition of a fee only for the issual of a license. There might be some ground for such a construction, if they related to useful occupations only. The words 'sum or sums' as used in the act, do not mean merely 'fee or fees.' The sum to be charged is not for issuing the license, but for the license itself. If the construction contended for be correct, and express companies can only be charged a license fee, then a saloon-keeper can be charged no more. It also follows, that, however proper it might be to charge one calling more than another, that yet it can not be done. This leads to an absurdity." Adams Express Co. v. City of Owensboro, 8 Ky. Law Rep. 908.

3. Land was conveyed "with the privilege of deepening the ditch leading from the premises, to drain the same, the grantor's land, as deep as the grantees may desire." The ditch then existing was 6 feet wide at the top and 2 at the bottom, and 6 feet deep. To "deepen" it required either curbing or widening the ditch at the top—the latter the usual

DEEPLY.—Profoundly, thoroughly. Used in the phrase "DEEPLY INDEBTED" to denote a state or condition of great indebtedness, but one short of insolvency.1

DEFALCATION.—(See also BILLS AND NOTES: SET-OFF.)—The etymon of this term is from falx, a Latin word for a pruning-knife. Hence falco, to amputate, or prune; defalco, the compound, to brune from: so that, vi termini, it expresses the pruning a demand by showing that it is less than it purports to be, by reason that it ought to be made less by something shown against it.2

DEFAMATION.—See LIBEL: SLANDER.

mode of ditching swamp lands. In an action of trespass, quare clausum fregit, for widening the ditch, held, (1) that parol evidence was admissible as to the land being sold as a peat-bed, which required thorough drainage, and as to the usual mode of digging ditches in swamp-lands; (2) that grantor must be understood to have intended the usual mode of "deepening" such ditch, and that the privilege was granted of widening the ditch at the top so far as was necessary in "deepening Park, I .: "Should we interpret the deed by the aid of these circumstances, we can have no doubt that the grantor intended to confer the right to 'deepen' the ditch in the usual mode in similar cases. Suppose the defendant while owner of the land had sent his servant, skilled in the business of digging ditches in similar places, with the simple direction to 'deepen' the ditch. Would the servant have supposed that the defendant intended that the unusual and extraordinary mode of 'deepening' the ditch by curbing should be resorted to, when the extra expenses of that mode would equal many times the value of the land necessary to be taken in 'deepen-ing' the ditch in the usual mode, and more especially when he found the ditch to be 'deepened' had sloping sides constructed by the defendant in accordance with the usual mode of ditching such lands? It is easy to see that the defendant would have had cause to complain if his servant had departed from the usual mode in 'deepening' the ditch. would have said that inasmuch as he had given no special directions in regard to the mode of doing it, his servant should have followed the customary mode in similar cases. What would have been true in the case supposed is true in the case under consideration. If the defendant had intended to restrict the plaintiffs to a mode of 'deepening' the ditch dif-ferent from the usual one, he should and would have done it specifically in his deed. This he did not do, and he therefore intended the usual mode in similar cases." Collins v. Driscoll, 34 Conn. 43.

1. On the trial of the issue whether a conveyance to the grantor's wife, through a third person, was made in fraud of the grantor's creditors, the party contesting the conveyance requested a ruling "that all that was necessary to make the conveyance fraudulent, it being made without consideration, was that the grantor was 'deeply indebted' even though he was not insolvent." This request the judge refused, but instructed the jury that whether a conveyance like the one in issue was fraudulent or not was a question of fact to be determined upon all the circumstances under which it was made, and especially the condition of the grantor's property, and the amount of his debts at that time; that it could not be properly adjudged that it was made in fraud of creditors if made by a grantor possessed of large property and substantially free from debt, whose sole motive was to withdraw the estate conveyed from the hazard of business, for the benefit of his family; but it was clear that a voluntary transfer of property by a person "deeply indebted" would furnish a strong presumptive evidence of fraud, and if unexplained would be set aside as void against creditors. On exception to this ruling, held, the refusal of the request, taken in connection with the instructions given, afforded no ground of exception. Winchester v. Charter, 102 Mass, 272. But see Parkman v. Welch, 19 Pick.

(Mass.) 231, for a contrary opinion; the court, Dewey, J., holding: "Actual insolvency of the grantor is not required to render his conveyance, when made with-out consideration, void as against credi-Such a doctrine has been sometimes advanced as respects creditors whose debts accrued after the making the conveyance, but this is not supported by the authorities. All that is necessary to entitle a creditor to impeach a deed as fraudulent, when made without a valuable consideration or on a secret trust, is that the grantor be 'deeply indebted.'"

2. Brackenridge's Law Miscellanies,

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I. Effect of.—I. AS AN ADMISSION.—It is said to be a general rule that a judgment by default operates as an admission of the plaintiff's cause of action as averred in the declaration or complaint.1

1. McGehee v. Childress, 2 Stew. (Ala.) 506; Hunt v. Burton, 18 Ark. 189; John-Son v. Pierce, 12 Ark. 599; Hunt v. San Francisco, 11 Cal. 250; McGregor v. Shaw, 11 Cal. 47; Hentsch v. Porter, 10 Cal. 555; Rowe v. Table Mountain Water Co., 10 Cal. 441; Harlan v. Smith, 6 Cal. 173: Shepard v. New Haven, etc., Co., 173; Shepard v. New Haven, etc.. Co., 45 Conn. 54; Welch v. Wadsworth, 30 Conn. 149; s. c., 79 Am. Dec. 236; Mass. Mut. Life Ins. Co. v. Kellogg, 82 Ill. 614; Laird v. Allen, 82 Ill. 43; Cutright v. Stanford, 81 Ill. 240; Chicago & N. W. R. Co. v. Cross, 73 Ill. 394; Mansfield Hoagland, 46 Ill. 359; Cronan v. Frizeld, 42 Ill. 310; Moore v. Titman, 33 Nl. 358; Lucas v. Spencer. 27 Ill. 15; Underhill v. Kirkpatrick, 26 Ill. 84; Peck v. Wilson, 22 Ill. 205; Garrison v. People, 21 Ill. 33; Cook v. Skelton, 20 Ill. 107; S. c. 535; Cook v. Skelton, 20 Ill. 107; s. c., 71 Am. Dec. 250; Unfried v. Heberer, 63 Ind. 67; Cravens v. Duncan, 55 Ind. 347; Murray v. Ebright, 50 Ind. 362; Mullendore v. Silvers; 34 Ind. 98; Scott v. Scott, 17 Ind. 309; Hubbard v. Chappel, 14 Ind. 601; Smith v. Carley, 8 Ind. 451; Marion & L. R. Co. v. Lomax, 7 Ind. Martion & L. R. Co. v. Lomax, 7 Ind. 406; Heffner v. Lynch, 2i Md. 552; Fisk v. Baker, 47 Ind. 534; Martin v. Asher, 25 Ind. 237; Smith v. Carley, 8 Ind. 451; Hoefgan v. Harrison, 7 Ind. 594; Leftwick v. Thornton, 18 Iowa, 56; Carleton v. Byington, 17 Iowa, 579; Wilkins v. Treynor, 14 Iowa, 392; Pfantz v. Culver, 24 Iowa, 270; Md. 247; Martin Screen, 14 Iowa, 279; Md. 100; Martin Screen, 14 Iowa, 279; Md. 100; Martin Screen, 14 Iowa, 279; Md. 100; Md. 247; Martin Martin Screen, 14 Iowa, 279; Md. 250; M 13 Iowa, 312; McLott v. Savery, 11 Iowa, 323; Keeney v. Lyon, 10 Iowa, 546; Whittey v. Douge, 9 Iowa, 597; Loeber v. Delahaye, 7 Iowa, 478; Burlington & w. R. R. Co. v. Shaw, 5 Iowa, 463; Cook w. Walters, 4 Iowa, 72; Gardner v. Able, Mor. (Iowa) 489; Cole v. Hoeburg, 36 Kan. 263, 264; Allen v. Lioteau, 9 Mart. (La.) 459; Davis v. Davis; 8 La. Ann. 91; Heath v. Whidden, 29 Me. 108; Hanson v. Wood (Me.), 3 New Eng. Rep. 225; Luckett v. White, 10 Gill & J. (Md.) 480; Patrick v. Ridgaway, 4 Har. & J. (Md.) 312; Winn v. Levy, 3 Miss. (2 How.) 902; Claibarge v. Pleaters' Park v. Miss. (2 Claiborne v. Planters' Bank, 3 Miss. (2 How.) 727; Irwin v. Williams, 1 Miss. (Walk.) 314; State v. Reinhardt, 31 Mo.

95; Froust v. Bruton, 15 Mo. 619; Mc-Cutchen v. Batterton, 1 Mo. 342; Deroin v. Jennings, 4 Neb. 97; Parker v. Roberts v. Jennings, 4 Neb. 97; Parker v. Roberts 63 N. H. 431; s. c., 1 New Eng. Rep. 157, 158; Manchester's Petition, 28 N. H. 296; Chase v. Lovering, 27 N. H. 295; West v. Whitney, 26 N. H. 314; Willson v. Willson, 25 N. H. 229; Toppan's Petition, 24 N. H. (4 Fost.) 43; Huntress v. Effingham, 17 N. H. 584; Bowman v. Noyes, 12 N. H. 307; Parker v. House, 66 N. C. 374; Parker v. Smith, 64 N. C. 291; Attorney General v. Carver, 12 Led (N. C.) torney-General v. Carver, 12 Ired. (N. C.) L. 231; McKinzie v. Perrill, 15 Ohio St. 162; Warren v. Kennedy, 1 Heisk. (Tenn.) 437; Union Bank v. Hicks, 4 Humph. (Tenn.) 327; Clark v. Compton, 15 Tex. 32; Sturtevant v. Milwaukee, W. & B. V. R. R. Co., 11 Wis. 63; Higgins' Trusts, 2 Giff. 562; Skelton v. Hawling; I Wils.

Where the Summons has been Duly Served, a judgment by default amounts to a confession on the part of the defendant of all material facts in the complaint. Rowe v. Table Mountain Water Co., 10 Cal. 441.

A default after notice admits every material and traversable allegation, properly set forth in the declaration or petition. Toppan's Petition, 24 N. H. (4 Fost.) 43.

In an Action to Redeem certain premises sold under a decree of foreclosure, where personal service was had on the defendants, and three of them failed to answer, it was held that the defendants having failed to answer the petition thereby admitted the truth of the facts stated therein, so far as they affected themselves, and that the court erred in dismissing the case as to them. Deroin v. Jennings, 4 Neb.

What Admitted by .- A default admits every traversable allegation in the plaintiff's declaration, and every ground upon which a recovery is sought, and where the suit is upon an instrument for a definite sum of money, no evidence is necessary upon the assessment of damages. Massachusetts Mut. Life Ins. Co. v. Kellogg, 82 Ill. 614. If a party permit judgment by default to be taken against him, it is per se an admission of a cause of action, though the declaration should not show it by failing to aver the existence of a fact which is essential to the defendant's liability; which, however, he might waive. Having failed to plead or demur, he cannot gainsay the judgment. Winn v. Levy, 3 Miss. (2 How.) 902; Claiborne v. Planters' Bank, 3 Miss. (2 How.) 727; Irwin v. Williams, 1 Miss. (Walk.) 314.

The Tacit Issue made by a Default is not a plea of any matter, amounting only to a dilatory exception. Fink v. Martin,

I La, An. 117; Act 1839, sec. 23, n. 53.

Indiana Practice.—Formerly in Indiana, the defendant, by suffering a default under the Indiana Revised Statutes, admitted the truth and sufficiency of the complaint; but since the statute of 1855 (Laws, 1855 p. 60) the rule is otherwise.

Marion & L. R. R. Co. v. Lomax, 7 Ind. 406.

The Rule in Cases of Default is different from that in cases of verdict; for in the latter it is uncertain upon what bases or on which of the counts the jury rests its finding, whilst in the former the law determines the fact and the amount of recovery. Hunt v. San Francisco, II Cal. 250.

Default by Part of Defendants—Effect.—
A. was made a party to an action, and suffered judgment to be taken against him by default. The evidence did not disclose any reason for his being joined. The plaintiff failed to recover against any of his co defendants, and it was held that the plaintiff was entitled to no judgment against A., and that judgment in favor of defendants 'for costs, if in favor of A, was not error, as he had made no costs. Lash v. Perry, 24 Ind. 126.

In an action against A and B on a joint contract, A suffered a default. B proved he was not jointly liable. The court held that A's default admitted only a joint liability, and therefore judgment could not be rendered against him personally. Murray v. Ebright, 50 Ind. 362; Mullendore v. Silvers, 34 Ind. 98.

New Parties—Default—Adjudication of Rights inter se.—When on a motion of a defendant, and upon a suggestion in his answer, that persons not before the court claim to have some interest in the subject-matter of the suit, such persons are made defendants in the action, by process requiring them to answer the petition of the plaintiff. The answer of the original defendant not being in the nature of a cross petition, and asking no relief against the new parties defendant, it is

error for the court, on default of such new parties for answer, to adjudicate upon rights of the defendant inter se by granting relief to the original defendant as against his newly made co-defendant. Such unauthorized adjudication is substantial error, and not a mere irregularity. Commercial Bank v. Buckingham, 12 Ohio St. 402.

Action for Goods Sold and Delivered.— A judgment by default in an action for goods sold and delivered operates as an admission by the defendant of a cause of action, and the plaintiff is entitled to nominal damages; but it does not relieve the plaintiff from the necessity of proving the delivery of the things alleged to have been sold and delivered, and their value. Parker v. Smith, 64 N. C. 291.

In Action against Administrator or Executor—Presumption.—A default in a suit against an administrator to enforce the liability of his intestate as a stockholder of a railway company, under the Illinois act of 1849, admits all the facts properly pleaded, and it will be presumed they were sufficient to justify the judgment rendered therein, when called in question collaterally. Cutright v. Stanford, 81 Ill. 240.

When an executor or administrator suffers judgment to go against him by default, he thereby admits assets in his hands, and is estopped to say the contrary in an action on such judgment suggesting a devastavit. Higgins' Trusts, 2 Giff. 562; Skelton v. Hawling, I Wis. 258.

Allegation of Parol Assignment of Cause of Action. —Action by A., alleging a parol assignment of cause of action to him against assignor and others. Assignor suffered a default. *Held*, assignment is admitted, and no evidence is necessary on that issue, Cravens v. Duncan, 55 Ind. 347.

In an Action of Assumpsit.—Where the declaration contained a special count on a note and a common count, the note constituting the only bill of particulars, the court held that it was not necessary to nolle the common count, and that the note was the only evidence which should be received to support title. Gardner v. Able. Mor. (Iowa) 480.

A judgment by default for want of a plea in an action of assumpsil, where an account was filed in the declaration, was held an admission of indebtedness for the articles charged, but the value of the articles and the amount of the items were required to be proved. Patrick v. Ridgaway, 4 Har. & J. (Md.) 312.

In a Complaint for Possession of Land .-

possession. Fisk v. Baker. 47 Ind. 534.

A Default on a Complaint containing Special Counts, defectively stated, and also the common counts in assampsit, properly stated, will support a judgment. the default being a confession of the indebtedness for the causes and on the accounts alleged in the complaint. The several counts are distinct causes of action, and the fact that by reason of one of them having been imperfectly stated no judgment could be rendered on that count.

A default confesses right of plaintiff to

Cal. 250.

On Contract—Damages for Non-performance.—In an action for damages for non-performance of a contract, a default entitles plaintiff to nominal damages, though he prove none. Allen v. Lioteau,

does not affect the right of plaintiff to

take judgment on those which are right-

Hunt v. San Francisco, 11

9 Mart. (La.) 459.

fully stated.

Dower Interest of Widow.—Where the dower interest of a widow in property sought to be converted into assets is manifested, it will be protected, although she may not have filed an answer. McDonald v. Aten, I Ohio St. 293.

The widow is heir of her deceased husband only in a special and limited sense, not in a general sense. And her claim as widow may be subsequently enforced in another action. Unfried v. Heberer, 63

Ind. 67.

Admits Judgment—Subsequent Reversal.

The admission by a default of the existence of judgment upon which the judgment in the subsequent defaulted suit rests is conclusive, although the first judgment be afterwards reversed. Sturtevant v. Milwaukee, W. & B. V. R. R. Co., II Wis. 63.

In Mortgage Foreclosure.—A default in a suit in chancery to foreclose a mortgage admits that the mortgage was made and acknowledged, Moore v. Tit-

man, 33 Ill. 358.

In a proceeding by A against B and others for the foreclosure of a mortgage, C, who had a judgment against B, was made a party defendant. The complaint alleged that the judgment of C was upon order lands, and did not affect any of the lands mortgaged to A. The court held that the averment as to lien of C's judgment was not the averment of a fact, but of a conclusion of law, which could be deduced from facts averred, and which, if a fact, was immaterial, and hence not admitted by a default. Fletcher v. Holmes, 25 Ind. 458.

When an action was brought to fore-

close a mortgage executed by one deceased, and several parties were made defendants to answer as "heirs" of the decedent, among whom was the widow (but not so described), and nothing was alleged hostile to her claim as "widow," and they and she suffered a default, the judgment did not conclude anything against the widow as to her claim as "widow." Unfried v. Heberer, 63 Ind.

In Order to Attend and Show Cause,—
On a default of the defendant to attend, pursuant to an order requiring him to attend and be examined or show cause why he should not, the plaintiff cannot take an order that he attend, or, in default thereof, his defence will be stricken out, because the final order on the default cannot extend beyond what is expressed in the first order to show cause. Anderson v. Johnson, I Sandf. (N. Y.) 713.

In Action on Partnership Bond—Defec-

In Action on Partnership Bond—Defective Execution.—A default admits that a bond declared to be the bond of a partnership was so executed as to bind the firm, though there appears to be but one seal. McKnight v. Wilkins, I Mo. 308. And a default in an action on an obligation under defendant's private signature is, in legal intendment, a joining of issue without a denial of signature, without which plaintiff may then confirm his default by simply offering the instrument in evidence. Davis v. Davis, 8 La. An. q1; La. Code Prac. 312, 324, 325.

In Action on Promissory Note.—A judgment by default in an action on a promissory note admits the cause of action, and the defendant's liability to the amount of the note; but the note must be produced on the trial, that it may be seen whether any part of it has been paid which need not be proved. Kiersted v. Rogers, 6 Harr. & J. (Md.) 283. And the validity of an indorsement on the note in suit is not open after a default. Underhill v. Kirkpatrick, 26 Ill. 84.

Complaint against A. B. and C. D. upon a note annexed to complaint. It was signed B. & D. per B. Complaint did not aver that it was executed by defendants, by style of B. & D. The court held that the default admitted the execution of the note. Hoefgan v. Harrison, 7 Ind. 594.

Same—Against Administrator.—In a suit by A against the administrator of B upon a lost note alleged to have been assigned by C to A in writing after loss and after the death of B, C, being joined as a defendant to answer as to the assignment, made default. The administrator answered. It was held, as C had admitted

and no more. A default is an admission only of the allegations in the declaration, and not of the plaintiff's legal right to recover.² It confesses no fact not averred,³ and as a general

the assignment by his default, he was not an adversary party to A, but their interests were identical. Martin v. Asher,

25 Ind. 237.

Promise of Marriage—Action for Breach. —In an action for a breach of promise of marriage, where the plaintiff alleges, among other things, that she is damaged in the sum of \$5000, and asks to recover that amount, and the defendant fails to file any answer, but makes default, the action was held to be one "on contract, "for the recovery of money only," with-in the meaning of sec. 128 of the Kansas Civil Code, which reads as follows: "Every material allegation of the petition not controverted by the answer shall, for the purpose of the action, be taken as true; . . . allegations of value, or of amount of damages, shall not be considered as true by failure to controvert them; but this shall not apply to the amount claimed in actions on contract. express or implied, for the recovery of money only." Cole v. Hoeburg, 36 Kan. 263, 264. And in an action for a breach of promise a default judgment may be rendered under this section in favor of the plaintiff for the amount claimed, without the introduction of any evidence; and this although the plaintiff, besides alleging the breach of the promise of marriage, also alleges, for the purpose of enhancing her damages, seduction under such promise. Id.

In Scire Facias.—A default admits the truth of the averment in a scire facias.

Garrison v. People, 21 Ill. 535.

In Action for Specific Performance .-Where a bill for specific performance is taken for confessed as to the original vendor, and it alleges that he is equitably bound to convey one half of the land sold, the complainant having purchased a half interest from the original vendee and paid part of the purchase-money, the vendor by his default admits the complainant's right to a conveyance, and cannot be heard to object that the whole price has not been paid. Laird v. Allen,

Title in Stranger .- The holder of a naked legal title to land will not, as against a plaintiff in possession of the land and asserting by action an equitable title thereto, be permitted to set up a countervailing equity in a third person with whom he is not in privity, and who, being also a party defendant to the ac-tion, by his default confesses the equitable title of the plaintiff. McKinzie v. Perrill, 15 Ohio St. 162.

In Action of Trespass. - A judgment by default in an action of trespass establishes the plaintiff's right to recover, and fixes the defendant's liability for the amount of damages which may be assessed by the jury. Clark v. Compton. 15 Tex. 32. But it is questionable whether. upon a declaration charging in one count trespasses both as to real and personal property, a default admits a cause of action as to each. Lamphear v. Bucking.

ham, 33 Conn. 245.

A default or a demurrer overruled operates as an admission of the cause of action as alleged, in full or to some extent, according to its nature. If it be distinct, definite, and entire, entitling the plaintiff to a sum certain without further inquiry, it is admitted in full; but if by the rules of law further inquiry is to be had to ascertain the damages due then the cause of action is admitted, but not to the extent alleged. Lamphear v. Buckingham, 33 Conn. 250; Sherwood v. Haight, 26 Conn. 436. However, the plaintiff is entitled to recover the full amount of damages shown by the evi-Warren v. Kennedy, I Heisk, dence. (Tenn.) 437.

In an Action for Waste, to recover the place wasted and treble damages, the plaintiff's allegation that the injury to his estate is equal to the value of the defendant's term, is not admitted by the default of the defendant. See Harder v. Harder.

26 Barb. (N. Y.) 409

1. Boston v. Nichols, 47 Ill. 353; Mansfield v. Hoagland, 46 Ill. 359; Cronan v. Frizell, 42 Ill. 319; Unfried v. Heberer, 63 Ind. 67; Burlington & Mo. R. R. R. Co. v. Shaw, 5 Iowa, 463.

A Default Admits every Issuable Fact stated in the complaint, and those only. People v. Rains, 23 Cal. 127; McGregor v. Shaw, 11 Cal. 47; Hentsch v. Porter, 10 Cal. 555; Rowe v. Table Mt. Water Co., 10 Cal. 441; Harlan v. Smith, 6 Cal.

Action on Note before Due .- Thus, the defect in an action on a note in being brought before it is due is not cured by a default, as the defect goes to the right of Winston v. Miller, 20 Miss. (12 Smed. & M.) 550.
2. Hunt v. Burton, 18 Ark, 189; John-

son v. Pierce, 12 Ark. 599.
3. Chicago & N. W. R. Co. v. Coss,

73 Ill. 394.

rule is conclusive upon the defendant only in the character in which he is sued.¹ The defendant cannot claim that the plaintiff is entitled to recover nothing, nor can he object to the sufficiency of the petition to authorize the judgment.² And the failure of the defendant to plead is an admission of the jurisdictional facts stated in the declaration, as well as a concession of the jurisdiction of the court to enter a final judgment for the amount ascertained to be due by the inquisition; and he is not at liberty to draw the jurisdiction of the court into question by any subsequent proceeding; 3 for a default admits every material allegation in the plaintiff's declaration, leaves no issue for the jury,4 and nothing for the court to decide but the amount of damages: 5 consequently the only question remaining for trial is the amount of damages, which must be proved. On this investigation the defendant has no right to give evidence to defeat the action, but only such as tends to reduce the damages.8

A Judgment by Default merely Admits a Cause of Action; but while the precise character of the cause of action and the extent of the defendant's liability are yet to be determined by a hearing, in damages and final judgment thereon, the cause of action is not merged in the judgment, and the rights of the parties, be-yond the mere admission of a cause of paired thereby. Welch v. Wadsworth, 30 Conn. 149; s. c., 79 Am. Dec. 236.

1. Unfried v. Heberer, 63 Ind. 67.

It Admits the Character in which plaintiff sues, where that character is averred in the complaint. Hubbard v. Chappel, 14 Ind. 601.

Thus, where the complaint avers title as administrator, a default admits it. Peck v. Strauss, 33 Cal. 678; Curtis v.

Herrick, 14 Cal. 117.

2. Carleton v. Byington, 17 Iowa, 579; Wilkins v. Treynor, 14 Iowa, 392; Pfantz v. Culver, 13 Iowa, 312; McLott v. Savery, 11 Iowa, 323; Keene v. Lyon, 10 Iowa, 546; Loeber v. Delahaye, 7 Iowa, 473; Cook v. Walters, 4 Iowa, 72.

The defendant cannot on an inquiry after judgment by default give evidence in denial of the plaintiff's right of action,

for this is admitted by the default. Froust v. Bruton, 15 Mo. 619.

In Tennessee, a judgment by default admits the cause of action alleged in the declaration, and no proof can be heard to disprove its existence. Where an action was brought by the indorsee of a note which was deposited in bank for collection, against the bank for neglect in making demand and giving notice to the indorser, whereby he was discharged and the debt lost, a judgment by default was held to admit the execution of the

note, the indorsement, the deposit of the note in the bank for collection, and the neglect to give notice. These were all necessary ingredients and indispensable parts of the cause of action as stated in the declaration. Union Bank v. Hicks. 4 Humph. (Tenn.) 327.

3. Heffner v. Lynch, 21 Md, 552.

4. Smith v. Billett, 15 Cal. 23. Defendant thereby confesses the truth of the allegations contained in the bill, and no evidence is required to sustain a decree based upon them. Boston v. Nichols, 47 Ill. 353.

5. Cook v. Skelton, 20 Ill. 107; s. c.,

71 Am. Dec. 250.

An Order taking a Bill Pro Confesso for want of an answer dispenses with proof on the hearing, and is conclusive that the matter of the bill is true, as if the same were confessed in an answer. Attorney-General v. Carver, 12 Ired. (N. C.) L. 231. Also, that the amount mentioned is due to the plaintiff. Mc-Cutchin v. Batterton, I Mo. 342. A Default in a Revocatory Action does

not relieve plaintiff from proving himself a creditor. Fink v. Martin, I La. An. 117; La. Code Prac. 312, 360.

An. 117; La. Code Prac. 312, 300.
6. Folger v. Fields, 66 Mass. (12 Cush.)
93; Storer v. White, 7 Mass. 448; Jarvis
v. Blanchard, 6 Mass. 4; Parker v.
Roberts, 63 N. H. 431; s. c., 1 New
Eng. Rep. 158; Manchester's Petition,
28 N. H. 296; Chase v. Lovering, 27 N.
H. 295; West v. Whitney, 26 N. H. 314;
Tonnan's Petition. 21 N. H. 43; Bow-Toppan's Petition, 24 N. H. 43; Bowman v. Noyes, 12 N. H. 307; Huntress v. Effingham, 17 N. H. 584.

7. Sherwood v. Haight, 26 Conn. 432.

8. Cook v. Skelton, 20 Ill. 107; s. c.,

71 Am. Dec. 250.

A Default does not Admit the Amount of

A judgment by default for want of an answer admits that the plaintiff has a good cause of action, and that he is entitled to some damages. 1 but is not a confession of any fact necessary to be proved on the assessment of damages.² Evidence is necessary only to establish the amount of damages for which judgment shall be

The general rule is that a default is only conclusive as to such matters as are properly averred or charged in the complaint.4 There must be a declaration or complaint containing such a state. ment of facts as will, when admitted, in point of law authorize a judgment against the defendant. It is well settled that a default does not admit allegations in the complaint of fraud, extrinsic to the cause of action.

A judgment by default cures the omission of profert of the note declared on. And a judgment by nil dicit is an admission that

Damages, and the defendant may thereafter introduce evidence to show an adjustment or part payment of the same. Willson v. Willson, 25 N. H. (5 Fost.)

1. Parker v. House, 66 N. C. 374.

2. Burlington & Mo. R. R. R. Co. v.

Shaw, 5 Iowa, 463.
3. Leftwick v. Thornton, 18 Iowa, 56;

Whittey v. Douge, 9 Iowa, 597. The Rules of Evidence are not to be re-

laxed on the hearing to ascertain the amount of damages. Shepard v. New amount of damages. Shepar Haven & N. Co., 45 Conn. 54.

Amount of Damages.—The judgment by default does not settle the right of the plaintiff to recover the amount stated in his cause of action. In such case the defendant is entitled to have an inquisition by a jury. Their verdict settles the amount the plaintiff is entitled to recover, and is not open for examination in the appellate court. Cooper v. Roche, 36 Md. 563. Vide infra, VIII., 4 c. The record must show that there was an inquiry. Wetzell v. Waters, 13 Mo. 366.

Allegations of Opinion and Estimate.-While all allegations of fact are admitted by the defendant's default, no allegation of an opinion or estimate of value can be deemed to be admitted; and although, under the Kentucky Code, the judge might render a judgment without a jury in the absence of any answer or other defence, yet the record should show that he heard evidence as to the extent of damages. Smith v. Curtis, 1 Duv. (Ky.) 281.

If the Action be One of Tort, evidence tending to show the injury complained of to be less than was alleged, or even that it occurred wholly through the fault of the plaintiff, is admissible. phear v. Buckingham, 33 Conn. 250.

Trespass De Bonis.-A default in an

action of trespass de bonis is simply an admission that there is no complete defence, and the plaintiff can recover nominal damages only, unless he proves a just claim for more. Rose v. Gallup, 33 Conn. 338.

As an Admission

In Action on Penal Bonds.-In a suit on a sheriff's bond, for a failure to levy on property sufficient to satisfy an execution, the truth of the allegation that the sheriff had notice of property belonging to the defendant in the execution which was subject to execution, is not admitted by a default. Proof of the existence of such property, and of his knowledge thereof, pertains to the condition and breach of the bond, and not to the penalty or execution thereof. State v. Ownby, 49 Mo.

Therefore where there was a judgment by default in a suit on a constable's bond, the plaintiff must prove that the debtors were solvent, and the amount of damage sustained by the constable's not using proper diligence in collecting the claims placed in his hands. Parker v. House, 66 N. C. 374.

In a Suit Against the Securities on an Administrator's Bond for a failure of the administrator to pay over a balance found due on settlement, where one of the se-curities defended successfully on the ground that the settlement was a nullity, and judgment by default was taken against the others, the plaintiff was held to be entitled to nominal damages only as against the defendants who were in default. State v. Reinhardt, 31 Mo. 95.

4. Barton v. Anderson, 104 Ind. 578; s. c., 2 West. Rep. 681.
5. Smith v. Carley, 8 Ind. 451.
6. Stelle v. Palmer, 11 Abb. (N. Y.) Pr. 62; Humphrey v. Brown, 17 How. (N. Y.) Pr. 481.

7. Ex parte Jones, 20 Ark. 35.

the defendant has been properly brought into court. 1 Yet a defendant in default is nevertheless entitled to notice of a material

amendment alleging additional facts.2

a. By a Party Served.—The general doctrine that when a party does not appear he waives nothing, is well settled: but this means nothing impeaching the jurisdiction or authority of the court to act, and nothing in the way of objections to the proceedings, and the competency or sufficiency of evidence on the part of This is the extent to which the doctrine has been, or can properly be carried.3

b. By a Party Not Served.—A judgment rendered by default, without notice in fact, and without the appearance of any one in

the defendant's behalf, is not necessarily a nullity.4

c. In Matrimonial Actions.—In divorce suits under the general chancery practice, a default, as in other suits, does not supersede the necessity for proof, or lighten the burden resting on the plaintiff in establishing the charges preferred.5 Where the pleadings together present an issue on the question of divorce, they cannot be disposed of by confirming the default.6

2. As AN ESTOPPEL.—A judgment by default operates as an estoppel, and like a judgment upon contest, is conclusive of all it professes to decide, as determined by the pleadings.7 After judg-

Teat v. Cocke, 42 Ala. 336.
 McClenney v. Ward, 80 Ala. 243.
 Clark v. Van Vrancken, 20 Barb.

(N. Y.) 278.

A Bill Taken for Confessed Against an Absentee after publication, who does not appear in the suit, is not evidence of any fact against him even as to his personal rights. Danforth v. Woods, II Paige Ch. (N. Y.) o.

4. Lapham v. Briggs. 27 Vt. 26.

A Judgment on Insufficient Notice.—A default entered upon an insufficient notice is not cured by the subsequent appearance of an attorney for the defendant merely to have the default set aside. Boals v. Shules, 29 Iowa, 507. Thus a judgment by default rendered against a defendant in an attachment suit who was notified by publication only, will bind only the property attached. Johnson v. Holley, 27 Mo. 594.

Action against Co-obligors - Bail Bond. In an action against several co-obligors in a bail bond, where only one is served with the original summons and against whom interlocutory judgment by de-fault is rendered, it is not necessary, in order to bring in the other co obligors to answer in that suit, to resort to the writ of scire facias, but it may be done by the ordinary alias summons. Cleveland

v. Skinner, 56 Ili. 500.

5 Scott v. Scott, 17 Ind. 309.

6. Knight v. Knight, 12 La. An. 59.

Default on Supplemental Petition .-Where, after issue on an original demand for a separation from bed and board, and a prospective divorce joined by defendant, who pleads in reconvention with a similar prayer, plaintiff by a supplemental petition alleges defendant's adultery and prays for an immediate divorce, a default on the supplemental petition cannot be confirmed, though at the time the case be fixed for trial. It must be regularly set for trial on the actual issue on defendant's plea and the feigned issue of the default; the plaintiff cannot divide the case.

Knight v. Knight, 12 La. An. 59.

Indiana Practice.—In Indiana, in a suit

for divorce, on default or admission, the prosecuting attorney resists the petition.

Scott v. Scott, 17 Ind. 309.

Under the Indiana statute, the wife by default admitting of record charges in the complaint, loses her right to an order for alimony. Scott v. Scott, 17 Ind. 309.

7. See Blount v. McNeill, 29 Ala. 473; Lattimer v. Ryan, 20 Cal. 628; Smith v. Lattimer v. Ryan, 20 Cal. 628; Smith v. Silliman, 8 Conn. 116, 117; Hemken v. Farmer, 3 Robt. (La.) 155; Cooper v. Roche, 36 Md. 563; Jackson v. Fassett, 9 Abb. (N. Y.) Pr. 137; s. c., 17 How. (N. Y.) Pr. 453; Union Bank v. Mott, 9 Abb (N. Y.) Pr. 106; s. c., 8 Abb. (N. Y.) Pr. 150; 16 How. (N. Y.) Pr. 525; Oregonian R. R. Co. v. Oregon R. & Nav. Co., 27 Fed. Rep. 277; s. c., 23 Cent. L. J. 314; Bigelow on Estop. 27.

ment by default, the question of jurisdiction is not open, and the defendant is estopped and precluded from disputing it.1

Where a plaintiff has obtained the benefit of proceedings as upon default, he must stand by the results of that proceeding.² Thus where a party by his own mistake, and without fault of the adversary party, takes judgment by default for a smaller sum than he is entitled to, he cannot maintain a second action to recover the remainder.³ But a judgment by default is not an estoppel upon a distinct cause of action, though the material issues of fact are precisely the same in both cases.4

How Far Defendant is Estopped by Default. - In the case of Oregonian R. R. Co. v. Oregon Railway & Nav. Co., 27 Fed. Rep. 277; s. c., 23 Cent. L. J. 314, the United States circuit court, upon the question how far a defendant is estopped by a judgment by default, held that a judgment by default, like a judgment upon contest, is conclusive of all that it professes to decide, as determined by the pleadings,-Bigelow on Estoppel, 27;and that such a judgment so rendered is conclusive as between the parties to the action as to every matter well pleaded therein, and necessary to the judgment. And it would appear that such judgment may be replied to a plea in a subsequent action between the same parties involving the same issues, setting up matter that might have been pleaded to the former action.

By Obtaining After Judgment Leave to Come In and Defend, leaving the judg-ment to stand as security, a defendant elects to treat the action as still undetermined, and is estopped from availing himself of the judgment, as a determination of it which would preclude a provition of it which would preclude a provisional remedy. Union Bank v. Mott, of Abb. (N. Y.) Pr. 106; s. c., 8 Abb. (N. Y.) Pr. 150; 16 How. (N. Y.) Pr. 525; Jackson v. Fassett, of Abb. (N. Y.) Pr. 137; s. c., 17 How. (N. Y.) Pr. 453.

Where the Issue as to the Plaintiff's Possession under section 7 of the title of the Revised Statutes of New York, respecting proceedings to compel the determination of claims to real property in certain cases (2 Rev. Stat. 313), was found in favor of the plaintiff, and the defendant being thereupon required to plead to the title, suffered judgment to be entered against him by default, held, that the judgment was conclusive against the defendant in said proceedings and all persons claiming under. by title accruing subsequent to the service of the notice by which the proceedings were instituted. Maltonner v. Dimmick, 4 Barb. (N.Y.) 566.

1. Cooper v. Roche, 36 Md. 563.

One Who has Moved to Set Aside a De. fault cannot urge on appeal that none was taken. Hemken v. Farmer, 3 Rob. (La.) 155.

Plea that Notes Sued on are Not Due. -Where the judgment is by nil dicit, and the complaint shows a good cause of action, the objection cannot be raised on error for the first time that one of the notes on which the suit is founded was not due when the action was commenced. Blount v. McNeill, 29 Ala. 473.

Verdict for a Sum Below the Jurisdiction of the Court. - When a judgment by default has been entered, it is error in the court to enter a judgment of non pros. because the verdict or inquisition of the jury was for a sum below the jurisdiction of the court. The judgment by default is conclusive of the question of jurisdiction. Cooper v. Roche, 36 Md. 563. 2. Lattimer v. Ryan, 20 Cal. 628.

3. Ewing v. McNairy, 20 Ohio St. 315. 4. Van Alstyne v. Indiana, etc., R. R. Co.. 34 Barb. (N. Y.) 28.

Pleading Defence After Judgment by Default in Another Action. - A defendant by allowing judgment to go by default in an action to which he has a good defence is not estopped from pleading such defence in a subsequent action against him by the same plaintiff, if such defence is not inconsistent with any traversable averment in the declaration in the former action. Howlett v. Tarte, 10 C. B. N. S. 813; s. c., 31 L. J. C. P. 146; 9 W. R. 868.

Therefore, where in an action in which judgment by default was obtained, the declaration was for non-payment of rent which had accrued under an agreement to grant a lease, and the plaintiff in a subsequent action sued the defendant for further rent under the agreement, he is not estopped from pleading in such action that a yearly tenancy had by agreement between the parties been substituted for the defendant's interest under the agreement declared on, and that such yearly tenancy had been duly put an end to before the accruing of the cause of ac-

3. ON OTHER ACTIONS AND PROCEEDINGS.—A judgment by default will operate as an estoppel in all other cases as to those matters and issues which were well pleaded and properly raised in the case in which the default was taken, and is binding alike upon the plaintiff 2 and the defendant.3

And for that reason, when a judgment is taken by default the allegations in the complaint cannot be questioned in subsequent proceedings in the court below or upon appeal; much less can they

be attacked in other or collateral proceedings.4

tion. Howlett v. Tarte, 10 C. B. N. S. 813; s. c., 31 L. J. C. P. 146; 9 W. R. 868.

1. Kittridge v. Stevens, 16 Cal. 381; Ligon v. Triplett, 12 B. Mon. (Ky.) 283; Abbott v. Stevens, 117 Mass. 340; Gaskill v. Dudley, 47 Mass. (6 Metc.) 546; s. c., 39 Am. Dec. 750; Briggs v. Richmond ar Mass. mond, 27 Mass. (10 Pick.) 391; s. c., 20 Am. Dec. 756; Minor v. Walter, 17 Mass. 237; Thatcher v. Gammon, 12 Mass. 268; Newton v. Hook, 48 N. Y. 676; Marks v. Sigler, 3 Ohio St. 358; McCurdy v. Baughman, 43 Ohio St. 78; s. c., 13 Week. L. Bull. 455.

In an Action on an Account .- A judgment by default in an action on an account annexed, wherein the defendant is credited with certain goods, is no bar to subsequent actions by the defendant against the same plaintiff for the price of the same goods if they were not credited in the first suit at their full value. Minor

v. Walter, 17 Mass. 237.

But a judgment by default upon an account annexed, in which the defendant is credited with the full value of services rendered by him, is a good defence to an action by said defendant for such services commenced during the pendency of the first action. Briggs v. Richmond, 27 Mass. (10 Pick.) 391; s. c., 20 Am. Dec. 756. See Abbott v. Stevens, 117 Mass.

In an Action to Recover Interest .- A judgment by default in an action to recover a payment of interest due upon a promissory note, where process was personally served and defendant appeared but did not answer, is conclusive against a defence of usury interposed in an action between the same parties brought to recover the principal of such note. ton v. Hook, 48 N. Y. 676.

In Action to Foreclose Mortgage. -Where one of several defendants in a suit in equity to foreclose a mortgage, which went by default, afterward, asserted a claim to the mortgaged premises, which he claimed he was not bound to set up in the suit to foreclose, he was held to be concluded by the decree in

that suit. Ligon v. Triplett, 12 B. Mon.

(Ky.) 283.

In an Action on a Note Void for Usury. -A judgment, although obtained by default upon a note which was wholly void for usury, precludes the maker from setting up the usury in defence to an action on a mortgage given to secure the amount of such judgment. Thatcher v. Gammon, 12 Mass, 268.

In Action Against School District .-Judgment by default against a school district is conclusive of the liability of the district, in a subsequent action by a member thereof against an officer for levving the execution on such judgment upon his private property. Gaskill v. Dudlev, 47 Mass. (6 Metc.) 546; s. c., 39 Am. Dec.

In an Action Against Partners. - Where defendants are sued as partners and liable only as such, and where they had before that time been sued as such partners and suffered judgment to pass against them by default, such judgment may be given in evidence against them as tending to prove the partnership. Marks v. Sigler,

3 Ohio St. 358.

2. Suit on Note-Vendor's Lien-Judgment Coram Non Judice .- Thus in a suit on a note secured by a vendor's lien upon real estate bought with the note, judgment by default was entered by the clerk for the amount of the note. After the plaintiff's remedies by execution and by supplementary proceedings were hausted, the plaintiff obtained a decree for the enforcement of the vendor's lien. Held, that this decree was coram non judice and void, the first judgment having terminated the suit. Kittridge v. Stevens,

16 Cal. 381.3. A judgment by default is a sufficient circumstance to corroborate a single witness. So proof by a single witness of an admission more than five years after maturity of a note that it was unpaid with a default, there being no answer, defeats, prescription pleaded on appeal.
Lopez v. Bergel, 7 La. 181.
4. Thomson v. Wooster, 114 U. S.

104; bk. 29, L. ed. 105.

It seems that in an action to which the defence of coverture could have been set up a judgment by default is not void, but only voidable; and for that reason the enforcements of such judgment will not be enjoined unless some equitable ground of relief be shown such as fraud or coercion.1

1. McCurdy v. Baughman, 43 Ohio St.

78; s. c.. 13 Week. L. Bull. 455.

Default Judgment Against a Married

Woman.—The court bases this ruling on its previous decisions in Wehrle v. Wehrle, 39 Ohio St. 365, and Callen v. Ellison, 13 Ohio St. 446, both of which are to the effect that coverture is a defence which must be pleaded and proved like any other defence, and which, if not pleaded and proved in the action against the married woman, cannot be pleaded and proved in some other proceeding to overthrow the judgment against her. In giving the opinion of the court, Okey, J. reviewed the authorities in a very masterly manner, as follows: "Undoubtedly a number of decisions have been found to a number of decisions have been found to be in opposition to Griffith v. Clark, 18 Md. 457; Morse v. Toppan, 69 Mass. (3 Gray), 411; Cary v. Dixon, 51 Miss, 593; Walker v. Deaver, 79 Mo. 664; Weil v. Simmons, 66 Mo. 617; Wernecke v. Wood, 58 Mo. 352; Higgins v. Peltzer, Wood, 58 Mo. 352; Higgins v. Peltzer, 49 Mo. 152; Swing v. Woodruff, 41 N. J. L. (12 Vr.) 469; Watkins v. Abrahams, 24 N. Y. 72; Brittin v. Wilder, 6 Hill (N. Y.), 242; Callen v. Ellison, 13 Ohio St. 446; Vandyke v. Wells, 103 Pa. St. 49; Swayne v. Lyon, 67 Pa. St. 439; Graham v. Long, 65 Pa. St. 383; Hartman v. Ogborn, 54 Pa. St. 120; Hix v. Gosling, 1 Lea (Tenn.), 560; Norton v. Meader, 4 Sawy. C. C. 603. With respect to some of the cases a brief explanation is proper. Morse v. Toppan, 69 Mass. (3 Gray) 411, which is an opinion of ten lines by Chief Justice Shaw, has not been followed in Massachusetts, and although not overruled, it is much shaken by Reid v. Holmes, 127 Mass. 326, 329, where Gray, C. J., remarked: In Morse v. Toppan. 69 Mass. (3 Gray) 411, the judgment, which was held void, was against a married woman alone, in an action brought against her upon a contract made by her during coverture, while she was incapable by law of contracting or being sued; no argument was submitted for the plaintiff, and in the only case cited by the court, Faithorne v. Blaquire, 6 M. & S. 73. the judgment was set aside on motion. Cary v. Dixon, 51 Miss. 593. And see Freison v. Bates College, 128 Mass. 464, though not overruled, is limited in Taggert v. Muse, 60 Miss. 870, which is an authority that the judgment against Mrs.

Baughman is not void. Norton w Meader. 4 Sawy. C. C. 603; affirmed in 78 U. S. (11 Wall.) 442; bk. 20. L. ed. 134. But in the supreme court the general question of the validity of a judgment against a married woman was not considered. Hix v. Gosling, I Lea (Tenn.) 560, though an able opinion, is not an authority that such a judgment is void: but if it could be considered, Crawford v. Crawford I Tenn. Leg. Rep. 37, is a direct authority against it. Watkins v. Abrahams, 24 N. Y. 72; Brittin v. Wilder, 6 Hill (N. Y.), 242, are cases in which the attack was made directly; and it is shown in later New York cases. hereinafter cited, that these cases are not to be regarded as sustaining the view that such a judgment is a nullity. In Swing v. Woodruff, 41 N. J. L. (12 Vr.) 469, also, the judgment was set aside on motion. While it is probable that the courts of Pennsylvania, Maryland, Missouri, and Mississippi would arrive at a conclusion in a case like Callen v. Ellison, 13 Ohio St. 446, exactly the reverse of that reached by this court, it does not follow that all of them would hold the judgment in this case to be void; for in several cases the point decided was that a married woman's warrant of attorney being void, the court did not acquire jurisdiction to render judgment pursuant to it, and hence, like the warrant, was void; but here, as the case stands before us, the note may have been given for the debt of Mrs. Baughman, contracted dum sola, and hence the action and judgment against both may have been entirely proper. Placing the case, however, on the broader ground that the debt was of such a character that the plea of coverture would have been a complete defence, our duty to hold the judgment not to be void, and thus to adhere to Callen v. Ellison, 13 Ohio St. 446, is very plain, for the doctrine there enunciated is, as Mr. Freeman and Mr. Bishop show (Freeman on Judgments, § 150; 2 Bish. Rights Mar. Wom. § 386), sustained by the better reason and greater weight of authority, and a somewhat laborious examination of the cases leads us to the same conclusion. Gambette v. Brock, 41 Cal. 83: Landers v. Douglas, 46 Ind. 522; Guthrie v. Howard, 32 Iowa, 54; Wolf v. Van Metre, 23 Iowa, 397; s. c., 27 Iowa, 4. ON JUDGMENT.—The judgment of a court of competent jurisdiction until reversed or set aside is conclusive upon parties or privies; 1 and a judgment by default regularly entered is as

341; Lewis v. Gunn, 63 Ga. 542; Mashburn v. Gouge, 61 Ga. 512; Glover v. Moore, 60 Ga. 189; Spalding v. Wathen, 7 Bush (Kv.), 659; Freison v. Bates College, 128 Mass. 464; Wilson v. Coolidge, 42 Mich. 112; Taggart v. Muse, 60 Miss. 870; Vick v. Pope, 81 N. C. 22; Green v. Branton. 1 Dev. (N. C.) Eq. 500; Frazier v. Felton, 1 Hawks (N. C.), 231; Smith v. Dunning, 61 N. Y. 249; First National Bank v. Garlinghouse, 53 Barb. (N. Y.) 615; Roraback v. Stebbens, 4 Abb. (N. Y.) App. Dec. 100; Baxter v. Dear, 24 Tex. 17; Bullock v. Hayter, 24 Tex. 9; Laird v. Thomas. 22 Tex. 276; Taylor v. Harris, 21 Tex. 438; Cayce v. Powell, 20 Tex. 767; Howard v. North, 5 Tex. 290; s. c., 51 Am. Dec. 769; Dick v. Tolhausen, 4 Hurls. & N. 695.

"And, indeed, this is but to reassert the

doctrine constantly maintained in this court, that the judgment or final order of a court having jurisdiction of the subjectmatters and parties, however erroneous, irregular, or informal such judgment or order may be, is valid until reversed or set aside. Wehrle v. Wehrle, 39 Ohio St. 365; Arrowsmith v. Harmining, 42 Ohio St. 254; s. c., 13 Week. L. Bul. 254. The amazing thing is that there should be such an array of authority in support of the opposite conclusion—a conclusion which is not supported by a particle of juridical sense; which is the work of judges who forget the fundamental prin-ciples which uphold the judgments of superior courts of record when collaterally assailed, and who imagine when such a judgment is called in question that they are dealing with it as though it were before them on appeal or error. decisions of some of the courts which take this position will show the very nonsense of it. Take, for instance, those of Missouri: If a judgment against a married woman is void, as held by the supreme court of Missouri, a judgment against a slave would be void, and for the same reason; and yet that court has held that such a judgment is not void. Exparte Kaufman, 73 Mo. 588; Ex parte Toney, 11 Mo. 661.

"Take also the Massachusetts court: If a judgment against a married woman is merely void, it is because it is a judgment against a person against whom the law does not allow a judgment to be rendered in the particular cause of action, for it is A judgment by default on a void order of

well known that there were causes in which the common law did allow judgments to be rendered against married women, and their bodies to be taken in execution. But the Massachusetts court has held that a judgment rendered against A. on a cause of action which was really against another man of the same name is not void, and cannot be assailed collaterally, not even in favor of liberty; that if A. is imprisoned under it he cannot be relieved on habeas corpus. If he was not the person against whom the plaintiff had his cause of action, that was matter of defence for him to plead and prove. Gorman's Case, 124 Mass. 190. Indeed there is a good deal of authority in favor of the general rule, that the fact that the person against whom a judgment has been rendered, even in quasi criminal proceeding, is not such a person as was amenable to the particular judgment, is matter of defence to be set up and established in the proceeding which resulted in the judgment, and that it cannot be set up in a collateral proceeding for the purpose of overthrowing such judgment. In addition to the cases just cited illustrative of this rule, it has been held that a court will not go behind the commitment of a minor to a house of refuge in order to try the question whether he was older than the limit of age prescribed by the statute under which the commitment took place [People v. Superintendent. 8 Abb. (N. Y.) Pr. N. S. 112], or whether other circumstances concurred which entitle the committing tribunal so to act [People v. New York Juvenile Asylum, 12 Abb. (N. Y.) Pr. 92; and yet these were causes where the court making the commitment proceeded in the exercise of a special statutory power. But see Re Kruse, 2 Cinc. Sup. Ct. Rep. 71; Blaker's Case, 106 Mass. 501, 504; Ex. parte Randolph, 2 Brock. C. C. 448."

1. Andrews v. Varrell, 46 N.H. 20; Jones

1. Andrews v. Varrell, 46 N.H. 20; Jones v. Jones, 45 N. H. 124; Bruce v. Cloutman, 45 N. H. 37; Wingate v. Haywood, 40 N. H. 437; Hollister v. Abbott, 31 N. H. 442; s. c., 64 Am. Dec. 342; Carlton v. Patterson, 29 N. H. 584, 589; King v. Hutchins, 28 N. H. 574; Snow v. Prescott, 12 N. H. 535; Whittemore v. Shaw, 8 N. H. 393; Batchelder v. Robinson, 6 N. H. 12; Crane v. Thurston, 4 N. H. 413; Tilton v. Gordon, 1 N. H. 33.

413; Tilton v. Gordon, 1 N. 11. 55.

2. What Preliminaries are Required.—

binding as any other as far as respects the power and jurisdiction in declaring that the plaintiff is entitled to recover, though the amount of the recovery in some cases remains to be ascertained by a jury. I Judgment by default for want of a plea, followed by a judgment upon an inquisition, is just as effectual as a verdict rendered upon issue.2 Allowing judgment to be taken by default to a waiver of all objections to the form of proceedings, 3 variance in the name.4 as well as of all right to object to the jurisdiction

publication is null. Crouch v. Crouch,

30 Wis. 667

After the Lapse of Twenty Years a judgment by default will be presumed valid. though the record showing jurisdiction is wanting, Fogg v, Gibbs, 8 Baxt. (Tenn.)

1. Smith v. Billett, 15 Cal. 23; Chase v. Swain, Admr., 9 Cal. 130; Smith v. Silliman, 8 Conn. 115; Sample v. Gilbert, 46 Ind. 444; Stansbury v. Keady. 29 Md. 361; Brown v. Kemper, 27 Md. 666; Green v. Hamilton, 16 Md. 317; Fowler v. Lee, 10 Gill & J. (Md.) 358; s. c., 32 Am. Dec. 172; Gray v. Coulter, 4 Pa. St. 188; Craig v. Alston, 1 Mill Const. (S. C.) 58 (Marginal 123.) Though an absent defendant is by the statute allowed four years in which to come in and answer a bill taken pro confesso against him, the decree will be treated as final in the mean time, and will be enforced. Watlington v. Howley, I Desaus. (S. C.) 167.

The Judgment Against an Administrator, though in the form of a common money judgment by default, is valid, its only effect being to establish the validity of the claim. Chase v. Swain. Admr., o

Cal. 130.

On a Bond.—A judgment by default in an action of debt on a bond is final. Craig v. Alston, 1 Mill Const. (S. C.) 58 (Marginal 123).

In Debt.—A judgment by default, in debt, not liquidated, and a like judgment on a sci. fa. to revive, will support a sheriff's sale; the nominal and real debt being indorsed on the execution. v. Coulter, 4 Pa. St. 188.

In Ejectment-Amended Complaint,-Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and judgment by default is regularly entered, the judgment is valid. Smith v. Billett, 15 Cal. 23.
In Foreign Attachment—Bond on De-

fault. - A debt due to an absconding debtor was factorized when he was out of the State, and, no attorney appearing for him at the first term, the suit was continued: Before that term, however, the debtor had returned, and had actual no-

tice of the suit. At the second term judgment was rendered against him by default, and the plaintiff lodged a bond with the clerk in double its amount to refund, etc., which bond was defective and void. Held, that its invalidity did not affect the judgment, as no bond was acquired. Smith v. Silliman, 8 Conn. 115, 116.

Under Maryland statutes, 1794, ch. 54, sec. 1, a judgment by default against a sheriff in the time limited for that purpose by rule of court is equally valid with a judgment rendered on a verdict. Fowler v. Lee. 10 Gill & J. (Md.) 358: s. c., 32 Am. Dec. 172.
2. Stansbury v. Keady, 29 Md. 361;

Brown v. Kemper, 27 Md. 666.

Interlocutory Judgment.-A default is not a judgment interlocutory. Holmes v. Lewis, 2 Wis. 83.

After a judgment by nil dicit, the defendant cannot take advantage on error of a variance between the writ and declaration. Summerlin v. Dowdle, 24 Ala.

Where parties appear in a case, and submit a motion, and afterwards a judgment nil dicit is rendered against them, all irregularities are cured which should have been objected to in the court below. And where the writ or summons is returned as to one of the defendants "not found," and the record afterwards recites that "the parties came by their attorneys," a judgment against all will be held good. Eaton v. Harris, 42 Ala.

3. Defects of Form-Statutes of Jeofails. -After judgment, all defects of form not previously objected to are cured by the Alabama Statute of Jeofails. Turner v.

Brown, o Ala. 866.

 A Default and Judgment under subdivision 10, sec. 7, Illinois Revised Stat-utes 1874, p. 138, cures a variance in the plaintiff's Christian name between the writ and declaration. Sidway v. Marshall 83. III. 438.

Fictitious Name. - Where a man is sued by a fictitious name, and the return of the sheriff on the summons shows service on of the court, the regularity of the proceedings, 1 and to a right of trial.2

Although a defective allegation of the fact may be cured by default verdict, but not so the entire absence of any allegation whatsoever. But the appearance of the defendant and the withdrawal of his plea are a waiver of any defect in the service of process, and is an admission of the legal liability charged in the declaration.4

A default is waived by the filing of an answer without leave of court, if the adverse party fails to object to such filing and joins issue upon the allegation thereof, and submits such issue upon the pleading to the court.5

the defendant by his proper name, as "John Doe alias Westfall," a default being entered, judgment may be rendered against the defendant in his true name, Westfall, with proof that Doe and Westfall are the same. Curtis v. Herrick, 14 Cal. 117; s. c., 73 Am. Dec. 632.

1. Where a defendant makes default,

he waives all objection that might have been made to the affidavit of the claim filed with the declaration. Knott v. Swan-

nell, 91 Ill. 25.

Defendant, in whose absence a default is confirmed by illegal evidence, cannot assign it for error on appeal. If not present to protect his rights, he cannot complain. So, though the record does not show that the witnesses were examined in open court, the confirmation of the default will be affirmed. Brander v. Goodin; 6 La. An. 521.

In Mississippi, a judgment by default is a waiver of an imperfection in the declaration. Irwin v. Williams, I Miss. (Walk.)

Cures Imperfections and Omissions. - The entry of a judgment by default cures all such imperfection or omissions as would have been cured by verdict. Keller v. Stevens, 66 Md. 132; s.c.. 5 Cent. Rep. 574.

Where a default was suffered by consent, it was held that the case stood upon the same footing as if there had been a verdict, and that the defendant was precluded from objecting that the venue was in the wrong county. The objection should have been taken advantage of by demurrer. Heath v. Whidden, 29 Me.

Defects in Return of Service .- A recital in a judgment by default that the default of the defendant was duly entered, cures a technical defect in return of service.

Peck v. Strauss, 33 Cal. 678.

2. A party defaulted has not a right to a trial as of right. Fisk v. Baker, 47

Ind. 534.

Motion to Change the Venue denied with costs, because defendant's default had been entered. Clapp v. Stevens, 2 How. (N. Y.) Pr. 276; Hull v. Wallis, 2 How. (N. Y.) Pr. 134.

Not Entitled to Ask for Instructions .-While a party is in default for want of an answer or plea, he is not entitled to ask the court to give instructions. All that he can do is to cross-examine the witnesses of the plaintiff at the time of the assessment of damages. Carleton v. Byington, 17 Iowa, 579; Wilkins v. Treynor, 14 Iowa, 392; Pfuntz v. Culver, 13 Iowa, 312; McLott v. Savery, 11 Iowa, 323; Keeney v. Lyon, 10 Iowa, 546; Loeber v. Delahaye, 7 Iowa, 478; Cook

v. Walters, 4 Iowa, 72.

Not Entitled to Plead .- After a judgment by default, although it may be necessary to execute a writ of inquiry, the defendant has not the legal right to plead to the merits of the action, whether his defence existed before, or arose after the rendition of the judgment. Ewing v. Peck, 17 Ala. 339.
3. Barron v. Frink, 30 Cal. 489; Peo-

ple v. Rains, 23 Cal. 127; Hentsch v. Porter, 10 Cal. 555.

In Ejectment.—The want of an allegation of actual ouster in a complaint in ejectment is a defect which cannot be cured by a default taken through the mistake or inadvertency of defendant's counsel. Payne v. Treadwell, 16 Cal. 243; Harlan v. Smith, 6 Cal. 173; Watson v. Zimmerman, 6 Cal. 46.

Kennedy v. Young, 25 Ala. 563.
 Jones v. Jones, 13 Iowa, 276.

When a party, instead of asking for a default, or ruling the other side to plead, goes-to trial without objecting to the want of a plea, the cause is to be treated as if the general issue had been filed, and the irregularity is no cause for a reversal of the judgment. Loomis v. Riley, 24 Ill. 307.

II. What Constitutes and When Authorized.—A judgment by default is the pronouncing of the final judgment in a case against a party without his appearance or presence in court either in person or by attorney, within the time prescribed by law to prosecute his claim or make his defence.

I. PRELIMINARY STEPS.—To render a judgment by default valid and binding, there must have been a proper service on all the defendants in the case, or they must have appeared in the cause.

a. Parties.—(1) Several.—Where there are several defendants one of whom is neither served with process nor appears, and judg. ment is taken by default against all, it is erroneous as to all. Where there is defective service of process upon one of several defendants, and judgment by default is rendered against him and his codefendants, such judgment must be set aside. 2 And where all are served the plaintiff cannot take judgment by default against some. omitting the others 3

If a writ issue against three defendants, which is served upon two of them only, and an alias is issued and served upon all. it is erroneous to render judgment by default against all of them, at the term to which the alias writ is returnable.4 Where original process issues against two, which is served upon one, and the plaintiff declares only against the party served, though appearance is entered as for both, judgment rendered against both defendants is error. Where one of two defendants in an action ex contractu suffers default, and judgment is rendered against the other defendant upon hearing, although the rendition of separate judgments would be erroneous, yet a judgment so rendered against one of the defendants would not be absolutely void.6

An error of the circuit court in taking judgment against two defendants, without process served or appearance as to one, may be affirmed as to one and reversed or dismissed as to the other.7

Where one only of several defendants makes defence, and there is a verdict for the plaintiff, judgment entered generally, without a formal entry by default against the others, is regular.8

Where a Writ Issues against Two and is served on one only of the defendants, it is error to take a judgment by default against both. Parker v. Parker, 39 Ala. 347; Childress v. Taylor, 33 Ala. 185; Faver v. Briggs. 18 Ala. 478; Granberry v. Wellborn, 4 Ala. 118; Smith v. Winthrop, 1 Ala. (Minor) 425; Winslow v. Lambard, 57 Me. 356; Covenant Mut. Life Ins. Co. v. Clover, 36 Mo. 392; Pomeroy v. Betts, 31 Mo. 419.

Same-Default Against One - When a writ is issued against two and is returned executed upon one, but is silent as to the other, the legal conclusion is that the latter was not served; under such circumstances it is allowable to take a judg

1. Palmer v. Edwards, 4 Ark. 431; ment against the party only who is before Moss v. Gibson, 4 Ark. 427. the court, and discontinue as to the other.

Granberry v. Wellborn. 4 Ala. 118.

Judgment by Default Charging Land. -A judgment by default which charges land in which a co-defendant not defaulted is interested may be objected to by him. Broghill v. Lash, 3 G. Greene (Iowa),

357. 2. Smith v. Rollins, 25 Mo. 408. Littl 18 Ark. 362; 3. Purefoy v. Hill, 18 Ark. 362; Sullivant v. Reardon, 5 Ark. 147; Hutchings v. Real Estate Bank, 4 Ark. 517.

4. Griffin v. Wilson. 19 Ala. 27.
5. Lucy v. Beck, 5 Port. (Ala.) 166.
6. Downer v. Dana, 22 Vt. 22.

7. Cutchen v. Coleman, 13 Ind. 568. 8. Rappleye v. Hill, 5 Miss. (4 How.)

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(2) Joint Parties.—It is erroneous to render judgment by default against two or more joint defendants, upon one of whom there was no service, because in an action against joint defendants in contract a personal judgment cannot be given against one not served.2

And a judgment rendered in a State court against several partners, on the appearance of one, under a State statute, providing that where joint debtors are sued and one only is brought into court on process, judgment may be rendered against all, is not entitled to full faith and credit in every court within the United States, against a partner who appears by the record not to have had personal notice nor to have appeared.3

Judgment by Default as to One Defendant, and Verdict as to Another. - In an action on a joint and several contract judgment may be entered against one defendant on verdict, and against another by default at the same term. Lynch v. Commissioners of Sinking Fund, 5 Miss. (4 How.) 377; Peyton v. Scott, 3 Miss. (2 How.) 870. But it is error to take judgment final against one at one term, and a verdict and judgment against the other for a different sum at a subsequent term. Deut v. Coleman, 18 Miss. (10 Smed. & M.) 83; Falconer v. Frazier, 15 Miss. (7 Smed. & M.) 235; Prewett v. Caruthers, 8 Miss. (7 How.) 304.

But where makers and indorsers of a note are sued in the same action, a judgment by default may be taken against the maker at one term, and the cause continued as to an indorser to the next. Hunt v. Nugent, 18 Miss. (10 Smed. & M.) 541; Moore v. Ayres, 13 Miss. (5

Smed. & M.) 310.

1. Parker, v. Parker, 39 Ala. 347; Faver v. Briggs, 18 Ala. 478; Rider v. Alleyne, 3 Ill. (2 Scam.) 474; Robertson v. Crawford, I. A. K. Marsh. (Ky.) 449; Winslow v. Lambard, 57 Me. 356; Mc-Caskill v. McBryde, 2 Ired. (N. C.) Eq.

Where All are Not Served.—In A's action on B's and C's joint contract, the declaration was joint, and the justice's summons was issued against both, but served on B only. Held, that a judgment entered against both without any appearance by either must be set aside. Murdy v. McCutcheon, 95 Pa. St. 435.

Where the Summons in Trover was against R. and A. as partners, but the complaint was against R. alone, who alone pleaded, though the summons was returned executed"by leaving a copy with R., and R. and A. defendants," held, that the judgment was against R. alone; use of the word "defendants" in its marginal statement was a clerical misprision, and amendable. Renfro v. Willis, 67 Ala.

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In Indiana—Partnership Note.—In Indiana, in a case where a note was made to one member of the firm and by him indorsed and transferred in discharge of a private obligation, the assignee having full notice of the character of the note. and suit was afterwards brought by such assignee and the other members of the firm answered, and judgment by default was taken against the partner assigning the note, the court held that such judgment was valid as against such defendant. See Rose v. Comstock, 17 Ind. 1.

In New Jersey. - Judgment cannot be taken by default against a joint defendant not served with process, within 60 days from the return of process, unless such defendant has been served with notice of the filing of the declaration under N. J. Act 1852. McMurtrie v. Doughten, 24

N. J. L. (4 Zab.) 252.

In Pennsylvania. - A judgment on default against two when but one of them was found on the writ, and entered special bail, is erroneous. Boaz v. Heister, 6 Serg. & R. (Pa.) 18.

2. Hickey v. Smith, 6 Ark. 456; Inos v. Winspear, 18 Cal. 397; Treat v. Mc-Call, 10 Cal. 511; Swift v. Green, 20 Ill. 173; Ogden v. Bowen, 3 Ill. (2 Scam.) 33; Ayer v. Bailey, 6 Miss. (5 How.) 688; Jones v. Reed, I Johns. Cas. (N. Y.)

3. D'Arcy v. Ketchum, 52 U. S. (11

How.) 165; bk. 13, L. Ed. 648.

Judgment of the Courts of a Sister
State.—The United States constitution provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." Constitution of United States, art. 4, sec. 1. The act of Congress declares how records of a State may be authenticated, and provides that records

In a joint libel against two or more persons for a marine tort, the court has the authority to dismiss the libel as to one of them, even if there is some evidence against him, for the purpose of his being used as a witness, if the purposes of justice require it.¹

b. Notice, Summons, and Appearance.—It is error to take judgment by default against a party who has neither been served with process nor entered his appearance.² Hence, to authorize a judg-

so authenticated shall have full faith and credit in every court of the United States as they have by law in the courts of the State from which they are taken. I Stat. at Large, 122; Rev. Stat. U. S., sec. 906.

There has been a difference of opinion in the construction of the constitutional provision and the statute. The decision in Mills v. Duryee, 11 U. S. (7 Cr) 481; bk. 3, L. Ed. 411, is a leading case on this subject which has been reviewed in many cases. From the weight of authority it appears that the jurisdiction of the court may be inquired into either as to the subject-matter or person. Denison v. Hyde. ject-matter or person. Denison v. Hyde, 6 Conn. 508, 518; Aldrich v. Kinney, 4 Conn. 380; Rogers v. Coleman, Hard. (Ky.) 413; s. c., 3 Am. Dec. 733; Seevers v. Clement, 28 Md. 426; Folger v. Columbian Ins. Co., 99 Mass. 267; Hall v. Williams, 6 Pick. (23 Mass.) 232; s. c., 17 Am. Dec. 356; Bissell v. Briggs, 9 Mass. 462; s. c. 6 Am. Dec. 88; Marx v. Fore, 51 Mo. 69; Hoffman v. Hoffman, 46 N. Y. 30; Mackay v. Gordon, 34 N. J. L. (5 Vr.) 286; Curtis v. Gibbs, 2 N. J. L. (1 Penn.) 399; Starbuck v. Murray, 5 Wend. (N. Y.) 148; s. c., 21 Am. Dec. 172; Penny-Y.) 148; s. c., 21 Am. Dec. 172; Pennywit v. Foote, 27 Ohio St. 600; s. c., 22 Am. Rep. 340; Paine v. Mooreland, 15 Ohio, 445; s. c., 45 Am. Dec. 585; Benton v. Burgot, 10 Serg. & R. (Pa. St.) 240; Christmas v. Russell, 72 U. S. (5 Wall.) 290; bk. 18, L. Ed. 475; Harris v. Hardeman, 55 U. S. (14 How.) 334; bk. 14, L. Ed. 444; Voorhees v. Jackson, 35 U. S. (10 Pet.) 449, 475; bk. 9, L. Ed. 490, 501; U. S. v. Arredondo, 31 U. S. (6 Pet.) 691; bk. 8, L. Ed. 547. In the case of Hunt v. Hunt, 72 N. Y.

In the case of Hunt v. Hunt, 72 N. Y. 217, the New York court of appeals held that the jurisdiction of a court of another State in which a judgment has been rendered is always open to inquiry in the courts of New York, and the judgment may also be questioned collaterally for

fraud.

However, a judgment rendered by a court having power lawfully conferred to deal with the general subject involved in the action, and having jurisdiction of the parties, but without facts or against the facts, is not void as rendered without jurisdiction, and cannot be questioned

collaterally,—Hunt v. Hunt, 72 N. Y. 217; Pringle v. Woolworth, 12 N. Y. Week. Dig. 554; affirmed, 90 N. Y. 502,—because jurisdiction in such case will be presumed. Pacific Co. v. Wheelock, 80 N. V. 278

N. Y. 278.
Notice to Appear and Defend necessary, for the rule that a judgment or decree of one State must receive full faith in the courts of another State does not apply to judgments rendered in proceedings instituted without personal notice to the Such judgments, though defendant. they may be authorized by statute of the States in which they are rendered, are not within the meaning of the rule. To render a judgment binding outside the State, it must be founded on personal notice to the party to be affected. Harris v. Hardeman, 55 U. S. (14 How.) 334; bk. 14. L. Ed. 647; D'Arcy υ. Ketchum. 52 U. S. (11 How.) 165; bk. 13, L. Ed. 648; Gruner v. United States, 52 U. S. (11 How.) 163; bk. 13, L. Ed. 647; Warren Mfg. Co. v. Ætna Ins. Co., 2 Paine C. C. 501.

A judgment in personam, recovered without any notice, and without any attachment of property or mesne process, though authorized by a law of the Territory in one of the courts in which it was rendered, is a nullity. Webster v. Reid, 52 U. S. (II How.) 437; bk. 13, L. Ed. 761.

1. Elwell v. Martin, I Ware (U. S. D.

2. Campbell v. Doss, 17 Ala. 401; Moore v. Watkins, 1 Ark. 268; Townsand v. Townsand, 21 Ill. 540; Johnson v. Delbridge, 35 Mich. 436; Duncan v. Gerdine. 59 Miss. 550; Prentiss v. Melen, 9 Miss. (1 Smed. & M.) 521; Stallings v. Gully, 3 Jones (N. C.). 344; Winslow v. Anderson, 3 Dev. & B. (N. C.) L. 9; Graham v. Graham, 4 Munf. (Va.) 205; Warren Mfg. Co. v. Ætna Ins. Co. 2 Paine C. C. 501.

Co., 2 Paine C. C. 501.

In Attachment — A judgment rendered upon default against a party, who at the time of the service of the writ is an inhabitant of the State, and whose goods are attached, but to whom no summons is delivered and where none is left at his last and usual place of abode, is erroneous, and will be reversed on error of

ment by default, it should appear affirmatively that there has been such service and compliance with the provisions of the law as gives the court jurisdiction over the person of the defendant, and when the record discloses the fact that there has been no such service and compliance, it is irregular to render such judgment. And a

Burt v. Stevens. such defective service.

22 N. H. (2 Fost.) 220.

If service is void so that the defendant has in law no notice, a judgment in the Hart v. suit on default is erroneous Huckins 6 Mass. 399. See Pixley v. Winchell, 7 Cow. (N. Y.) 366.

Want of Notice of Rule to Plead.—A

judgment by default is not absolutely void for want of sufficient notice of the rule to plead, where process has been personally served; and if the party suffering judgment neglects to seek relief against it on error until the other party would have lost his remedy by lapse of time, he cannot then have it vacated by mandamus. Granger v. Detroit Superior Court Judge, 44 Mich. 384.

In Iowa, -A plaintiff who fails to comply with the provisions of section 1826 of the Iowa Code in regard to service, cannot obtain a default. Broghill v. Lash.

3 G. Greene (Iowa), 357.

Judgment by default should not be rendered against a party not personally served, until the court is satisfied that every requirement of Iowa Code in reference to the notice has been performed. Lot Two v. Swetland, 4 G. Greene (Iowa), 465; Pinkney v. Pinkney, 4 G. Greene (Iowa), 324.

Same-In Action on Mortgage. - Judgment upon default, in an action upon a mortgage against the owners of the land, is not to be rendered until it appears that notice was served on the unknown or absent owner, according to the Iowa Code, § 1826. Byington v. Crosthwait,

I Iowa (I Clarke), 148.

Same-Improper Service of Copy of Complaint.-And where the defendant required that a copy of the petition should be sent to his attorney at a place named, and it was sent by mail to the residence of the defendant, who failed to answer, and was defaulted, held, that the service was insufficient and the judgment invalid. Woodward v. Whitescarver, 6 Iowa, r.

In Indiana-In Foreign Attachment.-To authorize a judgment in a proceeding in foreign attachment against a garnishee served with process in and being a resident of another county than that in which writ of attachment was issued, it is necessary under Indiana Rev. Stat. 1843 that property of absconding debtor shall

have been attached, or a garnishee served with process, in latter county. Rein-

hard v. Keith, 3 Ind. 137.

Same—Appeal in Vacation.—The rule

that where a judgment is rendered by default it will be reversed on appeal unless the record shows that summons was issued and served, applied to a judgment by default upon an appeal taken in vacation from an order of a board of county commissioners, the statute requiring it to be issued and served upon adverse parties, when such appeal is taken.

Houk v. Barthold, 73 Ind. 21.

Misnomer. - Where the sheriff was commanded by the writ to summon the defendant to answer William Cunnington in an action of debt, etc., and a judg-ment after due service of the writ was rendered by default against the defendant in favor of William Cunningham, held, that the defendant had no notice of any action against him by Cunningham, and therefore the judgment was void. parte Cheatham, 6 Ark. (1 Eng.) 531.

Suit on Default Judgment in Sister State.—A judgment was recovered by default in the State of Georgia, on a writ returned thus: "Served the defendant by leaving a copy at his most notorious place of abode July 19, 1848." Suit was brought on this judgment in Arkansas, and on the plea of nul tiel record the court below decided for the defendant. Held, that the decision was erroneous; that a judgment rendered on such service in the courts of that State would not be void, though it might be reversible, and that the judgment on such service in a sister State must be regarded as equally valid under the plea of nul tiel record, though the defendant might by special plea question the sufficiency of the service. Buford v. Kirkpatrick, 13 Ark. (8 Eng.) 33.

Where a claim to property levied on under attachment is dismissed for want of jurisdiction in the court to which it was made returnable, and no further steps are taken by the claimant to assert his rights, the levy is sufficient to support a judgment by default against the defendant in the attachment.

v. Doss, 17 Ala. 401.

1. Woodward v. Whitescarver, 6 Iowa,

Where jurisdiction depends upon the

judgment either strictly foreign or coming within the operation of the constitution and law of the United States, obtained without notice to the defendant, or his appearing in any manner to answer to the suit, can have no validity, or binding effect or operation.1

Where a judgment by default has been taken against a principal and his surety, the fact that no process in the suit has been served upon the former affords no ground for vacating such judgment

against the latter.2

When a petition has been stricken from the files for want of a verification, and the defect has been supplied, there must be a new summons issued and new service made; until then there is no defendant in court, and no default can be had.3 A non-resident defendant personally served out of the State is not liable to a personal judgment upon default. But when a non-resident defendant filed his answer to a petition in equity, it was held that he was a party regularly before the court, and that a personal judgment was authorized against him, notwithstanding a statement in the answer that it was made without entering his appearance in the action.5 And a judgment by default rendered in a county other than the one in which the party resides, no reasons appearing upon the record why service was made on him out of the county of his residence, the judgment will be erroneous.6

A judgment for want of an answer can only be taken when it appears that defendant has been duly served with summons and

process, the statute must be strictly followed. Milbourn v. Fouts, 4 G. Greene (Iowa), 346; Hodges v. Brett, 4 G. Greene

(Iowa), 345. Service by Unauthorized Person.—A judgment by default, against a party who has been served only by an unauthorized person, is a nullity. Kyle v. Kyle, 55 Ind. 387.

When served by a summons, returnable at a term of court beyond next. Briggs v. Sneghan, 45 Ind. 14.

Where service is made upon a defendant against whom judgment is taken by default, the judgment is valid, although there is no return of service until nearly a year after it is rendered. Lawrence v. Howell, 52 Iowa, 62.

1. Warren Míg. Co. v. Ætna Ins. Co.,

2 Paine C. C. 501

2. Mason v. Miles, 63 N. C. 564.

3. Stevens v. White, I West. L. Mon.

4. Allen v. Cox, 11 Ind. 383.

A Personal Judgment for Money or
State court, against an ab-Damages in a State court, against an absent defendant who did not appear in the action, is so far a nullity. Mickey v. Stratton, 5 Sawy. C. C. 475.

Massachusetts Doctrine - Judgment obtained on default against a person absent from the commonwealth, and who has no knowledge of the pendency of the action, after merely leaving a summons at his last and usual place of abode, and attaching his real estate, without the fur-ther notice required by Mass. Rev. Stat. ch. 90, \$ 48, is erroneous, and will be reversed on a writ of error sued out by him, or, if he takes the benefit of the insolvent law without having done so, by his assignee in insolvency. Johnson v. Thaxter, 78 Mass. (12 Gray), 198.

5. Tipton v. Wright, 7 Bush (Ky.). 448.
6. Thus suit was brought in the G. circuit court against D. alone. Summons was served in H. county, and judgment by default rendered against him. No special reason for such service appeared in the record. Held, that the judgment was erroneous. Dyas v. Lind-

sey, 4 Bush (Ky.), 349.

A suit was commenced by long summons in the New York marine court against the maker and indorser of a note, one living in the city, the other in an adjacent county, and judgment was taken against the latter, he only being served more than six days before the return day, but making no appearance. Held, that the judgment was void, and that the execution issued thereon would not justify the party issuing it. Harriott o. Van Cott, 5 Hill (N. Y.), 285. has failed to answer the complaint within the time allowed by law. To be duly served with a summons implies that the defendant has been duly served with summons, notifying him to appear and answer in the court where the judgment is sought to be taken. 1 A summons radically defective cannot support a judgment by default.² A judgment by default is not void because the return

1. Fowler v. Banks, 21 Ala, 670; Driver v. Spence, 3 Ala. 98; Land v. Patteson. I Ala (Minor) 14; Moore v. Watkins, 1 Ark. 268; State v. Woodlief, 2 Cal. 241; Garrett v. Phelps, 2 III. (r Scam.) 331; Jones v. Roland, 8 Blackf. (Ind.) 272; Dixon v. Boyer, 7 Blackf. (Ind.) 547; Miller v. Bottorff, 6 Blackf. (Ind.) 30; Klinger v. Brownell, 5 Blackf. (Ind.) 332; Bliss v. Wilson, 4 Blackf. (Ind.) 169; Carr v. Kopp, 3 Iowa, 80; January v. Henry, 3 T. B. Mon. (Ky.) 8; Holland v. Hunton, 15 Mo. 475; Johnson v. Delbridge, 35 Mich. 436; Glenn v. Wragg, 41 Miss. 654; Wolley v. Bowie, 41 Miss. 555; Ford v. Coleman, 41 Miss. 651; Holland v. Hunton, 15 Mo. 475; Bascom v. Young, 7 Mo. 1; Gamble v. Warner, 16 Ohio, 371; Brown v. Robertson, 28 Tex. 555. See Smith v. Ellendale Mill Co., 4 Oreg. 70.

The Record Must Show Service in some

manner. Miller v. Bottorff, 6 Blackf, (Ind.) 30; Klinger v. Brownell, 5 Blackf.

(Ind.) 332.

A judgment by default is irregular unless it appear by a return upon a process that it has been served, and what day service was made, Garrett v. Phelps, 2 Ill. (1 Scam.) 331; January v. Henry, 3 T. B. Mon. (Ky.) 8; Bascom v. Young, 7

Before Judgment by Default can be Regularly Taken against a party, there must be positive and sufficient evidence in court of due service; and no substantial defect in that respect can be cured by subsequent knowledge of the facts. An indorsement upon the process of a written acknowledgment of service, purport. ing to be signed by the party, is not sufficient without proof of the authentication of such indorsement and signature to authorize the entry of default for want of appearance. Johnson v. Delbridge, 35 Mich. 436.

It is error to enter judgment by default without service of process; and such error is not cured by the defendant filing pleas after entry of judgment by default without obtaining leave to do so, or applying to the court to set aside the judgment. Moore v. Watkins, I Ark. 268.

In Indiana. - Before a Justice, the record need not contain copies thereof, when entry of justice shows that summons was issued and served three days before day of trial. Taylor v. McClure, 28 Ind. 39; Dixon v. Boyer, 7 Blackf. (Ind.) 547.

Alter if record of justice does not recite such facts. Bliss v. Wilson, 4 Blackf. (Ind.) 169.

Same-In Probate Court .- A judgment by default cannot be taken in probate court unless the process has been served two days before the commencement of the term. Jones v. Roland, 8 Blackf.

(Ind.) 272.

Under the Act of Maryland relating to practice, if a petition on a promissory note be served upon the defendant, by leaving a copy at his usual place of abode, fifteen days before the return day of the writ, and the defendant fails to answer, the court may render judgment by default. Holland v. Hunton, 15 Mo.

2. State v. Woodlief, 2 Cal. 241.

If the writ appeared to have been executed and returned otherwise than by or in the name of the sheriff, judgment by default was erroneous. Land v. Patte-

son, I Ala. (Minor) 14.

Return as to Different Defendants. - The sheriff returned the writ executed on one defendant: as to the other defendant. there was an acknowledgment of service indorsed on the process, and subscribed with his name, but there was no proof of its genuineness. Held, that a judgment by default against both defendants was irregular. Driver v. Spence, 3 Ala. 98.

An Indorsement by the Sheriff on a Writ in Detinue that by virtue of the writ he had taken the property therein described, and five days having elapsed, and the defendant failing and refusing to put in bond, and the plaintiff having put in bond within five days, the property had been delivered to the plaintiff, is not sufficient to show that he had executed the writ on the defendant, and will not support a judgment by default. Fowler v. Banks, 21 Ala. 679.

A Return upor a Summons "executed by delivering copy to son of defendant at his residence, Sept. 12, 1866," held, not sufficient to support a judgment by default under Mississippi Revised Code, 489, art. 64. Glenn v. Wragg, 41 Miss. 654.

upon the summons was without date: but if the writ was not signed by the clerk, judgment by default will be deemed erroneous.2

Judgment by default where the return on the writ is insufficient is erroneous, and will be reversed on error, even though the judge. ment should recite that due service was made.4 And if the sheriff does not return the writ at the proper time, and the plaintiff takes no steps to compel him to do so, and enters no appearance, a judgment by default after an entry at a subsequent term is invalid.5

A judgment by default on acknowledgment of service is erroneous, unless such acknowledgment appears on the record.6 And acknowledgment of service of process must be proved to support a judgment by default.7

A return upon a summons "executed as to F. by leaving a copy with his clerk at his store (Mr. F. Eubanks), who is a free white person over sixteen years of age, he having no other place of residence and not being found," held, not sufficient to support a judgment by de-

fault. Ford v. Coleman, 41 Miss. 651.

A return of a citation to "Mrs. Parmelia Brown," as served upon "Mrs. Brown," will not sustain a judgment by default against Mrs. Parmelia Brown. Brown v. Robertson, 28 Tex. 555.

"Duly Executed."—A judgment by default upon a return of "duly executed"

on a summons is erroneous and will be reversed. Wolley v. Bowie, 41 Miss. 553.

"Not Found."-Judgment cannot be rendered by default upon a return of "not found," unless notice, etc., is sent to the defendant, or an excuse therefor shown under Iowa Code, sec. 1826. Carr

v. Kopp, 3 Iowa, 80.

Copy Left at Residence. - A summons was issued against three defendants. The return of the sheriff was in these words: "Served by leaving a copy of this writ at the residence of the within-named defendant." The fees taxed upon the back of the summons were but the legal fees for the service upon one defendant. was judgment by default against all of the defendants. The court held, on error, that it was not a good service as to all or either. Gamble v. Warner, 16 Ohio, 371.

1. Betts v. Baxter, 58 Miss. 329, 334. Service of Incorrect Copy.—It is not an error affecting the merits, and therefore not affecting the judgment, that an incorrect copy of the summons was served, though it may be an excuse for a default or give an action against the officer for a false return. Haughey v. Wilson, I Hilt. (N. Y.) 259.

2. Stone v. Harris, t Ala. (Minor) 32. A Summons not Signed by the Clerk or his deputy will not support a judgment

by default, though payments have been made on such judgment. Wilson v. Owen, 45 Ala. 451; Winnemore v. Mathews, 45 Ala. 449; Costley v. Driver, 45 Ala. 230.

3. Service on Corporation .- In an action against a corporation, where process is served upon one being president of the corporation, judgment by default cannot be entered without proof of his official character made to the court and entered of record. Wetumpka & C. R. R. v. Cole, 6 Ala. 655.

4. Roberts v. Stockslager, 4 Tex. 307. Recitals in Judgment. - Where a judgment by default recites that service of the writ in the case was acknowledged by the defendant, held sufficient to sus-. tain the judgment. Winston v. Miller, 20 Miss, (12 Smed. & M.) 550. Where a judgment by default of a court

of general jurisdiction recites that the summons was personally served upon a defendant, the recital is sufficient to show that the court acquired jurisdiction, and a defect in a proof of service attached to the judgment roll does not show want of jurisdiction or affect the validity of the judgment. Mackey, 89 N. Y. 146.

5. Hibbard v. Pettibone, 8 Wis. 270.

6. Finney v. Gilder, 73 Ala. 196. Acknowledgment of Service — A judgment by default upon a service acknowledged by indorsement, but not proved, is not cured by the Alabama Statute of Amendments. Wilson v. Owen, 45 Ala.

A Return of Writ " Not Executed by Order of Attorney," and acknowledgment of service by the defendant, will authorize the rendition of judgment by default.

Boughton v. Spear, 4 Ala. 257.
7. Bozman v. Brower, 7 Miss. (6 How.)
43; Davis v. Jordon, 6 Miss. (5 How.) 295; Harvie v. Bostic, 2 Miss. (I How.)

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Judgment by default may be taken upon service duly made by publication; but a default should not be taken upon publication without a return of summons "not found." Strict compliance with the statutes regulating constructive service by publication is essential to the validity of a judgment by default based on such service. If, however, the summons substantially complies with the material requirements of the statute, it is sufficient. When the defendant has been duly served with process, judgment by default may be entered against him without an entry in the record showing his appearance; because a defendant duly served

Acknowledgment of Service Must be Proved.—The acknowledgment of service of process indorsed thereupon, subscribed with the name of the defendant and attested by the clerk, does not authorize the rendition of a judgment of default unless the acknowledgment or to be genuine. O'Neal v. Garrett. 3 Ala. 276; Driver v. Spence, 3 Ala. 98; Norwood v. Riddle, 9 Port. (Ala.) 425; Hobson v. Emanuel, 8 Port. (Ala.) 442; Rowan v. Wallace, 7 Port. (Ala.) 171; Welch v. Walker, 4 Port. (Ala.) 120.

A Sci. Fa. to Revive a Judgment against an Administrator had upon it instead of the usual sheriff's return of service an acknowledgment signed by the administrator that it was personally served upon him. Judgment by default was rendered against the administrator. It was held that the judgment was not void; and that it could not be objected to in a collateral proceeding. Draper v. Bryson, 17 Mo. 71; s. c., 57 Am. Dec. 257.

1. Service by Publication.—Where service was made under the Iowa Code by publication only, it was held that default should not be entered without proof that a copy of the notice was directed to the defendant, or that his residence could not be ascertained. After such notice and default the proof will not be presumed. It should appear of record. Trask v. Key, 4 G. Greene (Iowa), 372; Broghill v. Lash, 3 G. Greene (Iowa), 357.
2. Smith v. Trimble, 27 Ill. 152; Cost

v. Rose, 17 Ill. 276.

Personal Judgment on Constructive Service.—Personal judgment against a defendant who was constructively sum-

fendant who was constructively summoned but did not appear in the action, is unauthorized by Kentucky Civil Code, sec. 450, and will be reversed. Harris v.

Adams, 2 Duv. (Ky.) 141.

Judgment by Default by a Justice of the Peace.—Although a justice of the peace may render judgment upon default after a constructive service, yet such judgment rendered at the return term is void. Betts v. Baxter, 58 Miss. 329.

3. O'Rear v. Lazarus, 8 Colo. 608.

4. Kimball v. Castagnio, 8 Colo. 525. The Record in a Decree for a Divorce Taken by Default contained the following: "And now comes the plaintiff and makes proof of publication in this cause." The notice and proof were not in record. Held, no legal notice on defendant was shown. Cochnower v. Cochnower, 27 Ind. 253.

A Judgment Which is Invalid Because Service was Obtained by Publication, and because it was not shown that a copy of the petition and notice was mailed to the defendant, or that his residence was unknown, cannot be cured by giving such proof afterward. Hodson v. Tibbetts,

16 Iowa, 97.

The Words "Known to the Affiant," instead of unknown, on an affidavit for the publication of citation, constitute no objection to the service on which a judgment by default will be reversed. Pier-

pont v. Pierpont, 19 Tex. 227.

What Should Appear on Judgment by Default.—Where notice to defendants by publication must be proved before default can be entered, it should affirmatively appear that a copy of the petition and notice have been mailed to them, or an excuse for the failure to do this should be shown. Wheeler v. Edinger, 11 Iowa, 409; McCraney v. Childs, 11 Iowa, 54.

Under the Kansas Code, sec. 75, provid-

Under the Kansas Code, sec. 75, providing that "service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section, such service should be proved by the affidavit of the printer, or his foreman or principal clerk, or other person knowing the same. No judgment by default shall be entered on such service until proof thereof be made and approved by the court and filed. Held, that judgment by default on proper service and proof was not void because the court did not examine or inspect the service or proof. Williams v. Moorehead, 33 Kan. 609.

5. Carter v. Daizy, 42 Miss. 501. Appearance Entered by an Attorney with process is in court for the purposes of judgment, and liable to be defaulted unless he appears on the return day of the writ 1

No personal judgment can be rendered against a party who has never appeared on merely constructive service; and where a party is summoned to appear in court on the wrong day, and he makes no appearance, and is defaulted, the judgment will be reversed on error.3 Where there is service, but no appearance of

saves default, although the attorney had no authority from the party to appear. Bodge v. Butler, 57 N. H. 204. Judgment May be Entered Against a

State for default of appearance. Oswald v. New York, 2 U. S. (2 Dall.) 414; bk. I, L. Ed. 438; Chisholm v. Georgia, 2 U. S. (2 Dall.) 419; bk. 1, L. Ed. 440.

Return of Service Not Necessary.—A

judgment by default may be rendered without a return of service being first verified by the affidavit of the officer in writing, when the defendant has once appeared in the suit. Hudson v. Messick.

I Houst. (Del.) 275.

Return of Sheriff.—Judgment by default for want of an appearance, cannot be entered where there is no return of the sheriff to the summons, in conformity to the statute. Wilmington v. Kearns, I Houst. (Del.) 362.

The Court Will Not Presume the Appearance of a Defendant not regularly served with summons, because a continuance was ordered after a default had been taken. Norblett v. Farwell, 38 Cal. 155.

And an entry of default for non-ap-

pearance without filing express proof of the failure to appear is not ground for reversal on error, where there has been in fact no appearance, and defendant is not prejudiced. The omission to file this proof may be cured by filing nunc pro tunc in the lower court. Bogue v. Prentis, 47 Mich. 124

An Affidavit for Continuance filed by a defendant is not such an appearance as will warrant the entering of judgment of default. Hoyt v. Macon, 2 Colo. 113.

Where Defendant's Motion to Quash the summons was overruled, and he refused to appear further, it was held that judgment against him was good, though the record showed no entry of default. Mc-Pherson v. Beatrice Bank. 12 Neb. 202.

Joint Defendants-Service on but One.-Where a judgment was entered against the defendants, and it appeared that upon one of them no service was made, and that he did not appear or plead, it was held erroneous as to him. Graham v. Graham, 4 Munf (Va) 205.

In Georgia-Notice to Produce Papers. -When a party notified to produce a paper fails to respond, but it appears affirmatively that the paper is lost, his failure to respond personally to the notice. and purge himself of any custody of the paper, does not authorize a judgment against him by default as provided in Georgia Code, sec. 3510. Sutherlin v. Underwriters' Agency, 53 Ga. 442.

In Iowa. - In an equitable action, where the defendant does not appear at the next term after service, if this has been made on him ten days before such term he will be defaulted. Iowa Revised Code 1860. sec. 2852, allows sixty days after the completion of service for an answer, and not from an appearance. McKinley v. Bechtel, 12 Iowa. 561.

In Mississippi.-When a defendant has been properly served with process, judgment by default may, under the practice in Mississippi, be legally taken against him without an appearance or entry thereof in the record. Carter v. Daizv.

42 Miss. 501.

In Ohio it has been held that if a suit is in debt without the actual appearance of the defendant, and a declaration in assumpsit is filed, the judgment by default in assumpsit is erroneous. Smitheron v.

Owens, Wright (Ohio), 574.

In Tennessee.—Where an attachment was taken out against property, and at the time the defendant appeared and put in a plea in abatement to the attachment there had been no publication made, as required in Tennessee Code, sections 3518, 3519, and the defendant contested the issue under the plea, it was held to be a sufficient appearance to warrant a judgment by default on the Strausv. Weil, 5 Coldw. (Tenn.) merits.

In West Virginia. - All judgment where there has been no appearance by the defendant are judgments by default within the meaning of sec. 5 of ch. 134 of the Code. State v. Slack, 28 W. Va. 372.

Lacher v. Will, 6 Wis. 282.
 Silver v. Luck, 42 Ark. 268.
 Neill v. Brown, 11 Tex. 17.

Sufficiency of Notice, -An original notice, which required defendants to appear and "answer" on or before a certain day. Held sufficient to support a default enthe defendant, the plaintiff proceeds on default at his peril: and he can only proceed in the suit brought—he cannot change it: as where the writ was in debt, and the declaration is assumpsit, the indoment must be reversed as erroneous. After a judgment by default has been reversed, because service was not made personally on the defendant, if he fails to plead, a second judgment by default will not be reversed, and no new writ is necessary.2 An order of court setting aside a default and judgment entered during vacation is regular and correct where there has been no service of summons upon the defendants.³ A judgment by default, rendered since the war on summons issued and served during the war, and a sale of lands under an execution issued thereon, has been held to be valid.4

c. The Pleadings.—To support a judgment in default, the complaint or declaration upon which it is based must be good and sufficient,5

tered for want of appearance. Lyman v. Bechtel, 55 Iowa, 437.

1. Smitheron v. Owens, Wright (Ohio),

574.
2. Petit v. McCombs. 41 Miss. 628.
3. Pico v. Carillo, 7 Cal. 30.

4 Bush v. Glover, 47 Ala. 167.
5. Amason v. Nash, 19 Ala. 164; Wellborn v. Sheppard, 5 Ala. 674; Ware v. Todd, 1 Ala. 199; Rankin v. Crowell, Minor (Ala.) 125; Elliott v. Smith, 1 Ala. 74; Masterton v. Beasley, 1 Stew. & Port. (Ala.) 247; McElroy v. Dwight, I Stew. (Ala.) 149; Abbe v. Marr. 14 Cal. 210; Madison Co v. Smith, 95 Ill. 328; Pratt v. Grimes, 35 Ill. 164; Collins v. Tuttle, 24 Ill 623; Hoes v. Van Alstyne, 16 Ill. 384; Gore v. Smith, I Ill. (Breese) 206; Smith v. Carley, 8 Ind. 451; Young v. Lancaster, 5 T. B.Mon. (Ky.) 381; Shelden v. Call, 55 Me.159; Berry v. Pierson, 1 Gill (Md.), 234; Me.159; Berry v. Pierson, I Gill (Md.), 234; Bagley v. Pridgeon, 42 Mich. 550; Hollis v. Richardson, 79 Mass. (13 Gray) 392; Nelson v. Rogers, 41 Miss. 635; Merritt v. White, 37 Miss. 438; Foulk v. Colburn, 48 Mo. 225; Brown v. King, 39 Mo. 380; Hartman v. Farrior, 95 N. C. 177; Hammerslaugh v. Farrior, 95 N. C. 135; Scott v. New Jersey Zinc Co. 1 West L. Mon. (Ohio) 675; Rhodenbaugh v. Carey, I West. L. Mon. (Ohio) 500; Mather v. Gallia L. Mon. (Ohio) 599; Mather v. Gallia Furnace Co., I West. L. Mon. (Ohio) 351; West v. Dodsworth, I Disney (Ohio), 161, 164; Vanormer v. Ford. 98 Pa. St. 177; Strock v. Commonwealth, 90 Pa. St. 272; Foreman v. Schricon, 8 Watts & S. (Pa.) 43; Glenn v. Shelburne, 29 Tex. 125; Weatherford v. Van Alstyne, 22 Tex. 22; Morrison v. Walker 22 Tex, 18; Scott v. Dunlop, 2 Munf. (Va.) 349; Ringgold v. Elliot 2 Cr. C. C. 462; Ault v. Elliot, 2 Cr. C. C. 372; McNeil v. Cannon, 1 Cr. C. C. 127.

Defective Complaint .- Where the complaint only alleges the value of the goods sold, but does not allege a promise to pay, a judgment by default final cannot be rendered. Hartman v. Farrior, os N. C. 177

And final judgment should not, upon default, be entered against a defendant if it be found that the facts alleged do not give a right to recover. Madison County v. Smith, 95 Ill. 328.

Where the plaintiff did not file with his declaration an affidavit "stating the amount he verily believes to be due, file with his pracipe a reference to the place where the bond could be found, as required by rules of the court, the court held that without compliance with these requirements of the rules of the court the judgment by default was erroneously entered. Strock v. Commonwealth, oo

Where, after default day for answer has passed, the petition is found defective in a matter that would constitute error in a judgment thereon, as in an action against a company name without alleging its formation to carry on business in the State, and an amendment is allowed on application, the plaintiff cannot have immediate judgment, but must wait the regular term for answer. Mather v. Gallia Furnace Co., I West. L. Mon. 351. In a Suit on a Bond for Stay of Execu-

tion, pending proceedings in error, the petition must show the amount of the judgment and costs, so that judgment might be given on default. If it only pray for judgment for the penalty of the bond, it will be defective on demurrer. West v. Dodsworth, 1 Disn. (Ohio) 161,

In Action on Promissory Note.-In an

and it must also always be filed as required by law,1 with the

action by a person other than the payee, on a promissory note not negotiable, a declaration averring that the defendant made a promissory note, a copy whereof is hereto annexed, payable to J. S., and the plaintiff is the owner of said note, and the defendant owes him the amount of said note," and annexing a copy of the note, but not averring any assignment thereof to the plaintiff, is insufficient, and a judgment rendered thereon by default will be reversed on error. Hollis v. Richardson, 79 Mass. (13 Gray) 392.

In assumpsit on a note if the declaration do not allege that defendant is the maker of the note, and that the note is unpaid, a judgment upon default cannot be sustained. Smith v. Carley, 8 Ind. 451.

No Interest Prayed For.—Where a petition contains no prayer for interest, it is error to render judgment on default for such surplus, for which the judgment will be reversed, unless the creditor remit the surplus; but if remitted, the judgment will stand, and the costs of error will be divided, it being substantially a reversal, Rhodenbaugh v. Carey, I West. L. Mon. 500.

599. In an Action Against a Partnership.—
If the names of the partners be omitted in the writ and declaration, and the writ be served on a person not named in either, a judgment against the company upon such person's default will be erroneous. Scott v. Dunlop. 2 Munf. (Va.) 340.

Scott v. Dunlop, 2 Munf. (Va.) 349.

Action in Firm Name.—In an action by or against a company by its company name, without averring that it was formed to do business in the State, a judgment by default would be erroneous. Mather v. Gallia Furnace Co. (Ohio), I West. L.

Mon. 351.

The Plaintiff Declared in Assumpsit on a note for \$1500, to be paid on the happening of a certain event, and averred that the event had happened, as appeared by an indorsement on the note, it was held that this was sufficient to warrant a judgment by default final for the amount, there being no plea. McGehee v. Childress. 2 Stew. (Ala.) 506.

dress, 2 Stew. (Ala.) 506.

A Judgment by Default is Not Affected by the fact that the plaintiff, who sued as a non-resident in forma pauperis, failed to appear to her complaint on the certificate of an attorney of his opinion that she had a cause of action. St. Louis Iron Mountain, etc., R. Co. v. Yocum, 34 Ark. 403.

Arkansas Statute.—The effect of the act of Dec. 5, 1846. (Ark. Dig. 795), authorizing the commencement of suits by filing

the evidence of debt in the clerk's office, merely dispenses with the declaration, but has no further or other effect, either upon the form or substance of the writ, or upon the pleadings subsequent to the declaration; and when a defence is made to such suit it must be presented by pleas appropriate to the form of action which the plaintiff may have indicated as adopted by his writ; and where the service of the writ is properly made, and the defendant fails to appear and plead, the plaintiff is entitled to judgment. Gatton Walker of Ark 100.

v. Walker, 9 Ark. 199.

Under the Michigan Acts 1879, No. 97, the jurisdiction of the superior court of Detroit is confined, in transitory actions, "to cases where one of the parties lives in Detroit." Held, that a judgment by default for non-appearance in a suit begun by declaration cannot be sustained where the declaration does not show the residence of either party. Bagley v. Pridgeon 42 Mich 150

eon, 42 Mich. 550.

1. When Declaration to be Filed.—A declaration must be filed when the suit is commenced, in order to obtain judgment by default at the return term. Merritt v. White, 37 Miss. 438.

And a judgment by default at the re-

And a judgment by default at the return term, when the declaration has not been filed at the issuance of the writ, is erroneous. Nelson v. Rogers, 41 Miss.

Failure to File Complaint by First Day of Term.—Where a plaintiff fails to file his petition by the first day of the term, it is error to give judgment by default against the defendant for failing to appear, notwithstanding that the defendant has waived the usual process by accepting service of the petition. Glenn v.

Shelburne, 29 Tex. 125.

Where a Statute Provides that if no Declaration is Filed within a certain time the defendant shall be entitled to a nonsuit, it is error to render judgment by default against the defendant when the declaration has not been filed within the time required without serving a rule requiring the defendant to plead. Pratt v. Grimes, 35 Ill. 164.

In Illinois.—It is erroneous to take judgment by default, where the declaration has not been filed ten days before court, unless by consent. Collins v. Tuttle, 24 Ill. 623; Gore v. Smith, I Ill. (Breese) 206.

Where the Declaration is not filed until within ten days of the second term of the court, it is error to enter a judgment by default, without a rule and service of proper notice. A declaration in the name of a party for whose use a suit is brought will not sustain a judgment by default, in the name of the legal plaintiff's, for his use.2 And a judgment by default final cannot be rendered unless the complaint is verified.3

it requiring the defendant to plead. He should at least have an opportunity to he heard before he is considered as having waived his right to a non-suit. Pratt

v. Grimes, 35 Ill. 164.

In Illinois, when a party consents to enter his appearance in the circuit court, such a stipulation does not authorize a judgment against him at the same term where a declaration was not filed ten days Hoes v. Van Alstyne, 16 Ill. 384.

In Pennsylvania.—Under Pennsylvania

act of June 13, 1836, a plaintiff is not entitled to judgment for want of an appearance, unless he has filed his declaration prior to the return day of the writ; and a rule of court providing that a plaintiff may enter such judgment upon filing a declaration, whether the same be filed at the return day or not, is of no force or effect. Vanormer v. Ford, 98 Pa. St. 177; Foreman v. Schricon, 8 Watts & S.

(Pa.) 43

The Pennsylvania act of February 26, 1872, relating to the administration of justice in Cumberland county, provides that before judgment is taken, for want of an affidavit of defence in an action, brought on an instrument for the payment of money, the plaintiff must file with his declaration a copy of the instrument of writing on which the action is founded. The bond of the committee of a lunatic was conditioned that the committee "shall and do well and faithfully execute and perform all and singular the duties appertaining to said trust, and duly account according to law for all property and funds that may come into his hands. an action upon the bond the court entered judgment for want of an affidavit of defence under the terms of the above act. Held error, as the bond was not an instrument for the payment of money within the meaning of said act. Strock v. Commonwealth, 90 Pa. St. 272.

1. Defective Notice. - Where, as in Colorado, the statute declares that the summons must state clearly the cause of action, there is no jurisdiction to render judgment on default if the summons lacked the statutory requisites. Atchison, T. & S. F. R. Co. v. Nichols, 8 Colo.

But although a summons does not give notice, as is required by statute, that in

case of default plaintiff will take judgment for a specified sum, if enough appears to apprise defendant clearly of the amount claimed, etc., the statute is substantially complied with. Miller v. Zeigler, 3 Utah,

An Amendment Introducing an Entirely New Cause of Action, as a new note, cannot be the ground of a judgment by default thereon until the defendant has had proper notice of the amendment as well as of the original suit, and an opportunity to defend. Weatherford v. Van Alstyne, 22 Tex. 22; Morrison v. Walker, 22 Tex.

Where, after service of a petition asking compensation for locating and surveying certain land, an amended petition was filed claiming like compensation in regard to other land, held, that, no notice having been given of the new cause of action, it was error to render a judgment by default embracing the new demand. Texas & N. O. R. R. Co. v. White, 55 Tex. 251.

If a Remittitur be Entered to cure the judgment, it must clearly appear that the remittitur covers all of the judgment that was founded on the new cause of action. Texas & New Orleans R. Co. v. White,

55 Tex. 251.
In Texas.—A citation not strictly regular yet plainly showing who are the defendants is sufficient to authorize a judgment by default. Bell v. Vanzandt, 54 Tex. 150.

Under the law in force in 1869, a judgment by default based on a citation by publication, made on an affidavit that defendant's residence was unknown to the affiant, is void, the fact appearing of Such judgment may be attacked collaterally, and a sale under an execution issued upon it conveys no title. The owner of the land is not bound to refund the purchase-money before bringing a suit against a purchaser under such sale, nor can the Statute of Limitations be pleaded in defence to such suit. Stegall v. Huff, 54 Tex. 193.

2. Elliott v. Smith, I Ala. 74.

3. Hartman v. Farrior, 95 N. C. 177; Hammerslaugh v. Farrior, 95 N. C.

Notary's Signature Omitted. - The seal of a notary without his signature to a verification of a petition is sufficient after A judgment by default, when no declaration has been filed, is erroneous, irregular, and cannot be supported. And the error and irregularity cannot be cured by filing a declaration after judgment, But where a judgment has been rendered against the defendant on default, the court will not entertain a writ of error to reverse such judgment on account of the insufficiency of the declaration. The court will not sustain a motion to have the defendant defaulted on the ground that his specifications of defence are defective if the plaintiff's own declaration is also defective. But if any one of the counts will support a judgment, judgment may be rendered on default, as that admits them all.

The several counts are not distinct causes of action; and the fact that by reason of one of them having been imperfectly stated no judgment could be rendered on that count does not affect the right of plaintiff to take judgment on those which are rightly stated. Where one of two or more defendants, after personal service, makes default in the original action, and another defendant files a cross-complaint setting up new matter not apparent on the face of the original complaint, the defaulting defendant must be served with process issued on such cross-complaint, before any judgment by default can be taken or rendered against him thereon. Where the petition filed in a suit has been lost, the

judgment by default. Scott v. New Jersey Zinc Co., I West. L. Mon. 675.

1. Amason v. Nash, 19 Ala. 104; Well-

1. Amason v. Nash, 19 Ala. 104; Wellborn v. Sheppard, 5 Ala. 674; Ware v. Todd, 1 Ala. 199; Rankin v. Crowill, Minor (Ala.), 125; McElroy v. Dwight, 1 Stew. (Ala.) 149; Masterton v. Beasley, 1 Stew. (Ala.) 149; Merritt v. White. 37 Miss. 438; Glenn v. Shelburne, 29 Tex. 125.

2. Wellborn v. Sheppard. 5 Ala. 674.
3. Amason v. Nash, 19 Ala. 104; Rankin v. Crowell, Minor (Ala.), 125.

Ford v. Baird τ Chand. (Wis.) 212.
 Shelden v. Call, 55 Me. 159.
 Hunt v. San Francisco, 11 Cal. 250.

When Plaintiff not Entitled to Recover.

When Plaintiff not Entitled to Recover.

Where it appears by the matter of the count that the plaintiff is not entitled to recover the sum demanded in the count and declaration, judgment cannot be given by default for the greater sum. Young v. Lancaster, 5 T. B. Mon. (Ky.) 381; Thigpen v. Mundine, 24 Tex. 282; Hall v. Jackson, 3 Tex. 305.

If the Complaint Shows no Legal Cause of Action, but "states" the plaintiff out of court by showing his own turpitude, judgment by default cannot be sustained. Abbe v. Marr. 14 Cal. 210; Thigpen v. Mundine. 24 Tex. 282; Hall v. Jackson,

3 Tex. 305.

Defective as to One Cause of Action.— Where it is manifest that as to one defendant there is no cause of action, although he may be in default for want of an answer, the rule of practice prescribed by the statute of Texas does not authorize a judgment against him even for costs. Johnson v. Davis, 7 Tex. 173.

7. Hunt v. City of San Francisco, II

Cal. 250.

A Petition Subject to Special Exception, but good on general demurrer, will sustain a judgment by default. Graves v. Drane. 66 Tex. 658; Bledsoe v. Wills, 22 Tex. 650.

And after a judgment by default regularly entered, the defendant cannot object for the first time that the declaration, which was placed on file before the judgment, was not indorsed by the clerk so as to show the time of filing. Fanning v. Fly, 2 Coldw. (Tenn.) 486.

8. Lewis v. Bortsfield, 75 Ind. 390. Interpleader.—When matters set up in cross-complaint are apparent on the face of the original complaint, no new process or default need be had on cross-complaint. Pattison v. Vaughan, 40 Ind. 253. Contra.: Joyce v. Whitney. 57 Ind. 550.

Default on Day when Judgment Filed.—
It is not error for the circuit court to default the defendant on the same day on which the plaintiff by leave of court files a new declaration, the order of the court fixing no time in which the pleadings should be amended; and if it were, the subsequent appearance of the defendant to move the court to arrest the judgment

plaintiff will not be permitted to go and take a default upon proof of loss and of the contents of the petition, for the defendant has no opportunity to answer until the lost petition is restored. And when the petition or writ is lost or destroyed, after service, the plaintiff cannot file a new petition and take judgment by default, without giving notice to the other party. When a demurrer is pending, no default should be entered or judgment taken.3 After the demurrer to the declaration by one defendant correctly sustained, judgments against all of the defendants, without any further steps taken by them, is erroneous.4 And a judgment by default, in an action on a promissory note, will be reversed on error, when the record shows that a plea of non est factum duly verified by affidavit, was on file.5

2. THE DEFAULT.—a. Failure to Appear and Plead.—When a party fails to plead to the action, judgment should be taken against him by default, and not submitted to a jury to try the issue joined, because there was no "issue joined;" and unless he appears and pleads, the presumption is that he has no defence, and the

plaintiff is entitled to judgment by default.7

for want of jurisdiction, without complaining of the default, is a waiver of all objection thereto. Caughey v. Vance, 3 Chand. (Wis.) 308.

1. Foulk v. Colburn, 48 Mo. 225; Brown

v. King, 30 Mo. 380.

 Ring, 39 Mo. 380.
 Brown v. King, 39 Mo. 380.
 Demurrer Pending. — When it appeared on the 13th of December, 1859, one of the respondents filed his demurrer to complainant's bill, and that afterward, in April, 1860, a default was entered for the failure of all the respondents "to plead, answer, or demur," held, that the default was improperly entered as to said demurrant, and that the decree should, as to him, be set aside. Key v. Hayden, 13 Iowa 602; Canal Bank v. Newberry, 7 Iowa,4; Arbuckle v. Bowman, 6 Iowa, 70; Burlington & Mo. R. R. R. Co. v. Marchand. 5 Iowa, 468.
4. Murphree v. State Bank, 4 Ark. 448.

5. Crow v. Decatur Bank. 5 Ala. 249; McCoy v. Harrell, 40 Ala. 232.

Filing Answer Before Default .- An answer filed without leave of court after the time for answering has expired, is not a nullity, but at most an irregularity. Bowers v. Dickerson, 18 Cal. 420.

6. Hewett v. Cobb, 40 Miss. 61.
7. Gatton v. Walker, 9 Ark. (4 Eng.)
202; Tagert v. Harkness, 6 Ark. (1 Eng.) 528; Manville v. Parks, 7 Colo. 128; Trew v. Gaskill, 10 Ind. 265; Thatcher v. Haun, 12 Iowa, 303; Fowler v. Smith, I Rob. (La.) 448; Hardy v. Miller, 11 Neb. 395; Law v. Duncan, 2 Brev. (S. C.) L. 263.

A Defendan; who has Answered a Peti-

tion is not in default because an amended petition is filed, making a new party plaintiff, to which no new answer is filed. Stevens v. Thompson, 5 Kan. 305.

Where a petition is filed containing two counts and the defendant answers one count and demurs to the other, if the demurrer is sustained, and the plaintiff obtains leave to amend his petition, and afterwards obtains leave to reply to the answer, which had been filed, the defendant will not be in default. Cavenaugh v. Fuller, o Kan. 233.

A defendant's disregard of a permissive order of the district court that "the defendant is allowed to answer the said amended bill of particulars within twenty days," held not to place him in default; and a judgment renderedwithout evidence to be void. Kuhuke v. Wright, 22 Kan.

Rule Day.—When a party is ruled to answer by a day named, and for his noncompliance has a good and valid excuse, he is not thereby released from answering after that time and before the next term. if the rule day extends into vacation, unless for such continued default he has sufficient justification. Thatcher v. Haun, 12 Iowa, 303.

A defendant, cited to answer within a certain number of days, is entitled to the whole of the last day before a default can be taken. Fowler v. Smith, I Rob.

(La.) 448.

Default at Time of Trial.-Where defendant fails to plead, plaintiff is not deprived of his right to claim a default, because he does not demand it until the

A default is properly rendered, though an answer is filed on the

time of trial. Manville v. Parks. 7 Colo.

Fraud, Mistake, Neglect.-It is no ground for the reversal of a judgment against a defendant in a bastardy case that he submitted to a default before the declaration of the complaint, required by

Maine Rev. Stat. ch. 97, sec. 5, was filed. Priest v. Soule, 70 Me. 414.

How Far may be Impeached or Attacked Collaterally for Fraud, Irregularity, or Want of Jurisdiction.—The rule that an unreversed judgment, rendered on default of the defendant to appear and defend after due personal service of notice upon him, cannot be impeached by him collaterally, applied on habeas corpus to procure one's discharge from arrest on execution under a judgment on a replevin bond signed by another person of the same name as the defendant. Gorman's Case, 124 Mass. 190.

In Alabama. - Under the provisions of the Code in connection with the rules of practice in the circuit courts, if the defendant fails to plead within the prescribed time, the plaintiff may have the default entered on the docket in vacation, at any time before pleas are filed, and claim the benefit thereof at the ensuing term of the court; but the defendant may plead at any time before the default is entered against him. Woosley v. Mem-

phis & C. R. R. Co., 28 Ala. 536.
In Arkansas.—Where process is served upon the defendant over fifteen and under thirty days thereof, unless the defendant appear and plead to the action at the return term, the plaintiff is entitled Tagert v. Harkness, 6 to judgment. Ark. (1 Eng.) 528.

In Indiana. —If on the first calling of a cause the defendant is not present, no rule can be taken against him, and a de-

fault is to be taken in the first instance. Langdon v. Bullock, 8 Ind. 341.

And where defendant fails to appear, judgment may be rendered by default without previously entering a rule to answer. Trew v. Gaskill, 10 Ind.

Under the Kentucky Code a judgment in personam cannot be rendered against a defendant who has not appeared when summoned in the manner provided by section 86, any more than if only constructively summoned. Griswold v. Popham. I Duv. (Ky.) 170.

The Massachusetts Statute does not give the right to a default because insufficient or evasive answers to interrogatories are given. Further proceedings

should first be had. Fels v. Raymond.

130 Mass. 08.

In Missouri.—When a party has been summoned as a witness in accordance with Missouri Rev. Stat. 1855, 1577, and fails to attend, it is no error to strike out his pleadings and to enter judgment against him. Haskell v. Sullivan, 31 Mo. 435.

In New Jersey. - Under the new practice, a false plea, although it be the general issue and verified by affidavir may be disregarded and treated as a nullity by the plaintiff, and judgment entered by default either interlocutory or final in term time or vacation. Walter v. Walker, 35 N. J. L. (6 Vr.) 262.
Where the plea filed is on its face a

good plea to the action, the party who treats it as a nullity must do so at his Walter v. Walker, 35 N. J. L. peril.

(6 Vr.) 262.
In New York it is held that the fact that defendant had promised to pay the debt, but threatened to make delay if he were sued, does not justify the plaintiff in disregarding a regular pleading and entering judgment by default. Perine v. Blackford, 2 How. (N. Y.) Pr. 131.

In Pennsylvania—Requisites of davit.—In order to entitle plaintiff to judgment for want of an affidavit of defence under the Pennsylvania rule of court requiring the affidavit verifying plaintiff's claim to be made "by the party or his agent," the fact of agency must be averred when the affidavit is by any other than the party. Hutchinson Woodwell, 107 Pa. St. 500.

Where the rules of court require two constructive rules to plead to be taken to entitle the plaintiff to enter judgment by default, the plaintiff cannot take judgment by default on one rule. Green v.

Hallowell, 9 Pa. St. 53.

A Summons was Issued in Case Sur Assumpsit; in the declaration filed an indebtedness was alleged, but no mention made of a book account, but a copy of the plaintiff's book entry was filed. motion to quash the writ was made but not allowed; no affidavit of defence was filed, and judgment was rendered as on default against defendant. Held, that the judgment ought not to be reversed. Wilson v. Hayes, 18 Pa. St. 354.

In South Carolina, if the defendant fails to enter an appearance according to South Carolina Stat. 1791, the plaintiff may take judgment by default, without serving or posting any rule to plead. Law v.

Duncan, 2 Brev. (S. C.) 263.

same day, but after the judgment was rendered. And when an answer is actually filed, but out of time, a default may be entered:2 yet if a defendant pleads before default, but out of time. or without leave, and the plea be good, he cannot be defaulted: while the plea stands the proper practice would be to move to strike it from the files.3 And where a party who was notified to appear and answer at a certain term fails to do so, the court may enter a default at a subsequent term.4

But to warrant entering a judgment against one who has been made a defendant upon his own motion, there must be notice, and proof of no answer, the same as in the ordinary case of a defendant who has been served, and has appeared. Where a plea is filed to one of several counts, but not as to the others, and the count is stricken out, no further plea having been filed, judgment may be taken by default. And where leave has been granted to the

1. Edwards v. Watkins, 17 Mo. 273.

2. Harrison v. Kramer, 3 Iowa, 543;

Dewey v. Lewis, 12 Neb. 306.
Where Final Judgment by Default was Rendered against a defendant, who filed an answer on the same day that judg-ment was rendered, but it did not appear affirmatively that the answer was filed before the judgment was rendered, or that the attention of the court was called

to the answer before judgment was rendered, held to be the legal presumption that the judgment was first rendered. Wooldridge v. Brown, 1 Tex. 478.

Filing an Answer After the Day, though it might induce the court more readily to set aside the default, yet does not de-prive the plaintiff of his right to have judgment as for default after that filing. Harrison v. Cramer, 3 Iowa, 543.

Notice of Appearance Served by a Defendant upon the plaintiff after the time for answering has expired, although the judgment has not been perfected, may be disregarded, and judgment be taken by default. White v. Featherstonhaugh, 7 How. Pr. (N. Y.) 357. Contra: Carpenter v. New York & N. H. Co., 11 How. Pr. (N. Y.) 481; Abbott v. Smith, 8 How. Pr. (N. Y.) 463.

Services and Default on Same Day .- If defendant serves plea after time expired, and plaintiff on the same day enters default, the court will not inquire which act was done first, but the default will be held regular. Havens v. Dibble, 18 Wend. (N. Y.) 655; Rogers v. Beach, 18 Wend. (N. Y.) 533.

3. Pett v. Clark, 5 Wis. 198. When An Answer is Actually Put In after the proper time, but before an order taking the bill pro confesso and judgment for want of answer is made, it is irregular to take such latter order without first

removing the answer from the record. Maxwell v. Jarvis, 14 Wis. 506.

4. Langford v. Ottumwa Water Power

Co., 53 Iowa, 415

The Authority to Render Judgment by Default follows from the failure to answer within the time limited by law, and it is sufficient prima facie if the defendant has failed to answer or demur. v. Miller, 11 Neb. 395.

The Right to a Continuance in such case is dependent upon an appearance and plea to the action by the defendant. Tagert v. Harkness, 6 Ark. (I Eng.) 528.

Upon a Plea in Abatement of improper service, judgment may be rendered by default if the defendant does not appear to support the issue on his plea. McKellar v. Lamkin, 22 Tex. 244
5. Fagan v. Barnes, 14 Fla. 53.

6. Thus where a declaration contained two counts, and all the pleas were applicable to the first count only, which was stricken out upon the trial, judgment was properly given upon the second count for want of a plea, Hogan v. Ross, 54 U. S. (13 How.) 173; bk. 14, L. Ed. 100.

Where a Defendant Filed a Motion to-Quash service, and an answer which expressly alleged that it was not to be considered as in the case unless the motion was overruled, and the motion was sustained, the court was authorized to hold that defendant was without pleadings, and to render judgment by default at the London Assurance Co. v. next term. Lee, 66 Tex. 247.

Where Defendant Demurs to the declaration and his demurrer is overruled, and he fails to obtain leave to plead, a default for want of a plea is the necessary consequence. The judgment on demurrer in such case, in debt on a replevin bond, is that plaintiff recover his debt, and

plaintiff to amend his declaration, and to the defendant for time to plead, this is an abandonment of all existing issues; and if the plaintiff amends his declaration, and no plea is filed to such amended declaration, the plaintiff is entitled to a judgment by default. Where the plaintiff moves to strike out the defendant's answer, and the defendant does not appear when the case is called, whereupon judgment is given for the plaintiff without formally disposing of the motion, the defendant will not be heard to complain of this disposition of the case.2

Where the plea is shown irrelevant or frivolous it will be stricken out on motion of the plaintiff; and where a plea is stricken out as frivolous, it is within the discretion of the court to enter final

judgment as for want of a plea.3

An agreement by the defendant that judgment may be entered as by default, on his failure to do a certain thing by a certain day. is a waiver of the right to file a plea, and judgment may be cor-

rectly entered by default on such failure.4

b. Withdrawal of Appearance and Plea.—If after pleading a party withdraws his appearance by leave of the court, his pleas go with him, and judgment may be entered by default. But a defendant who, after answer, withdraws his appearance and answer. should be properly called; but the failure so to do may be amended at any time below, and therefore will not be fatal on appeal.6 But a judgment entered by default after the defendant had withdrawn his appearance will be reversed on appeal, unless the record shows issuance and service of summons upon him.7

damages occasioned by detention of the same, to assess which a jury should be called. Bates v. Williams, 43 Ill. 494. It is premature to enter a default of a defendant whose demurrer is on file and undisposed of, notwithstanding the fact that the demurrer had not been indorsed as filed by the clerk. It is to be deemed as filed when delivered to and received by him. Tregambo v. Comanche Mill & Mining Co., 57 Cal. 501.

As to when default may be taken,

side infra, II. 2, d.
1. Robinson v. Keys, 9 Humph. (Tenn.) 144.

2. Webb v. Stevens, 14 Mo. 480. 3. State v. Brown, 34 Miss. 688.

When an Answer is Struck Out as Frivolous and irrelevant, the proper method of obtaining judgment is to proceed as if no answer had been put in. If the summons be for relief, the defendant is entitled to the usual notice of application for judgment after the answer has been stricken out. DeForest v. Baker, 1 Abb. (N. Y.) Pr. N. S. 34.

It is not allowable to treat an insufficient answer as a nullity, and render judgment by default, as if no answer was on file. Burlington & Mo. R. R. R. Co.

v. Marchand. 5 Iowa, 468; vide infra-II. 2, d. Where the plea filed on its face is a good plea, the party who treats it as a nullity must do so at his Walter v. Walker, 35 N. J. L. peril. (6 Vr.) 262.

Where a Motion for Judgment on the answer as frivolous had been denied, defendant's attorney insisting upon the argument that as the plaintiff's attorney had returned the answer there was no answer in the cause, held, that plaintiff was strictly regular in thereafter entertaining judgment as upon a failure to answer. Hoffaring v. Grove, 42, Barb. (N. Y.) 548; s. c., sub nom., Hoffnung v. Grove, 18 Abb. Pr. (N. Y.) 142.

4. Foster v. Filley, 2 Ill. (I Scam.)

5. Carver v. Williams, 10 Ind. 267.

A withdrawal of appearance by defendant without prejudice to plaintiff, in an attachment proceeding, after a rule had been served, leaves the plaintiff at liberty to enter a personal judgment against defendant, as upon default after appearance. Creighton v. Kerr. 87 U. S. (20 Wall.) 8; bk. 22. L. Ed. 309.
6. Sloan v. Wittbank, 12 Ind. 444.

7. Young v. Dickey, 63 Ind. 31.

c. When It May be Taken.—A default may be properly entered where no plea has been filed within the required time, notwithstanding the fact that there has been an affidavit of merits filed.1

But default and final judgment cannot be taken against a defendant on first day of the term.² However, a default may be taken on any day of the term after the first.³ In the absence of some statutory limitations we conceive the rule would be that a indoment upon default might be rendered at any time during any term of court. There is no reason in the nature of things to the contrary, and no statutory restriction, except that when placed on

With Respect to the Issues .- A plea is an appearance; but a withdrawal of the plea is not a withdrawal of the appearance. On failure to plead further than the plea in abatement, judgment nil dicit may be entered. Grigg v. Gilmer, 54 Ala. 425

By Nil Dicit .- Where there was a plea in abatement for variance between the writ and declaration, and at the same term of court the writ was by leave of court, on motion of plaintiff, amended so as to conform to the declaration, and a rule on the defendant to plead ten days before the next term of the court, and at the next term a replication was by inadvertence filed to the plea in abatement, but by leave of court withdrawn before issue was joined on it, and the defendant having failed to plead as he was ruled to do, it was proper to render judgment against him as upon nil dicit, notwithstanding the plea in abatement was not formally disposed of. Wilday v. Wight, 71 Ill. 374.

Withdrawal of Appearance by Attorney -Effect on Plea on File. -It is error to render judgment against a defendant by default, when his plea to the merits is on file. Hence, where an attorney, after filing a plea to the merits, withdraws his appearance, this does not withdraw the plea, and a trial must be had. Mason v.

Abbott, 83 Ill. 445.
In an Action of Assumpsit brought by A. against F. & W., defendants appeared and pleaded non assumpsit. At term following plaintiff suggested sheriff's return to writ of "not found" as to W. Defendant's attorney then withdrew his appearance, and default was taken against T. Assessment of damages and final judgment against T. Held, error. If plea was abandoned, then default is erroneous, because it does not appear that T. had notice of suit. If plea be considered as still in, then default is erroneous, because it was entered over an issue to country. Ellison v. Cain, 2 Ind. 236.

A Failure to Call and Default a De-

fendant who, after having appeared and answered, had withdrawn his appearance, and taking judgment by default, is an irregularity. It prevents the defendant from having a fair trial; it is a cause for a new trial, but cannot be reviewed in the supreme court, as such imperfection will be deemed to be amended. Young v. Dickey, 63 Ind. 31; Smith v. Foster, 59 Ind. 595; Sloan v. Wittbank, 12 Ind. 444; Allis v. Gumberts, 1 Ind. 104; Dunn

v. Hall. 8 Blackf. (Ind.) 32.

A Judgment by Nil Dicit cannot be rendered when there is a plea of the general issue on file in the case, unless the plea is expressly or tacitly withdrawn; but such withdrawal will be presumed, if it appears by the record that the de-fendant's counsel was in court at the time judgment was rendered against his client and made no objection. Miller v. Hard-

acre, I G. Greene (Iowa), 154.

1. Scammon v. McKey. 21 Ill. 554.

Default for Want of an Appearance regularly entered is as binding as any other as far as respects the power and jurisdiction of the court in declaring that the plaintiff is entitled to recover, though the amount of recovery may remain to be ascertained by a jury. Loney v. Bailey, 43 Md. 10; Davidson v. Myers, 24 Md. 538; Heffner v. Lynch, 21 Md. 552.

2. Clegg v. Fithian, 32 Ind. 90. In Indiana Practice.—It is such error as will sustain a complaint for review under § 68, 2 Rev. Stat. 1876, 67 Rev. Stat. 1881, 400; Mitchell v. McCorkle, 60 Ind. 184.

In a Suit in New York Against an Insurance Company on a policy of insurance, judgment cannot be entered on the return day of the first process, though the defendants do not appear. Tyler v. Ætna Fire Ins. Co., 2 Wend. (N. Y.) 280.

3. Reed v. Spayde. 56 Ind. 394.

On Second Day of Term.—A default may be taken on the second day of the

term where the summons has been served ten days before the first day of such term. Kaufman v. Sampson, 9 Ind. 520.

the trial docket it should be on or after the day on which the case was there set for trial.1

A default cannot be entered until the day after the time for pleading has expired.2 And a judgment by default rendered

1. Race v. Malony, 21 Kan. 37.

Thomas v. Douglass, 2 Johns, Cas.

(N. Y.) 226.

If a Special Bail is required, and four days after bail is filed notice should be given to the plaintiff's attorney, but notice of the filing is not indispensable. Leispenard v. Baker, 6 Johns. (N. Y.) 323.

Age of Claim .- A part of the plaintiff's claim being more than six years old does not render a judgment on default for the whole illegal. Wilson v. Hayes, 18 Pa.

St. 354.

In Action on Bond. - Judgment for want of a plea may be rightly entered in an action on a bond to which non est factum is pleaded, and afterwards the description of the bond in the declaration is varied by amendment, no further plea being filed. Sartin v. Weir, 3 Stew. & P. (Ala.) 421.

Change of Venue-Failure to Perfect Change. - A rule was taken against defendant to answer cross-complaint. agreement between some of the parties a change of venue was taken to another county. Neither party perfected change. At the next term it was not error to take judgment in same court as by default against defendant for failure to comply with rule. Snyder v. Bunnell, 64 Ind. 403.

Failure to Comply with Order.-The court ordered that the cause be put off on payment of costs or that plaintiff should have judgment, and defendant failed to pay the costs. Held, that the judgment should be in the usual form of judgment by default, without plea, etc. Booth v. Whitby, 5 Hill (N. Y.), 446.

Improper Service-Erroneous Default.-A writ which bears date September 8, 1837, and is returnable to the next September term, is bad, and a judgment by default rendered upon it at September term is erroneous. Murphy v. Williams, I Ark. 376.

Judgment Without Service. - In general, judgments taken without service of process, signed out of term, or by default before the proper period of the term, are irregular. Winslow v. Anderson, 3 Dev.

& Bat. (N. C.) 9; s. c., 32 Am. Dec. 651.
An Interlocutory Judgment.—A case standing upon an interlocutory judgment by default, without any issue of law or fact to be heard, may be taken up and the judgment made final at any time in the term next after that at which the default was entered. A motion to set aside the default should be made before the entry of final judgment. Matthews w.

Cook, 35 Mo. 286.

The Declaration of the Judge, in the judgment confirming a default, that two judicial days had elapsed from the date of the default, does not make proof of the fact when the contrary appears from the minutes of the court. blanc, 15 La. An. 224. Deblanc v. De-

Recognizance. - A recognizance for the appearance of an accused having been forfeited, a scire facias was served and judgment taken by default at the return term of the writ, contrary to the regular rules. Held erroneous. The defendant is entitled to a rule to plead unless the court had made provision for a short rule to plead these cases during the term. Hearn v. State, 5 W. L. J. 511.

Time for Entering.—The law and the course of practice require the judgments by default, where the defendant has never entered an appearance, should be rendered either at the first or, at farthest, at the next succeeding term of the court. Carrington v. Holabird, 17 Conn. 537.

Time to Plead must be allowed before judgment by default. See Dobynes v. United States, 7 U. S. (3 Cr.) 241; bk. 2, L. Ed. 427; Union Bank of Georgetown

v. Crittenden, 2 Cr. C. C. 238.

A Summons was Issued by a Justice of the Peace on February 13th and returnable on the 20th; it was served on the 18th and on the 20th judgment was rendered by default, which on the 27th was set aside on plaintiff's motion, and the trial set for March oth following, on which day judgment was again rendered by default. In December suit was instituted in the circuit court to set aside this judgment. Held, that on February 20th there was not such jurisdiction of the person of the defendant as authorized the rendition of the judgment of that date. Jamieson v. Caster, 16 Ind. 426.

Sufficiency of Proof. - Where a bill has been taken as confessed, the respondent cannot object to the sufficiency of the complainant's proof. Johnson v. Don-

nell. 15 Ill. 97.

Where the Clerk of the Circuit Court Received a Mandate from the supreme court after the commencement of a term, and of his own motion entered the mandate on the third day, and the court entered judgment by default on the fourth day, it appearing that no rule of the circuit court had been violated, and no affidayit of merits had been made, the appellate court refused to set the judgment aside. Doan v. Holly, 27 Mo. 256.

In Alabama.—Judgment by default for want of plea cannot be taken until three days after the time allowed for filing the declaration, though the term may not continue so long. Pruit v. Clack, 9 Port. (Ala.) 286; Rather v. Owen, 1 Stew. (Ala.) 38.

Failure to Appear.—In Alabama since the statute of 1839 "to abolish attorneys' fees in certain cases," it is not allowable to render a judgment by default at the appearance term without the defendant's consent. O'Neal v. Garrett, 3 Ala.

276.

In Arkansas.—There being less than fifteen days between the date and return day of the writ, judgment by default thereon was quashed by certiorari. Robinson v. State Bank, II Ark. (6 Eng.)

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In Illinois, judgment by default cannot be rendered until ten days after service of process. Pattison v. Hood, 4 Ill. (3 Scam.) 152. And under the practice act of 1853 a party to be entitled to a default at vacation term must serve his declaration and rule to plead ten days before the term, and if the other party does plead, demur, or enter any motion though not till the rule to plead has expired, yet if not defaulted by order of court he will be in time. Castle v. Judson, 17 Ill. 381.

In Indiana.—Act of 1844 regulating practice of law in Allen county provides that if either party fails to comply with any rule on or before proper rule day, clerk shall note such failure on rule book, and judgment shall thereupon be entered against the party in default, unless the court for cause shown and on an affidavit of merits shall set such default aside. Shoaff v. Jones, I Ind. 564.

Where process was served ten days before the first day of the term, it cannot be objected that it was made returnable on second day, and a default may be taken on that day. Macy v. Eller, 11 Ind. 352; Kaufman v. Sampson, 9 Ind. 520.

To authorize judgment by default in probate court against an administrator, under Revised Statute 1843, he must have been served with process at least twenty days before first day of term. Carter v. Spencer. 4 Ind. 78; Jones v. Roland, 8 Blackf. (Ind.) 272.

In Iowa—Service by Publication.—Where, under the Code of 1851, service of notice was made by publication only,

default should not be entered without proof that a copy of the notice was directed to the defendant, or that his residence could not be ascertained. After such notice and default the proof will not be presumed; it should appear of record. Trask v. Key, 4 G. Greene (Iowa), 372; Broghill v. Lash, 3 G. Greene (Iowa), 357.

In Kansas.—Judgment by default was entered on the fourth day of a term, the answer having been due nine days before the term commenced. Held, that the judgment was not prematurely entered before the day upon which the clerk had set the case for hearing upon the trial docket. Race v. Malony, 21 Kan. 31.

In Louisiana.—The ten days defendant

In Louisiana.—The ten days defendant has to answer run both in vacation and term time. Whenever that time expires without answer, if the court be in session, default may be taken, provided it be not the first day of the term. Code Pr. 310. 317, 318; Bryan v. Spruell, 16 La. 313; Carmena v. Mix, 15 La. 165; Maurin v.

Dashiell, 14 La. 471.

Passiell, 14 La. 471.

Premature Entry.—Where a judgment by default was entered before the day required by law had expired, it will not be maintained as valid on the ground that it was not made final until after the usual delays, and that defendant having thereby suffered no injury, cannot complain. The words "ordinary course of practice" mean that the course which is positively commanded by the law shall be pursued. There is no issue joined when the judgment by default has been improperly entered, and judgment in confirmation has nothing to rest upon. Hart v. Nixon, 25 La. An. 136.

In Massachusetts.—The constitution of Massachusetts does not prohibit the legislature from enacting that in all actions at law in the supreme or superior court a default shall be entered against any defendant on whom legal service has been made, unless he or some one in his behalf files an affidavit that he verily believes that the defendant has a substantial defence to the action on its merits, and intends to bring the same to trial. Hunt

v. Lucas, 99 Mass. 404.

In Mississippi.—By statute, five days' notice before the commencement of the term is required to authorize the plaintiff to demand a judgment by default. Rainey v. Planters' Bank, 26 Miss. 177.

Judgment by default rendered before the expiration of the time within which the defendant might plead, is erroneous, and will be reversed, unless it affirmatively appears that the defendant took action in the case from which a waiver can be inferred. The defendant's claim of his exempt property, if tried and decided before rendition of judgment, does not constitute such waiver. Burns v.

Loeb, 59 Miss. 167.
On What Day Judgment by Default
May Be Taken.—A judgment by default under art. 150, p. 503, of the Mississippi Rev. Code of 1857, is premature before the fourth day of the term; the defendant has until that day to plead, and such a judgment will be reversed on writ of error. Davis v. Patty, 42 Miss. 509. But in Winston v. Miller, 20 Miss. (12 Smed & M.) 550, it was held that it was no objection to a judgment that it was rendered before the time allowed for pleading had expired; an application should be made to the court below to set it

In Missouri.-In an action on a promissory note the default cannot taken earlier than the third day of the term. Hart v. Walker, 31 Mo. 26; Hol-

land v. Hunton, 15 Mo. 475.

In Nebraska. -By a rule of the district court regulating the making up of issues in cases entered therein by appeal, the petition should be filed on or before the third Monday after the time fixed by law for filing the transcript, and the answer on or before the second Monday thereafter. Held, that the defendant was not in default until after the time fixed by the rule for filing the answer had elapsed. Rich v. Stretch, 4 Neb. 188.
In New Hampshire.—When a default

has been entered, and no continuance of the action ordered, the plaintiff may take judgment at any time afterward, as of the term when the default was entered. Laighton v. Lord, 29 N. H. 237; Haynes

v. Thom, 28 N. H. 386.

In New Jersey.—A plaintiff cannot have a judgment by default entered after the term next after such default without giving 30 days' notice to the adverse party. Slack v. Reeder, 30 N. J. L. (1

Vr.) 348.

In New York, it is sufficient under the seventh rule of April term, 1796, that the defendant, though the rule for pleading has expired, has four days after bail is actually filed before his default is Leispenard v. Baker, 6 Johns.

(N. Y.) 323.

At General Term .- When a defendant, under sec. 268 of the Code as amended in 1867, noticed a motion for a new trial, which was put on the general term cal-endar, and he not appearing when the same was called for argument, plaintiff took an order that the motion be submitted to the court on the case and exceptions and plaintiff's printed points,

with liberty for defendant to submit points in support of said motion, and that his attorneys have notice, held, that it was clearly an order on defendant's default, and as such subject to be opened on defendant's motion, as any other default. Bolles v. Duff, 56 Barb. (N. Y.)

An order extending time to answer to a complaint without any affidavit of merits. or any such affidavit as is required by Rule 22 of the supreme court, is irregular; and the plaintiff may avail himself of such irregularity, where the service of such order is substituted and not personal. although he would not be at liberty to disregard the order if actually and personally served. Graham v. Pinckney, 7 Robt. (N. Y.) 147.

In suit against insurance company, on a policy of insurance, judgment cannot be entered on the return day of the first process, although the defendants do not Tyler v. Ætna Fire Ins. Co., appear.

2 Wend. (N. Y.) 280.

In North Carolina. - If a writ of capias ad respondendum (under the former system) was not returned for two terms it lost its vitality. Wherefore, where such writ was executed returnable to spring term 1864 of Johnson superior court, and no such court sat then or at fall term. held, that a judgment by default taken in such suit at spring term 1867 was irregular. Williams v. Rockwell, 64 N. C. 325.

In Ohio -A judgment rendered by default, before the expiration of the day named in the summons for answer, may be reversed on error; such rendition is not a clerical mistake within the Ohio Code, secs. 528, 529 Nicklin, 34 Ohio St. 123. Williamson v.

In Pennsylvania. - Judgment for want of an appearance can only be taken after fourteen days have expired after service, four days of grace being allowed besides the statutory ten days. Association v. Gardiner, 10 Phila. (Pa) 361; s. c., 32 Leg Int. 386; 2 W. N. Cas. 96.
Time—How Estimated—In taking judg-

ment for want of an appearance on a return of two nihils on a sci. fa. sur mortgage, the fourteen days must be calculated from the return day of the writ, and not from the teste of the writ. Faunce v. Subers. 10 Phila. (Pa.) 411; s. c., 32 Leg.

Int. 90; r W. N. Cas 248.

Default Against Bail—Error.—It is error to render judgment by default against bail where there were not fifteen days between service and return of writ of scire facias, although that period has elapsed before the judgment is actually before the expiration of the time in which the defendant might plead, is erroneous, and will be reversed unless the defendant by some act waives the irregularity. And the error is not cured by opening the judgment on motion of plaintiff without any notice to the defendant.2

Upon a default, judgment was entered as of the day of default, no good reason appearing for postponing it.3 But where the day of the rendering of judgment is not minuted upon the record, it is entered by usage of the courts as of the last day of the term, though the record shows a default upon a previous day.4 Judg-

on the journal. Lyon v. Randall, I W. 1. 396.

Under Early Laws .- Under what conditions of a cause judgment may be taken by default according to early laws of Pennsylvania, see Sheepshanks v. Boyer, Baldw. C. C. 462; Hines v. Dean, 4 Wash. C. C. 159; Smith v. Bohn, 4 Wash. C. C. 127.

Under 15 South Carolina Statute 502, sec. 21, providing as to the court of common pleas that "it shall be the duty of the clerk to place all cases filed in his office in which there is no defence upon a docket to be prepared by him for that purpose, and this shall be called on the first day of the term," held, that a defendant whose time for answering expired after the day fixed for the opening of the court, but before it was actually in session, could be defaulted upon the call of the docket on the first day of the term. McComb v. Woodbury, 13 S. C. 479.

In Texas. - A judgment by default where the writ was served March 15, returnable to a term commencing March 10. was reversed on error because the ser-vice was not made "five days before the first day of the term, exclusive of the days of service and return." Fitzhugh v.

Háll, 28 Tex. 558.

In the Federal Courts. - Where the summons is served ten days before the return day, the plaintiff on filing his declaration is entitled to enter up judgment by nil dicit for want of appearance. But this must be done at the rules. Hines v. Dean, 4 Wash. C. C. 159.

A judgment by default at the imparlance term at Washington is regular, the rule to plead having expired the preceding

vacation. Linthicum v. Remington, 5 Cr. C. C. 546. 1. Teat v. Cocke, 42 Ala. 336; Gwynn v. Weaver, I Stew. (Ala.) 219; Rather v. Owen, 1 Stew. (Ala.) 38; Robinson v. State Bank. 11 Ark. 301; Mitchell v. Mc-Corkle, 69 Ind. 184: Clegg v. Fithian, 32 Ind. 90; Hart v. Nixon. 25 La, An. 136; Burns v. Loeb, 59 Miss. 167; Winston v. Miller, 20 Miss. (12 Smed. & M., 550; Currin v. Ross, 2 Mo. 203; Winslow v. Anderson, 3 Dev. & Bat. (N. C.) 9; s. c., 32 Am. Dec. 651; Leispenard v. Baker, 6 Johns. (N. Y.) 323; Thomas v. Douglass, 2 Johns. Cas. (N. Y.) 226; Williamson, v. Nickling, c. Obis St. 1023; Dec. 10 Miss of the St. 1023; Dec. 1023; son v. Nicklin, 34 Ohio St. 123; Dobynes v. United States, 7 U. S. (3 Cr.) 241; bk. 2, L. Ed. 427; Union Bank of Georgetown v. Crittenden, 2 Cr. C. C. 238.

Judgment by default cannot be had until the expiration of the time allowed for filing a plea, although the term may not continue so long. Gwynn v. Weaver, 1 Stew. (Ala.) 219; Rather v. Owen, 1

Stew. (Ala.) 38.

With Respect to the Terms of Court .-Rendering judgment at a term before that fixed by statute is not a mere formal defect which may be remedied by an amendment in the court below. It is radical error, which is not cured by appearance, nor by judgment by nil dicit. Teat v. Cocke, 42 Ala. 336.

Imparlance Term.—If a judgment by

default be rendered on the third day of the imparlance term and before the time of pleading has expired, it will nevertheless be good if no application be made to set it aside, and for leave to plead.

Winston v. Miller, 20 Miss. (12 Smed. & M.) 550.

Judgment by default at the imparlance term is regular, the rule to plead having expired the preceding vacation.

thicum v. Remington, 5 Cr. C. C. 546.

Arkansas Practice.—Where there are less than fifteen days between the date and return day of the writ, the service of it imposes no obligation upon the defendant to appear to the action, and a judgment by default rendered thereon is void, and may be quashed on certiorari. Robinson v. State Bank, 11 Ark. 301.

2. Currin v. Ross, 2 Mo. 203.

 Coolidge v. Cary, 14 Mass. 115.
 Hildreth v. Thompson, 16 Mass. 191; Portland Bank v. Maine Bank, 11

Mass. 204; Herring v. Polley, 8 Mass.

ment may be rendered by default on a day prior to that set by the clerk for the trial of the cause.1

Where to a plea of former recovery in another court a replication of nul tiel record is filed, with an averment and prayer of debt and damages, and no rejoinder is filed, judgment by default is properly rendered.² And a default may be properly entered in a cause, notwithstanding the pendency of a motion to quash a capias ad respondendum, under which the defendant was held to answer in the suit.3

Where a cause is continued by the defendant upon the condition that "he pay the costs of the term, and if the costs are not paid in ninety days after the adjournment of the court the defendant's plea shall be stricken from the file, and the plaintiff shall have judgment nil dicit with inquiry," if the costs are not paid within the time specified, the court may at the next term strike the defendant's plea from the file, and give the plaintiff judgment by nil dicit.4 And where a frivolous demurrer is filed, and no leave is asked to file an answer, it is not error for the court to enter a default of judgment upon overruling a demurrer.5

After an order striking out an answer, plaintiff may enter judgment in the same manner as though no answer had been put in,6 where no leave to plead has been asked or granted.7 And where an answer is lost, and an entry is made upon the record that by consent of the parties defendant may file an answer within a certain specified time, it is proper to render a judgment by default if the answer is not filed within the time limited. But the withdrawal of an attorney's appearance does not so leave the case as to make a default proper.9

d. When it May Not be Taken.—Default is not to be taken unless the defendant has been served with notice. 10 And a judg-

1. Archibald v. Lamb, 9 Ind. 544; Blair v. Manson, 9 Ind. 357; Blair v. Davis, 9 Ind. 236; Brenner v. Gunders-

hiemer, 14 Iowa, 82.
When Granted.—A default may be granted before a cause is reached in its regular order as assigned on the docket. Brenner v. Gundersheimer, 14 Iowa, 82.

Before Day of Trial.-The cause was docketed for trial below on the fifth day of the term. At calling of docket for issues on second day a rule was taken to plead; defendant was defaulted and judgment rendered against him. Held, no error. Blair v. Davis, 9 Ind. 236.

Where cause was docketed for trial on tenth day of the term, a rule to plead was taken on fourth, and judgment was rendered on ninth. *Held*, no error. Archibald v. Lamb, 9 Ind. 544; Blair v. Manson, 9 Ind. 357.

2. Bates v. Hinton, 4 Mo. 78; Burck-

hart v. Watkins, 4 Mo. 72. 3. Phillips v. Kerr, 26 Ill. 213.

Waller v. Sultzbacher, 38 Ala. 318.
 Seale v. McLaughlin, 28 Cal. 668.

6. Aymar v. Chase, I Code R. N. S. (N. Y.) 141.
7. Fanning v. Russell, 81 Ill. 398.
Insufficient Plea or Answer.—Where the defendant pleaded four pleas, the plaintiff replied to the second plea, and he demurred to the other three; the defendant did not join issue, and the court sustained the demurrer, and, without noticing the second plea, rendered a judgment by nil dicit. Held, that the judgment was correct. Waters v. Simpson, 7 Ill. (2 Gilm.) 570. 8. Owens v. Tinsley, 21 Mo. 423.

9. Field v. Fowler, 62 Tex. 65.

10. Townsand v. Townsand, 21 Ill. 540. Vide supra, II. 1. b.

Process issued from R. county against A, residing in C county, and B, residing in C county, and was served on both. B failed to appear, and the suit being dismissed as to A, judgment by default was ment by default rendered upon service within the prescribed time is void.

Where the writ is made returnable on no specified day, a judgment by default is irregular and void.2 And it is error to grant a default for failing to file an answer to an amended petition when no time for filing such answer has been fixed by statute, or rule, or order of court.3

Interlocutory judgment cannot be entered before a rule for default where the defendant neglects to plead.4 And it is error to take judgment by default where a defendant simply waives the issue of process.⁵ If the defendant appear at first calling of cause he must be ruled to plead before he can be defaulted; but if he should not be present, he must be defaulted in the first instance.6 A default cannot be had in vacation. And a judgment by default obtained by an assurance that the suit had been dismissed according to agreement is fraudulent.8

Judgment by nil dicit cannot be entered while an issue of law or fact remains undisposed of. And where issue has been joined the court cannot render judgment by default 10 as long as it remains

undisposed of.11

And no default can be taken in a cause which is at issue until it

rendered against B. It was held that it should be reversed, as the court had no jurisdiction over B under Illinois Laws 1877, p. 146. Herkimer v. Sharp, 5 Ill. App. 620.

Default in Action against an Insurance Company.-Where the charter provided that the directors were to levy the amount necessary to pay just claims on the stockholders, pro rata, and that such assessments should be collected by action if not paid within sixty days after notice, such stockholders cannot be joined in a suit against the company, nor can judgment be rendered against them in such suit, though they be in default. Lee v. Fraternal Mut. Ins. Co., I Handy (Ohio),

1. Howard v. Clark, 43 Mo. 344; Williams v. Bower, 26 Mo. 601; Sanders v.

Rains, 10 Mo. 770. 2. Bobb v. Graham, 4 Mo. 222. 3. Wright v. Howell, 24 Iowa, 150.

Default on Cross-petition. - To render a final decree upon the filing of a crossbill, granting the relief thereby sought, when no answer has been filed by the defendants, nor any steps taken to place them in default, is error. Western Union Tel. Co. v. Pacific, etc., Tel. Co., 49 III. 90.

If plaintiff amends his declaration, and at the same time takes a judgment by default, it is error. Hickman v. Barnes, 1 Mo. 156. But in order to reverse such judgment in the supreme court, a motion must be made in the court where it was rendered to set it aside, and the refusal must be excepted to and made part of the record. Id.

4. Oudenarde v. Van Bergen, Cole.

Cas. (N. Y.) 47.
5. Unless such waiver has been made five days before the first day of the term.

Pearce v. Tally, 8 Tex. 304.

6. Langdon v. Bullock, 8 Ind. 341.

 Langdon v. Bullock, 8 Ind. 341.
 Cook v. Forest, 18 Ill. 581.
 Duringer v. Moschino, 93 Ind. 495.
 Alexander v. Stewart, 23 Ark. 18;
 Phillips v. Reardon, 7 Ark. (2 Eng.)
 Boyer v. Robinson, 6 Ark. (1 Eng.)
 Hicks v. Vann, 4 Ark. 526; White v. Thompson, 1 Ill. (Breese) 43; Young v. State Bank, 4 Ind. 301; s. c., 58 Am. Dec. 630; Elliott v. Leak, 4 Mo. 540.

10. Elliott v. Leak, 4 Mo. 540.
11. Alexander v. Stewart, 23 Ark. 18, citing Reed v. State Bank, 5 Ark.

The General Issue.—There cannot be judgment by default if the general issue is on file,—McAllister v. Ball, 24 III.

149; Ellison v. Nickols, I Ind. 477; Patten v. Hazewell, 34 Barb. (N. Y.)

421;—because the general issue puts the plaintiff upon proof of his entire cause of action; therefore, where the general issue is pleaded, and also payment as to part, judgment by default cannot pass, as to the portion to which payment is not pleaded. Van Dusen v. Pomeroy, 24 Ill. 289.

is called for trial, where there has been no failure to discharge any rule or order.1

A default cannot be entered where a plea has been filed and not disposed of.2 And where in the record for the higher court pleas appear before the entry of the judgment by default, it will be presumed they were filed before judgment, though there is no statement showing when they were filed.³ So where the record recites that the writ was returned into court on the first day of the term. and that "thereupon" the defendant filed his plea which is set out in the appropriate place, it was held that the plea appeared to be properly filed, and that the judgment by default was erroneous.4

A decree by default should not be entered while there is a

material motion pending.5

Striking Out Answer Setting Up .-Where the defendant pleads the general issue, it is error to strike out the answer and render judgment by default; the plaintiff is put to the proof. McKaughan v.

Harrison, 25 Tex. (Supp.) 461.

A General Denial in an action on a promissory note precludes the plaintiff from taking judgment by default; the note must be produced in evidence. Bedwell v. Thompson, 25 Tex. (Supp.) 245.

Rendering judgment for the want of an answer, and without the intervention of a jury, when the defendant did answer by Though the general denial, is error. general denial did not put the plaintiff to prove the execution of the note described in the petition, it required its production, and precluded the plaintiff from taking judgment by default for the want of an

Judgment by default for the want of an answer. Able v. Chandler, 12 Tex. 88; s. c., 62 Am. Dec. 518.

1. Norris v. Dodge, 23 Ind. 190.

2. Mason v. Abbott, 83 Ill. 445; Parrott v. Goss, 17 Ill. App. 110; White v. Thompson, 1 Ill. (Breese) 43; Harris v. Muskingum Mfg. Co., 4 Blackf. (Ind.) 267; s. c. 20 Am. Dec. 272; Levi v. Monroe, 11 Iowa, 453; Canal Bank v. Newberry, 7 Iowa, 4; Brown v. Hollenbeck, 2 G. Gr. (Iowa) 318; Taylor v. Mcbeck, 2 G. Gr. (10wa) 318; Taylor v. Mc-Nairy, 42 Miss. 276; Arrington v. Mobile & O. R. R. Co., 30 Miss. 470; Kidd v. Harris, 30 Miss. 396; Dickson v. Hoff, 4 Miss. (3 How.) 165; Selser v. Wilkinson, I Miss. (Walk.) 108; Ruch v. Jones, 33 Mo. 393; Cox v. Capron, 10 Mo. 691; Briggs v. Sholes, 14 N. H. 262.

What Pleadings will Prevent a Default. -When a plea suited to the action has been pleaded in proper time and replied to, plaintiff is not entitled to a default.

Cox v. Capron, 10 Mo. 691.

Plea in Bar.—Judgment by default can-not be taken if there are pleas in bar on file. Harris v. Muskingum Mfg. Co., 4 Blackf. (Ind.) 267.

Defective Plea .- A plaintiff cannot have judgment on motion in a case where a plea has been filed by the defendant. which, even though bad in form or substance, does not admit the plaintiff's case. Briggs v. Sholes, 14 N. H. 262.

Judgment by nil dicit cannot be rendered, upon a bad plea to the special counts, while the general issue pleaded to the common counts remains undisposed of. Keeler v. Campbell, 24 Ill.

Practice when Plea is Bad -After replying to a plea filed in proper time, the plaintiff cannot take judgment by nil dicit, but if the plea is bad he should withdraw his replication and demur. Cox v. Capron, 10 Mo. 691.

After the General Issue had been Pleaded, and a plea denying that the plaintiff was the owner of the note sued on, the plaintiff filed an amended complaint, which was demurred to and the demurrer sustained. The court then ordered a default to be entered. Held, on appeal, to be error, as there was a valid plea on file. Kidd v. Harris, 30 Miss. 396.

Rule to Plead .- It is erroneous to take judgment by default when a plea is filed by defendant in compliance with the rule against him to plead. Semple v. Locke, Ill. (Breese) Appen. 5.
Unanswered Plea.—It is error to render

judgment by default when a plea is filed and unanswered. White ν . Thompson,

1 Ill. (Breese) 43.
3. Tomlinson v. Hoyt, 9 Miss. (1 Smed. & M.) 515; Irving v. Montgomery, 4 Miss. (3 How.) 191; Dickson v. Hoff, 4 Miss. (3 How.) 165.

4. Purvis v. Forbes, 6 Miss. (5 How.)

5. Arbuckle v. Bowman, 6 Iowa, 70; Coffin v. Kemp, 4 G. Gr. (Iowa) 119; Baldwin v. Winn, 3 G. Gr. (Iowa) 180; Brown v. Hollenbeck, 2 G. Gr. (Iowa) 318.

A motion to quash the return or the summons is no waiver of the right to plead, and in such a case a refusal to allow the defendant to plead, and an entry of judgment as upon default. is

Until the issue raised by a demurrer is determined, defendant cannot be defaulted for want of an answer.2 because the plaintiff cannot disregard a demurrer as frivolous, and enter judgment as on failure to answer. He must apply to the court. Where separate demurrers are filed to separate paragraphs of the complaint, and some of the demurrers are overruled, a rule to answer should not he entered until all the demurrers have been disposed of; and a judgment for default of an answer is erroneous.4 And pending a demurrer by one of several defendants, going to the merits of the whole bill, a final decree cannot be entered up against the other defendants who are in default for plea, answer, or demurrer.5

While a defendant has an answer or plea on file undisposed of, a judgment cannot be rendered against him; 6 for a verified answer.

Where a decree by default was rendered pending a motion on which no order had been made, and an answer was filed before the rendition of the decree, held. that it must be set aside. Coffin v. Kemp, 4 G. Gr. (Iowa) 119

Under the Colorado Civil Code no default can be entered for want of answer while a motion to quash the return upon the summons is pending and undetermined. Chivington v. Colorado Springs

Co., o Colo. 597.

Where there is a Motion to Dismiss for want of security for costs by a nonresident plaintiff, made in time, judgment by default cannot be entered until such motion is disposed of. Steamboat Osprey v. Jenkins, 9 Mo. 635. Steamboat

 Story v. Ware, 35 Miss. 399.
 Taylor v. Coolidge, 17 Ark. 454; 2. laylor v. Coolidge, 17 Ark. 454; Bradshaw v. McKinney, 5 Ill. (4 Scam.) 54; McKinney v. May, 2 Ill. (1 Scam.) 534; Hirsh v. Clawson, 106 Ind. 320; Kegg v. Welden, 10 Ind. 550; Key v. Hayden, 13 Iowa, 602; Willamette, etc., Co. v. Smith, 1 Oreg. 181.

Unanswered Plea. - A defendant cannot be defaulted while a plea or demurrer is unanswered by the plaintiff. Sammis v.

Clark, 17 Ill. 398.

After Demurrer or Exceptions.-It is erroneous to render judgment by nil dicit against a defendant who has filed a demurrer to the declaration when the same remains unanswered and not disposed of in any way, and he has not taken any subsequent step in the cause amounting to a waiver of the demurrer. Steelman v. Watson, 10 Ill. (5 Gilm.) 249.

If a demurrer is filed within the time specified in the summons to answer, the clerk cannot enter the default of the defendant and final judgment for want of answer, even if the demurrer has not been served upon the opposite attorney. Oliphant v. Whitney, 34 Cal. 25.

It is Error to Default for Want of

Appearance one who has filed a demurrer. Walla Walla Printing, etc., Co. v. Budd,

2 Wash. Ter. 336. 3. De Witt v. Swift, 3 How. Pr. (N. Y.) 280.

4. Hirsh v. Clawson, 106 Ind. 329; s. c., 4 West. Rep. 481.
5. Jenkin v. McCully, 1 Mor. (Iowa)

6. Levi v. Monroe, 11 Iowa, 453; Canal Bank of Cleveland v. Newberry, 7 Iowa, 4; Arbuckle v. Bowman, 6 Iowa. 70; Coffin v. Kemp, 4 G. Gr. (Iowa) 119; Brown v. Hollenbeck, 2 G. Gr. (Iowa) 318; Baldwin v. Winn, 3 G. Gr. (Iowa)

Thus where the defendants in a petition to have a commission of surveyors appointed to establish a corner alleged to be in dispute answer, denying that it is in dispute, it is error to default the defendants. Harrah v. Conley, 82 Ill.

Directions to Let Suit Go by Default .-Defendant wrote to his attorney telling him to let the suit go by default. The attorney never received the letter, but it was filed in court, and defendant's answer stricken from the files and a default entered. Held, that this was error. Shaw v. Shaw, 114 Ill. 586.

Affidavit that Answer Not Made in Good Faith.-When in an action on a promissory note the defendant answered, denying that the sum claimed was due, and

which distinctly denies any fact material to the plaintiff's right to recover, cannot be treated as a nullity so as to entitle the plaintiff to judgment. And judgment taken for want of an answer when an answer is actually on file must be reversed, even though the answer is not sufficient. Where the plea filed is defective in form and matter, the proper course is to move to strike it from the files.³ It is erroneous to render a judgment by default so long as an answer is on file, whether properly verified or not; if not properly verified it should be stricken out, and then the default may be taken.4 It is error to render judgment by default when the defendant, though not in proper time, has appeared by leave of court and filed his plea. And it is error to render judgment by default where the parties have agreed to consider a plea

pleading usury, to which answer, no replication was filed; and where under a rule of the district court which prescribed that in actions on written contracts for the payment of money, where answers setting up a defence were interposed, the plaintiff might file in open court an affidavit averring that the answer was not made in good faith, but was intended for the purpose of delay merely, and that, unless the defendant filed a counter affidavit by the next day, the cause might be called up out of its order, and judg-ment rendered as though no answer had been filed, the plaintiff filed his affidavit, and the defendant failed to file a counter affidavit, and thereupon judgment was rendered for the plaintiff for the sum found to be due upon the note,—held, that the rule did not authorize the court to render a judgment as for want of a plea. Lyon v. Byington, 7 Iowa, 422. Under the Civil Practice Act of Mon-

tana, judgment cannot be entered against a defendant as upon default for want of issues to be tried when there is an answer on file in the cause, denying upon information all the allegations in the complaint, upon information and belief only. The denial is none the less specific, because based on information and belief. McLay v. Sands, 94 U. S. (4 Otto) 586-589; bk. 24, L. Ed. 211. See also Sayre v. Cushing, 7 Abb. Pr. (N. Y.) 371, n.; Edwards v. Lent, 8 How. Pr. (N. Y.) 28; Hacket v. Richards, 3 E. D. Smith (N.

1. Ghirardelli v. McDermott, 22 Cal.

539.
2. Levi v. Monroe, II Iowa, 453; Wolff v. Hagensick, 10 Iowa, 590; Taylor v. Runyan, 9 Iowa, 522; Twogood v. Coopers, 9 Iowa, 415; Canal Bank, etc., v. Newberry, 7 Iowa, 4; Lyon v. Bunn, 6 Iowa, 48; Seachrist v. Griffith, 6 Iowa, 200; Rurlington & Mo. R. R. R. Co. v. 390; Burlington & Mo. R. R. R. Co. v.

Marchand, 5 Iowa, 468; Brown v. Hollenbeck, 2 G. Gr. (Iowa) 318; Markey v. Mettler, I Iowa, 528; Dickson v. Hoff, 4 Miss. (3 How.) 165; Ruch v. Jones, 33 Mo. 393; Pritchard v. Huntington, 16 Wis. 569; Maxwell v. Jarvis, 14 Wis.

Defective Answer .- Judgment cannot go by default while there is an answer or plea on file and undisposed of, however defective it may be. Levi v. Monroe, 11 Iowa, 453; Canal Bank, etc., v. Newberry, 7 Iowa, 4; Brown v. Hollenbeck, 2 G. Gr. (Iowa) 318; Dickson v. Hoff, 4 Miss. (3 How.) 165; Ruch v. Jones, 33

Answer Repudiated by Defendant .-Where the plaintiff's attorney, on being informed by the defendant that the answer served by his attorney was not his, and that he had never sworn to it, entered judgment as upon failure to answer, held, that such judgment was irregular. The remedy in such case is by motion to strike out the answer. Chadwick v. Snediker, 26 How. Pr. (N. Y.) 60.

3. Markey v. Mettler. I Iowa, 528. 4. Ruch v. Jones, 33 Mo. 393.

Default Against an Unverified Answer. -Where a petition was sworn to and demanded an answer under oath, and the defendant answered denying each and every allegation in the petition, but not under oath, it was held that the court erred in rendering judgment as for want of an answer; that the plaintiff should have taken some steps to have the answer removed, and that the petition could not Wolff v. Hagensick, be taken as true. taken as true. Woll v. Hagelistok, 10 Iowa, 590; Taylor v. Runyan, 9 Iowa, 522; Twogood v. Coopers, 9 Iowa, 415; Lyon v. Bunn, 6 Iowa, 48; Seachrist v. Griffith, 6 Iowa, 390; Burlington & M. R. R. Co. v. Marchand, 5 Iowa, 468; Markey v. Mettler, 1 Iowa, 528.

5 Phodes v. McForland, 42 Ala, 95. filed and issue joined.¹ Judgment by default cannot be rendered when the defendant has appeared by leave of the court and filed his pleas, though not in the proper time.² And where it appears that judgment was rendered by default on the same day that a plea was filed, it will be reversed, as the court will presume the plea to have been filed before judgment rendered.³ No default can be taken until all legal exceptions be disposed of.⁴ A judgment by default entered while exceptions are filed and undetermined is a nullity.⁵

An action cannot be brought to trial until in such a situation that final judgment can be rendered between all the parties. Where an action is at issue as against all of several defendants, one of them cannot give notice of trial, and upon plaintiff's failure to appear take a judgment against him by default. Thus where one of several defendants fails to appear, though no default is taken against him, it is error to render judgment in favor of all the defendants. Where no answer has been put in neither a default nor a decree pro confesso can be rendered against infants by default, but the plaintiff must prove his case.

1. McEwin v. State, 11 Miss. (3 Smed. & M.) 120.

Agreement by Parties to Consider Plea Filed.—And it is error to enter judgment by default where the parties have agreed that it shall be considered that a plea is filed as "nul tiel record in short by consent," and "replication and issue in short by consent." But the court reluctantly conceded that this mode of pleading had any validity whatever. McEwin v. State, II Miss. (3 Smed. & M.) 120.

2. Rhodes v. McFarland, 43 Ala. 95. Plea Filed Out of Time.—If an answer is filed and brought to the notice of the court, though not on or before the fourth day of the term, it is error to render judgment by default. Ellett v. Britton, 6

Tex. 220.

Where a defendant at the return term craved oyer and demurred, and after demurrer overruled filed his plea, to which a demurrer was sustained, and a writ of inquiry thereupon awarded, an entry of default made at the next term is idle and nugatory. Logan v. Moulder, I Ark. 313; s. c., 33 Am. Dec. 338.

Effect of Filing Plea Out of Time.—Filing an answer after the day, though it might induce the court more readily to set aside the default, yet does not deprive the plaintiff of his right to have judgment as for default after that filing. Harrison v. Kramer, 3 Iowa, 543.

3. Lyon v. Barney, 2 Ill. (1 Scam.)

4. Francis v. Steamer Black Hawk, 18 La. An. 629; Rawle v. Shipwith, 8 Mart. N. S. (La.) 118. 5. Francis v. Steamer Black Hawk, 18 La. An. 629.

6. Ward v. Dewey, 12 How. Pr. (N. Y.) 193.

7. Wells v. Moore, 15 Tex. 521.

In Wisconsin.—Prior to the Code a default entered against two defendants after one of them had filed his plea was irregular as against him, even though his plea was filed after time and without leaves the proper practice was first to have such plea struck from the files. Pett v. Clark, 5 Wis. 198.

8. Thomas v. Adams, 59 Ill. 223; Mills v. Dennis, 3 John. Ch. (N. Y.) 367; Massie v. Donaldson, 8 Ohio, 377, 381. Decree Cannot be Taken by Default

Decree Cannot be Taken by Default Against an Infant.—A decree cannot indeed be safely made against an infant on default upon taking the bill for confessed for want of an answer, or upon an answer filed in his behalf by his guardian ad litem; for the answer is that of the guardian and not of the infant, and therefore cannot be used against him. Ralston v. Lahee, 8 Iowa, 17; s. c., 74 Am. Dec. 291; Chalfant v. Monroe, 3 Dana (Ky.) 35; Walsh v. Walsh, 116 Mass. 382; s. c., 17 Am. Rep. 162; French v. French, 8 Ohio, 214; s. c., 31 Am. Dec. 441; Bulow v. Witte, 3 S. C. (N. S.) 323; Davidson v. Bowden, 5 Sneed (Tenn.), 129; McGavock v. Bell, 3 Coldw. (Tenn.) 520. See Massie v. Donaldson, 8 Ohio, 377; I Dan. Ch. Pr. ch. 4, § 8. Infants cannot be prejudiced by the misstatements or omissions of their guardian in his answer. Lenox v. Notrebe, Hempst. C. C. 257. And laches is not

Where infants are defendants in chancery proceedings the proper and convenient practice is for the court to refer the matter which requires to be proved to the master in chancery, that he may take the evidence and report the facts to the court for its final determination.1

It is error for the court to enter judgment by default or decree bro confesso against a lunatic without an answer from his guardian ad litem.2

The guardian ad litem of a lunatic is a representative merely to make defence, and receiving no authority from the defendant can admit nothing against him, and cannot have the plaintiff's claim admitted by being in default, and it is therefore error for the court to decree against a lunatic without an answer from his guardian ad litem. When a decree is taken as on petition confessed, against a lunatic and his guardian ad litem, as in default for answer, plea. or demurrer, even if the court hear evidence as to the complainant's claim, it will not cure the error.3

It is the duty of the court to compel the guardian ad litem to answer or to appoint some other person to defend, and to defer the hearing of the case until after a proper answer has been filed.4

If a continuance has been granted in a cause, and afterwards set aside, it has been held to be irregular to take a default without notice to the other party.5 And a judgment on default, after proceedings are duly stayed by demand for a bill of particulars, whether entered in or out of term, is not void, but only irregular.6

to be imputed to a minor. Dragoo v. Dragoo, 50 Mich. 573; Chandler v. Mc-Kinney, 6 Mich. 217; s. c., 74 Am. Dec. 686; Dow v. Jewell, 21 N. H. 470. See Smell v. Dee, 2 Salk. 415.

Admissions of Infant.—No decree can be

taken against an infant on his own admissions or those of his guardian ad litem; but every allegation to affect him must be duly proved. Tucker v. Bean, 65 Me. 353; Dragoo v. Dragoo, 50 Mich. 573. Where there are two infant defendants,

and it is necessary, in order to entitle the complainant to the relief he prays, that certain facts should be before the court, such facts, although they might be the subject of admission on the part of the adults, must be proved against the infants. Shultz v. Sanders, 38 N. J. Eq. (11 Stew.) 156; Wright v. Miller, 1 Sandf. Ch. (N. Y.) 111. See Holden v. Hearn, 1 Beav. 445. A court of chancery will not decree against infants without full. not decree against infants without full proof, though their guardians ad litem confess the ground of action. Stephenson v. Stephenson, 6 Paige Ch. (N. Y.) 353; James v. James, 4 Paige Ch. (N. Y.) 115, 119. See Hite's Exr. v. Hite's Legatecs, 2 Rand. (Va.) 409.
1. Chaffin v. Heirs of Kimball, 23 Ill.

36; Cost v. Rose, 17 Ill. 276; Enos v. Capps, 12 Ill. 255; McClay, Admr. v. Norris, 4 Gilm. (Ill.) 370.

2. Ward v. Kelly, 1 Ind. 101; South v. Carr, 7 T. B. Mon. (Ky.) 419; Coleman v. Comm'rs Lunatic Asylum, 6 B. man v. Comm'rs Lunatic Asylum, 6 B. Mon. (Ky.) 239; Allison v. Taylor, 6 Dana (Ky.), 87; s. c., 32 Am. Dec. 68; Shirley v. Taylor, 5 B. Mon. (Ky.) 104; Beeler v. Bullitt, 4 Bibb (Ky.), 11; Henly v. Gore, 4 Dana (Ky.), 133; Ullery v. Blackwell's Heirs, 3 Dana (Ky.), 300; Thatcher v. Bellows, 13 Mass. 112; Montgomery v. Montgomery, 3 Barb. Ch. (N. Y.) 132; Massie v. Donaldson, 8 Ohio, 377; Sturges v. Longworth, 1 8 Ohio, 377; Sturges v. Longworth, 1 Ohio St. 545; Harrison v. Rowan, 4 Wash. C. C. 207; Altham v. Smith, Cary, 93; Knight v. Young, 2 Ves. & B.

3. Sturges v. Longworth, I Ohio St.

544. 4. Massie v. Donaldson, 8 Ohio, 377; Henly v. Gore, 4 Dana (Ky.), 133. See also Ullery v. Blackwell's Heirs, 3 Dana (Ky.), 300; Sturges v. Longworth, 1 Ohio St. 545.

5. Mattoon v. Hinckley, 33 Ill. 209;

McKee v. Ludwig, 30 Ill. 28.

So long as there is a judgment of nonsuit against the plaintiff. which the record shows not to have been set aside, judgment by default cannot be taken against the defendant. And where in a previous proceeding a judgment for costs has been rendered against the plaintiff, a judgment by default cannot be taken against the defendant without his appearance and the setting aside of the former judgment.2

It is error to enter the default of a defendant after the death of a sole plaintiff, and before his representative has been made a

3. CONFIRMATION.—After a default has been taken and made final by judgment it must be confirmed; the time when a default may be confirmed, and the manner of such confirmation, are matters regulated by the local codes and statutes.4

1. Kelly v. Hogan, 16 Mo. 215.

2. McElhany v. McHenry, 26 Mo. 174; McAdams v. McHenry, 22 Mo. 413.

Jury Fee. - The mere failure to pay the jury fee in an action, while it does not entitle the party to have the verdict re-corded, and if it be recorded improvidently, is ground for vacating the entry, does not, after the vacation of the entry. put the party in default, so that judgment can be rendered against him as in default. Stevens v. Breatheven, Wright (Ohio), 733.
Under the New York Code.—A party

whose proceedings are stayed because of his failure to pay costs cannot, under New York Code, sec. 779, take advantage of the other's default. Brown v.

Griswold, 23 Hun (N. Y.), 618.

3. Barbour v. White, 37 Ill. 164. 4. In Louisiana. -To confirm a default, plaintiff must now in all cases prove his Code Proc. 312; Byran v. demand.

Spruell, 16 La. 313.

A default cannot be confirmed without proof of the agency of the party cited. Mechanics' Bank v. Walton, 7 Rob. (La.)

In an action by the payee of a note a default may be confirmed against the maker without proof of the latter's signature. Kearney v. Fenner, 14 La. An.

When Judgment by Default Null and Void.—A default made final within less than ten days after service of citation is null. Code Proc. 180, 310; Arthur v. Cochran, 12 Rob. (La.) 41; Williams v.

Dunn, 2 La. An. 806.

Where the record discloses the fact that a judgment by default has been confirmed without introducing the evidence on which it is founded, although it is on file in the case, the judgment will be declared null and void on appeal, and the

case will be remanded to be proceeded in according to law. Pike v. State, 20 La. An. 547; Gubernator v. New Orleans, 20 La. An. 106.

When a Default to be Taken.—Former-ly a default could not be made final until after the lapse of three judicial days. Johns v. Boyle, 14 La. 268; Gorham v. DeArmas, 7 Mart. (La.) 360; Hall v. Mulholland, 3 La. 114; Gridley v. Conner, 4 Rob. (La.) 448.

Under the present Code, two full days must elapse between the default and the judgment confirming it. The formality of signing it after the proper delay does not alter the fact that it was rendered too soon. Code Proc. 312, amended by act April 30, 1853, No. 300; Code Proc. 544, 546; Ward v. Graves, 11 La. An.

In Louisiana Code, art. 312, the words "if two days after this first judgment has been rendered, the defendant neither appears," etc., import two judicial days. A judgment by default is reasonably confirmed on the third day. Taney v. Meilleur, 35 La. An. 117.

Under Missouri Statute Feb. 28, 1855, a judgment by default in the county of St. Louis may be made final at the return term. Morris v. Horrell, 35 Mo. 467.

In New Hampshire. - After default has been entered in an action, judgment cannot be taken at any time afterward, as of the term when the default was entered; yet if taken more than 30 days after the last day of the term, any attachment made on the original writ will be ipso facto dissolved. Haynes v. Thom, 28 N. H. (8 Fost.) 386.

In North Carolina it has been held that a judgment by default final upon a note payable in Confederate money is irregu-Williams v. Rockwell, 64 N. C. 325. The proper remedy for the defendA default on a petition and supplemental petition, if the former has been improperly served, cannot be confirmed only on the latter. A judgment by default that has been improperly made final because of defective citation will be set aside on appeal, and the cause will be remanded. 2

4. JUDGMENT.—The term "judgment by default" is understood in its technical sense as a judgment for want of a plea.³ To be binding; a judgment by default must be regularly and properly entered.⁴ A judgment of a court will always be presumed to be regular; and a judgment erroneously entered is valid until revised.⁶

5 PRACTICE.—The practice relating to the taking and entering of default, and final judgment thereon, are matters regulated almost entirely by local statutes and the rules of court; however, there

ant in such case is by motion in the cause.

In Texas.—A default was taken nisi on the third day of the term, and on the sixth day a final judgment was entered, and afterward on the same day the defendant tendered his answer. Held, that a default could be taken on any day of the term after the second and before appearance and answer, but that three full days must elapse before the entry of final judgment, which, having been done in this case, the judgment was reversed. Wheat v. Davidson, 2 Tex. 196.

In Federal Courts.—A circuit court of the United States should not render a final decree for want of appearance at the first term after service of subpœna, unless another rule day has intervened. O'Hara v. McConnell, 93 U. S. (3 Otto),

150; bk. 23, L. ed. 840.

1. Ballard v. Lee, 14 La. 213.

Plaintiff suing for the removal of obstructions to his natural drainage, and damages, may, on discontinuing his claim for the latter, confirm a default for the former. Leonard v. Kleinpetre, 7 La. An. 44.

2. Dupuy v. Arceneaux, 21 La. An.

629.

3. Rhodes v. DeBow, 5 Iowa, 260.

4. Thus where a defendant is summoned to answer to the claim of A and B, judgment by default in favor of A, B & Co. is not binding. v. 24 S. C. 424.

In Detinue. —A final judgment by default cannot be rendered in detinue, Studdert w. Hassell, 6 Humph, (Tenn.) 137.

dert v. Hassell, 6 Humph. (Tenn.) 137.

5. Wilson v. Wilson, 18 Ala. 176; Venable v. McDonald, 4 Dana (Ky.), 336; Green v. Creighton, 15 Miss. (7 Smed. & M.) 197; Pender v. Felts, 10 Miss. (2 Smed. & M.) 535; Briggs v. Clark, 8 Miss. (7 How.) 457; Coleman v. McInight, 4 Mo. 83.

6. Drexel's Appeal, 6 Pa. St. 272; Lewis v. Smith, 2 Serg. & R. (Pa.) 142. Informal Judgment by Default.—A re-

Informal Judgment by Default.—A recital in the judgment-entry, "the defendant not being present in person or by attorney, and no plea filed in the cause," does not show a formal judgment by default, or nil dicit; but if the further recitals show a judgment on verdict for the plaintiff, the judgment is not void, and cannot be assailed collaterally. McLaren v. Anderson, 81 Ala. 106.

How Far May be Impeached or Attacked Collaterally for Fraud, etc.—The summons in an action in a justice's court for a trespass on land contained a statement that, in case of defendant's failure to answer, "plaintiff would take judgment for the amount claimed in the complaint." Held. that a judgment by default, rendered after a personal service on the defendant, was voidable only, and could not be collaterally attacked. Keybers v. McComber, 67 Cal. 395.

Where one sued is induced by false and

Where one sued is induced by false and fraudulent representations of the plaintiff to allow the case to go by default, he may attack the judgment as fraudulent in a subsequent suit by the creditor to subject property in satisfaction thereof. Richardson v. Trimble, 38 Hun (N. Y.), 409; s. c., 17 Abb, (N. Y.) N. C. 210.

ardson v. Trimble, 38 Hun (N. Y.), 409; s. c., 17 Abb. (N. Y.) N. C. 210.

A Judgment by Default Against a Married Woman.—A judgment rendered upon default against a married woman, in an action to which coverture would have been a defence, is not void, but voidable only. McCurdy v. Baughman, 43 Ohio St. 78; s. c., I West. Rep. 33.

The enforcement of such judgment will

The enforcement of such judgment will not be enjoined, unless some equitable ground of relief be shown, such, for instance, as fraud or coercion. McCurdy D. Baughman, 43 Ohio St. 78; s. c., I

West. Rep. 33.
7. In Alabama.—A writ issued against

two defendants, and was returned executed generally, but there was another return, certifying that one of the defendants was not found: a second writ, similar to the first, was issued returnable to the next term, and executed on the defendant not previously served. At an adjourned term, holden about three months after the second writ was served. a judgment was rendered against the two defendants by their omission to gainsay the action. Held, that the first writ was not executed on both the defendants; that the term to which the second was returnable was the appearance term, and that the judgment rendered was a mere continuation of it. Dupree v. Smith, 3 Ala, 736.

In Arkansas. -- A party defendant, by agreeing to a continuance, waives any defect which may exist in the service of the writ, and makes himself a party to the record. Judgment by default against him thereafter is irregular, but cured by statute. Rogers v. Conway, 4 Ark. 70.

Default, After Plea or Answer.—It appeared of record that the defendant filed, severally, special pleas of justifica-tion and joined in the general issue; but the pleas were not set out in the transcript, and it did not appear of record that notice was given to the defendant to produce the papers on which they justified, although the record stated that they failed to produce them on notice being served. Held, that it was error in the court below to disregard such pleas, and render judgment by default; but that the judgment could not be reversed, as nothing appeared of record to show that the judgment was wrong; held also, that it was error to disregard the plea of not guilty and render judgment by default, even if the papers relied on in the special pleas were not produced on legal notice, as they could be defaulted only as to so much of the defence as was sustained by the papers not produced. Cole v. Wagnon, 2 Ark. 154.

In Colorado. - As to the proper practice under the Colorado Code after default, failure to plead, demurrer overruled, etc., in proceeding to ascertain damages and enter judgment, see Good v. Martin, 1 Colo. 406; Hoehne v. Rupear, I Colo. 405; Watson v. Hahn, I Colo. 385; Ford v. Brown, 1 Colo. 265; Gallup v. Wilder, I Colo. 264, 293; Haskins v. Tucker, I Colo. 263; Jones v. Stevens, I Colo. 67; McNasser v. Sherry, I Colo. 12; Wilcox

v. Field, I Colo. 3.

In Georgia.—Where a process was served only fourteen days before the beginning of the April term, and the

entries showed that the counsel appeared for the defendant October, 1873, and at April term, 1874, the case was put to heel of the docket. Held, that the defect was waived, and a judgment at the October term, 1874, by default was valid. pin v. Whitehead, 66 Ga. 688.

In Iowa. - A party demanding a copy of the petition when served with the notice under Iowa Code, sec. 1772, must designate the place where it is to be sent. or the omission to send it will not affect the plaintiff's right to have judgment upon default. Lyon v. Cloud, 7 Iowa, 1.

In Maine. - The defendant in an action in the court of common pleas, of which it has not final jurisdiction, is not bound to disclose the matter of his defence, but is entitled to have a verdict returned, and to appeal. The power of the court in an action of which it has final jurisdiction from the entry of a default, is derived from the consent of the party. Frothingham v. Dutton, 2 Me. (2 Greenl.) 255.

A case marked "law" on the county

docket should be transferred to the next law term; and if not done so, the judge afterwards presiding at the county court may enter a nonsuit, default, or judgment on the verdict, though it is suggested that the omission occurred through mistake or inadvertence. Farrin v. Kennebec & P. R. R. Co., 36 Me. 34.
In Maryland.—The legal force and

effect of the appearance of the defendant to the action before the first return day thereafter is to annul the judgment by default for want of appearance. Greff v.

Fickey, 30 Md. 75.

In King v. Hicks, 32 Md. 460, it is held that "the plaintiff having by his own laches lost the benefit of obtaining the summary judgment by default against the defendant, the case must be disposed of by the court below as if the suit had been instituted independently of the act of 1864, ch. 6."

The law prescribing modes of proceeding unusual must be strictly pursued; and neither by its letter nor spirit does it authorize the plaintiff to have judg-ment by default entered against the defendant at any time subsequent to the day prescribed by the law. King v.

Hicks, 32 Md. 460.

"It embraces by its terms all cases in which a judgment by default has been or shall hereafter be entered." Stansbury v.

Keady, 29 Md. 361.

In Massachusetts.-- A judgment by default rendered in another State against two defendants after service of process on one only, with an award of execution against the joint property of both and

the several property of the one served, will not support an action in this commonwealth even against the one served, without proof that a judgment in such form was regular by the law of the State where it was rendered. Knapp v. Abell, 92 Mass. (10 Allen) 485. Thus a judg-ment recovered in Connecticut against a partnership is not binding in Massachusetts upon one partner who was not within the jurisdiction, was not served with process, and did not appear by himself or attorney, although by the law of that State service upon one partner authorized a judgment against all the partners. Phelps v. Brewer, 63 Mass. (9 Cush.) 390; s. c., 57 Am. Dec. 56.
The Inhabitants of a School District

against whom an action is pending having voted to be defaulted therein. the most proper mode for the plaintiff in such action to pursue is to call in question the right of the agent or counsel of the district to appear further rather than to move that the defendants be defaulted. Havward v. North Bridgewater School Dis-

trict, 56 Mass. (2 Cush.) 419.

Upon Trial of Trustee Process upon a judgment by default, on publication against non-resident defendant, objections to the validity of the judgment may be shown and assigned for error on a writ Kittredge v. Martin, 141 Mass. 410; s. c., 2 New Eng. Rep. 85.

In Michigan it has been held that the

fact that the rule to plead required a plea in ten days, instead of twenty, as prescribed by law, was held not to impair a default entered after waiting more than twenty days, where the notice of the rule given to defendant was for twenty days.

Howe v. Maltz, 35 Mich. 500.

In Minnesota an affidavit showing that no answer had been filed, upon which judgment by default was rendered, bore date before the service of the summons. Held, that the judgment was irregular, but not necessarily void; that if the affidavit could be shown to have been in fact correct, the plaintiff should allowed to show this, and to amend by changing the date. Dunwell v. Warden, 6 Minn. 287.

In Mississippi, if in entering judgment by default the clerk omit to state the amount, the court cannot at a subsequent term enter a new judgment without notice to defendant. The mode to correct is by petition, and notice as prescribed by the statute allowing the amendment of judgment (H. & H. C. 18). Poole v. McLeod, 9 Miss. (I Smed. & M.) 391. Such a judgment is void, and the amount cannot be inserted by the clerk in making up the final record. Claughton at Black, 24 Miss. 185.

The Missouri Practice Act 1855, ch 12. sec. 11, is intended only to prevent judgments on defaults appearing at the return term. Such judgments taken at any other term are not within the reason Doan v. Holly, 26 Mo. 186. of the law.

Amended Declaration-Default by.-Where in an action of debt the plaintiff, after pleas filed, obtains leave for and files an amended declaration in assumbsit, and at a subsequent term takes judge. ment by nil dicit, the court will not reverse the judgment for such irregularity when the court below was not called on to decide upon the points or irregularity, Hanly v. Holmes, I Mo. 84.

In New Jersey. - If a plaintiff who has become entitled to a judgment by default in vacation omits to enter the same until after the term next after such default, he cannot have such judgment until he has given thirty days' notice to the defendant. Slack v. Reeder, 30 N. J. L. (1 Vr.) 348.

In New York .- A judge at chambers has power to make either an absolute or a conditional order for judgment on account of frivolous pleading, precisely as at a special term. Witherhead v.

Allen, 28 Barb. (N. Y.) 661.

Plaintiff's attorney received defendant's special pleas, which were not verified, on the day that he entered default and returned them, objecting only that they were not served in time. Held, that his default was irregular. Royce v. Mott, 1

How. (N. Y.) Pr. 50.
Fraudulent Delay.—If the retainer, and course of proceeding on defendant's part are out of the ordinary and natural course of business, and obviously intended to work extraordinary delay, plaintiff's attorney may disregard it as fraudulent, and enter a default. Bank of Buffalo v. Lowry, 22 Wend. (N. Y.). 630; Anon., 22 Wend. (N. Y.) 619.

Disregarding Order not Served .- Defendant obtained an order setting aside an inquest on payment of costs, but omitted to serve the order or offer of the Held regular to enter judgment costs. by default, in disregard of the order; and that such judgment should not be opened unless defendant disclosed a meritorious defence. McGaffigan v. Jenkins, 1 Barb.

(N. Y.) 31. New York Code, Civ. Proc. sec. 1778, providing for judgment as by default in an action against a corporation on a note, etc., is constitutional, and applies to municipal corporations. Moran v. Long Island City, 101 N. Y. 439; s. c., 2 Cent.

Rep. 401.

Practice in Ejectment. - Wood v. Wood, 9 Johns. (N. Y.) 257; s. c., 1 Cai. (N. Y.) 503; 4 Johns. (N. Y.) 489; Jackson v. Stiles, 3 Cai. (N. Y.) 133.

Old Practice.—For cases under the old

practice, which are not deemed wholly obsolete, see, as to taking default in bailable case, Broome v. Wellington, I Sandf.

(N. Y.) 664.

In North Carolina. - The effect of North Carolina laws 1866, ch. 63, sec. I, is to abolish imprisonment for debt in all cases. After its passage it was proper for a judge to refuse to render judgment on default of the defendant's appearance after appeal from an adverse finding of the issue of "fraud or concealment" on a ca. sa., the appeal bond being in the nature of a bail bond. Bunting v. Wright. Phill. (N. C.) L. 295.

After Default-Justice.-Appeal will lie from judgment by default before a Wood v. O'Ferrall, justice of the peace.

19 Ohio St. 427.

Default Below .- A decree will not be reversed on bill of review because a defence may have existed of which the party neglected to avail himself. On a bill of review the court will not reverse a default

judgment. Gary v. May, 16 Ohio, 66.
Where the defendants in the original cause are in default in not answering a supplemental bill, but the decree of the court is not founded on the charges in the supplemental bill, but is contradictory thereto, such default will not operate as a bar to a bill of review. Creed v. Lan-

caster Bank, I Ohio St. I.

Costs Not Secured .- The defendant is not excused from filing his plea within the rule because the plaintiff has failed to comply with an order to give security for costs. The violation of an order of court by one party does not justify the violation of another and different rule by Newsom's Adm v. the opposite party. Ran, 18 Ohio, 240.

Service.—In proceedings in rem, where under the circumstances the seizure could not be considered as notice, the court may order actual notice to be given, though not provided for in the statute. Courts also may and should require stricter proof in default in such cases. Young v. Steamboat Virginia, I Handy (Ohio), 156.

Plea Before Third Default.-It is not error to take a third default after a plea had been filed, when it also appeared that no judgment was taken upon the default, and the issue was by consent regularly submitted to and found by the court, Ferguson v. Ryler, 2 Ohio St. 493.

Notice of Appeal .- If after judgment

by default against a defendant not within the jurisdiction of the court because of defective service of summons, the defendant appears in court to give notice of appeal, and has it entered on the record. he thereby appears in the action, and submits to the jurisdiction of the court, and cannot afterward be allowed to deny such jurisdiction. Fee v. Big Sand Iron Co., 13 Ohio St. 563.

In Pennsylvania. - After a narr. is set aside for irregularity, with liberty to plaintiff to cure the irregularity by filing and serving papers nunc pro tune, he should file an affidavit of the service of such papers before proceeding to enter the Schilling v. Welman, 5 Leg. default.

Obs. 20.

In South Carolina-A Failure to Indorse on the Complaint the Order for a Judgment by Default, as required by the South Carolina statute, will not invalidate a judgment otherwise regular, the requirement being directory only. Genobles v. West, 23 S. C. 154

In Tennessee .- The Demanding of Over of a Written Instrument merely by memorandum written on the foot of the declaration, and signed by the attorney of the defendant, presents no legal obstacle to the plaintiff's right to a judgment by Mabry v. Cowan, 6 Heisk. default. (Tenn.) 295.

In Texas.-To authorize a judgment by default there must be a strict compliance with Texas statute; the return on the citation must show the day when the writ was served. Whitaker v. Fitch, 25

Tex. (Supp.) 308.

In Vermont-Entering Review by One Defendant. - If the defendant who appears enters a review, the effect is to vacate the judgment as to both defendants and carry the whole case to the next succeeding term, notwithstanding a separate judgment may have been entered upon the record against the defendant who was defaulted. Downer v. Dana, 22 Vt. 22.

The Virginia Statute of Jeofails does. not apply to cure errors and defects in the proceedings in cases of judgment by default. In such cases the writ is part of the record, and the writ being in assumpsit and declaration in covenant the variance is fatal. Wainwright v. Harper, 3 Leigh (Va.), 270.

In Wyoming Territory—Record Showing Service. - Judgment having been rendered against defendant by default, he brought a writ of error upon which plaintiff moved for an affirmance of the judgment below on the ground that the record presented no question for review. It was held that the judgment should beare a few general principles applicable alike in all jurisdica

A decree on failure to appear at the return term should be interlocutory, not final; 1 for when no judgment by default has been taken prior to rendering a final judgment, it is a nullity, and will

be so declared when attacked by a third party.2

It is error to render a final judgment by default against a defendant without his appearance and without setting aside a former judgment for costs rendered in his favor in the same suit.3 Where the proceedings are ex parte and in rem, upon a default, there must be a strict conformity with the statute. If the entry of a default is essential to the validity of a judgment by default, it will be presumed that one was taken, unless the contrary appears.5

Judgment by default for a debt demanded, with damages and costs, which the record shows is larger than the plaintiff has a right to recover, will not be reversed, but may be amended. On judgment by default the defendant below is entitled to all legal

exceptions to the writ and service thereof.7

It is good ground for reversal that the defendant's answer was improperly stricken out by the court on its own motion, and the defendant defaulted, notwithstanding that the plaintiff was required to prove his claim.8

A judgment by default should not be rendered without notice; and where judgment is rendered without notice, the defendant by

affirmed, the record showing that defendant was served. Garbanati v. Beckwith,

2 Wy. Ter. 213.

In Federal Courts .- Where three causes brought on the same facts by different libellants, being at issue, it was stipulated that two should abide the decision of the third. Before the third was brought to hearing the libellant died, and his administratrix continued the cause. A decree was rendered in favor of the claimants, but without costs, for the reason that the action was prosecuted by an administratrix. *Held*, that in the other causes the claimants were entitled to decrees dismissing the libels with costs. Abb. Adm. 483.
 Hyde v. Pinkard. 25 Ark. 163.
 Washington v. Hackett, 19 La. An.

146.

3. McElhany v. McHenry, 26 Mo. 174. Several special pleas in addition to a plea of the general issue having been filed in an action of assumpsit, the court having sustained demurrers to the special pleas without noticing the plea of the general issue, rendered final judgment against the defendant. Held, that this was error, and the judgment was reversed. Bell v. Sheldon, 12 Ill. 372.

4. Lawrence v. Yeatman, 3 Ill. (2

Scam.) 15.

Thus a judgment by default, predicated on an attachment void because issued by an officer not having authority to issue it, is void, and will on error be reversed, and the whole proceeding quashed. Matthews v. Sands, 29 Ala. 136; Stevenson v. O'Hara, 27 Ala. 362; Flash v. Paul, 20 Ala. 111.

Judgment by Default Without Evidence. Where judgment was entered upon a default for \$124.75, and it did not appear that any testimony had been heard, the presumption that a judicial officer has acted regularly was held to apply to the case; and nothing appearing to the contrary, this court will presume that the judge had informed himself as to the matter of complaint, in a proper and regular manner, and such judgment will be affirmed. Crane v. Brannan, 3 Cal.

Judgment Nil Dicit Instead of by Default.—Where the judgment is nil dicit, when it should have been by default, it is merely informal, and will not be reversed Shields v. Barden, 6 on that account.

Ark. (1 Eng.) 459.
5. Miller v. Miller, 33 Cal. 353.
6. Hart v. Seixas, 21 Wend. (N. Y.)

7. Gilbreath v. Kuykendall, 1 Ark. 50. 8. Keeney v. Lyon, 10 Iowa, 546.

appearing and applying to have it set aside waives no legal right except that of notice, and after the judgment by default is set

aside may interpose any defence whatever.1

Pleas filed where the defendant is in default should, on motion of a plaintiff, be stricken from the files.2 And the court may proceed to judgment upon default for answer without regarding pending motion to strike the petition from the files, it appearing that the motion could not prevail if heard, being without merits and frivolous.3 But if an answer is filed raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the court takes the case into consideration, it cannot then strike out the answer of the defendant and enter his default, and render judgment for the plaintiff for the amount claimed in the complaint.4

An entry on the docket, in vacation, after the time for pleading has expired, in the words "plaintiff claims judgment against defendant for want of plea," signed by the plaintiff's attorneys, with the date attached, and attested by the clerk, is not a sufficient entry of the default; nor is it sufficient to sustain a judgment by default at the ensuing term, after pleas are filed, although proof is made to the court that no pleas were filed when it was entered.⁵ And in an action against several defendants, two of whom are not shown to have been served with process, and who did not appear, a judgment by default against them will be regarded as a mere clerical misprision, and will be amended in the appellate court at the costs of the appellants without remanding the cause.6

6. THE RECORD.—The record in default must show affirmatively that the proceedings were according to law,7 because the

1. Pennington v. Gibson, 6 Ark. (1

Defective Notice.—A judgment by default, rendered on an original notice which is merely defective, is not void for want of jurisdiction. The judgment in such a case is irregular, but the remedy is by motion to correct in the court wherein it was rendered. De Tar v. Boone County, 34 Iowa, 488.

Where, pending an application for removal of a cause to a United States court, it was removed from the docket of the State court, and two years subsequently was redocketed without notice to the defendant, a judgment by default was held erroneous. Mattoon v. Hink-

ley. 33 Ill. 208.

Waiver of Default .- The amendment of the complaint, putting the substantial matters contained therein into two counts, not being answered by defendants, and no default taken therefor, the plaintiff cannot go to trial without objecting to the answer to the original complaint, and, after verdict against him, object to the want of an answer to the amended complaint. Gale v. Tuolumne

Water Co., 14 Cal. 25.

With Respect to Terms of Court.-A judgment rendered on default in a suit to test the right to an office, when the court is not in regular session, without giving the parties interested legal notice of the trial, is null and void. State v. Billings. 23 La. An. 798.

2. Brayton v. County of Delaware, 16

Iowa, 44.
3. Kellogg v. Churchill, I West. L. Mon. 46.

4. Abbott v. Douglass, 28 Cal. 295. 5. Woosley v. Memphis & C. R. R.

Co., 28 Ala. 536.
6. Neff v. Edwards, 81 Ala. 246. See

Ala. Code § 3154

7. Hudson v. Breeding, 7 Ark. 445. A judgment by default, against a defendant who was not before the court, purporting to be founded on an original attachment which nowhere appears in the record, but which was prayed for and obtained (if at all) by the person for whose use, in the name of another, as nominal plaintiff, the judgment was rencourt will not presume in favor of a judgment by default. Where a judgment is entered by default, the record must show that the defendant has been legally notified of the pendency of the suit or has waived it.2 Otherwise on motion to set aside the judgment it will be reversed on appeal.³ The summons and return become a part of the record when there is no appearance, without any order of the court or bill of exceptions.⁴ And failure of the clerk to copy them does not carry from the record a statement in the order and judgment that process had been issued and duly served on defendant in proper time; and it must be presumed, therefore, that default was after service of process.5

III. Default of Plaintiff.— I. FAILURE TO SERVE A COMPLAINT.— Where the plaintiff fails to serve a complaint within the time allowed for that purpose, the defendant is entitled to a judgment of In a case of seizure of property by attachment or ser. nonsuit.6

dered, is wholly irregular and erroneous, and cannot be aided by any intendments. Kennedy v. Millsap, 25 Ala. 560.

Want of Affidavit of Defence.—As to Pre-

requisites of a Judgment for want of an affidavit of defence, after a pluries summons returned "served," etc., see Mc-

Innis v. Smith, 9 Phila. (Pa.) 222.

Judgment Day After Writ Returnable.

-Where judgment is rendered by default on the day after the writ is made returnable, and the record does not show that the case was continued, nor that the defendant appeared on the return day, the judgment is illegal and void. Woolford v. Harrington, 2 Ark. 85.

In a Proceeding for a Divorce, when the bill is taken for confessed, it is sufficient that the record shows proof was heard sustaining the allegations of the bill, without preserving the evidence in the record. Hawes v. Hawes, 33 Ill. 287; Davis v. Davis, 30 Ill. 180; Shillinger v.

Shillinger, 14 Ill. 147.

What a Sufficient Showing in Record.-When the record contains a statement that "the defendants were severally duly called, but came not nor either of them. it sufficiently shows that such defendants were not present by attorney or otherwise, even though one of such defendants may be a corporation. Union Pacific R. Co. v. Horney, 5 Kan. 340.

When a judgment recites that all owners and claimants of the property have been duly summoned to answer the complaint and have made default, the judgment in this respect cannot be impeached in a collateral action, although it appear that the name of the one of the owners was omitted in the printed summons. Reily v. Lancaster, 39 Cal. 354.
In Indiana.—In an appeal under Indi-

ana Revised Statute 1852, where the de-

fendant was defaulted, the record must contain a copy of the summons, and show that the same was properly served, or judgment will be reversed. New Albany & S. R. R. Co. v. Welsh, 9 Ind. 479.

In Iowa.-It is sufficient to bring a case under the provisions of sec. 1824 of the Iowa Code, if, where no judgment by default has been entered, the default appears from the record. Cook v. Walters, 4 Iowa, 72.

1. Hudson v. Breeding, 7 Ark. 445.

2. Pennington v. Gibson, 6 Ark. 447; Cole v. Allen, 51 Ind. 122; Miles v. Buchanan, 36 Ind. 490; Cochnower v. Cochnower, 27 Ind. 253; Indianapolis & Cincinnati R. R. Co. v. Wyatt, 16 Ind. 204; New Albany & S. R. R. Co. v. Welsh, 9 Ind. 479

Record Must Show Service. -On appeal. a judgment by default will be reversed. unless the record show service on the defendant, or appearance, though possibly a judgment so obtained could not be impeached collaterally. Schloss v. White, 16 Cal. 65.

Judgment by Default. - An omission to enter of record a default will not render a judgment inadmissible in evidence against the defendant where the record of the judgment shows that the defendant has been served with process. Gillespie v. Splahn, 1 Wilson (Ind.), 228.

Record need not contain copy of summons issued by a justice when defendant was properly served (as shown by copy of return), was defaulted, and had appealed. Baldwin v. Webster, 68 Ind.

 Cole v. Allen, 51 Ind. 122.
 Barnes v. Roemer, 39 Ind. 589. 5. Nutting v. Losance, 27 Ind 37.
6. Defective Petition. — Where the plain-

tiff obtains judgment nil dicit upon a

vice on a garnishee, the plaintiff must file a declaration on the return of the writ, if ruled therefor; and if he neglects so doing, the

defendant is entitled to judgment.1

After a plaintiff has become nonsuited, if the defendant moves for the taxation of costs, the court has authority to decide upon any agreement alleged to have been made by the parties, whereby the defendant waived costs, and to refuse to allow him costs, on its being shown that he has already received them, or has made a valid agreement not to claim them. So when a defendant is defaulted the court has the like authority on the plaintiff's moving for the taxation of costs.2

2. FAILURE TO REPLY.—If plaintiff fail to reply or demur to new matter in the answer, the defendant shall have such judgment as he is entitled to upon such statement.3 If such new matter is a complete defence to the action it entitles defendant to judgment if unreplied to.4 But the court exceeds a sound discretion in ren-

petition which omits an essential part of the description of the cause of action, the cause will be treated as if no petition had been filed, by reversing the judgment and granting a new trial. Goodlett v. Stamps, 29 Tex. 121.

On Proceedings before Justice of the Peace.—Where process is not served before the return day, proceedings before a justice of the peace are coram non judice; and if the defendant subsequently appears and insists upon the cause being heard, and judgment is given for the defendant, it is but a judgment of non suit, and is no bar to another action for the Fisher v. Longnecker, 8 same cause. Pa St. 410.

Damages on Appeal from Justices' Docket.-Where, in an action of replevin certified up to the common pleas from a justice, under sec. 145, Justices' Code, and on the plaintiff's failure to prosecute, the defendant files a petition to have his damages assessed, the plaintiff may contest the claim for damages, and the right of property and of possession being found in plaintiff, the defendant is not entitled to nominal damages, nor to costs accruing after the defendant's application to have his damages assessed. Clark, 't West. L. Mon. 598. Loudon v.

Where an action of replevin before a justice is certified to the common pleas, on the appraisement being beyond his jurisdiction by § 145, Justices' Code, and the plaintiff is in default, the defendant cannot have his damages assessed on the transcript, but must file a petition. Loudon v. Clark, I West. L. Mon. 598.

1. Plato v. Turrill, 18 Ill. 273.

2. Moore v. Cutter, 85 Mass. (3 Allen),

468; Coburn v. Whitely, 40 Mass. (8 Metc.) 272.

3. St. Louis v. Clemens, 36 Mo. 467; Mo. Gen. Stat. ch. 165, § 16, Wag. Stat. p. 1017. See also Moore v. Sauborin, 42 Mo. 490.

If the answer sets up new matter to which no demurrer or reply is filed, the defendant is entitled to judgment by default on the new matter. St. Louis v. Clemens, 36 Mo. 467.

4. Moore v. Sauborin, 42 Mo. 430.

When an application of the plaintiff is pending in a district court of the State, to remove the action into the United States circuit court, and the hearing of the application is set by the court for a particular day in the future, it is error for the court to allow the defendant, before the day arrives, and in the absence of the plaintiff and his attorneys, and without any notice to them, to take judgment against the plaintiff, although upon the pleadings the defendant is entitled to just such a judgment as he obtained. But where said application is defective, and ought to be overruled, and is eventually overruled, and where the plaintiff, who is in default for want of a reply, afterward moves the court to vacate said judgment, but does not offer to file a reply, and where the judgment is correct upon the pleadings in the absence of a reply, and the court overruled the motion to vacate the judgment, held, that the error of the court in rendering the judgment is now immaterial, and therefore the judgment will not be disturbed. Cooper v. Condon, 15 Kan. 572.
Under the Missouri Divorce Act, secs.

3 & 16 of the Practice Act, where the an-

dering judgment by default on a set-off for want of reply, it not appearing that the defendant had any meritorious defence.

IV. Default of Defendant. - I. A FAILURE TO ANSWER. - Where the defendant fails to appear and answer, judgment may be rendered against him by default, where the record shows that he had been properly served with notice of the action.²

swer of the defendant prays relief, a default may be taken against the plaintiff, and a decree of divorce granted. Ficke v. Ficke, 63 Mo. 335; s. c., 3 Cent. L. J. 318.

1. Arnold v. Palmer, 23 Mo. 411.

2. Haldeman v. Starrett, 23 Ill. 393;

Luke v. Johnnycake, 9 Kan. 511.
But it is error to assess damages or render final judgment without an issue or defaulting the defendant. Crabtree v.

Green, 36 Ill. 278.

If the record shows that the defendant had an opportunity to answer over, and refused to do so, judgment by nil dicit is good without an entry of a formal judgment of respondent ouster. Haldeman v.

Starrett, 23 Ill. 393.

Under the California Code .- Where the defendant moves to compel the plaintiff to elect which count of the complaint he will go to trial on, and the court makes an order extending the time to answer until the decision of the motion, and the motion is sustained, a default of the defendant, entered by the clerk in less than ten days after plaintiff serves notice of his election, is void, and the court may set it aside upon suggestion without any affidavit of merits. Willson v. Cleaveaffidavit of merits. Willson v. Cleaveland, 30 Cal. 192; Cal. Proc. Act. sec. 150.

Answer Without Verification .- In all cases not within the exception of the statute, an answer without a verification to a complaint duly verified may be stricken out on motion, and application for judgment, as upon default, may be made at the same time. Drum v. Whit-

ing, 9 Cal. 422. In Kansas.—The Code (secs. 136, 137, Gen. Stat. 654) gives the defendant ten days from the filing of an amended petition to answer the same; but unless notice of filing the amended petition is given to or waived by the defendant, there is no default on his part on a failure to answer. Haight v. Schuck, 6 Kan. 192.

In Louisiana. - A defendant who asks for no delay in the trial may file an answer pleading the general denial, even after plaintiff has introduced part of his evidence to confirm a default. Foster v. Baer, 7 La. An. 613; Moran v. Tanner,

6 La. An. 119; Louisiana Code Prac.

In Maryland .- A policy of marine insurance, although a contract of indemnity. is vet (if the measure of the indemnity or the certain means of its ascertainment after loss is agreed on in the instrument) within the act of 1864; and in an action upon it, an affidavit of loss may be made and a judgment may be taken by default under said act, for want of a verified plea. Orient Mut. Ins. Co. v. Andrews, 66 Md. 371; s. c., 6 Cent. Rep. 459.

Under Nebraska Gen. Stat. 533, sec. 64. p. 910, sec. 666, if the defendant fails to appear, judgment cannot be rendered for a greater sum than that indorsed on the summons. Cleveland Co-operative Stove

Co. v. Grimes, 9 Neb. 123.

In New York.—The Statutory provisions as to taking judgment by default in New York revised and amended by Code Civ. Proc. secs. 214, 216. As to the application of these provisions, see Code Civ. Proc. sec. 3347, subd. 8.
In what cases judgment may be had on

failure to answer. Code of Pro., sec. 246,

Rules 33, 34, 36, 46, of 1871.

The West Virginia Code, sec. 5 of ch. 134, includes judgments for fines in misdemeanor cases as well as judgments in civil cases, where such judgments are entered by default. State v. Slack, 28 W. Va. 372.

Appearance Without Answer .- Where a defendant makes an appearance in an action, but makes no answer nor excuse therefor, the allegation of the petition will be taken as true. Pfantz v. Culver, 13 Iowa, 312. And a judgment after an appearance without a plea is one by default which does not authorize process. Duke v. Routh, 2 La. An. 385.

Indiana Doctrine.—But in Indiana it is held that where there is an appearance but no answer, default should not be entered; for when defendant appears and fails to answer, judgment against him should be by nil dicit. Rhoades v. Delaney, 50 Ind. 468; Young v. State Bank. 4 Ind. 301; s. c., 58 Am. Dec. 630. The same doctrine prevails in Alabama. See Stewart v. Goode, 29 Ala. 476.
Withdrawal of Appearance—Error in.

Date of Writ .- It is no ground for re-

versing a judgment rendered on the default of the defendant after he has appeared and then withdrawn his appearance, that the date of the writ is a year earlier than the fact. Fav v. Havden. 73 Mass. (7 Grav) 41.

An Answer Filed out of Time and without leave or consent is no answer, and need not be noticed. The cause stands for hearing as on default. Johnnycake, 9 Kan. 511. Luke v.

Defendant who asks for no delay in the trial may file an answer pleading the general denial, even after plaintiff has introduced part of his evidence to confirm a default. Foster v. Baer, 7 La. An. 613; Moran v. Tanner, 6 La. An. 119; Code Prac. 514.

General Denial Day Default Confirmed -Presumption. - Where a general denial is filed the same day that a default is confirmed, but not in open court nor under the usual order to set aside the default, the judge, it will be presumed. did his duty and confirmed the default before the answer was filed. Blessey v. New Orleans O. Factory, 13 La. An. 310.

Amendment of Petition as to Formal Matters.-Where a defendant has answered a petition putting in issue all the averments thereof, and the plaintiffs afterward amend their petition in some mere matter of form not affecting his defence, as by alleging an assignment of the claim sued upon to one of the plaintiffs, or by joining new parties defendant, and the answer of such defendant to the original petition remains on file, such defendant is not required to answer the amended petition; and it is error for the court to adjudge him in default for want of an answer thereto. Cohen v. Hamill, 8 Kan. 621.

And where a defendant filed a demurrer to a petition, and afterward, while the demurrer was still pending, and in vacation, plaintiff without leave filed with the clerk of the court an amended petition, and at the next term defendant moved to strike out such amended petition, which motion the court overruled and afterward gave judgment by default against defendant, it was held that the action of the court was proper. McCollum v. Lougan, 29 Mo. 451.

Failure to File Rejoinder .- At the return term defendant filed a set-off, to which plaintiff demurred. At the next term the demurrer was overruled, when it was withdrawn by plaintiff and a replication was filed by him. Held, that though the defendant was entitled to a continuance, yet having failed to rejoin, the court properly rendered judgment against him by default. Dempsey v. Harrison, 4 Mo.

Entry of Default by Clerk-Decree for Equitable Relief and Sale of Real Estate. -In a suit to recover money due on a promissory note, and to establish a lien for the amount upon certain real estate purchased with money advanced by plain-tiff to defendant, and for which advance the note was given, the clerk entered judgment by default for the amount of the Plaintiff having exhausted his remedies on this judgment, his execution, and proceedings supplementary thereto, obtained from the court a decree for the equitable relief sought in the complaint, to wit, for a lien upon and a sale of the real estate. Held, that this decree was coram non judice, and void, assuming the judgment by the defendant to be valid. Such judgment, if valid, terminated the controversy, and whatever related to the merits of the case was merged in the judgment. Kittridge v. Stevens, 16 Cal.

It is doubtful whether the clerk could enter judgment in an action of this nature without application to the court. point reserved. Kittridge v. Stevens, 16

When the defendant demands a bill of particulars and obtains an order for leave to answer within ten days after the bill is served, which does not contain the items of account, the clerk may enter a default and judgment if the defendant fails to answer within the ten days. Providence Tool Co. v. Prader, 32 Ćal. 634.

Discretion of Court.-Where a case, referred by a rule of court to an arbitrator who hears the parties and adjourns the case to be taken up on agreement of the parties, remains upon the docket of the superior court for nearly six years after its entry, and four years elapse without any further action by the arbitrator, and more than one year after the withdrawal of the counsel originally employed by the defendant without any counsel being retained, it is within the discretion of the superior court, under a notice duly published that "cases which have been upon the docket for one year without any action in the same will be dismissed unless good cause is shown to the contrary." to default the defendant, and to refuse to take off such default upon his motion.

Willey v. Durgin, 118 Mass. 64.

Retrial after Default — Evidence. — Where judgment entered on a default in an action on a promissory note has been opened, and retrial ordered under sec. 3160* of the Revision, it is not necessary

A judgment entered on default before the time for answering

had expired is irregular, but not void.1

Where judgment is rendered on default, if defendant would denv the facts declared upon, his remedy is by review.² But a defend ant who fails to appear to an action cannot-complain if final judg. ment is rendered against him without any entry of default,3

When the defendant appears by attorney and does not plead, judgment by nil dicit is proper. And when the defendant's attorney withdraws his appearance at the judgment term, and defendant makes no further defence, nil dicit is the proper judge.

ment.5

The plaintiffs attorney, when the copy of a plea is given to him. is to presume that the original is filed, and cannot enter a default if he does not find a plea on file. 6 And an acceptance by plaintiff's attorney of service of demurrer, filed by a defendant after his default has been entered, is a waiver of the default,7 If judgment

on the retrial to again introduce the note in evidence. No sufficient defence to the action being found, the original judgment is simply confirmed and continued in full rce. Morton v. Coffin, 29 Iowa, 235. Consenting to Finding—Waiver of Error.

-A party failing to answer or demur, but consenting to the sum found due, will be deemed to have waived the irregularity of a judgment entered without entry of default. Jones v. Null, 9 Neb. 57.

Effect of Default on Rights of Defend-

ant .- A defendant in default who has neither answered nor demurred to the petition of plaintiff is not thereby barred from objecting to the petition that the same does not state facts sufficient to constitute a cause of action when the insufficiency appears on the face of the petition. Zane v. Zane, 5 Kan. 138.

In an action before the justice of the peace on a note given for the price of a horse the defendant relied on a breach of warranty, and judgment was given on a portion of the note, from which the plaintiff appealed to the court of common pleas, and the defendant was there defaulted. Held, that the former judgment was no bar to an action on the warranty. Bodurtha v. Phelon, 79 Mass. (13 Gray)

The Rule that there can be but One Judgment against promissors within the same jurisdiction refers to final judgment, and not to a default for not pleading entered against one. Netso v. Foss, 21 Fla.

Indemnity Against Judgment.—A judgment by default is covered by an indemnity against judgment. Conner v. Reeves, 103 N. Y. 527; s. c., 5 Cent. Rep. 415.

A judgment in another State after de-

fendant withdraws a plea is not one by default within meaning of Code Pac.

747, and process may issue thereon. A. default by our laws is where defendant neither appears nor answers. Stone v. Minor, 6 Rob. (La.) 29.

1. Schobacher v. Germantown Farmers' Mut. Ins. Co., 59 Wis. 86.
2. Hanson v. Wood (Me.), 3 New Eng.

Rep. 225. Issue of Law Pending .- It is error to take a judgment by default against a defendant who has appeared, demurred to complaint, and demurrer has not been acted on. Gunel v. Cue, 72 Ind. 34; Kellenberger v. Perrin, 46 Ind. 282; Carver v. Williams, 10 Ind. 267. Also when pleas of payment and accord and satisfaction are filed. Kirby v. Holmes, 6 Ind. 33; Harris v. Muskingum Mfg. Co., 4 Blackf. (Ind.) 267; s. c., 29 Am. Dec. 372. Also when a general denial is filed. Tipton v. Cummins, 5 Blackf. (Ind.) 571; Ellison v. Nickols, I Ind. 477.

3. Davis v. Burt, 7 Iowa, 56.

A defendant who has filed no answer cannot object that no interlocutory judgment was entered where he voluntarily proceeded with an inquiry of damages. McClurg v. Hurst, 37 Mo. 144.

The Former Practice in England and in New York in respect to the entry of interlocutory judgment against a defendant making default to plead, pending the trial of the issue against his codefendant, is reviewed. Catlin v. Billings, 13 How. (N. Y.) Pr. 511; Catlin v. Latson, 4 Abb. (N. Y.) Pr. 248.

4. Stewart v. Goode, 29 Ala. 476; Rhoades v. Delaney, 50 Ind. 468; Young v. State Bank, 4 Ind. 301; s. c., 58 Am.

Dec. 630.

5. Summerlin v. Dowdle, 24 Ala. 428. 6. Smith v. Wells, 6 Johns. (N. Y.)

7. Hestres v. Clements, 21 Cal. 425.

is rendered in favor of plaintiff by default, the court cannot grant any greater relief than is demanded in the prayer of the complaint and specified in the summons. Thus a judgment by default for an amount exceeding that asked for in the prayer of the complaint is erroneous.2 And where the complaint on a promissory note prays judgment for a sum certain, which sum is the principal and interest due when the complaint is filed, judgment by default should not include interest accruing after the complaint is filed.3

Judgment by default may not only be entered against all natural persons of full age and sound mind, where they have been properly served with notice, but also against infants, 4 administrators, 5 married women,6 a partnership,7 against corporations, private and

municipal,8 and against a State.9

v. Hyatt, 27 Cal. 99; Raun v. Reynolds,

11 Cal. 19.

Provisions of California Code .- The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue. Cal. Pr. Act. sec. 147. The provisions of this section apply to mandamus and quo warranto. People 7. Board of Supervisors of San Francisco Co., 27 Cal. 655.
2. Gage v. Rogers, 20 Cal. 91.

Rendering Judgment for More than the Amount Specified in Summons .-- A judgment rendered in an action on contract in favor of plaintiff on the complaint alone, after striking out for irregularity an answer previously filed by defendant, must be considered as a judgment by default, and is therefore erroneous if rendered for a greater amount than for that which the summons stated judgment would

be taken. Lattimer v. Ryan, 20 Cal. 628. 3. Lamping v. Hyatt, 27 Cal. 99. Judgment for Interest.—Where the complaint prayed judgment for a certain amount alleged to be due, as principal and interest of the note sued on, and that the judgment bear interest at a certain rate, and judgment by default was subsequently rendered for the amount, from the date of filing the complaint, held, that the judgment was erroneous in awarding interest from date of filing the complaint instead of the date of its entry. Gage v. Rogers, 20 Cal. 91.

If the prayer for judgment asks for interest to accrue after the complaint is filed, and neither the prayer nor summons mention the rate of interest, the clerk should not render judgment for a rate greater than the ten per cent per annum.

Lamping v. Hyatt, 27 Cal. 99.

Judgment by default, in a suit on a note

1. Parrott v. Den, 34 Cal. 79; Lamping drawing interest at more than ten per cent per annum, should not direct that the judgment bear interest at the agreed rate, unless the complaint prays that the judgment bear interest at the rate named in the note. Gautier v. English, 29 Cal. 165.

4. Judgment Nil Dicit Against Infant. A judgment by *nil dicit* against an infant heir is not void, but only erroneous. White v. Albertson, 3 Dev. (N. C.) L. 241; s. c. 22 Am. Dec. 619; Bender v. Askew, 3 Dev. (N. C.) L. 149.

5. À judgment by default may as well be taken against an administrator as any other party. Chase v. Swain, Admr. 9

Cal. 130.

6. Against a Married Woman. - When a married woman unites with her husband in executing a note, and judgment by default is rendered thereon against her, the judgment is not void. McCrudy v. Baughman, 43 Ohio, 78; s. c., I West. Rep. 33.

A Wife sued on a note made jointly and

severally with her husband, though for his debt, will be bound by a default, where no fraud or duress is alleged to have prevented her appearance and defence of the Aubic v. Gil, 2 La. An. 342.

7. Where a partnership by which a note is signed is alleged to consist of two members, a default against one individually. whose name does not appear in the firm, nor the return of citation, cannot be confirmed without proof that he is a partner.

Davis v. Davis, 8 La. An. 91.

8. Default Against a Corporation.—A default may as well be taken against a municipal corporation as against a private person. The rules of pleading are general; they were designated to embrace all persons, natural or artificial, capable of suing or being sued. Hunt v. City of San Francisco, 11 Cal. 250. And a judgment by default may be entered against a corporation, incorporated under the laws of the States. Dodge v. The Mariposa Co., Oct. Term 1867.

9. Default Against a State. - Where judg.

2. ALLOWANCE OF DEMURRER TO ANSWER.—Where a demurrer to the answer is sustained, and the defendant refuses to plead over he stands in default for want of an answer; 1 but where a demurrer to an answer is sustained, a default should not be granted for want of a further answer, in the absence of any rule or order of the court fixing the time within which such answer must be filed.2 However, where the defendant pleads bad pleas to which a demurrer is sustained and judgment of respondeat ouster awarded, and he pleads bad pleas again, to which a demurrer is again sustained, the plain. tiff is entitled to a judgment for want of a plea.3

3. FAILURE TO COMPLY WITH ORDER.—The defendant having appeared and failed to comply with a rule to answer, judgment is

properly rendered as on default.4

4. FAILURE TO ANSWER AMENDED COMPLAINT.—If the complaint be amended after answer by the defendant, on failure to plead to such amended complaint judgment may be rendered as on default; 5 but where the complaint is amended only as to a formal part, and such amendment does not affect the defence, no answer to the amended complaint is required.6

5. FAILURE TO PLEAD BY ONE OF SEVERAL DEFENDANTS.— Where some of the defendants plead and some do not, judgment by default should be entered against the latter; but if there be no formal judgment by default, and judgment for the amount of the verdict against those pleading be entered against all, it will be

good.7

ment may be entered by default against a U. S. (5 Pet.) 284; bk. 8, L. Ed., 127; Oswald v. New York, 2 U. S. (2 Dall.) 415; bk. 1, L. Ed. 438.

1. Brandt v. Foster, 5 Iowa, 287.
2. Rollins v. Coggshall, 29 Iowa, 510.
3. Harrison v. Balfour, 13 Miss. (5 Smed. & M.) 301.

4. Jelley v. Gaff, 56 Ind. 331; Risher

v. Morgan, 56 Ind. 172.

A default can only be taken against one who has failed to comply with some order of the court; not where a demurrer to an answer is sustained, and a rule issued fixing the time to answer. Rollins v. Coggshall, 29 Iowa, 510.
Failure to Answer Interrogatories.—

On failure to comply with a rule to answer interrogatories. See Reed v.

Spayde, 56 Ind. 394.

In Louisiana.—A party's failure to show cause when called on by rule in a summary proceeding, Code Prac. 754,e.g. in a proceeding against a delinquent tax collector and his sureties under the revenue act 1855, sec. 71, No. 346,-admits the justice of the rule; no further contestatio litis is necessary, and judgment may be obtained at once on proof as in other cases of default. State v. Mc Donell, 13 La. An. 231.

5. Woodward v. Wous, 18 Ind. 206; McCollum v. Lougan, 20 Mo. 451.

Thus after answers have been filed, and subsequently the complaint amended by changing plaintiff's name, and the de-fendant moved to quash summons, a judgment may be rendered as by default,. defendant being called and not appearing.
Answer cannot be deemed to be to amended complaint, or defendant could not have made motion to quash. Woodward v. Wous, 18 Ind. 296. 6. Cohen v. Hamill, 8 Kan. 621.

7. Henry v. Halsey, 13 Miss. (5 Smed. & M.) 573; Rappleye v. Hill, 5 Miss. (4.

How.) 205.

In Illinois. - Where there are joint defendants, and one files an affidavit of merits to a plea in his behalf, and the other defendant does not make an affidavit, the common pleas of Cook county may default the party who has not verified even at a future term, the suit being pending on the issues of the other defendant. Anthony v. Ward, 22 Ill. 180.

In Iowa.-In an action against two defendants on a contract, in which one leaves the action undefended by making

But a judgment against one defendant for the want of a plea, or a decree for want of an answer, does not prevent any other defendant from contesting, so far as respects himself, the facts admitted by the absent party. There is no reason why the same rule should obtain. But a judgment by default may be taken against one defendant after a demurrer has been sustained as to the others.2

However, where one only of several defendants appears and demurs, and the demurrer is sustained, it is error for the court to give judgment in favor of the defendant who does not appear.3

A joint judgment against two defendants, one by nil dicit and the other on verdict, is regular; such judgment should not be rendered until the issue is tried, and then the judgment so framed as to be joint.4 But a default against two defendants after one of them has filed his plea is irregular.5

default, and the other defends by filing an answer, it is not the practice to enter judgment on the default before the issue raised by the answer is disposed of. A motion made by a defendant in default for a judgment against himself was properly overruled. Greenough v. Shelden. o Iowa, 503.

In Missouri it is provided by statute that where there are several defendants, and some appear and others make default, judgment by default may be entered as to those who make default, and the case may be proceeded against the others, but only one final judgment can be entered in the action. Gen. Stat. ch. 171, sec. 8; Wag.

Stat. 1053. In New Hampshire, in an action on a contract against two or more, if one defendant is defaulted, and another under the general issue sets up and maintains a defence which negatives the plaintiff's right to recover against either of the defendants, and shows that he had no cause of action, the plaintiff will not be entitled to judgment against the one who is defaulted, and he cannot therefore be a witness for the other. Bowman v. Noves. 12 N. H. 302.

New York Code, sec. 1278, construed as to the power to allow a judgment to be entered against one joint debtor, on his failure to appear and answer while an issue is pending, raised by the answer of another joint debtor. Orleans Co. Bank v. Spencer, 19 Hun (N. Y.), 569.
In North Carolina. — The judgment

entered by default against a part of numerous defendants, others of whom plead, is only interlocutory. McLaurin, 63 N. C. 185. Dick v.

Where the plaintiff's writ was returned to the spring term 1867, executed on

five of seven defendants, and at that term three of the defendants pleaded, and judgment by default final was entered against two others; and alias process was ordered to issue against the two defendants upon whom the first process had not been executed, held, that the judgment taken by default was irregular.

Dick v. McLaurin, 63 N. C. 185.

1. The Mary, 13 U. S. (9 Cr.) 126; bk.
3, L. Ed. 678.

Thus where a Trustee and his Cestui Trust are defendants, and the latter answers, his rights are not prejudiced by the default of the former. Danforth v. Woods, II Paige Ch. (N. Y.) 9.

Collusive Judgment. - A default allowed by one of several defendants, while holding a substitution in his hands, in collusions with the plaintiffs, held, a fraud upon the other defendants. People v. Mayor, etc., of N. Y., 19 How. (N. Y.) Pr. 289.

2. Lyon v. Page, 21 Mo. 104. Where there are Several Defendants in a Real Action, a verdict in favor of one upon his separate plea will not avail another against whom a default has been rendered. Lecompte v. Wash, o Mo.

Farwell v. Jackson, 28 Cal. 105.
 Weaver v. Crenshaw, 6 Ala. 873;
 Dearing v. Smith, 4 Ala. 432.
 Pett v. Clark, 5 Wis. 198.

Where one of several defendants pleads and the others are defaulted, final judgment cannot be entered upon the default until the issue as to the other defendants is disposed of. Wight v. Hoffman, 5 Ill. (4 Scam.) 362; Wight v. Meredith, 5 Ill. (4 Scam.) 360; Teal v. Russell, 3 Ill. (2 Scam.) 319; Russell v. Hogan, 2 Ill. (1 Scam.) 552.

Where there is a demurrer of one of several defendants in chancery for the want of equity, and going to the merits of the whole bill, and undisposed of, a final decree cannot be entered up against the others, who are in default for plea, answer, or demurrer. If a defendant is defaulted, and a good plea to the merits is made by a codefendant, judgment cannot be rendered by default against the defaulted defendant. And where the plea of the general issue purports to be the plea of one defendant only, if judgment by default for the failure of the other defendant to plead is given against both, it is not good as to either.

In an action on a joint promise, should general issue be decided in favor of a defendant appearing, final judgment should be for all defendants, and will be a bar to a subsequent suit on joint promise.4

1. Jenkin v. McCully, Mor. (Iowa)

2. Sutherlin v. Mullis, 17 Ind. 19; King v. State, 15 Ind. 64; Kincaid v. Purcell,

I Ind. 324.

In an Action against Several, on contract, though one suffered default, but others proved payment, held, that damages could not be assessed against the defendant who had suffered default. McClure v. Hall, 19 Wend. (N. Y.) 25.

Where All Do Not Appear or Plead.—If

Where All Do Not Appear or Plead.—If judgment by default be rendered against one of two defendants, and the other appear and interpose a successful defence to the merits of the action, such defence will inure to the benefit of both, and the party in default is entitled to be discharged also. State v. Gibson, 21 Ark. 140; Bruton v. Gregory, 8 Ark. (3 Eng.) 177; Champlin v. Tilley, 3 Day (Conn.), 303.

Where the record was as follows: "And this cause is submitted to the court for trial on the complaint, default, and exhibits herein filed, and after examining, the court finds," etc., some of defendants having answered and some having been defaulted, the court held that the judgment was not rendered as upon default without evidence. Heavenridge v. Nelson, 56 Ind. 90.

Default as to One and Judgment against Another.—In an action on a joint and several promissory note, when one defendant answers, setting up a defence to the action, and the other permits a default, judgment cannot be rendered against the latter before the answer of the former is disposed of. Campbell v. McHarg. o Iowa. 354.

McHarg, 9 Iowa, 354.

If a judgment by default be rendered against one of two defendants, and the other appear and interpose a successful defence to the merits of the action, such a defence will inure to the benefit of both.

and the party in default is entitled to be discharged also. Bruton v. Gregory, 8 Ark. (3 Eng.) 177. Where a judgment by default was rendered against one of three joint and several obligors, in an action against two of them, without disposing of an issue raised by the answer of the other defendant alleging payment by the obligor who was not sued, held, that the judgment was erroneous. Rouse v. Howard, I Duv. (Ky.) 31.

After Discontinuance or Nonsuit by

After Discontinuance or Nonsuit by Some.—In a suit on a replevin bond, the principal and three sureties were defaulted; the fourth surety answered, but when the case came on for trial, plaintiff discontinued as against this fourth and one other of the sureties, and took judgment against the other two. Held, that this was error. Winslow v. Herrick, o. Mich. 330.

3. Cole v. Wagnon, 2 Ark. 154. 4. Kincaid v. Purcell, 1 Ind. 324.

Where One of Two Joint Promisors filed a plea in abatement, the other suffering a default, and a motion was made for judgment against the latter on default, the court refused the motion on the ground that the plea showed that there could be no procedure against him. Earl v. Raymond, 4 McL. C. C. 233. And in an action against two on a joint contract, where both are arrested and only one pleads, the plaintiff must take judgment by default against the other before he can have a verdict against him who pleads. Greer v. Miller, 2 Overt. (Tenn.) 187.

Semble, that where one Joint Contractor Pleads a Defence which, if established, would avail all, such as payment, that judgment should not go by default against the others before trial, as if he succeeds his defence will avail them. Sprague Admr. v. Childs, 16 Ohio St. 107, 117. Thus in an action against A, B, & C, to

And where several are sued at law, and the defence pleaded by one is available to the others, and is such as shows that the plaintiff has no right of action, after a verdict for the defendant so pleading, plaintiff is not entitled to a default against the other defendants.1

V. Partial Default.—I. WHERE ANSWER CONTAINS NO DENIAL. BUT SETS UP A COUNTER-CLAIM.—Where the answer admits a cause of action, and seeks to avoid it by new matter which is insufficient, the plaintiff is entitled to judgment upon the merits, as in a case of judgment non obstante verdicto.2 The court may strike out counter-claims for a failure of the defendants to comply with an order for a bill of particulars.3

2. STATEMENT ADMITTING COUNTER-CLAIM.—Where a plaintiff files an admission of a counter-claim for less than the sum sued for, he is entitled to judgment for the excess, as on default, and

without notice to the defendant.4

set aside a mortgage on account of fraud, A suffered a default, B and C pleaded a general traverse. Held, it was incumbent on plaintiffs, in order to recover, to prove their case as stated in complaint. Perrin v. Johnson, 16 Ind. 72; King v. State, 15 Ind. 64.
In Action on Joint Promissory Note.—

In an action against A. B. & C. as makers of a joint but not several promissory note. A & B were defaulted, and C pleaded the general issue that he did not promise with the other defendants, and on such issue judgment was rendered in his favor. *Held*, that the plaintiff was not at common law entitled to judgment against A & B. Tuttle v. Cooper, 27 Mass. (10 Pick.) 281. But see now Gen. Stat. c. 133, sec. 5.
But where A, B, and C are sued on a

joint contract, and a general verdict is rendered for A, and his pleading the general issue and giving in evidence a discharge under the insolvent law, and B is defaulted and a verdict is returned against C, the plaintiff is entitled to a judgment against B and C. Hathaway v. Crocker, 48 Mass. (7 Metc.) 262.

8 How. (N. Y.) Pr. 491; Patterson ν. Goodrich, 3 Tex. 331.

Thus where a defendant files an answer admitting the cause of action or containing no defence to it, plaintiff is entitled to judgment at the return term as for want of an answer. North v. Nelson,

21 Mo. 360.

When a Plea in Bar confessing a good

declaration is clearly frivolous, or so totally destitute of substance as to constitute no semblance of a legal defence, and yet the party has obtained a verdict. the court will render judgment in chief verdicto non obstante. Garrett v. Beau-

mont, 24 Miss. 377.
Where the Admission in an Answer Negatives its General Denials, the latter may be disregarded, and if the complaint be verified, judgment may be asked on the former. Fremont v. Seals, 18 Cal.

Insufficient Answer.—Where an answer, though true, presents in law no defence to the action, it cannot afford a foundation for a judgment for the defendant, when the plaintiff, on his part, has shown a cause of action supported by proof. Patterson v. Goodrich, 3 Tex. 331.

Arkansas Doctrine—Judgment after Decision on Demurrer or Exceptions.—In Arkansas, where the plaintiff demurs to one plea and replies to others, if the demurrer is sustained he is not entitled to judgment by nil dicit for the mere omission of the defendant to enter a similiter to the replications. Wooster v. Clarke, 2 Ark. 101.

3. See Wilson v. Fowler, 44 Hun (N.

Y.), 89.

4. Thus where the plaintiff sued for goods sold and delivered, his complaint was verified and its allegations were admitted by the answer, which set up a counter-claim, and upon the call of the default docket at the next term, moved for judgment for the excess, held, that judgment was properly rendered on his motion, and that defendant was not entitled to notice. Burges v. Pollitzer, 19 S. C. 451.

3. DENIAL OF ONLY PART OF THE COUNTS.—If a declaration contains several counts and the defendant pleads to but one a default may be taken as to the unanswered counts, at a term subsequent to that at which issue is joined on the plea. If the plaintiff takes judgment by nil dicit before the trial of the issue, it will be in time. And if the petition sets out several different causes of action in different counts, and the answer denies the allegation of one count only, the plaintiff may dismiss as to that count and take judgment on the remaining counts.2

VI. Defendant's Failure to Appear at Trial.—I. EFFECT ON PLAINTIFF'S CLAIM.—After issue joined, judgment cannot be entered by default, if the defendant does not answer on being called, but a trial must be had in the same manner: as if the defendant had answered.3 unless upon summons he fails to an-

1. Taylor v. Coolidge, 17 Ark. 456; Yell v. Outlaw, 14 Ark. 623; Cole v. Wagnon, 2 Ark. 154; McAllister v. Ball, 28 Ill. 210: Kinvon v. Palmer, 20 Iowa. 138; Williams v. Harris, 3 Miss. (2 How.) 627; Weigand v. Schrick, 34 Mo. 510.

Thus where the petition contained nine counts, the defendant assailed all but the fifth by motion or demurrer, and while these were pending the plaintiff demanded a default on the said fifth count. Held, that the court did not err in overruling the motion. Kinyon v. Palmer, 20 Iowa, 138.

Default as to Part of Claim .- It was error to disregard the plea of not guilty and render judgment by default, even if papers on which the defendants relied in their special pleas were not produced after due notice. The defendants could only be defaulted as to that part of their defence to which the papers not produced applied. Taylor v. Coolidge, 17 Ark. 456; Yell v. Outlaw, 14 Ark. 623; Cole v. Wagnon, 2 Ark. 154.

Judgment by Default upon Admission of Part of Claim. - A party, on payment of the costs of the motion, may take a judgment by nil dicit to that portion of his demand not answered by a plea, at any time during the term at which the plea is filed, and before any final judgment, even though a demurrer may have been

filed. Safford v. Vail, 22 Ill. 327.
In Mississippi, if a plea admits a part of the debt sued for without a tender, the plaintiff may take judgment for the amount by nil dicit. Williams v. Harris,

3 Miss. (2 How.) 627.

2. Weigand v. Schrick, 34 Mo. 510. 3. Phillips v. Connon, 5 Harr. (Del.) 366; Crabtree v. Green, 36 Ill. 278; Covell v. Marks, 2 Ill. (1 Scam.) 391; Manlove v. Gallipot, 2 Ill. (1 Scam.) 390; Terrell v. State, 68 Ind. 155; Maddox v. Pulliam, 5 Blackf. (Ind.) 205; Patten v. Hazewell, 34 Barb. (N. Y.) 421.

In Delaware, on a hearing in defendant's absence, though after an appearance, a magistrate must hear proof as well as allegations before giving judgment, and the record must show this.
Phillips v. Cannon, 5 Harr. (Del.) 366.
Illinois Doctrine.—The practice is well

settled that a defendant must plead and trial be had, or be defaulted, before a final judgment can be rendered against him. Crabtree v. Green, 36 Ill. 278.

Indiana Doctrine. - Failure to appear at a trial after the formation of the issues does not operate to withdraw pleadings. Default cannot be taken while pleadings of defendant are on file. Indianapolis

P. Manuf. Co. v. Caven, 53 Ind. 258.

Judgment cannot be taken against a defendant by default, if there is an answer in bar on record upon which issue is taken, though he fails to appear when case is called for trial. The issue should be tried by the jury. Terrell v. State, 68 lnd. 155; Maddox v. Pulliam, 5 Blackf. (Ind.) 205.

Under Kansas Code. — When the issues have been made up in a case, and where one of the parties has failed to appear at the trial, it is competent for the party who is present to submit the issues to the court for decision and judgment under sec. 289 of the Code. It is sufficient in such case that the court finds generally in favor of the plaintiff or defendant un-less requested to do otherwise. Union P. R. Co. v. Horney, 5 Kan. 340.
In Missouri, a judgment rendered by a

justice of the peace when the defendant is present by attorney, who, however, takes no part in the trial, is not a "judgment by default." 2 Wag. Mo. Stat. p. 846, secs. I, 2, which provides for appeals from a justice of the peace to the

near. But although pleas are on file judgment by nil dicit may be rendered, and such judgment authorizes the presumption that the defendant was present and did not attempt to support his pleas.2

2. EFFECT ON COUNTER-CLAIM OR AFFIRMATIVE PLEA.— Where a defendant appears, pleads an affirmative plea in bar, and afterwards makes default at the trial, judgment by default may be entered against him.3

3. PRACTICE.—Where a cause is at issue, a party cannot be defaulted until the day set for trial, unless upon failure to dis-

charge some rule or order.4

VII. Judgment without Application to Court.—I. IN WHAT CASES CLERK MAY ENTER.—Where the plaintiff is entitled to judgment on default without application to the court upon a verified complaint,

circuit court. Borgwald v. Fleming, 60 Mo. 212.

In New York .- Where the defendant by his answer denies all the facts stated in the complaint, judgment cannot be taken, even by default, without evidence. Patten v. Hazewell, 34 Barb. (N. V.) 421.

1. Firestone v. Firestone, 78 Ind. 534.
See also Shaw v. Binkard. 10 Ind. 227;

Key v. Robinson, 8 Ind. 368.

The non-appearance of a defendant who is not an inhabitant of the State, before a trial commissioner, when notified to appear and testify before him, is not suffi-cient cause for the rendition of judgment by the court against him as by default. Cheever v. Scott, 38 N. H. 32.

2. Bryant v. Simpson. 3 Stew. (Ala.) 339. A Judgment Nil Dicit is proper against a defendant who filed pleas and does not appear to sustain them. If the record recites that the defendant said nothing in bar or preclusion of the suit, the intendment is the pleas were waived. stall v. Donald. 15 Ala. 841; Dearing v. Smith, 4 Ala. 432; Dougherty v. Colquitt, 2 Ala. 337; McCollum v. Hogan, I Ala. 515; Bryant v. Simpson, 3 Stew. (Ala.) 339; (in conflict with, and in effect overruling) Thomas v. Brown, I Stew. (Ala.)

If, after issue joined, the defendant does not appear when the cause is called for trial, a jury should be impanelled to try the issue; it is error to enter judgment nil dicit. Taylor v. McLaughlin, 2 Colo. 375.

3. Schooler v. Asherst, I Litt. (Ky.) 216; s. c., 13 Am. Dec. 232; Stapp v. Thomason, 2 Litt. (Ky.) 214.

An Affirmative Plea, not Verified by Affidavit, will not prevent the rendition of judgment by default, if the defendant does not appear to sustain it. McCoy v. Harrell, 40 Ala. 232; Dougherty v. Colquitt, 2 Ala. 337; McCollum v. Hogan, I Ala, 515.

Thus on the return-day of a justice's summons the defendant filed an answer to a verified complaint, without any verification, in which a counter-claim was set up exceeding the amount of plaintiff's claim. He thereupon asked for an adjournment, which was granted by consent of plaintiff, no reply having been put in. On the adjourned day, defendant not appearing, judgment was rendered upon proofs submitted in favor of plaintiff for the amount of his claim. Thompson v. Killian, 25 Minn.

Trial without Issues Framed .- To a complaint an answer by way of set-off was fixed, to which there was no reply. Cause was called for trial, and defendant not appearing was defaulted. Held, as no rule was taken to reply, trial was properly had as if answer had been denied. If a rule to reply had been taken on failure to reply under, judgment might have been taken for defendant; but this right was waived. Aston v. Wallace, 43 Ind. 468.
4. Lines v. Benner, 52 Ind. 195; Nor-

ris v. Dodge, 23 Ind. 190.

In an Action of Ejectment issue was joined and the cause called for trial. The defendant did not appear and an inquest was taken. Held, not a judgment by default within 2 N. Y. Rev. Stat. 309, sec. 38, the judgment by default there referred to being for failure to answer; and that defendant was entitled under sec. 37 to a new trial as of course, at any time within three years, upon payment of damages. Sacia v. O'Connor, 47 N. Y. Super. Ct. (15 J. & S.) 53.

In Distress for Rent.—A proceeding in the circuit court by distress for rent stands for trial like any other case upon the docket; if the defendant fails to appear in the time prescribed by the rules of court he may be defaulted. Fergus v.

Garden City Manf. Co., 71 Ill. 51.

the clerk has no discretion but to enter judgment for the sum and interest demanded in the complaint, as the default admits both the right of recovery and the amount. But in an action against several defendants, all of whom were served and defaulted, the clerk has no authority to enter judgment against one only.² But where a demurrer has been filed, the clerk cannot enter a default without an order of court.3

The clerk in entering a default acts merely in a ministerial capacity, and exercises no judicial functions, 4 and cannot render a judgment granting any relief beyond that warranted by the facts stated in the complaint.⁵ He derives all his power in entering a default, without an order of court, from the statute, and when he enters a default it must appear that the facts existed which the law requires to authorize it.6 A statute authorizing a clerk to enter judgment in vacation, on failure of the defendant to answer. is a summary proceeding out of the ordinary course of common law, and must be strictly construed and closely followed.7

A judgment entered by the clerk upon default, for a sum greater

1. Bullard v. Sherwood, 85 N. Y. 253,

rev'g 22 Hun (N. Y.), 462.

When Clerk Authorized to Enter Judgment by Default.—A notice that defendant will move before a court commissioner to dissolve an attachment issued in a cause, is not such an appearance in an action as will authorize the clerk to enter a judgment by default. Glidden v. Packard, 28 Cal. 649. In Alabama, on the rendition of a judg-

ment by default, in an action on a promissory note, it is the duty of the clerk to compute the interest (Ala. Rev. Code. sec. 2770), allowing proper credits for partial payments, and to enter judgments for the amount ascertained to be due; if by mistake, judgment is entered for a greater amount than is actually due, the judgment will be corrected on appeal, and affirmed at the cost of the defendant. Lenoir v. Broadhead, 50 Ala. 58.

In Iowa, in case of judgment by default, where the action is for a money demand, and the amount for which judgment should be rendered is a mere matter of computation, the clerk of the district court may make the assessment of dam-Burlington & Mo. R. R. R. Co.

v. Marchand, 5 Iowa, 468.
Minnesota Gen. Stat. ch. 66, sec. 192, as amended by Sess. Laws 1868, 123, which authorizes the clerk of the district court to enter judgment if the defendant fails to answer the complaint in an action arising on contract for the payment of money only, when the summons has been personally served, etc., is not in conflict with that provision of the Minnesota constitution creating the courts of

the State. Skillman v. Greenwood, 15 Minn. 102.

In Mississippi, in Actions on Written. Instruments for a Sum Certain, the clerk is authorized by statute to make the calculation of the amount due on the default. of the defendant. But this does not authorize judgment to be entered in that way, where there is a plea of the defendant answering the whole action, and a replication by traverse, in which it is confessed that only a part of the sum sued for is due, and in which are also stated the facts from which the amount due can be calculated, and to which there is no rejoinder by defendant. In such case there should be a judgment nil dicit with a writ of inquiry. Grover v. Gaunt, 14 Miss. (6 Smed. & M.) 317.

In Wisconsin, the clerk cannot assess damages upon default until interlocutory judgment has first been entered; so held under sec. 3, ch. 101, Rev. Stat. 1849. Holmes v. Lewis, 2 Wis. 83. Obsolete

since the Code.

Long v. Serrano, 55 Cal. 20.

 Oliphant v. Whitney, 34 Cal. 25.
 Willson v. Cleaveland, 30 Cal. 192; Gray v. Palmer, 28 Cal. 416; Leese v. Clark, 28 Cal. 33; Wallace v. Eldredge, 27 Cal. 495; Kelly v. Van Austin, 17 Cal.

564.
5. Wallace v. Eldredge, 27 Cal. 495.
6. Providence Tool Co. v. Prader, 32

But when the law declares what the judgment shall be, a judgment on default is not the judgment of the clerk. Harding v. Cowing, 28 Cal. 212.

7. Files v. Robinson, 30 Ark. 487.

than is demanded in the prayer of the complaint and specified in the summons, is not void, but is simply erroneous, and may be enforced until modified on motion or on appeal. But if the note sued on is payable in money generally, and the complaint contains a copy of the same, the clerk cannot, after default, enter judgment payable in gold, although the complaint prays for such judgment.2

Where the defendant demands a bill of particulars, and obtains for leave to answer within ten days after the bill is served, which does not contain the items of account, the clerk may enter a default and judgment, if the defendant fails to answer within ten

days.3

2. PROOF OF DEFAULT.—Where the defendant fails to appear and answer, judgment against him may be entered by default, without proof of such fact, 4 and a statute providing for an entry of default by the clerk without proof is constitutional.5

3. ASSESSMENT BY CLERK AND WHEN NECESSARY.—The assessment of damages in a default of defendant to appearance and answer is a matter of statutory regulation in those States where the damages are assessed by the clerk without the calling of a jury: 6 it is necessary that damages be laid in the complaint to authorize the clerk to assess damages.7

Bond v. Pacheco, 30 Cal. 530.
 Wallace v. Eldredge, 27 Cal. 495.

3. Providence Tool Co. v. Prader, 32

Cal. 634.
4. Where defendants fail to answer, it is unnecessary to enter an order for their

default. Watson v. Brigham, 3 How. (N. Y.) Pr. 290; I Code R. 67.
5. Florida Code Proc., sec. 194, which provides that "in any action arising on contract, for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons, according to the provisions of sec. 8, and that no answer has been received; the clerk shall thereupon enter judgment for the amount mentioned in the summons against defendant or defendants, or against one or more of several defendants, in the case provided for in sec. 87," is not unconstitutional. Gamble v. Jacksonville, Pens. & M. R. R. Co., 14 Fla. 226.

Alabama Code. — In all actions founded on any instrument of writing, ascertaining the plaintiff's demand, if judgment by default, nil dicit, or on demurrer be rendered for the plaintiff, such judgment may be entered up by the clerk, under the direction of the court, without the intervention of a jury, and the clerk must compute the interest, and in case of a bill of exchange the damages, if any be due thereon. Ala. Rev. Code, sec. 2770. This section of the code is a substantial re-enactment of the statute of 1812. Clay's Dig. 325, sec. 70.

Iowa Code-Assessment of Damages .-In an action on a contract in writing, one defendant made default. It was held that under the 13th section of the practice act of 1843 it was not necessary to call a jury to assess damages. Parvin v.

Hoopes, Mor. (Iowa) 294.

In Mississippi, in actions of debt for a sum certain, and in actions founded on any instrument of writing ascertaining the sum due or upon an open account where a copy of the account is filed with the declaration, if judgment be rendered on demurrer or by confession or by default, for want of appearance or plea, the clerk shall calculate the amount due for principal and interest, and judgment shall be entered therefor; and such judgment shall be final on the last day of the term unless set aside. And in actions where the sum due does not appear as aforesaid, and in all actions sounding in damages, if the defendant does not appear and plead, interlocutory judgment by default shall be entered with a writ of inquiry. Miss. Rev. Code of 1857, p. 527, art. 253.

In South Carolina, a judgment taken by default before the clerk of the court, since the act of 1873 amending the South Carolina Code, is void. Adams v. Agnew,

15 S. C. 36.

7. Where Damages are not Laid in the Declaration, and judgment is had by nil dicit, the omission may be cured by reference to the writ. Bryan v. Moore, Minor (Ala.), 377.

And where the statute provides for assessment of damages, the clerk may assess plaintiff damages on default in an action on a

promissory note payable otherwise than in money.1

VIII. Judgment on Application to the Court.—1. WHEN APPLICA. TION IS NECESSARY.—Upon facts found, whether by report of ref. eree or special verdict of the jury, the direct action of the court must be invoked before the judgment can be entered.2

On Promissory Note-Erased Indorsement.-When a credit indorsed on a note is erased before the assessment of damages by the clerk, on a judgment by default, the party is not entitled to a supersedeas. Burt v. Hughes, 11 Ala. 571.

And in an error upon such a showing to amend the judgment entry nunc pro tune, the duty of the clerk is to enter the judgment according to the note, and if entered for more or less than the proper sum, it may be corrected; but if a credit is erased before judgment, the court cannot set up the erased credit. Burt v. Hughes, 11 Ala, 571.

1. Note Payable in Cattle or Cotton .-Thus after default, in an action brought on a note payable in cattle, the clerk may assess plaintiff's damages. hooser v. Logan, 3 Scam. (4 Ill.) 389.

But it has been held by the supreme court of Alabama, that on a note payable in cotton or other specific goods, final judgment by default cannot be rendered.

Phillips v. Malone, Minor (Ala.), 110.
2. Connoly v. Alabama & Tenn. R.
R. Co., 29 Ala. 373; Driver v. Spence, 3
Ala. 98; Tombeckbee Bank v. State, Ala. 98; Tombeckbee Bank v. State, Minor (Ala.), 425; Byrne- v. Haines, Minor (Ala.), 286; Phillips v. Malone, Minor (Ala.), 110; Martin v. Price, Minor (Ala.), 68; Kennon v. McRae, 3 Stew. & P. (Ala.) 249; Martin v. Woodall, 1 Stew. & P. (Ala.) 244; Ballardy v. Purcell, 1 Nev. 342; Moore v. Mitchell, Phill (M. C.) 1 2004 Phill. (N. C.) L. 304.
In an Action on Unliquidated Money

Demand.—Final judgment cannot be en-tered on default in an action to recover an unliquidated demand. Phillips v. Malone, Minor (Ala.), 110; Martin v. Price, Minor (Ala.), 68; Ballard v. Pur-

cell, 1 Nev. 342.

A judgment by default final sounding in damages for an unliquidated money demand is irregular, and on motion will be set aside even at a subsequent term. Moore v. Mitchell, Phill. (N. C.) L. 304.

Thus where final judgment by default without the intervention of a jury was rendered for unpaid calls for stock, held, the judgment was erroneous, as unpaid calls for railroad stock are not "instruments of writing ascertaining the plaintiff's demand." Connoly v. Alabama & Tenn. R. R. Co., 29 Ala. 373.

For Penalty on Bond.—A final judgment

by default for a penalty given by stat-ute is erroneous. Tombeckbee Bank v. State, Minor (Ala.), 425; Byrne v. Haines. Minor (Ala.), 286.

In Action against Indorser of Note .-In an action by the indorsee of a promissory note against the indorser, final judgment on demurrer cannot be rendered by the court for the plaintiff without the intervention of a jury on a common money count. Kennon v. McRae, 3 Stew. & P. (Ala.) 249.

On Contract for Rent .- On a contract for the payment of eight dollars per acre rent for a lot of ground supposed to contain ten acres more or less, a final judgment cannot be rendered by default for the rent of the ten acres, but a writ of inquiry must be executed.

Spence, 3 Ala, 98,

On Contract for Purchase of Staves.—A paper promising to pay a certain sum of money for staves (subject to a deduction for any number not procured) at two dollars a thousand, held, not subject to the same rules of decision which regulate promissory notes, so as to authorize the court to give judgment on it without the

intervention of a jury. Martin v. Woodall, I Stew. & P. (Ala.) 244.

Trespass Waived.—The proper form of action for an injury done by a railroad company to cattle pasturing along the track would be trespass, and sue in assumpsit for the value of the cattle; yet the waiver does not give him the benefit of the statute which allows him to take judgment by default final on open accounts where there is no plea, it appearing from the declaration that the cattle were killed and not bought by the defendant. Miss. Cent. R. R. Co. v. Fort, 44 Miss. 423.

In Alabama a final judgment by default on an account or other unliquidated demand is erroneous, whether suit is originally commenced in the circuit court, or taken there by appeal from a justice of the peace. Martin v. Price, Minor (Ala.),

Unpaid Calls for Railroad Stock are not

But where a court of record having jurisdiction renders judgment. upon default for want of answer, and the statute governing the case requires that evidence be taken and special findings made, and these statutory requirements are not complied with, the judgment is not void, but, at most, erroneous.1

2. PROOF OF DEFAULT.—Affidavits showing service and default need not be served with the notice of motion for judgment.² And an irregular affidavit of default in a case where judgment must be taken before the court, but which is good as an oath, is sufficient. proof.3

3. PROOF OF DEMAND.—a. In Ordinary Actions.—A judgment by default is a confession of the plaintiff's cause of action, and that something is due and payable, but not a confession of any fact necessary to be proved on the assessment of damages. plaintiff's demand is unliquidated, or where defendant's whole liability is not fixed by the instrument of writing declared on, the amount of the demand must be ascertained by the court unless a iury be demanded by the party not in default. After suffering a

"instruments of writing ascertaining the plaintiff's demand" within the meaning of the statute authorizing the rendition of a final judgment by default without the intervention of a jury. Connoly v. Alabama & Tenn. R. R. Co., 29 Ala. 373.

Mississippi—When Final.—It is not

necessary on a judgment by default in an action on an award for a sum certain. Chace v. East, 1 Miss. (Walk.) 439. Nor in judgment by default against the indorser of a note. Owen v. Snyder, I Miss. (Walk.) 326. It is necessary on judgment by default on a judgment on a foreign contract to enable the court to ascertain the interest. Fretwell v. Dinsmore, 1 Miss. (Walk.) 484. And it is necessary where a part of the claim sued for is an open account. Sandford v. Campbell, 15 Miss. (7 Smed. & M.) 107. But this is not the rule under the Rev. Code of 1857, art. 253, p. 521.

And in an action of debt on a penal bond with conditions, when the declaration alleges special breaches, the judgment by default must not be final, but with a writ of inquiry, and a jury must be impanelled to assess the damages. York v. Crawford, 42 Miss. 508; Russell v. McDougal, II Miss. (3 Smed. & M.) 234.

But under the Rev. Code of 1857, if the action be in assumpsit, with bill of particulars filed, for the value of cattle killed by defendant,-the tort being waived,the judgment by default should be with writ of inquiry, since the statute only allows judgment final where the action is ex contractu. Miss. Cent. R. R. Co. v.

Fort, 44 Miss. 423.

Missouri Doctrine.-Where the defendant in an action for specific performance fails to appear and no damages are asked, an interlocutory judgment by default should be entered which should be made final at the next term without any inquiry of damages. Lombard v. Clark, 33 Mo.

In actions not founded on bonds, bills, or notes, for the direct payment of money, it is error to take a final judgment at the same term with the default, whether that be the return term or not. Hopkins v. McGee, 33 Mo. 312.

1. Garner v. State, 28 Kan. 790.
2. Smith v. Hoyt, 14 Wis. 252.
3. Reed v. Catlin, 49 Wis. 686, subd.
2, sec. 2891, Wis. Rev. Stats. 1878.

4. Wellborn v. Sheppard, 5 Ala. 674; Burlington & M. R. R. R. Co. v. Shaw, 5 Iowa, 463; Bryan v. Spruell, 16 La. 313; Collins v. McDonald, 14 La. An. 745; Young v. Talbot, 12 Rob. (La.) 518; Young v. Talbot, 12 Rob. (La.) 518; Barker v. Justice, 41 Miss. 240. In Cases on the Inquiry Docket, the de-

fendant being defaulted, and the only question being as to the amount of damages, full proof of, as in other cases, is not required. Walters z Rich. (S. C.) L. 287. Proofs Necessary after Walters v. McGirt, 8

Default.—A written acknowledgment of the receipt of money, and a promise therein to account for the same on settlement, will not authorize a judgment by default. Wellborn v. Sheppard, 5 Ala. 674.

A judgment by default on account for money paid out for defendant, when no bill of particulars is filed, cannot be made

default, the defendant cannot object to the form of the action. having by his default confessed the cause of action and plaintiff's right to some damages thereon; he can, however, object to testimony tending to enhance the damages, which is irrelevant to And after judgment by default the action in the form brought.1 counsel may contest in any way the plaintiff's right to a recovery of more than nominal damages.2

Where, in a suit in equity against several defendants, some of

final until after writ of inquiry executed; and in executing the writ no proof can be introduced to support the count, unless, perhaps, proof of actual payment of money to the defendant, and that is doubtful. Barker v. Justice, 41 Miss. 240.

Proof of Signature, Indorsement, etc — In an action against the maker, a default cannot be confirmed without proof of the mark or signature of the payee and maker. Bryan v. Spruell, 16 La. 313; Young v. Talbot, 12 Rob. (La.) 518.

The payee's indorsement, through which plaintiff claims in an action against the maker of a note which is offered in evidence to confirm a default, must be proved. Code of Proc. 312. If defendant had answered, and so was presumed present at the trial, the case would have been different; for then by permitting the note to be offered he would be considered as admitting the signatures of the parties thereto. Collins v. McDonald, 14 La. An. 745.

A default in an action on an obligation under defendant's private signature is, in legal intendment, a joining of issue without a denial of signature, without proof of which plaintiff may then confirm his default by simply offering the instrument in evidence. Davis v. Davis,

8 La. An. 91.

Damages.—Where the action is for an injury to property, and damages are proved but not the amount, the plaintiff is entitled to judgment, but only for nominal damages. Brown v. Emerson, 18 Mo. 103.

Mitigation of Damages .- On the execution of a writ of inquiry after judgment by default in trespass for taking personal property, the fact that the property was, at and before the levy of the execution which constituted the trespass complained of, in the possession of the de-fendant in execution is competent evidence for the defendant in mitigation of damages, as tending to show that he acted in good faith in having the levy made. Sterrett v. Kaster, 37 Ala. 366.

In such case the judgment by default estops the defendant from showing, even

in mitigation of damages, that the plain. tiff had not such a title as would authorize a recovery; and yet he may show in mitigation that the plaintiff was not the owner of the property, as that fact is not necessarily inconsistent with the plaintiff's right to recover. Sterrett v. Kaster 37 Ala. 366.

Maryland Act of 1794, ch. 46, providing a more convenient mode of taking inquisitions upon default, assumes and proceeds on the theory that all interlocutory judgments, where inquisitions are required to give them effect, establish the plaintiff's right to recovery, without regard to the amount which the jury may subsequently ascertain to be due. Heffner v. Lynch, 21 Md. 552.

1. Pyne v. Van Bergen, I Pin. (Wis.)

2. Hightower v. Hawthorn, 1 Hempst. C. C. 42.

Right of Defaulted Defendant to Crossexamine Witnesses, -A defendant against whom a default has been taken for want of a plea is not absolutely out of court, but still retains the right to appear upon an inquest of damages, to cross-examine the plaintiff's witnesses, and to address the jury thereupon. Watson v. Seat, 8 Fla. 446.

Where a judgment is rendered in favor of the plaintiff on demurrer in the declaration on default of plea, the defendant is so far out of court as to be entitled to cross-examine witnesses for the purpose of reducing damages only; and it is not admissible for him to make any defence to the action. Binz v. Tyler, 79 Ill. 248. In such case the demurrer admits every material allegation, and there is nothing left to be inquired into but the damages sustained by the plaintiff. Binz v. Tyler, 79 Ill. 248.

Under the Iowa Code, the defendant who has been defaulted may cross-examine the witnesses with regard to the amount of the damages, but cannot ask for instructions touching his liability. Loeber v. Delahaye, 7 Iowa, 478. Nor can he object to the sufficiency of the petition unless it is clearly wanting in substance.

Id.

whom make default, the complainant makes his claim against such for the same title or right that he does against those who appear, he is bound to establish that right so as to satisfy the chancellor that he should have relief before he is entitled to a decree against those in default.1

b. In Actions for Special Relief .- In actions for special relief in the absence of statutory regulations, judgments by default are governed by the same general principles which relate to and govern judgments by default in ordinary actions.

A judgment by default on a special count, without discontinu-

ance as to the common counts, is not error.2

c. In Case of Publication of Summons.—Where judgment is rendered by default, after service by publication, the material

facts alleged must be proved.3

4. ASSESSMENT OF DAMAGES.—a. When Made.—The court may exercise a sound discretion as to the time when a case, in which the defendant is in default, may be called for trial or assessment of damages.4

 Pierson v. David. 4 Iowa, 410.
 Rankin v. Sanders, 7 Miss. (6 How.) 52; s. c., 28 Am. Dec. 431; Soria v. Planters' Bank, 4 Miss. (3 How.) 46.

Where suit was brought on a promissory note for a sum certain, but with the privilege reserved to the maker to pay it at a specified time and place in specific articles, and had also the common money counts added, but with no bill of particulars, and to these counts was pleaded non assumpsit, but there was no plea to the counts on the note, held, that judgment by default final might be taken on that count, without a discontinuance as to the common counts. Rankin v. Sanders, 7 Miss. (6 How.) 52; s. c., 28 Am. Dec. 431.

3. Doty v. Moore, 16 Tex. 591.

4. Thus where a default and judgment were entered at May term, 1850, being the second term after judgment, and the de-fendant then appeared and moved the court to suspend proceedings in order to enable him to file a motion to vacate the judgment, it was not error to deny the motion. Leavenworth v. Hicks, McCahon (Kan.), 160.

by Nil Dicit-When.-If Judgment three defendants demur, and after the demurrer is withdrawn two of them plead, a judgment of nil dicit should be entered against the party not pleading, and the jury should assess the damages against all. If but two plead, and the other abide by his demurrer, he cannot be regarded as going to trial with the others. Freeland v. Board of Supervisors of Jasper Co., 27 Ill. 303.
Interlocutory Judgments.—The mere

entry of a default does not amount to the rendering of a final judgment. The default is an incident which entitles the plaintiff to a judgment, but does not determine either the kind or amount of such judgment. Further proceedings are required,-as the assessment of damages, etc.,-until which time the action must be regarded as still pending. Sheldon v. Sheldon, 37 Vt. 152. And see Webb v. Webb, 16 Vt. 636.

After default, rule for judgment must be entered before plaintiff can assess damages. Griswold v. Stoughton, I Cai. (N. Y.) Cas. 6; s. c., Col. & C. Cas. (N. Y.) 146. And see Hart ν. De Lord, 17 Johns. (N. Y.) 270.

A judgment by default in an action of assumpsit is only interlocutory, and must be entered up before the plaintiff can proceed to have his damages assessed, and final judgment rendered in the cause. Strong v. Catlin, 3 Chand. (Wis.) 130.

Where a judgment by default was obtained in January, 1862, upon which a final judgment by confession was entered in October following, it was held that "judgments by default on demurrer and non obstante veredicto are interlocutory; and final judgment cannot be given until the damages to be recovered are assessed. Davidson v. Myers. 24 Md. 538.

Discretion of Court .- In an ex parte proceeding to confirm a default by testimony under commission, the judge may refuse to act where the return of the service of interrogatories on defendant is defective, and there is no evidence that he has had a proper opportunity to propound cross-interrogatories. Litigatoris b. How Made.—(I) By Sheriff's Jury.—Where an action is for a mere money demand, and the amount to which the plaintiff is entitled is a mere matter of computation, the clerk of the court may assess damages; 1 but, where parol evidence is exhibited, it cannot be so referred; and if inadvertently done, the judgment must be set aside, 2 for the clerk has no authority to hear evidence ex parte or otherwise, and try the question whether a demurrer or answer has been served upon the opposite attorney, nor can the court by a rule confer that authority upon him. Such question can be tried by the court alone.3 And where the demand is not a mere money demand on an interlocutory judgment by default the defendant has a right to a jury to assess the damages.4

absentia dei præsentia repleatur. Medley

v. Wetzlar. 5 La. An. 218.

In New York, where one of two defendants pleads and the other makes default, the plaintiff cannot proceed to try the issue joined and have damages assessed against both defendants before an interlocutory judgment has been entered against the defendant who neglects to plead. Hart v. DeLord, 17 Johns. (N.

Y.) 270.
In Wisconsin, prior to the Code, an omission after entering defendant's default to take an interlocutory judgment, before suing out a writ of inquiry to assess damages, was ground for a reversal of judgment. Hibbard v. Pettibone, 8 Wis. 270. And in a case of default interlocutory judgment was required to be en-tered before damages could be assessed and final judgment had thereon. Strong v. Catlin, 3 Pin. (Wis.) 121; s. c., 3 Chand. (Wis.) 130. But these provisions may be regarded as obsolete since the Code.

1. Burlington & M. R. R. Co. v. Shaw, 5 Iowa, 463; Eaton v. Morgan, Tappan

(Ohio), 45.
2. Eaton v. Morgan, Tappan (Ohio),

45.
3. Oliphant v. Whitney, 34 Cal. 25.
4. Porter v. Burleson, 38 Ala. 343; Patterson v. Blakeney, 33 Ala. 338; Beville v. Reese, 25 Ala. 451; Young v. McLemore, 3 Ala. 295; Cooper v. Roche, 36 Md. 563; Storey v. Bird, 8 Mich. 316; Sandford v. Campbell, 15 Miss. (7 Smed. & M.) 107; Carmichael v. The Governor, 4 Miss. (3 How.) 236; Fretwell v. Dinsmore I. Miss. (Walk.) 484; Brown v. more, I Miss. (Walk.) 484; Brown v. King, 39 Mo. 380. See Rogers v. Moore, 86 N. C. 85; Wynne v. Prairie, 86 N. C.

But a party in default can only crossexamine the witness of the opposite party. He cannot demand a jury, nor introduce evidence, object to the admissibility of plaintiff's witnesses, or controvert the allegations of plaintiff's petition.

Carleton v. Byington, 17 Iowa, 579; Wilkins v. Treynor, 14 Iowa, 392; Pfantz v. Culver, 13 Iowa, 312; McLott v. Savery, 11 Iowa, 323; Keeney v. Lyon, 10 Iowa.

In Assumpsit against the Indorser of a Note Pavable in Bank, it is erroneous to render judgment by default without the intervention of a jury, either under the common counts, or a special count which contains no averment of suit against the maker, and no allegation dispensing with the necessity for such averment. Langdon v. Williams, 22 Ala. 681.

On Demurrer.-On an inquiry after a default or a judgment on demurrer to the declaration, or against the defendant on any other pleadings, the question with the jury is the same: What damages has the plaintiff sustained by the breaches assigned? The evidence must of necessity be the same. Bush v. Critchfield, 5 Ohio, 100, 112.

Damages-Effect of Default.-A judgment by default does not settle the right of the plaintiff to recover the amount stated in his declaration. The defendant is entitled to have an inquisition by the jury. Cooper v. Roche, 36 Md. 563.

In an Action on an Open Account for goods sold and delivered, and to recover money paid by plaintiff for defendant, the court is not authorized to render judgment final by default, or nil dicit, without the intervention of a jury. Porter v. Burleson, 38 Ala. 343; Sandford v. Campbell, 15 Miss. (7 Smed. & M.) 107.

In an action on an open account, the court is not authorized, on overruling a demurrer to the plaintiff's evidence, to render judgment final for the plaintiff without having the damages ascertained by a jury. Patterson υ. Blakeney, 33 Ala. 338.

Alabama Doctrine--Failure to Answer Interrogatories .- The failure of the defendant to answer interrogatories filed under Alabama Stat. 1837, to provide

However, the court may assess the damages where neither party requires a jury. When a jury is demanded they must be sworn to assess damages as to all defendants, appearing and defaulted.

and the judgment must be for or against all.2

Defendant failing to plead further, and interlocutory judgment having been rendered, his liability cannot be contested on execution of a writ of inquiry.3 And leave to plead cannot be granted after the impanelling of a jury to assess damage, unless under special circumstances. In such an inquiry the question is not

more effectually for discoveries in suits at common law, will authorize a judg-ment by default against him, but judgment, except for nominal damages, cannot be had without the intervention of a Young v. McLemore, 3 Ala. 205. iurv.

On Note and Account .- When an action is brought by summons and complaint (under the Code) on a promissory note and an open account for work and labor done, it is error to render judgment final by default for the aggregate amount of the sums claimed without the intervention of a jury or the execution of a writ of inquiry. Beville v. Reese, 25 Ala. 451.

As to when a jury should be impanelled in the orphans' court, see Reynolds v.

Reynolds, 11 Ala, 1023.

In Louisiana. - Damages on a judgment by default cannot be assessed without a jury, in other cases they may. Art. 313 Code Prac. is not repealed by act February 10, 1841, sec. 17, No. 16; and in suits before the late district, parish, and commercial courts of New Orleans plaintiff was obliged to advance the jury-fee allowed by that act. Daly v. Van Benthuysen, 3 La. An. 69: Olivier v. Cannon, 18 La. 474; Liles v. New Orleans Canal & Banking Co., 6 Rob. (La.) 273; Guillotte v. Thompson, 5 Rob. (La.) 141.

In Michigan, where the maker and indorser of commercial paper are sued jointly under the statute, and one is defaulted and issue is joined as to the other, it is competent for plaintiff to have damages assessed against the defaulted party by the jury sworn to try the issue joined as to the other, and upon their verdict and assessment to proceed to a joint judgment against both. Storey v.

Bird, 8 Mich. 316.

In Mississippi, a judgment by default on a foreign note cannot be final-a jury must ascertain the interest. Fretwell v. Dinsmore, 1 Miss. (Walk.) 484. where the suit is on open account. Sandford v. Campbell, 15 Miss. (7 Smed. & M.) 107. And where in an action of covenant on a bond for a breach of its conditions, the defendant makes default, the judgment is not final; it is necessary to prove the breach and the damages, the bond being merely an inducement to the action. Carmichael v. The Governor, 4 Miss. (3 How.) 236.

Missouri Statutory Provisions, Gen. Stat. ch. 171, secs. 9, 10; Wag. Stat. p. 1053; Case on the statute 1845; Pratte v.

Corl, 9 Mo. 163.

In North Carolina, in suit for goods or services rendered, and the like, even though the complaint be verified and no answer filed, the judgment is interlocutory, and the former practice of referring the inquiry of damages to a jury under the supervision of the judge, is restored by the act suspending the North Carolina Code. Bat. Rev. Stat. ch. 18; Rogers v. Moore, 86 N. C. 85. Compare Wynne Compare Wynne v. Prairie, 86 N. C. 73.

1. Reed v. Horne, 73 Ill. 598; Alexander v. Hayden, 2 Mo. 211.

Discretion of Court as to Jury.-In con firming a default, where the damages claimed are uncertain and to be valued by opinion, a jury must estimate them; otherwise where they can be ascertained by precise evidence. It is often difficult to distinguish between these two classes of cases; the matter rests in the judge's discretion. Brander v. Goodin, 6 La. An. 521. So where damages for defendant's breach of contract to take freight consist of charges for storage, insurance, and extra freight, a default may be confirmed without a jury. Id. Thus, where the damages are fixed by contract, as in case of stipulated penalty, or by law, as in case of legal interests, no jury need be called. So too in case of torts, though it be generally otherwise in practice; yet damages may be so certain as to require no assessment, e.g., the larceny of a sum of money, harboring of a servant for which a fixed penalty is given, etc. On the other hand, damages for a breach of contract may be so uncertain as to require a jury, e.g., breaches of promises to marry, failure to comply with an obligation to furnish an object of intellectual enjoyment, and the like. Id.

2. Davis v. Graniss, 5 Blackf. (Ind.) 79.

3. Smith v. Ferguson, 2 Ind. 454.

whether any damages should be awarded, but how much. when it appears that the plaintiff had no case, as where, in a suit against bail on an appearance bond, it appears that the principal was taken in execution and discharged on the plaintiff's order, the damages must be only nominal.1

Where persons are sued jointly and one is defaulted, and issue is joined as to the other, it is competent for the plaintiff to have damages assessed against the defaulted party by the jury sworn to try the issue joined as to the other, and upon their verdict and

assessment to proceed to a joint judgment against both.2

(2.) By Court.—After default, it is competent for the court to assess the damages³ where neither party asks for a jury.⁴ judgment rendered upon default will be valid although it does not appear explicitly that the court inquired into the damages.5

1. Stout v. Lisinger, Tappan (Ohio).

2. Storey v. Bird, 8 Mich. 316. When there is a judgment of default against one joint promissor and an issue of fact joined as to another, it is proper practice to submit to a jury the issue of fact as to the defendant who pleads and the assessment of damages as against the The statute one who makes default. authorizing the clerk to assess damages upon default does not apply to this case. Netso v. Foss, 21 Fla. 143.

3. Wilcox v. Woods, 4 Ill. (3 Scam) 51.

4. Reed v. Horne, 73 Ill. 598; Alexander v. Hayden, 2 Mo. 211.

Damages will be Assessed by the Court on judgment by default in an action upon a bond given under the act to abolish imprisonment for debt, the declaration reciting the condition of the bond in which the precise amount due to the plaintiff is set forth. Rogers v. Brundred, 16 N. J. L. (I Harr.) 159. But when evidence is offered in defendant's absence to confirm a default, the judge has a right, and it is his duty, to require legal evidence. this case, it is to be presumed that the judge did not receive affidavits of witnesses taken out of his presence, and so the clerk's certificate is to be interposed. Brander v. Goodin, 6 La. An. 521.

A Judgment in Ejectment awarding damages, rendered on a default, will not be reversed because it does not appear that the court examined witnesses upon the question of damages. Dimick v.

Campbell, 31 Cal. 238.

Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and a judgment by default is regularly entered, the judgment is valid. In this case the court denied a trial by jury and took proof as to title and possession. Smith v. Billett. 15 Cal. 23.

By a Justice of the Peace. - The damages may be assessed before a justice at v. Chase, 30 N. J. L. (1 Vr.) 233. But such order is discretionary in the court, and will not be made unless special grounds are shown, as some legal intricacy, or objection to the sheriff. White v. Hunt, 6 N. J. L. (1 Halst.) 330.

In Massachusetts, upon a default, after appearance, damages were formerly as-sessed and judgment rendered by the court under the provision of Stat. 1784, ch, 28, sec. 7, for the assessment of damages upon the non-appearance of the de-

fendant. Jarvis v. Blanchard, 6 Mass. 4.

The New Code of Missouri does not require the court to find the facts upon an assessment of damages after a judgment by default. Hubbell v. Weston, 18

Mo. 601.

In Ohio. — Under 29 L. 73, a judge in default is required to assess the damages, unless a jury is demanded by either party. In such a case it is not necessary that an issue should be joined or a jury called, and it is sufficient that the record show that "it was shown and proved that the plaintiffs have sustained damages in the premises in the sum of . . . dollars." The entries, though not technical, are substantially good. Harper v. Ashtabula County, Wright (Ohio), 708.

5. Jarvis v. Blanchard, 6 Mass. 4. Massachusetts Doctrine.-However, the supreme court of Massachusetts said in Coolidge v. Cary, 14 Mass. 115, that, after a default, judgment went of course unless there was some good reason for postponing it, and judgment was entered as of the day of the default upon the defendant's motion.

And where, upon default in an action upon a promissory note, damages are assessed by the court, if the damages are not correctly

computed judgment may be reversed by a writ of error.
c. Order for Writ of Inquiry.—In a suit for damages, where the demand is not liquidated and the law does not fix the measure of damages, a writ of inquiry must be executed and the damages proved before final judgment.² But a writ of inquiry should be

1. West v. Whitney, 26 N. H. (6 Fost.)

314. 2. McKiel v. Porter, 4 Ark. 534; Starbuck v. Lazenby. 7 Blackf. (Ind.) 268; Simmons v. Garrett, McCahon (Kan.), 83; Carraway v. McNeice, 1 Miss. (Walk.) 538; Robinson v. Lawson, 26 Mo. 69; Wetzell v. Waters, 18 Mo. 396; Guelberth v. Watson, 8 Mo. 663; Martin v. Martin, 14 N. J. L. (2 J. S. Gr.) 125; Witt v. Long, 93 N. C. 388; Colson v. Wade, I Murph. (N. C.) 43; Smith v. Vanderhorst, I McC. (S. C.) 328; s. c., 10 Am. Dec. 674; Perry v. Starke, 10 Humph. (Tenn.)

In an Action on an Open Account, a recovery for the reasonable value of goods sold being demanded, judgment by default final is irregular. The judgment should be by default and inquiry.

v. Long, 93 N. C. 388.

In Action on Penal Bond .- In case of default in an action on a penal bond, an interlocutory judgment should be ren-dered on the default, and an order made that the truth of the breaches assigned be inquired into, and the damages thereby sustained assessed. Simmons v. Garrett, McCahon (Kan.) 83.

In Detinue. - If the jury in an action of detinue fail to assess the value of the property, the court may award a writ of inquiry to ascertain the same. Carraway v. McNeice, I Miss. (Walk.) 538.

In an Action for Dower. - In the case of judgment by default in an action for dower, if the demandant seeks to recover damages under the statute she must suggest upon the record that the husband died seized, or that she had demanded her dower, and thereupon a writ of inquiry will be awarded. Martin v. Martin, 14 N. J. L. (2 J. S. Gr.) 125.

In an Action upon an Agreement Payable in Current Bank Notes of Arkansas, the plaintiff is entitled to recover the value of the notes at the time when the money is made payable. It is error, therefore, to enter judgment for the nominal amount of the notes by default without a writ of McKiel inquiry to ascertain the value. v. Porter. 4 Ark. 534.

Where a Note is Payable "with Current Rate of Exchange on Philadelphia," the court cannot assess the damages without a writ of inquiry. Guelberth v. Watson, 8 Mo. 663.

Where a Defendant Dies, after judgment by default and before writ of inquiry executed, if the plaintiff proceed to execute the writ of inquiry, a final judgment against the defendant is erroneous and void. Colson v. Wade, I Murph. (N. C.)

In Indiana, the declaration in assumpsit contained a count for goods sold and Judgment was rendered by delivered. default. Held, that a writ of inquiry was Starbuck v. Lazenby, necessary.

Blackf. (Ind.) 268.

In New York.—Under the Code of Procedure in New York an inquest may be taken as heretofore practised in a suit commenced and placed on the calendar of issues of fact for trial, unless the defendant files and serves an affidavit of merits, as required by the standing rule of the court. Anderson v. Hough, I Sandf. (N. Y.) 721.

Personal Injuries. - In case of judgment by default in an action for personal injuries, damages must be ascertained by means of a "writ of inquiry" (N. Y. Code Civ. Proc. sec. 1215), but this does not require that the writ should be executed by the sheriff, for it may be executed by the judge of the circuit without the presence of the sheriff. O'Donnell v. Hecker, 3 of the sheriff. O'Donnell v. Hecker, 3 How. (N. Y.) Pr. N. S. 384: See Dillaye v. Hart, 8 Abb. (N. Y.) Pr. 394; Hays v. Berrymyn, 6 Bosw. (N. Y.) 679; Cazneau v. Bryant, 6 Duer (N. Y.), 668; s. c., 4 Abb. (N. Y.) Pr. 402; Peck v. Corning, 2 How. (N. Y.) Pr. 84; Tillotson v. Cheetham, 2 Johns. (N. Y.) 107; s. c., 3 Am Dec 450 George v. Fisk v. Roh Am. Dec. 459, George v. Fisk, 3 Robt. (N. Y) 710; Ellsworth v. Thompson, 13 Wend. (N. Y.) 658.

When Judgment Final -Where several are sued, part make default, an inter-locutory judgment is rendered against them, and a writ of inquiry ordered, and the others appear, plead, and there is a verdict and judgment against them, no further action being had as to the parties in default, the judgment is not final. Bivins v. McElroy, 11 Ark. (6 Eng.) 23, s. c., 3

Am. Dec. 258.

awarded only after a judgment by default is taken. And where one was awarded, and damages assessed without a default being entered against the defendant, the proceedings were held irregular.

and judgment was reversed.2

The assessment of damages may be made under the writ of inquiry at the same term at which the interlocutory judgment is rendered.³ or at a subsequent term.⁴ And if it appear that important questions of law will arise on the execution of a writ of inquiry of damages, in an action for a libel, the court will order it to be executed by a judge.5

d. Notice of Inquiry.—If a writ of inquiry be awarded at the term in which the default is taken, notice should be given to the

defendant of the day on which the inquiry will be made.6

e. Inquisition and Return.—Where a writ of inquiry has been issued, it should be properly returned; but where a writ of inquiry on a judgment nil dicit is, by consent, executed by the judge in vacation, without a jury, it is of no importance that the finding and judgment bear no date, where there are no intervening liens claimed.7

5. SETTING ASIDE INQUEST.—Counsel being absent and suffering an inquest against them, because they deemed the circuit irregular, is sufficient cause for setting the inquest aside on affi-davit of merits and payment of costs.

Judgments by default are interlocutory or final, and although in actions of debt the judgment by default is commonly said to be final, still where the action is brought on a judgment the plaintiff is entitled to a writ of inquiry after a judgment by default to recover interest by way of damages for the detention of the debt. Smith v. Vanderhorst, I McC. (S. C.). 328; s. c., 10 Am. Dec. 674.

1. Nobles v. Christmas, 3 Miss. (2

How.) 885.

2. Fisher v. Chase, 2 Chand. (Wis.) 3. 3. Robinson v. Lawson, 26 Mo. 69.

An inquiry awarded after the overruling of a demurrer, and judgment rendered thereon, may be executed at the same term at which it is awarded. Sumners v. Tice, I Mo. 349.

4. Froust v. Bruton, 15 Mo. 619.

Under the Tennessee Act of 1794, ch. 1, upon the default of a defendant, when being called to appear and make defence to the action, the court should enter a formal judgment of default, and award a writ of inquiry, which shall be executed at the term next succeeding that at which the judgment of default was entered.

5. White v. Hunt, 6 N. J. L. (1 Halst.) 330; Tillotson v. Cheatham, 2 Johns. (N. Y.) 107; s. c., 3 Am. Dec. 459. See Cazneau v. Bryant, 4 Abb. (N. Y.) Pr. 403;

s. c., 6 Duer (N. Y.), 670; Peck v. Corning, 2 How. (N. Y.) Pr. 85; Ellsworth v. Thompson, 13 Wend. (N. Y.) 658.
6. Evans v. Bowlin. 9 Mo. 406.

In New York an Attorney May Demand Notice of execution of reference or writ of inquiry taken on default to plead. N. Y. Code Civ. Proc. sec. 1219, subd. 2. This provision applies to proceedings taken in the supreme court, a superior city court, county court, or the New York marine court. N. Y. Code Civ. Proc. sec. 3347, subd. 8; and as to marine court, see sec. 3159.

7. Hughes v. People, 82 Ill. 78. A judgment rendered by default without anything to vindicate the amount, is interlocutory in the first instance, and becomes final where the amount is settled and entered on the record. Phillips v.

Hellings, 5 Watts & S. (Pa.) 44.

Defective Return—Statute of Jeofails. It is not fatal to a judgment that it appears on the record that the writ of inquiry was executed after its return day. Young v. Delaware, L. & W. R. Co., 38 N. J. L. (9 Vr.) 502. Such a writ when executed was a nullity, and by the Statute of Jeofails the want of a writ of inquiry Id. is not aided on error.

8. Eagle Bank v. Holley, 7 Cow. (N.

A Defendant, by Suffering Judgment to

TX. Waiver of Default.—Where the defendant is in default, the plaintiff must with proper diligence take advantage of such default, or he in effect waives the benefits provided by law for the entry of judgments by default.1

X. Opening and Setting Aside Default .-- Judgment by default may be set aside on motion of the plaintiff by the court which rendered it.2 in its discretion,3 in a proper case.4 The defendant

go by default, is out of court, and has no right to except to testimony. He is, however, permitted to cross-examine the witness, but cannot introduce testimony. or make a defence to the action. Should improper testimony or wrong instructions be given, the proper course is to apply to the court to set aside the inquisition and grant a new inquest. Morton v. Bailey, 2 Ill. (1 Scam.) 213; s. c., 27 Am. Dec. 767.

In New York, on setting aside an inquest regularly obtained, the defendant will be required to withdraw the Statute of Limitations. Fox v. Baker, 2 Wend.

(N. Y.) 244.

1. King v. Hicks, 32 Md. 460. Waiving Default.—Default is waived by joining issue upon an answer filed out of rule without leave of court, without objecting to such filing. Jones v. Jones, 13 Iowa, 276. And where a party, instead of asking for a default, or ruling the other party to plead, goes to trial without objecting to the want of a plea, the default will be waived, and the cause treated as though the general issue had Loomis v. Rilev. 24 Ill. 307. been filed.

Where a defendant was returned " summoned," but did not appear on that day, and no motion for judgment by default against him was made, and no order whatever taken by the plaintiff on that day, or on any day before the next return day, after sundry return days, and the entire September term, and nearly the whole of the succeeding January term of the court had transpired, the plaintiff made his motion in writing for judgment nisi against the defendant; and on that day judgment by default for want of appearance by the defendant was enered. At the succeeding term the judgment was extended, and during the same term the defendant appeared and moved in writing to strike out this judgment by default. Held, "It seems clear from the enor of this act that diligence and dispatch were its leading intent and policy. The terms of this law are more imperative than any rule of the court; and where the defendant does not appear upon the return day, and is thus liable to be defaulted, but the plaintiff makes no motion to have the default entered during the

interval between the first and the next return day, he in effect waives the benefit of the judgment by default." Hicks. 32 Md. 460.

2. Ballard v. Whitlock, 18 Gratt, (Va.)235.

3. Discretion of Court. - Where, pending a motion by a defendant who has been served with process to set aside judgment erroneously entered at a previous term against him and a co-defendant who had made default, the plaintiff applied to the court for judgment for striking out the name of the moving defendant on the ground that it had been inserted by a Held, that, admitmistake of the clerk. ting the mistake, it was within the discretion of the court to deny so tardy an application. Lewis v. Rigney, 21 Cal. 268.

When parties are allowed time in which to file a further answer, and failing to do so they are defaulted, the setting aside of the default is a matter of discretion, and the motion to set it aside should be accompanied by an affidavit and a full Norton v. Hixon, 25 Ill. 439.

The granting of relief from default, in an equity cause, is a matter of discretion depending upon the circumstances of the case, and subject to no positive and precise rule; the power may properly be exercised, even after enrolment of final decree, where a defendant has been deprived of his defence through surprise. mistake, or accident, which must either be unavoidable, or such as would not have been prevented by the ordinary care of a prudent man, or his solicitor's negligence, but not where negligence or laches is imputable to the party himself. Rogan v. Walker, 1 Wis. 631.

Where by Mistake the Successor to a Deceased Attorney Fails to Appear at the term at which the case is placed on the calendar, it is in the discretion of the court to vacate the judgment entered Walsh v. Walsh, 114 Ill. 655;

s. c., I West. Rep. 924.

Orders Opening Defaults Sustained on the ground that the question was discretionary with the court below, and the discretion did not appear, under circumstances, to have been abused. Stafford v. McMillan, 25 Wis. 566; Bertline v. Bauer, 25 Wis. 486.

4. Lewis υ. Rigney, 21 Cal. 268; Nor-

must show, to entitle him to have a default opened, that injustice has been done him by the judgment. And as against the plain. tiff's affidavit, he must produce evidence besides his own affidavit to show such injustice. As a rule, a default will only be set aside in a clear case, and the decision of the lower court thereon will not be reversed merely because the evidence seems to justify a different conclusion.3

ton v. Hixon, 25 Ill. 439; Dunlap v. Gregory, 14 Ill. App. 601; Walsh v. Walsh. 114 Ill. 655; s. c., 1 West. Rep. 924; Allbright v. Warkentin, 31 Kan. 442; Wilkinson v. Chemical Fire 442; Wilkinson v. Chemical Fire Co., N. Y. Daily Reg., January 7, 1884; People v. Hektograph Co., 10 Abb. (N. Y.) N. C. 358; Stafford v. McMillan, 25 Wis. 566; Bertline v. Bauer, 25 Wis. 486; Rogan v. Walker, 1 Wis. 631.

In Action Against a Corporation -In a proper case, a judgment obtained against a corporation by default may, on the application of a stockholder, be allowed to be opened, and he be allowed to intervene and defend. People v. Hektograph Co., 10 Abb. (N. Y.) N. C. 358; Wilkinson v. Chemical Fire Co., N. Y.

Daily Reg., Jan. 7, 1884.

Right to have Default Opened.—The right of one against whom judgment by default has been rendered after service by publication only to be let in to defend, is an absolute right if he brings himself within the statute. The court has no discretion in the matter, but must grant his application. Allbright v. Warkentin, 31 Kan. 442.

1. Forster v. Capewell, I Hilt. (N. Y.)

2. Forster v. Capewell, I Hilt. (N. Y.)

Technical Defence.-Where defendant has had opportunity to set up his own discharge in bankruptev as a technical defence, and neglected to do so, the court will not open a regular default to enable Warren, 3 Barb. Ch. (N. Y.) 635. Compare Kingsland v. Spalding, 3 Barb. Ch. (N. Y.) 341; Cross v. Hobson, 2 Cai. (N. Y.) 102.

3. Brophy v. J. M. Brunswick & Balke

Co., 2 Wy. Ter. 86.

Motion to set aside a default is no waiver of an omission to file a complaint before issuing the summons. Mills v. State, 10 Ind. 114.

A judgment setting aside a judgment by default will not be set aside except for gross error. Laurent v. Mullikin, 10 Mo. 495; Howe v. Coldren, 4 Nev. 171.

În Alabama, courts may set aside office judgments, whether on default or nonsuit.

upon good cause shown at the succeeding term, even after such judgment has been perfected; but it is within their discretion. and their decision cannot be appealed Wilson v. Torbert, 3 Stew. (Ala.) 296; s. c., 21 Am. Dec. 637; Acre v. Ross, 3 Stew. (Ala.) 288.
In Illinois.—The Practice in this State

has been liberal in setting aside default at the term at which they were entered, when it appears that justice will be promoted thereby. Mason v. McNamara.

57 Ill. 274.

The Indiana Statute allows the court within a year to relieve the party from a judgment taken against him through his excusable neglect. In this case the service was constructive only; the defendant did not know of the suit, and during its pendency, and until after it was rendered, was sick in another State; and the judgment was opened. Sage v. Matheny, 14 Ind. 369.

Under Section 99 of Indiana Code, a party may be relieved from a judgment taken by default where he did not have actual notice of suit, and was at time of constructive service, and until after expiration of term at which judgment was rendered, absent from State, and physically unable to return. Sage v. Matheny,

14 Ind. 369.

Where the return of the sheriff showed service of the summons on Monday, but the proofs on a motion to set aside a judgment taken by default showed that the service was in fact made on Sunday. it was held that though the return could not be impeached for the purpose of excusing the default, that it could be to sustain an application for relief under section 99 of the Indiana Code. Smith v. Noe, 30 Ind. 117.

Where an officer did not read or give a copy of the summons to defendant, but told him that he had a subpœna for him as a witness in a case pending in another court and county than the one from which the summons issued, but made return that the same was duly served, held, that on motion, under Indiana Code, sec. 99, to set aside a judgment obtained by default, defendant might show the facts as an excuse for not appearing, and also that he did not know or learn that a suit was really pending against him until after the judgment was rendered.

v. Fisher, 76 Ind. 231.

What Constitutes Inadvertence.-Where in action to have a judgment set aside which had been rendered by default, evidence showed that applicant had, with reasonable diligence, employed an attorney to defend, who by reason of sickness had failed to so, held, inadvertence of attorney should be regarded as that of applicant within the meaning of section og, Indiana Code. Bristor v. Galvin, 62 Ind. 352

Power to Open Default .- Extent of the power to open judgments recovered by default, and the proper mode of applying for and granting that relief, explained.

Fisk v. Baker, 47 Ind. 534.

In Kansas, when it appears that judgment on default was obtained irregularly within the meaning of Kansas Civil Code, sec. 568, subd. 3, it should be vacated; but, generally, upon condition that the moving party shall show that he has a good cause of action or defence. The issue must then be made up and the case tried; and the judgment should then be vacated absolutely, modified or affirmed, according to the result of the trial. Meixell v. Kirkpatrick, 25 Kan. 13.

The setting aside of an entry of a de-

fault, and an order that the cause stand in its order on a trial docket for an assessment of damages, and the permitting of the defaulting party to answer upon terms, is allowable under the provisions of sec. 114, Code 1859 (Comp. L. 142). In such a case, the action of the district court being discretionary, ordinarily this court will not interfere. Spratly 25

Putnam Ins. Co., 5 Kan. 155.

In Minnesota, a non resident upon whom there was no personal service. may, under Gen. Stat. 1876, c. 66, within a year after judgment, obtain leave to answer, and is not required to show that he did not have actual notice. Frankoviz v. Smith, 35 Minn. 278.

By Nebraska Comp. Stat. 645, "when judgment shall have been rendered against a defendant in his absence, the same may be set aside." Held, that "absence" means "non-appearance."

Strine v. Kaufman, 12 Neb. 423.

In Nevada, a party will not be allowed to avail himself of the requirement of Nevada Practice Act, sec. 68. for service of summons, etc., as a technical excuse for not answering in time. Thus a motion to set aside a default against a defendant because sued as "The San Francisco Sulphur Company," on the ground

that its true name was "The San Francisco Sulphur Mining Co.," was not sustained. Jones v. San Francisco Sulphur Co., 14 Nev. 172.

In New York, on affidavit that the plea was sent by mail to the plaintiff's attorney, and the receipt of it not being denied in his counter affidavit, held, that the default should be set aside, with costs to be paid by the plaintiff's attorney himself. Post v. Van Dine, Col. & Cai. (N. Y.) 110; Stafford v. Cole, I Johns. Cas (N. Y.) 413. See Ludlow v. Heycraft, 2 Cai. (N. Y.) 386; Hudson v. Henry, ∢ Cai. (N. Y.) 67.

When Opened. - Where, at a special term of the New York supreme court, an order is obtained *ex parte*, or a party is prevented, without fault, from appearing at the hearing, and injustice is done him. upon application to another special term it is the duty of the court to open the default and give him proper relief. Matter of New York, etc., R. Co., 40 How. (N.

Y.) Pr. 335.

In the Court of Appeals .- A dismissal of appeal by default, for not procuring the return to be filed, or not serving his case in due season, unless the respondent can show some delay or inconvenience, ought to be relieved against, on motion, in all cases where good faith appears, on terms, in analogy to the old rule for relieving against defaults for want of a plea. Dresser v. Brooks, 2 N. Y. 559; Waterman v. Whitney, 7 How. (N. Y.) Pr. 407. And see Slade v. Warren, 1 N. Y. 431; Conant v. Vedder, 4 How. (N. Y.) Pr. 141; Vanderheyden v. Mallary, 3 How. (N. Y.) Pr. 295.

In Pennsylvania, judgment had been entered by default for want of an affidavit of defence upon a copy filed of an agreement in writing under the statute Pennsylvania. Held, that as the copies of book entries, filed to assist the assessment of damages, tended to extend the claim shown by the agreement, the judgment should be set aside. Detmold v. Gate Vein Coal Co., 3 W. N. C. 567.

In Wisconsin, a judgment entered by default, on a service not personal, made many years before, and an unauthorized appearance by attorney, should be set aside under sec. 2832, Rev. Stat. 1878, on prompt application after actual knowledge of it, showing merits and ignorance of the service till after judgment. Cleveland v. Hopkins, 55 Wis. 387.

Where a resident cestui que trust was served with process, and appeared and made defence, held, that her trustee who was a non-resident was not entitled under Wisconsin Rev. Stat. 1855, ch. 124,

But in actions for divorce an exception is made upon the ground of alleged adultery upon the part of the wife, where, if a judgment has been taken against her by default, the court should be liberal in affording her an opportunity to establish her innocence.1 party wishing to have a default set aside must not sleep on his rights, but do so at the earliest opportunity.2

The court must be informed of the grounds upon which a motion is made to open default, that it may judge of good faith and the excuse.³ A defendant who moves to open a regular

sec. 10, to appear and defend after judgment rendered against him. Croft v.

Mead, 13 Wis. 528.

In Admiralty Courts.—In order to set aside a default and obtain leave to answer under the 27th rule of practice in admiralty, the respondent must satisfactorily account for his laches, and exhibit either by answer or affidavit a meritorious defence. The Constitution v. The Young America, 1 Newb. Adm. 107.

1. So held upon a motion by a wife to set aside such judgment and be permitted to defend the action. Donnelly v. Donnelly, N. Y. Daily Reg., Nov. 12, 1883.

In an Action for Divorce.—An order

opening a default in an action for divorce should be granted on proper terms wherever it appears that the obtaining of the divorce rested in any degree upon the consent of or upon friendly communications between parties. Knester v. Knester, N. Y. Daily Reg., April 22,

In Ejectment.—If the tenant, sued in ejectment, has by neglect or design suffered a default, the landlord may, upon a proper showing and motion in the name of the tenant, have the default set Dimick v. Deringer, 32 Cal. 488.

Where a judgment by default in an action of ejectment has been taken against the landlord, by the fraud or neglect of the tenant in possession to give notice to his landlord, the judgment may be set aside after the expiration of the term on the application of the landlord. Conn v.

Whiteside, 6 Humph. (Tenn.) 47.
In Injunction.—Where a default is taken and final judgment entered in a suit for an injunction against the defendant on the first day of the term, the default can be set aside on motion; but an affidavit in support of such motion can be made part of the record only by a bill of exceptions. Clegg v. Patterson, 32 Ind.

135; Clegg v. Fithian. 32 Ind. 90.
Newly-discovered Evidence—What Must be Shown -To set aside a writ of inquiry, on the ground of newly-discovered evidence sufficient to support a plea, the names of the witnesses must be disclosed,

as well as what is expected to be proved. Richardson v. Backus, I Johns. (N. Y.)

Petition to Open Default .- If upon overruling a demurrer to petition for such relief court set aside default without first ordering plaintiff to plead over, he cannot assign such ruling as error unless it appears from record that the court refused to permit him to plead over. Sage v. Matheny. 14 Ind. 369.

Dilatory Exception.—An order setting

aside a default to allow a dilatory exception is irregular. It cannot, however. be treated as a nullity by plaintiff, but must be rescinded, as improperly made, before he can confirm his default,

cox v. Huie, 18 La. 426.

2. Default Taken on First Day of Term. -It is the practice of the New York superior court, where a default is taken on the first day of the term, to open it and permit the case to be argued upon just terms, if application is made without delay at the same term, unless some bad faith appears, or there is reason to believe that the appeal is frivolous, or the purpose is delay. Bradford v. Greenwich Ins. Co., 8 Abb. (N. Y.) Pr. 261. This should not be done if the question in the case at bar may be distinguished from those actually decided by that court in previous cases, the court below, although their opinion is against the moving party, should open his default on terms, so that he may be able to raise before the court of appeals the precise question in this case. Bradford v. Greenwich Ins. Co., 8 Abb. (N. Y.) Pr. 261.
3. Samo v. Morrison, Sheldon (N. Y.).

382; Seymour v. Elmer, 4 E. D. Smith (N. Y.), 199; Gardner v. Wight, 3 E. D. Smith (N. Y.), 334. But in Georgia, after opening a judgment by default, the defendant may avail himself of any radical defect in the plaintiff's declaration. Farrar v. Baber, Ga. Dec. 125, Part 2.

Limiting Defendant's Defence -Where a judgment is opened the defendant ought to be limited in his defence to the grounds set forth in his affidavit as the condition of opening the judgment.

indement that he may defend must swear to merits. 1 show reason-

Gilkyson v. Larue, 6 Watts & S. (Pa.)

Parrott v. Den, 34 Cal. 79; Francis v. Cox, 33 Cal. 323; Bailey v. Taaffe, 29 Cal. 422; Reese v. Mahoney, 21 Cal. 305; Woodward v. Backus, 20 Cal. 137; Pitts v. Magie, 24 Ill. 610; Hitchcock v. Herzer, 90 Ill. 543; Dunn v. Keegin, 4 Ill. (3 Scam.) 292; Stevens v. Helm, 15 Ind. 183; Shields v. Taylor, 21 Miss. (13 Smed. & M.) 127; Porter v. Johnson, 3 Miss. (2 How.) 736; Adams v. Hickman, 43 Mo. 168; Camppen v. Carron, 343; Miller v. Alexander, I N. J. L. 43 Mo. 168; Campbell v. Garton, 29 Mo. (Coxe) 400; Denn v. Evaul, I N. J L. (Coxe) 201; Quinn v. Case, 2 Hilt. (N. Y.) 467; Van Pelt v. Boyer, 7 How. (N. Y.) Pr. 325; Van Horne v. Montgomery, 5 How. (N. Y.) Pr. 238; Bogardus v. Doty, 2 How. (N. Y.) Pr. 75; Stewart v. McMartin, 2 How. (N. Y.) Pr. 38; Robinson v. Sinclair, I How. (N. Y.) Pr. 106; Alberti v. Peck, I How. (N. Y.) Pr. 230; Tallmadge v. Stockholm, 14 Johns. (N. Y.) 342; Davenport v. Ferris, 6 Johns. (N. Y.) 131; Draper v. Bishop, 4 R. I. 489; Cook v. Phillips, 18 Tex. 31; Watward, 19 Wis. 232; Butler v. Mitchell, 15 Wis. 355; Mowry v. Hill, 11 Wis. 146; Popino v. McAllister, 4 Wash. C. C. in, 393.

A motion to set aside a default in not answering in time should be supported by affidavits setting forth clearly the rea-Dunn v. Keesons for setting it aside.

gin 4 Ill. (3 Scam.) 292.

A Sworn Answer is Not Equivalent to the Affidavit of a defence on the merits required to relieve a defendant from a judgment by default. Mowry v. Hill. 11 Wis. 146. And the affidavit of merit annexed to the plea will not serve. Robinson v. Sinclair, I How. (N. Y.) Pr. 106. To the same effect Alberti v. Peck,

I How. (N. Y.) Pr. 230.

Affidavit of Attorney. - An application to set aside a default should show a meritorious defence, and a reasonable excuse for not having made in due time. An affidavit of an attorney upon information and belief as to a meritorious defence, but containing no statement of the facts on which the same is based, and alleging, as an excuse, an unsuccessful search for the papers by a third person, who makes no affidavit to that effect, is sufficient. Hitchcock v. Herzer, 90 Ill.

After Service of Summons Defendant was Arrested, and at the same time served with a copy of the complaint, but he was discharged from arrest on the ground of privilege. It was held that a judgment entered by default 20 days after service of summons, but less than 20 days after the service of the complaint, was regular, but on swearing to merits the defendant was let in on terms. Van Pelt v. Bover. 7 How. (N. Y.) Pr. 325.
When a Judgment by Default has been

Reversed and Remanded, the court should grant a motion to open the default if it. appears that the defendant has a meritorious defence, that his attorney had prepared a plea which for some reason unknown to the defendant was never filed. that he was unavoidably absent at the time the default was taken, and that he made application for the opening of the default at his first opportunity. Waterson

v. Seat. 10 Fla. 326.

Statement of Case to Counsel and Adviceof Defence.-The general affidavit of a defendant that he has stated his case truly to his counsel, and that he is advised by such counsel, and believes that he has a good and substantial defence upon the merits, is not sufficient to authorize the court of chancery to set aside a regular default or decree; but the affidavit should state the substance of such defence, or it should be stated under oath in some form so that the court-may iudge whether it is meritorious. Goodhue v. Churchman, I Barb, Ch. (N. Y.) 596; Winship v. Jervett, I Barb. Ch. (N. Y.) 173; McGaffigan v. Jenkins, 1 Barb. (N. Y.) 31.

On application by defendant to set aside a default, an affidavit by him stating that the case had been fully and fairly represented to counsel, who have advised affiant that he has a good, full, and perfect defence on the merits, is sufficient on that point, without stating the facts constituting the defence. Francis v. Cox, 33 Cal. 323; Woodward v. Backus, 20 Cal. 137.

Default Should Not be Opened, unless the party has a good defence on the merits, and the omission to plead was the result of accident or mistake. without culpable negligence. Macomber v. Mayor, etc., of New York, 17 Abb. (N.

Y.) Pr. 36.

In California. - An affidavit on motion to vacate a judgment by default, under the 68th section of the Practice Act, must show, first, that the default occurred through mistake, inadvertence, surprise, or excusable neglect; and second, that the defendant has a meritorious defence. Bailey v. Taaffe, 29 Cal. 422.

sonable excuse,1 due diligence,2 and pay costs.3 But an affidavit of merits is not necessary where a default is taken against a defendant before the time allowed by law to answer has expired: and a motion may be made at a subsequent term to set aside such iudgment.4

When it appears by the affidavit in support of the motion that the party has a defence to the merits, either to the whole or a part of the cause of action, it has been usual to set aside the default if a reasonable excuse is shown for not having made the defence. where no trial is lost. But where the proposed answer is on in. formation, the affidavit of the person furnishing the information should be served with it. On application to be let in, a defence must be disclosed.7

The affidavit to set aside a default must state that a default has been taken: 8 show reasonable diligence: 9 must set forth facts

In New York .- In ordinary cases under the Code, in the nature of actions at law, default by failure to answer may be opened upon a general affidavit of merits. Van Horne v. Montgomery, 5 How. (N. Y.) Pr. 238. But if the circumstances throw suspicion upon defendant's case, a special affidavit should be required. Van Horne v. Montgomery, 5 How. (N. Y.) Pr. 238; Dix v. Palmer, 5 How. (N. Y.) Y.) Pr 233.

An Affidavit of Merits, Averring that a Specfic Sum should have been Credited by the plaintiff, is not a sufficient ground for opening a default, the plaintiff showing that defendant admitted the whole demand before suit, and defendant making no excuse for not answering. White v. Featherstonhaugh, 7 How. (N. Y.) Pr.

357 In Pennsylvania, a judgment by default against the casual ejector for want of an appearance, and confessing lease, entry, and ouster, may be set aside at subsequent session upon good cause shown, where the defendant swears to merits and a trial has not been lost. The affidavit of the party is sufficient on which to found the motion. Popino v. McAllister, 4 Wash. C. C. 393.

In Winconsin. -It seems that under ch. 211, stat. 1861, an affidavit of merits is not essential on an application to open a default where the answer itself shows merits and is verified; but the answer in this case being hardly such as to show merits, and the only affidavit on file which shows merits not having been included in the motion papers, an order setting aside a default is reversed, with out prejudice to the renewal of the motion. Omro v. Ward. 19 Wis. 232.

1. Hitchcock v. Herzer, 90 Ill. 543.

2. Adams v. Hickman, 43 Mo. 168:

2. Adams 27 Filckman, 43 Mo. 100; Campbell v. Garton, 29 Mo. 343. 3. Quinn v. Case, 2 Hilt. (N. Y.) 467. 4. Branstetter v. Rives, 34 Mo. 318. 5. Mason v. McNamara, 57 Ill. 274. 6. Pitts v. Magie, 24 Ill. 610; Shields v. Taylor, 21 Miss. (13 Smed. & M.) 127; Porter v. Johnson, 3 Miss. (2 How.) 736; Denn v. Evaul, I N. J. L. (Coxe) 201; Tallmadge v. Stockholm, 14 Johns. (N. Y.) 342; Davenport v. Ferris, 6 Johns. . (N. Y.) 131.

If the debtor shows by affidavits that he has a good defence to a judgment by confession, if he can substantiate his affidavits before a jury, the court should open the judgment. Pitts v. Magie, 24

Discretion of the Court Not Reviewed .-Setting a default aside is within the discretion of the lower court, which discretion will not be interfered with, unless manifest injury has been done. v. Uhrig, 35 Mo. 517.

7. Goodhue v. Churchman, 1 Barb. Ch. (N. Y.) 596.

8. Pike v. Power, I How. (N. Y.) Pr.

9. Palmer v. Russell. 34 Mo. 476; Edwards v. Watkins, 17 Mo. 273.

An Excuse for Not Having Pleaded is An Excuse for Not Having Pleaded is Required on setting aside a regular default. Cogswell v. Vanderburgh, I Cai. (N. Y.) 156; Spencer v. Webb, I Cai. (N. Y.) 118; McKinstry v. Edwards, 2 Johns. Cas. (N. Y.) 113; s. c., Col. & C. Cas. (N. Y.) 125; Johnson v. Clark, 6 Wend. (N. Y.) 517. Compare Allen v. Thompson I Hall (N. Y.) 52 (N. Y.) 517. Compare Allen v. Thompson, I Hall (N. Y.). 54.

Due Diligence.—An affidavit to support a motion to set aside a judgment by default must not only show merits, but due diligence also. Green v. Goodloe, 7 Mo. 25. But a meritorious defence and showing a good defence, and not a mere conclusion of law: 1 should also state the facts relied upon in such motion, so that the court may judge of the questions of merits, and must show proper diligence in preparing for the defence,² and should be accompanied with the answer and an offer to file the same.³ A deponent in opposition to a motion to open a default should swear to facts only, and not to his inferences and belief.4 When there has been an appearance, and that appearance withdrawn, an affidavit to set aside default must explain previous appearance and withdrawal, or it will be insufficient.⁵ The common affidavit of merits is not sufficient where defendant, after suit brought, has acknowledged the debt and asked forbearance. The lack of an affidavit of merits is not a conclusive objection to an application by defendant to excuse his default. He may supply the defect on terms. But if the circumstances throw suspicion upon the defendant's case a special affidavit should be required.8

A judgment by default will be set aside on motion, where it

a reasonable degree of diligence in making it will justify the setting aside of an interlocutory judgment by default. Adams v. Hickman, 43 Mo. 168.

1. Roberts v. Corby, 86 Ill. 182.

Must Set Out Defence, -On an application to set aside a default, and to be permitted to answer, the affidavit must not only state that the defendant has a meritorious defence, but must set out that defence, and must show the exercise of proper diligence. Florez v. Uhrig, 35 Mo. 517; Lamb v. Nelson, 34 Mo. 501; Green v. Goodloe, 7 Mo. 25; Barry v.

Johnson. 3 Mo. 372.

Statement of Merits—Expression of Opinion.—Where a collision was admitted, a statement that it was not caused by respondent's negligence, but was an unavoidable accident, is merely an expression of opinion, and does not disclose a meritorious defence. Constitution v. The Young America, I

Newb. Adm. 107.

Advice Must be by Counsel.-An affidavit which states that the defendant was advised, etc., without stating that he was advised by counsel, is not sufficient. Lecompte v. Wash, 4 Mo. 557.

2. Lamb v. Nelson, 34 Mo. 501; Palmer v. Russell, 34 Mo. 476.

3 Bailey v. Taaffe, 29 Cal. 422; Dunn v. Keegin, 4 Ill. (3 Scam.) 292; Howey v. Clifford, 42 Wis. 561.

As to what is an insufficient affidavit to set aside a default, see Richardson v.

Finney, 6 Dana (Ky.), 319.

Defendant's Answer should be Shown to Court .- The better practice is to prepare and exhibit to the court the defendant's answer at the hearing of a n'otion to set aside a default. Bailey v. Taaffe, 20 Cal. 422.

On a motion to set aside a judgment and default, addressed to the court's discretion, a proposed verified answer must v. Goldberg, 40 Wis. 308. But not so on a motion founded upon irregularities in entering judgment. McCabe v. Sum-

ner, 40 Wis. 386.
4. Powell v. Kane, 5 Paige Ch. (N.

Y.) 265.

5. Bass v. Smith, 60 Ind. 40.

Withdrawal of Appearance Must be Explained.-A judgment by default against a defendant who had been ruled to answer and had withdrawn his appearance, will be set aside only upon his affidavit, explaining such withdrawal. Smith, 60 Ind. 40.

Sworn Answer Not Treated as Affidavit of Merits .- If a sworn answer to the original complaint is filed, and an amended complaint is then filed to cure a technical defect in the original, and judgment is rendered by default, the answer to the original complaint cannot be treated as an affidavit of merits on a motion to set aside the judgment. Parrott v. Den, 34 Cal. 79.

6. Sheldon v. Campbell, 5 Hill (N. Y.), 508.

7. Fassett v. Tallmadge, 15 Abb. (N. Y.) Pr. 205.

8. Ellis v. Jones, 6 How. (N. Y.) Pr.

296; Dix v. Palmer. 5 How. (N.Y.) Pr. 233. What Court May Require. — The court may require defendants to show a probability that they will be able to sustain their defence. Ferussac v. Thorn, I Barb. (N. Y.) 42.

was entered while there was an answer1 or demurrer2 on file and undisposed of: where an action has been treated by both plaintiff and defendant as though there was a formal appearance, and the plaintiff causes judgment to be entered as on default; where an amendment introducing an entirely new cause of action was allowed, and the defendant was defaulted without having had proper opportunity to defend; where the failure to reply was the result of accident or mistake; where judgment is entered ex parte against one in contempt, where it is shown that it was unjust, and that the failure to appear was through an excusable mistake of the defendant or his attorney; where the judgment was obtained by fraud or surprise; where judgment was taken before the case regularly came up for hearing; where the petition is filed out of time, and the judgment taken by default; 10 for irregularity; 11 where the defendant was absent from the State; 12 where the judgment was taken against the defendant before the expiration of the time allowed him to plead; 13 where the defendant filed a plea, but the clerk neglected to notice the filing of record: 13 where the plaintiff has previously filed a bill in chancery concerning the matter in litigation, and obtained the defendant's consent for the case to stand continued until the bill is heard, but afterwards took judgment by default while the bill was pending: 13

1 Norman v. Hooker, 35 Mo. 366. 2. If a Demurrer is Filed with the clerk within the statutory time, and the clerk in vacation enters a default and judgment, ex parte proofs made by the defendant that no copy of the demurrer has been served upon the opposite attorney, the default should be opened upon defendant's application. Oliphant v. Whitney, 34 Cal. 25.

3. Schoonmaker v. Albertson & D.

Machine Co., 51 Conn. 387.
4. Weatherford v. Van Alstyne, 22

5. On Reasonable Terms, if the motion is made during the term. Ennis v. Hogan, 47 Mo. 513.
6. Mead v. Norris, 21 Wis. 310.

7. See Obermeyer v. Einstein, 62 Mo. 341; Delancey v. Brownell, 4 Johns. (N. Y.) 136; Marsh v. Perrin, 10 Oreg.

Fraud or Surprise. - The court of common pleas may set aside a regular judgment by default where there has been any fraud or surprise, especially in a bail-bond suit. Delancey v. Brownell, 4

Johns. (N. Y.) 136.

Thus, when at the hour when defendant's case was called for trial before a justice, the defendant was engaged with plaintiff and one of his attorneys in trying to come to a settlement, and the plaintiff's other attorney, knowing this, procured a default and judgment, it was held that the judgment was obtained by fraud, and should be set aside. Marsh v.

Perrin. 10 Oreg 364.

Inveigling into the Jurisdiction.— Where a party has been induced to come within the jurisdiction of the court by false and fraudulent representations, so that process could be served on him, he cannot for that reason have a judgment set aside if he was personally served and failed to appear. Marsh v. Bast, 41 Mo. 493.

8. Bidleman v. Kewen, 2 Cal. 248.

9. Judgment by Default before Hearing -Misrepresentations. - Where the court has been induced to depart from its ordinary practice and render judgment upon default before the case regularly came up, upon the plaintiff's statement that the defendant did not intend to appear, the judgment will be set aside. Beach v. McCann, r Hilt. (N. Y.) 256; Findley v. Johnson, I Overt. (Tenn.) 344.

10. Leave to File a Petition within a Certain Time having been granted, and the time having expired, the defendant paid no further attention to the case. Subsequently it was filed, and the defendant defaulted. Held ground to set aside the default. Cluz v. Carter, 12 Neb. 113.

11. See, infra, FOR IRREGULARITY.

12. Wells v. Cruger, 5 Paige Ch. (N.

Y.) 164.

13. Browning v. Roane, 9 Ark. (4 Eng.) 354; s. c., 50 Am. Dec. 218.

where the default was entered by the clerk, without special direction from the court; where the default was taken on the first day of the term; where notice or complaint was not served: 3 where the service of the summons was insufficient.4 or the return improperly made; 5 where service was made by publication only: 6 where a necessary and important non-resident witness for the party was absent from the trial, and such absence was owing to controlling circumstances, entitling to a continuance,7 and

1. In Action to Enforce Mechanic's Lien.—An entry of judgment in the superior court, upon default, upon a petition to enforce a mechanic's lien, made hy the clerk without special direction, under the general order, may be stricken off at a subsequent term by the court in its discretion, as having been entered by mistake, and the case brought forward and other persons interested in the petition summoned in. Lucy v. Dowling, 111 Mass. 93.

2. Clegg v. Patterson, 32 Ind. 135;

Clegg v. Fithian, 32 Ind. 90.

8. Engs v. Overing, 2 N. Y. Code Rep. 79.

Default set aside, because plaintiff's opposing papers did not show when the declaration was served. Smith v. Roberts, I How. (N. Y.) Pr. 42.

4. Heffner v. Gunz, 29 Minn. 108:

Smith v. Rollins, 25 Mo. 408.

Insufficient Service.—A judgment by default, and all subsequent proceedings, will be set aside upon motion, if it is shown that the service of summons was insufficient, as being made by leaving a copy at defendant's residence with a person not resident there, the statute requiring that the person should be resident therein, and the fact that an attachment was made does not alter the case. Heffner v. Gunz, 29 Minn. 108.

5. Davis v. Burt, 7 Iowa, 56; Thoma-

son v. Bishop, 24 Tex. 302.

Insufficient Return .- After a default upon sufficient service, but an insufficient return thereof, the plaintiff cannot have the return amended upon motion without notice; he must file his petition setting forth the facts and serve the same on the defendant, and thereupon have the judgment set aside, and give the defendant Thomason v. an opportunity to plead. Bishop, 24 Tex. 302.

Where it is sought to reverse a judg-

ment of the district court, rendered by default, on the ground that the court erred in acting upon the return of process by a person who was not the sheriff of the proper county, and where the return was signed by a person who designates himself "sheriff," without stating of

what county, the fact that the person signing the return was not sheriff, or was not sheriff of the proper county, must be made to appear before the appellant can question the correctness of the action of the district court. Davis v. Burt. 7 Iowa, 56.

6. Albright v. Warkentin, 31 Kan. 442; Davis v. Davis, 24 Tex. 187; Snow v. Hawpe, 22 Tex. 168.

Service by Publication.—A defendant

defaulted after service by publications merely need only aver, in his petition to set aside the default, that he had no actual notice, and that he has a good de-Snow v. Hawpe, 22 Tex. 168.

A judgment by default after service by publication only must be reversed on error, unless supported by a recital of the necessary facts upon which it was rendered, in the decree itself or on the Davis v. Davis, 24 Tex. 187.

Insufficiency of Affidavit of Publication. —But in Guy v. Ide, 6 Cal. 99; s. c., 65 Am. Dec. 490, the court say, that on appeal taken by the defendant immediately after judgment on default, on the ground of insufficiency of the affidavit of publication of summons, the appellate court will not disturb the judgment, the defendant having his remedy in the courts below within six months after judgment.

7. Absence of Non-resident Witness. -A motion to open a default taken at the circuit, and to set aside the assessment of damages and the judgment, is properly granted where it appears that an important and necessary non-resident witness for the party in default was absent from the trial, where it also appears that there were controlling circumstances which would have rendered the absence of such witness a sufficient ground for a postponement of the trial. So held, where the witness had attended on previous terms of the court voluntarily, and had agreed and was expected to attend the term of the court where the default was taken, the propriety of order opening the default not being affected by the fact that the trial judge had made an order refusing to postpone the trial, from which

for want of authority in the attorney appearing for the plain

Where a judgment is taken by default upon a summons regularly issued and served, it will not be set aside on the ground that the summons was not marked as filed by the clerk at the time the default was taken,2 nor for any default of the clerk in entering rules where another party was produced.3 Default will not be set aside because of an insufficient complaint,4 or a frivolous demurrer. or because the citations were made returnable on a day other than the one on which the court was to be held according to law; 6 or because of an amendment which does not affect the merits of the case. veven where so amended as to claim an increased judgment, where the action was founded on a note filed with the complaint; 8 or because judgment had been taken for a larger sum than that agreed upon; or because of the mere neglect of an agent or attorney to defend the suit, unless there was a fraudulent concert or collusion participated in by the plaintiff. 10 A

order there had been no appeal. Cahill v. Hilton, 31 Hun (N. Y.). 114. This case was affirmed, as it seems, but without opinion, in 96 N. Y. 675.

1. Want of Authority in Attorney appearing for Plaintiff.—Upon motion to vacate a judgment by default on the ground of want of authority on the part of the plaintiff's attorney to bring the action, counter-affidavits may be heard by the court. Reed v. Curry, 35 Ill. 536.

As to default set aside in particular cases, see Popino v. McAllister, 4 Wash. C. C. 393; West v. Talman, 4 Wash. C. C. 200; Hand v. Yahoola Mining Co., 2 Wood C. C. 407.

 Reed v. Curry, 35 Ill. 536.
 Jones v. Freeman, 29 Md. 273; Bascom v. Feazler, 2 How. (N. Y.) Pr.

Neglect or Failure of Clerk-Maryland Doctrine. - Where a plaintiff is in no default, and has complied with the provisions of Maryland Stat. 1864, ch. 6, the failure of the defendant to receive notice of the affidavit to the plaintiff's declaration through the omission of the clerk furnishes no ground for striking out the judgment. Jones v. Freeman, 29 Md.

4. Berry v. Seitz, 15 Ind. 60.

5. A Frivolous Demurrer being in fraud of the rules of court, will not be cause for setting aside an inquest. Carey v. Hanchet, 1 Cow. (N. Y.) 154.

6. Tobler v. Stubblefield, 32 Tex. 188.

6. Tobler v. Stubbleheid, 32 1ex. 100.
7. McDonald v. Donaghue. 30 Iowa, 568; Spofford v. Ritten, 4 McL. C. C.

Amendments not Served .- An amendment of the declaration, by alleging alienage in order to show jurisdiction. since it is only slight and does not affect the merits of the case, does not require a copy of the amended declaration to be Spofford v. Ritten, 4 McL. C. served.

Effect of Subsequent Amendment -Nor would the default be waived or the rule changed by a subsequent amendment of the petition, merely bringing in new parties, and which in no manner affected the cause of action against, or rights of, the defendant in default. McDonald v.

Donaghue, 30 Iowa, 568.

8. Barnes v. Smith, 34 Ind. 516.

9. Default Cannot be Set Aside for the reason that attorneys of parties had agreed that there should be a judgmentfor plaintiff by default, but that judgment had been taken for a larger sum than had been mentioned in the agreement, when the agreement was by parol, made out of court, and a rule of court required that no agreement would be enforced "unless in writing or made of record or in the presence of the court." Barnes v. Smith, 34 Ind. 516.

In an Action on a Note and Mortgage in which, the summons is indorsed with the amount due on the note and for which a personal judgment is asked, but without any statement of a claim for other relief, and such summons is personally served, it is not error to enter on default a decree for the sale of the mortgaged premises, as well as a judgment for the sum indorsed on the summons. Weaver v. Gardner, 14 Kan. 347; George v. Hatton, 2 Kan. 333.

10. Matthis v. Town of Cameron, 62

Mo. 504.

default will not be set aside because an inquest was taken without the pleadings, where it does not appear that a false issue was tried. or because of irregularity not excepted to at the proper time: because of a misjoinder of cause of action, or because the party had no actual notice where legal notice was given.4 or because the defendant neglected without excuse to defend.⁵ or because of an omission to file proof of default where the fact of default is not denied and no merits are shown; on nor because of a variance between the declaration and the indorsement of a writ. or because service was had on the defendant outside of the State .8 nor because the defendant was induced to come within the jurisdiction of the court by false and fraudulent representations, so that process could be served on him, if he were personally served and failed to appear. A default will not be opened or set aside where no certain ground therefor appears in the notice, affidavit, or iudgment roll, 10 nor to allow the defendant to plead another judgment: 11 nor because the case was reversed and remanded by the supreme court, and the mandate received by the clerk of the lower court, after the commencement of the term, who on his own motion docketed the case, and default was subsequently entered, in the absence of a showing of a meritorious defence. 12

1. Brophy v. J. M. Brunswick & Balke

Co., 2 Wy. Ter. 86.
2. Irregularity—When Taken Advantage of .- The indorsement on the writ showed that the suit was brought upon a bill of exchange, whereas the declaration contained not only a count upon a bill of exchange, but also the common counts. There was judgment by default, Held, if there be any error in this, it is rather late to take advantage of it. plaintiffs in error having been served with process, were, in contemplation of law, in court. The proceedings against them were regular, or if not so, the time to take advantage of any irregularity was during the pendency of the suit. Walke v. Bank of Circleville, 15 Ohio, 288,

3. A Misjoinder of Causes of Action can only be taken advantage of by demurrer or answer (Ohio Code, sec. 89), and after judgment by default a petition in error cannot be prosecuted for this cause. Bratton v. Smith, 2 West. L. Mon. 497.

Orr v. Howard, 5 Ill. (4 Scam.) 559.
 Braden v. Reitzenberger, 18 W. Va.

6. Mitchell v. Rolison, 52 Wis. 155.

7. Mayfield v. Allen, Minor (Ala.), 274; Powell v. Clement, 78 III. 20; Shrock v. Bowden, 5 Miss. (4 How.) 426.

A Variance between the contract declared on and the indorsement of the cause of action upon the writ cannot be taken advantage of after judgment by default. Shrock v. Bowden, 5 Miss. (4 How.) 426.

Where the return of a service was regular in a suit to foreclose a mortgage, and one of the defendants, after default, decree of foreclosure, sale and confirmation thereof, appeared and asked to have the default set aside, and he be allowed to answer on his affidavit showing a variance between the original summons and the copy delivered by the officer, held, that the motion to set aside the default was properly refused. Powell v. Clement, 78

8. In Iowa, one who has been personally served outside of the State, and who has allowed a judgment of default to be rendered against him, cannot have the judgment set aside under Iowa Code, sec. 2877. McBride v. Harn, 52 Iowa, 79. 9. Marsh v. Bast, 41 Mo. 493.

10. Ellis v. Jones, 6 How. (N. Y.) Pr.

 In Suit Against Administrator. – Where an administrator was sued and pleaded plene administravit, except, etc., and plaintiff entered judgment for twentyeight cents in excess of the amount confessed, and interlocutory judgment for the residue of demand, held, that it should not be set aside to enable defendant to plead another judgment. Wright. 2 Cai. (N. Y.) 101.

12. Doan v. Holly, 27 Mo 256.

It is a general rule that merits must be shown in order to relieve a party against a judgment by default; 1 yet the court will admit an exception to the rule where the plaintiff has filed a hill in chancery concerning the matter in litigation, and obtained the defendant's consent for the cause to stand continued until the bill should be heard, and has afterwards taken judgment by default whilst the bill was pending.2 Where the complaint has not been served the defendant will not be required to produce the affidavit of merits,3 and merits need not be shown to set aside a default accidentally incurred for not assigning errors.4 Where a judgment by default is taken against two defendants, it must be set aside as to both, if set aside as to either.5

I. FOR IRREGULARITY—(a) What Irregularities Will Open.— An irregular default is to be set aside without regard to merits.

354; s. c., 50 Am. Dec. 218.

Where a Judgment is Reversed by the supreme court, and the cause remanded, and the mandate of the supreme court is received by the clerk of the circuit court after the commencement of the term, and he of his own motion dockets the cause on the third day of the term, and on the fourth day the court renders a default. defendant is not entitled as of right to have the default set aside without showing a meritorious defence. Doan v. Holly, 27 Mo. 256.

2. Browning v. Roane, 9 Ark. (4 Eng.) 354; s. c., 50 Am. Dec. 218.

3. Engs v. Overing, 2 N. Y. Code Rep.

4 Van Alstine v. Brower, 1 Cow. (N.

Y.) 45. 5. Where a Judgment by Default Against Two Defendants was set aside as to one, and a trial had and a judgment rendered as to him for a less sum than the judgment against the other, held, that the proceedings were erroneous; that the default should have been set aside as to both, and on trial of the damages assessed against both, and judgment rendered Gould v. Sternburg, 60 Ill. thereon.

6. Mattoon v. Hinkley, 33 Ill. 208; Armstrong v. Grant, 7 Kan. 285; Lawther v. Agee, 34 Mo. 372; Edwards v. Woodruff, 90 N. Y. 396; Seaman v. McReynolds, 40 N. Y. Super. Ct. (8 J. & S.) 545; Howell v. Denniston, 3 Cai. (N. Y.) 96; Clinton v. Porter, 2 Cai. (N. Y.) 176; s. c., Col. & C. Cas. (N. Y.) 388. And see Depeyster v. Warne, 2 Cai. (N. Y.) 45; Coon v. Noble, 2 How. (N. Y.) Pr. 97; Dick v. McLaurin, 63 N. C. 185; Findley v. Johnson, 1 Overt. (Tenn.) 344; Sheepshanks v. Boyer, Baldw. C. C. 462; Jenks v. Garretson, 4 McL. C.

1. Browning v. Roane, 9 Ark. (4 Eng.) C. 258; Kemball v. Stewart, 1 McL. C.

C. 332. Vacating or Setting Aside.—A judgment by default irregularly entered may be set aside without an affidavit of merits; but if the judgment is regular an affidavit is required. Sheepshanks v. Boyer, Baldw. C. C. 462. To nearly the same effect, Jenks v. Garretson, 4 McL. C. C. 258; Kemball v. Stewart, 1 McL. C. C. 332.

Conditions may be Imposed .- But defendant may be required not to sue for false imprisonment. Depeyster v. Warne,

2 Cai. (N. Y.) 45.
Default before Suit Called.—A judgment by default taken before the suit is called by the clerk in the order in which it stands on the docket, may be set aside for irregularity at any time during the holding of the rules, without an affidavit of merits. Beach v. McCann, I Hilt. (N. Y.) 256; Findley v. Johnson, I Overt. (Tenn.) 344.

Several Defendants-Service and Default as to Part Only. - Where a writ (in assump. sit upon a note) against seven was returned to spring term 1867, executed upon five, and at the return term three of those taken entered pleas, a judgment final by default was taken against the other two, and at the same time an alias writ was ordered against those not taken, held, upon application by the parties against whom judgment had been taken. made at spring term 1868, that such judgment was irregular, and should have been set aside so far as it was final, and allowed to stand as an interlocutory judgment. Dick v. McLaurin, 63 N. C.

Pending Application for Removal .-Where an application for the removal of a cause from a State court to the circuit court of the United States, under Judici-

Thus where the notice to plead required defendant to do so within ten days instead of twenty, a default was set aside as irregular, although it was not entered until after twenty days. And a default taken against one of two defendants answering separately by different attorneys, without notice to his attorney, is irregular. and must be set aside.2

Until set aside, an irregular judgment must in general be regarded as a subsisting and regular judgment as to all the world.3 Thus a judgment rendered by default on a service of a summons made on the return day is not void, but is valid until set aside or reversed; and such a judgment, though irregular, can be attacked only by the judgment debtor or by his legal representatives, and that only in a direct proceeding instituted for that purpose.4 But irregularity cannot be taken advantage of by a writ of error to the supreme court; 5 application must be made to the court at the proper time and in the proper manner.

(b) Application, When Made.—Where a judgment has been taken irregularly by default, the party against whom it operates should avail himself of the first opportunity after the irregularity is discovered to correct it: 6 for if no objection be made to the

ary Act of 1789, is pending, it is irregular to enter a default against the party making the application, and a motion to set aside a default in such case should be allowed. Mattoon v. Hinkley, 33 Ill. 208.
In Mortgage Foreclosure—Failure to

Move to Set Aside. - A judgment on default in a suit to foreclose a mortgage being made final is irregular, and can be set aside on motion by defendant; but not having made such motion, he cannot avail himself of the irregularity by a writ' of error to the supreme court. Lawther

z. Agee, 34 Mo. 372. Revival and Opening.—An action was brought to set aside a conveyance, claimed to have been made by D. in fraud, and also to set aside an assignment made by D. to W. for the benefit of creditors. Certain creditors were made co-defendants, whose answers served neither on D. nor W. D. died. The action was not renewed against his representatives, and judgment by default was obtained against W. Held, that W. was entitled to have the judgment opened, it being irregular for want of the service of the answers and of notice of trial on W., and for want of a revivor against D.'s representatives. Edwards v. Woodruff, 90 N. Y. 396.

1. Coon v. Noble, 2 How. (N. Y.) Pr.

2. Seaman v. McReynolds, 40 N. Y. Super. Ct. (8 J. & S.) 545.

3. Winslow v. Anderson, 3 Dev. & B. (N. C.) L. 9; s. c., 32 Am. Dec. 656.

Erroneous Judgment Valid until Reversed. - Where courts have jurisdiction of a cause, their judgments, however erroneous, are valid until reversed or set erroneous, are valid until reversed or set aside. Lawrence v. Smith, 45 N. H. 533; Bruce v. Cloutman, 45 N. H. 37; Wingate v. Haywood, 40 N. H. 437; State v. Weare, 38 N. H. 314; Moulton v. Wendell, 37 N. H. 409; White v. Landaff, 35 N. H. 128; Brown v. Dudley, 33 N. H. 511; Claggett v. Simes, 31 N. H. 56; Keniston v. Little, 30 N. H. 318; Lamprey v. Nudd, 29 N. H. 299; Nichols v. Smith, 26 N. H. 298; State v. Richmond, 26 N. H. 232; Morse v. Preshv. 25 N. H. 302; Kittedge v. Emerson Richmond, 26 N. H. 232; Morse v. Presby, 25 N. H. 303; Kittredge v. Emerson, 15 N. H. 262; Smith v. Smith, 15 N. H. 55; Gorrill v. Whittier, 3 N. H. 265; Blanchard v. Goss, 2 N. H. 491.

4. Armstrong v. Grant, 7 Kan. 285.

5. Lawther v. Agee, 34 Mo. 372.

Regularity is Presumed, in an appel-

late court, of a default taken at trial

tate court, of a default taken at trial term. Voorhis v. French, 47 N. Y. Super. Ct. (15 J. & S.) 550.

6. See Ryder v. Twiss, 4 Ill. (3 Scam.)
4; Jennings v. Greenwald, 20 Ind. 408; Wilhelm v. Bull, 19 Ind. 227; Walpole v. West, 18 Ind. 81; Obenchain v. Comegys, 15 Ind. 496; Wade v. De Leyer, 40 N. Y. Super. Ct. (8 J. & S.) 541; s. c., 63 N. Y. 318.

But a default taken at a special term

But a default taken at a special term will not be opened at the same term, in the absence of the party who took it, where the party suffering it did not attend until late in the term, and then judgment and no motion to modify it, no objection is available on appeal or review, however erroneous the judgment may be, even on judgment by default. After delaying two terms without showing reason for such delay, the party cannot disturb the judg. ment.2 If there was an error in entering a judgment, the court at a subsequent term cannot set it aside, unless it was entered by misprision of the clerk, by fraud, or the like.³ But a default rendered in an attachment on publication should be set aside on application of the defendant at any time before damages are assessed, upon proper terms.4 And one who was proceeded against as an absentee, though not in fact such, may defend at any time before sale under the decree. In such case, however, it is not necessary to vacate the decree in the first instance, but it may stand until the hearing. Notice of a motion to set aside a default is not required when made at the term when judgment was rendered, but is required when made at a subsequent term.7

·found his default had been taken. He must move at the next term. Mather v.

Opening and Setting Aside.

Wardell, I How. (N. Y.) Pr. 172.

Entering Judgment When Answer on
File—Setting Aside.—Entering a judgment by default while there is an answer on file undisposed of, is an irregularity, which may be set aside on motion at a subsequent term. Nooman v. Hooker,

35 Mo. 366. Under California Practice Act 1850, Sec. 68, an application to a district court to set aside a judgment is not restricted by any limited time, and need not be made in any particular form. People v. Lafarge, 3 Cal. 130.

In Illinois, motion to set aside a default does not come within the provisions act the act of July, 1837. Gillet v. Stone,
2 Ill. (1 Scam.) 539; Wallace v. Jerome,
2 Ill. (1 Scam.) 524.
In Indiana.—Under section 99 of Code,

a relief against a judgment by default may be obtained without a complaint or answer, and must be heard on motion and affidauits. Lake v. Jones, 49 Ind.
297; Kemp v. Mitchell, 29 Ind. 163;
Ratliff v. Baldwin, 29 Ind. 16.
In Iowa—Service by Publication; Ex-

ecutor's Sale.—In a proceeding for the sale of real estate by an executor, wherein the probate court prescribes the same notice as is provided by statute on ordinary cases, a defendant in the proceeding, who has been served by publication only, is entitled to avail himself of the provisions of section 3160 of the Revision, and may thereunder have the order of sale made on default set aside, on motion therefor at any time within two years after making such order. Huston v. Huston, 29 Iowa, 347.

Service by Publication and Judgment by Default — Defendant appealed to the supreme court, where the judgment was affirmed upon the ground that no motion had been made in the court below for a new trial, as provided by section 3160 of the Revision of 1860. Held, that the judgment of affirmance did not affect the defendant's right to make the motion in the court below, within the time pre-scribed by said section. Berryhill v. Jacobs. 20 Iowa. 246.

Aside Default-Remedy, -Setting Where judgment is by default, steps should be taken to set it aside or to review before appeal. Jennings v. Greenwald, 20 Ind. 408; Willhelm v. Bull, 19 Ind. 227; Walpole v. West, 18 Ind. 81; Obenchain v. Comegys, 15 Ind. 496.

1. American Ins. Co. v. Gibson, 104
Ind. 336; s. c., I'West. Rep. 834.
2. Ryder v. Twiss. 4 Ill. (3 Scam.) 4.
Fourteen Years' Unexplained Delay in

moving to open a judgment held laches, justifying a denial of the motion. Wade v. De Leyer, 40 N. Y. Super. Ct. (8 J. & S.) 541; see s. c., 63 N. Y. 318.

3. Medford v. Dorsey, 2 Wash. C. C.

4. Sloan v. Forse, 11 Mo. 126. 5. Jermain v. Langdon, 8 Paige Ch. (N. Y.), 41.

6. Lake v. Jones, 49 Ind. 297; Burnside v. Ennis, 43 Ind. 411; Yancy v. Teter, 39 Ind. 305. But it is required if made after term. Lake v. Jones, 49 Ind. 297: Burnside v. Ennis 43 Ind. 411.

Notice to Adverse Party. - Perhaps adverse party is entitled to notice of a motion to set aside a default. Martindale v. Brown, 18 Ind. 284.

7. Yancy v. Teter, 39 Ind. 305.

(c) Application Where and How Made.—An application to open or set aside a default may be by motion or on complaint; and the evidence may consist of affidavits, depositions, or oral testimony. No answer is required. An application to set aside a judgment taken on default is not governed by the practice on motion for new trial.² No notice to an adverse party of the intention to make a motion to set aside a default is necessary when he is present by his counsel at the time the motion is made.3

An action cannot be revived and tried at the same term except by consent of the parties. An order of revivor must be entered, and be served as a summons, and the action continued until a rule

day has passed.4

2. UPON EXCUSE AND AS A FAVOR.—a. Sufficiency of Excuse. -(1) What is Sufficient.—Where a proposed defence is not clearly

An Order Opening Default on Appeal contained the words, "appeal to be heard at the next S. general term without further notice, on condition, etc." Held. that the appeal might be brought on at an earlier general term in another county. Brotherson v. Consalus, 28 How. (N. Y.) Pr. 117.

1. Nord v Marty, 56 Ind. 531; Lake

v. Jones, 40 Ind. 207.

On Demurrer to Complaint Filed .- When party applying for such relief files a complaint, to which a demurrer is filed, cause is submitted on facts alleged. Nord v.

Marty. 56 Ind. 531.

An Affidavit in support of a motion to set aside a default, is not part of the record unless made so by bill of exceptions. Clegg v. Patterson, 32 Ind. 135; Clegg v. Fithian. 32 Ind. 90; Whiteside v. Adams, 26 Ind. 250; Thompson v. White,

18 Ind 373.

Valid Defence.—If a defendant has a valid defence which he neglects to make, he cannot, after judgment against him, obtain equitable relief from the judgment.

Jackson v. Patrick, 10 S. C. 197.

In Illinois it is the rule of practice, whenever a party desires to move to reinstate a cause on the docket, or to set aside a default, and predicates his motion upon an affidavit, to require him not only to give the adverse party notice of his intended motion, but also a copy of the affidavit. Hall v. O'Brien, 5 Ill. (4 Scam.) 405.

In Indiana. - An application for relief against a judgment taken on default, under last clause of amended section 99, must show that (1) the party applying has a meritorious case, and (2) set forth facts showing grounds on which relief is asked; all duly supported by affidavits. Former point cannot but latter may be controverted at hearing of application.

Nord v. Marty; 56 Ind. 531; Lake v. Jones, 49 Ind. 297; Buck v. Havens, 40 Ind. 221; Phelps v. Osgood, 34 Ind. 150; Hayes v. Bank of State, 21 Ind. 154.

In Iowa-Application to Set Aside Default.-The filing within the time specified of a motion in the clerk's office, by a defendant served by publication, to have the cause retried, is a sufficient compliance with section 3160 of the Revision, which provides that the defendant may, within two years from the rendition of the judgment, "appear in court and move to have the action retried." Conklin v. Johnson, 34 Iowa, 267. to publication of this section, see Gilruth v. Gilruth, 20 Iowa, 225.

An application to set aside a default granted for want of an answer should be accompanied by an answer or some sufficient excuse for presenting the same.

Thatcher v. Haun, 12 Iowa, 403.
In New York.—Where a motion is made to open a default at general term. for irregularity in obtaining the judgment or order there, and the point was not before that court; or if the judgment or order was regular, and the party seeks to excuse his default,—the application may be made to the special term where the motion requires a reconsideration of the adjudication at general term. Ayres v. Covill, 9 How. (N. Y.) Pr. 573.
2. Robertson v. Bergen, 10 Ind. 402.

3. Hill v. Crump, 24 Ind. 291.

Objection to Service. - Where the attorney puts his refusal to receive a paper as duly served, upon a specific ground, he cannot resist the motion to vacate the default upon any other ground. Vandeventer v. Phillips, 7 Hill (N. Y.), 143; Royce v. Mott, 1 How. (N. Y.) Pr.

4. Hamilton v. Sals, I West. L. Mon. 403.

frivolous or technical, is set up in good faith, and the neglect is satisfactorily excused, a default will be opened up almost as a matter of course.1

1. Mason v. McNamara, 57 Ill. 274; Monroe v. Paddock, 75 Ind. 422; Slagle v. Bodmer, 75 Ind. 330; Hakes v. Shupe, 27 Iowa, 465; Harrison v. Kramer, 3 Iowa, 554; Thompson v. Erie R. R. Co., 9 Abb. (N. Y.) Pr. N. S. 233; Commissioners of Excise v. Hollister, 2 Hilt. (N. Y.) 588; Clark v. Lyon, 2 Hilt. (N. Y.) 91; Selover v. Forbes, 22 How. (N. Y.) Pr. 477

What Must be Shown on Application .-On an application to open a judgment by default, it should be shown that there was a good defence and a good reason why it was not set up at the proper time. Cogswell v. Vanderburgh, I Cai. (N. Y.) 156; McKinstry v. Edwards, 2 Johns. Cas. (N. Y.) 113; s. c., Col. & Cai. Cas. (N. Y.) 125; Spencer v. Webb, 1 Cai. (N. Y.) 118; Watson v. Newsham, 17 Tex. 437. But on a motion to open a default the court will not determine absolutely whether the defence interposed will be sufficient at the trial, but merely see that it is not frivolous. If set up in good faith and the negligence excused, a party will be let in to answer as of course. Commissioners of Excise v. Hollister. 2 Hilt. (N. Y.) 588.

Reason for Absence. - A judgment rendered in a case called in its order on the calendar, and tried in the defendant's absence, may be set aside on his motion, if he shows a good reason for his ab-sence; or if either affidavit or answer shows any defence to the action on the merits. Holden v. Kirby, 21 Wis. 149.

Money Lost at Gaming .- The defence that the money sought to be recovered was money lost at play, is no exception to the general rule that a party asking leave to open default and interpose a defence must show an excuse for the Cowton v. Anderson, I How. default. (N. Y.) Pr. 145.

Defaults taken on motion at special term are opened as a matter of course on excuse being shown. Thompson v. Erie R. R. Co., 9 Abb. (N. Y.) Pr. N. S.

After a Motion for a Default is Regularly Filed the party against whom it is entered can be permitted to plead only upon showing a reasonable excuse for such default. Hakes v. Shupe, 27 Iowa, 465: Harrison v. Kramer, 3 Iowa, 554.

Appearance. - An appearance of a party and offer to file an answer in obedience to an order of the court is a technical appearance, and amounts to a motion for leave to file. If default be entered up against him he may move to set it aside. Tennison v. Tennison, 49 Mo. 110.
When Cause has been Remanded.

entitle the defendant to have the default set aside when the cause is remanded he should make a reasonable excuse for suffering the default, and show that he has a defence to the merits, which should be verified by affidavit. Nelson v. Hubbard.

13 Ark. 253.

As to Excuses for Defaults and terms of opening, see Olney v. Bacon, 3 Cai. (N. Y.) 132; Giles v. Caines, 3 Cai. (N. Y.) 107; Beekman v. Franker, 3 Cai. (N. Y.) 95; Lansing v. Horner, 3 Cai. (N. Y.) 95; Thompson v. Payne, 3 Cai. (N. Y.)
88; Mayor, etc., of New York v. Sands,
2 Cai. (N. Y.) 378; ε c., Col. & Cai. Cas.
(N. Y.) 420; Ludlow v. Heycraft, 2 Cai.
(N. Y.) 386; People v. Freer, 1 Cai. (N. Y.) (N. Y.) 386; People v. Freer, I Cai. (N. Y.) 394; Cogswell v. Vanderbergh, I Cai. (N. Y.) 156; Steele v. Tennent, I Cai. (N. Y.) 68; Hudson v. Henry, I Cai. (N. Y.) 67; Gardinier v. Crocker, Col. & Cai. Cas. (N. Y.) 481; Wilson v. Guthrie, Col. & Cai. Cas. (N. Y.) 477; Thompson v. Payne, Col. & Cai. Cas. (N. Y.) 447; Ludlow v. Heycraft, Col. & Cai. Cas. (N. Y.) 441; Ludlow v. Heycraft, Col. & Cai. Cas. (N. Y.) 420; Knywles v. Poillon, I How (N. Y.) 429; Knowles v. Poillon, I How. (N. Y.) Pr. 252; Travis v. Hadden, I How. (N. Y.) Pr. 57; Namee v. Jones, I How. (N. Y.) Pr. 55; People v. Mayor, etc., of Brooklyn, I How. (N. Y.) Pr. 53; Wilmarth v Gatfield, I How. (N. Y.) Y.) Pr. 52; Harker v. McBride, I How. (N. Y.) 41; Van Elten v. Hurst, I How. (N. Y.) Pr. 26; Smith v. Reid, I How. (N. Y.) Pr. 26; Smith v. Reid, I How. (N. Y.) Pr. 23; Clark v. Rawson, I How. (N. Y.) Pr. 17; Steer v. Head, I How. (N. Y.) Pr. 17; Steer v. Head, I How. (N. Y.) Pr. 15; Corning v. Tripp, I How. (N. Y.) Pr. 14; Varnum v. Wheeler, I How. (N. Y.) Pr. 11; Fenton v. Garlick, 6 Johns. (N. Y.) 287; Bennet v. Fuller, 4 Johns. (N. Y.) 486; Livingston v. Livingston, 3 Johns. (N. Y.) 254; Russell v. Ball, 3 Johns. Cas. (N. Y.) 91; Stafford v. Cole, I Johns. Cas. (N. Y.) 413; s. c., Col. & Cai. Cas. (N. Y.) 110; Butler v. King, 10 Wend. (N. Y.) 561.

In Indiana.—On a petition to set aside a judgment by default, under 2 Indiana

a judgment by default, under 2 Indiana Revised Statute 1876, p. 82, sec. 99, the party must show a meritorious defence, in addition to a reasonable excuse; and the facts constituting such defence must be fully stated so that the court may judge whether such defence exists. Slagle v.

Thus where the failure to appear was the result of accident. or mistake,2 or by the act or omission of the other party;3 by ignorance: 4 by the severe and dangerous illness of the party him-

But the fact that Bodmer, 75 Ind. 330. defendant was detained at home, sixteen miles from the county-seat, by the serious illness of his wife, was held a good excuse. Slagle v. Bodmer, 75 Ind. 330. And where the court opened at eight o'clock on the return day, and entered default and judgment, and defendant reached the court-house at nine o'clock, having been obliged to ride from home. eleven miles distant, in a buggy, there being no public conveyance, and after reaching the court-house he employed an attorney and filed an affidavit showing a good defence, was held a sufficient excuse to warrant the opening of the default. Monroe v. Paddock, 75 Ind. 422.
Under Mississippi Laws, August 23,

1865, ch. 7, sec. 3, any judgment rendered in the circuit courts since Ianuary 9, 1861, and before August 23, 1865, may be set aside upon affidavit of the party against whom it was rendered that he was unavoidably absent, had no attorney in court, and believes the judgment is unjust. Walker v. Hasser, 41 Miss! 90.

In New York, a default and judgment thereon, under the statute to compel the determination of claims, will be set aside for good cause, the Provost, 3 Abb. (N. Y.) Pr. 446; Platt v. Torrey, 18 Wend. (N. Y.) 572.

1. See Cavanaugh v. Toledo, W. & W. R. Co., 49 Ind. 149; Macomber v. Mayor, etc., of New York, 17 Abb. (N. Y.)
Pr. 36; Stoppelfeldt v. Milwaukee, M. &
B. R. Co., 29 Wis. 688; Omro v.
Ward, 19 Wis. 232.

Detention by Railway Accident.-An affidavit that the defendant was prevented from being present at the trial of the cause by an unavoidable railroad accident, shows a sufficient ground for vacating a judgment against him on default if it appears that he had a good defence.

Omro v. Ward, 19 Wis. 232.

Attorney Detained by.—The facts here held to show good ground for relief from a judgment rendered in default of the appearance at the trial of the party's attorney, who had the sole management of the cause, and who was prevented from attendance by detention of trains, although his law partner, who was unfamiliar with the facts of the cause, appeared and made a technical objection to the hearing, and Stoppelfeldt v. Milwauthen withdrew. kee, M. & G. B. R. R. Co., 2) Wis. 688

2. Robertson v. Bergen, 10 Ind. 402: Macomber v. Mayor, etc., of New York, 17 Abb. (N. Y.) Pr. 36; Johnson v. Eldred, 13 Wis. 482.

Mistake as to Court in which Answer to be Filed .- An affidavit that the party defaulted mistook the court in which his case was pending does not show mistake, surprise, or excusable neglect for which a judgment may be set aside by statute. Robertson v. Bergen, 10 Ind. 402.

Mistake as to Time within which Answer to be Filed, -On motion to set aside a default, affidavits of the defendant showed a good defence, and stated that it was necessary for him to make inquiries at different places in order to ascertain facts preparatory to his defence, and that in consequence of the multitude and character of his business engagements calling him away from home he mistook the time within which he was allowed to answer. The application was made with due diligence. Held to be a case of such "mistake," "inadvertence." or "excusable negligence" as entitled the defendant to the allowance of his motion.

Johnson v. Eldred, 13 Wis. 482.

3. A default of plaintiff may be set aside on account of excusable neglect of plaintiff by being detained from the trial by accidents or delay of opposite party in running its trains. Cavanaugh v. Toledo, W. & W. R. Co., 49 Ind. 149.

4. McGaughey v. Woods, 92 Ind. 296; Union Dime Savings Inst. v. Clark, 59 How. (N. Y.) Pr. 342; Bertline v. Bauer,

25 Wis. 486.
Default Occasioned by Ignorance, etc.-An order vacating a judgment and default, and permitting defendants to file an answer on terms, held properly granted here on the ground that the default was shown to have been occasioned by ignorance, and the confounding of civil and criminal proceedings together; and this, though the summons had been personally served, and though defendant did not serve his answer with the motion papers, but merely made an affidavit of merits. Bertline v. Bauer, 25 Wis. 486.

Ignorance of Our Language, etc —On

application to set aside a default made within two years after judgment of foreclosure, and not made by the party, it appeared that the applicant was ignorant of our language, knew of no summons having been made, would not have known if there had been, that her first self. of his family. or of his attorney: 3 by absence in the actual military service of the State or the United States, 4 or in a State's prison: 5 by compulsory attendance before the grand jury, 6 or on

knowledge was after sale to the judgment plaintiff, and that she had a good defence. Held, that the default should be set aside. McGaughev v. Woods, 92

Ind. 296.

In Mortgage Foreclosure—Ignorance of Usury.—A default suffered by a second mortgagee, by reason of his ignorance of the fact of usury in the first mortgage, may be opened to allow him to plead it. Union Dime Savings Inst. v. Clark, 50

How. (N. Y.) Pr. 342.

1. See Luscomb v. Maloy, 26 Iowa, 444; Depriest v. Patterson, 85 N. C. 376;

Goodhue v. Meyers, 58 Tex. 405. Sickness of Defendant .- But where, on motion to open a default, it appeared that defendant was sick and unable to leave home when the summons was served, and that he then expressed to the officer a doubt as to whether he was the person meant, on which the officer promised that if, upon inquiry, he found that the summons was not intended for defendant, he would notify him. held. that the motion was properly denied. Depriest v. Patterson, S5 N. C. 376.

In Indiana. - A complaint under Indiana Rev. Stat. 1881, § 396, for relief from judgment, which shows that the party had a good defence, and was prevented from being at court in time by sickness in her family, and a change of the hour for the convening unknown to her, it was held sufficient. Flanagan v.

Patterson, 78 Ind. 514.

In Iowa. - Where a party intending to appear and defend an action was attacked with a severe and dangerous sickness some time before the term of court, and continued ill so that he was unable to attend to his case until after the court had adjourned, and it sufficiently appeared that he had a valid defence, held to be good ground, under Iowa Rev. Stat. § 5499. for a vacation of the judgment rendered by default. Luscomb v. Maloy, 26 Iowa,

444. 2. Monroe σ. Paddock, 75 Ind. 422;

Skinner v. Bryce, 75 N. C. 287.

Sickness of Members of a Defendant's Family may be a ground on which the judge, in his discretion, may grant a continuance; but it is not such a surprise, mistake, etc., as warrants opening a default. Skinner v. Bryce, 75 N. C. 287.

3. See Bristor v. Galvin, 62 Ind. 352; Stout v. Lewis, 11 Mo, 438; Wilmarth v. Gatfield. 1 How. (N. Y.) Pr. 52; Goodhue v. Meyers, 58 Tex. 405.

Sickness of the Attorney is a sufficient Wilmarth v excuse to open default. Gatfield, 1 How, (N. Y.) Pr. 52.

Sickness of Attorney's Family. - Where a party had a meritorious defence, and a judgment by default rendered against him, and it appeared that he had employed an attorney to make his defence. and that his attorney had been in attendance in court until the trial of another case had commenced, and then only left to attend his sick family, and while so absent for a short time the suit which had been on trial was suddenly terminated by a compromise, by reason of which the judgment by default was rendered, held, that the judgment by default will be set aside. Stout v. Lewis, 11 Mo. 438.

In Indiana .- Failure of a party's counsel by reason of sickness to attend the case is, within 2 Indiana Rev. Stat. p. 82, § 99, an "inadvertence" wherefor a judgment by default may be set aside, no want of due diligence being shown. Bristor v. Galvin, 62 Ind. 352.

4. In the Military Service —The Intent of the Missouri Acts of May 15, 1861, and March 17, 1863, is only to prevent the plaintiff from deriving any other benefit from the suit than to avoid the bar of the Statute of Limitations during the defendant's absence. Hence where a defendant, being constructively served with legal process, did not appear at the return term of the writ, and judgment and execution were accordingly obtained upon default, the judgment was set aside two years afterward upon the defendant's appearing and filing a motion alleging that at the time of the commencing of the suit, and also at the time of the judgment, he was in the actual military service of the State and the United Piper v. Aldrich, 41 Mo. 421. States.

5. A Convict. - If a party is deprived of a meritorious defence by being in a State's prison, the court may on a proper application after his release open the default and vacate the judgment, when it can be done without prejudice to the right of the adverse party. Bonnell v. Rome, W. & O. R. R. Co., 12 Hun (N. Y.), 218; Phelps v. Phelps, 7 Paige Ch. (N. Y.) 150.

6. Attendance Before a Grand Jury .-Where, on the second day of the term of a court, the defendant in a suit in which no answer had yet been put in, was compelled to appear before the grand jury, a Federal court; 1 by pressing business engagements; 2 by neglect or omission of the clerk of the court; 3 by stipulation between the parties, by a settlement, or pending negotiations for a settlement; by the pendency of a petition by plaintiff for relief; by a change in the time of holding court where there was not actual notice; by an announcement that the case would not be tried:9

and was still before them when the court adjourned at a time earlier than usual, and did afterwards file his answer with the clerk on the same day, the court held that he was entitled to have a judgment by default rendered against him on the said second day of the term set aside. Frazier v. Bishop, 29 Mo. 447.

1. Attendance on Federal Court.—A

defendant against whom a judgment by default was taken disclosed, in his motion to set aside the judgment and for a new trial, a good defence, and that his failure to appear in obedience to the process of court was on account of his compulsory attendance on the Federal court elsewhere. Held error to overrule the motion. Tullis v. Scott, 38 Tex. 537.

2. Business Engagements and advertences. -- The excuse for default shown, consisting of pressing business engagements and inadvertence, allowing the time for answer to elapse while fully intending to defend, held sufficient to require that the default be set aside. .John-

son v. Eldred, 13 Wis. 482.

In Indiana. -- On a motion to set aside a judgment by default, the affidavit set forth that defendant was a resident of an adjoining State, and was not served, etc.; that the other defendants were accommodation parties; that a previous suit had been dismissed by agreement; that at the commencement of the present action he was absent from home, and as soon after being informed of the suit by co-defendants as he could possibly leave his business he returned home and found himself defaulted; that the other defendants did not understand his defence, and supposing the matter had been arranged, made none; that he had no attorney, having after the dismissal of the suit aforesaid discharged his attorney; that he was misled by the agreement of statement, etc. Held, not a case of "excusable neglect" under Indiana Code, § 99, and the motion was refused. v. Bank of the State, 21 Ind. 154.

3. Ex parte Sawtell. 23 Mass. (6 Pick.) 110; Wynne v. Prairie, 86 N. C. 73. Compare Francks v. Sutton, 86 N. C. 78.

Neglect or Omission of the Clerk of the Court. - Defendant had twice called on the clerk to enter upon the docket the name of the attorney whom he had employed, and the clerk promised to do so. The attorney himself applied to the clerk to examine the plaintiff's complaint, but was unable to see it, and during the balance of the term was absent in obedience to the summons as a witness. Held, on motion to set aside the judgment, the defendant's neglect was excusable. Wynne v. Prairie, 86 N. C. Compare Francks v. Sutton, 86 N. Č. 78.

Where the defendant in an action in the justice's court was defaulted in consequence of the clerk's forgetting to enter his appearance on the docket, but no judgment was entered up, it was held that the justices had power at their discretion at a subsequent term-day to take off the default, and to order the cause to stand for trial. Ex parte Sawtell, 23 Mass. (6 Pick.) 110.

4. A Stipulation which was not reduced to writing may be set up to excuse a default, but not to impeach its regularity. Wager v. Stickle, 3 Paige Ch. (N. Y.)

5. Settlement of Case. - Affidavits that before the term in which the case was to be tried the case was settled; that the defendant, obliged to leave the State, directed his agent to employ counsel, but that by mistake of the agent there was no appearance-are, when presented two days after judgment, ground for setting aside the default. Alvord v. Gere, 10 Ind. 385,

6. Negotiations for a Settlement .- A motion setting aside a judgment and default, and permitting a defendant to answer on the ground that his negligence had been caused on plaintiff's promise to call at his office and fix the matters up (the motion papers showing merits), held properly granted in this case. Stafford v. McMillan, 25 Wis. 566.
7. Because there is something of sur-

v. Sands, 2 Cai. (N. Y.) 378; s. c., Col. Cai. Cas. (N. Y.) 420.

8. Frazier v. Williams, 18 Ind. 416.

9. Misleading Announcement as a Trial

of Cause. - An affidavit in support of a motion to set aside a default disclosing a defence, and showing that the defendant and his counsel had been in attendance until the judge announced that the case

by reason of failure to notify the defendant's attorney in accordance with an established custom; 1 by brief delay in responding when notified by telephone.2

In a suit against a company where service was made on a local agent of the proper person to have the matter in charge, and a default taken, it will be set aside on showing of a meritorious de-

A default will be set aside where the defendant relied on the assurance of a co-defendant and competent counsel that the codefendant's answer was a perfect defence and would protect both: or where he relied on the statement of the plaintiff's assignor as to the purpose of the suit.⁵ And a judgment by default will be set aside on the application of a receiver where there is a showing of a probable fraud, collusion, or a defence. A default will be

would not be tried at that term, and that upon the faith thereof they left court, and an attorney acting as a judge allowed the default, shows a cause for setting aside the default, and is a basis for a summary disposal of the application under the Indiana Code, § 99. Ratliff v. Baldwin,

29 Ind. 16.

On a motion to set aside a default, evidence that default was taken on the third day of the term, that defendant was told that the case would not be tried that term, and that his co-defendant would see to his defence, and that at the time default was taken he was looking for said co-defendant, it was held that the trial court did not abuse its discretion in setting aside the default. Cruse v.

Cunningham, 79 Ind. 402.

1. Failure to Notify Defendant's Counsel of Calling of Cause. - Where it is the custom of the court to send the crier to notify the defendant's attorney of the calling of a cause when he is not in the court room, but can be found elsewhere in the building, evidence is admissible, on a motion to set aside a default to show that when the cause was called the attorney was in one of the other rooms of the building, though he did not receive notice. Gernon v. Handlin, 13 La. An.

2. Hinman v. C. H. Hamilton Paper

Co., 53 Wis. 169

3. Houston & T. C. R. R. Co. v. Burke,

55 Tex. 323; s. c., 40 Am. Rep. 808.
4. Judgment will be set aside to let in the defence peculiar to such defendant. Wicke v. Lake, 21 Wis. 410.

It appeared that C. signed the under-taking upon which he was now sued, upon the representation of H. that the sole consideration of the note declared upon in the attachment suit was a gambling debt, and he, H., could and would

defend the action on that ground; that H., instead of defending the action, and by collusion with the plaintiff for the purpose of cheating and defrauding C., suffered a judgment to be taken against him; that H. frequently represented to C. that the matter was settled, and that he need not trouble himself about it, etc. : that he was actually induced by these representations, made by procurement of the plaintiff, to neglect to file his answer in time. Held, that this was excusable neglect. Evans v. Cook, 11 Nev. 60.

Where the Complainant's Name had been Forged to a Note and he was Sued upon it, and one of the makers of the note sent him word that he need not trouble himself about the note; the other makers would pay it. The sheriff also told him that there was no necessity for his appearing at the first term. other makers put in a plea for all at the return term, and the complainant was sick, and unable to attend or employ counsel. But the other makers withdrew their plea, and allowed judgment to go by default. Plaintiff knew that complainant's name was forged. Held, that the complainant was not guilty of such negligence as would preclude him from having the judgment at law set aside by a bill in equity. Rowland v. Jones, 2 Heisk. (Tenn.) 321.
5. Birch v. Frantz, 77 Ind. 199.
6. Application by Receiver.—Where

the president of an insolvent national bank, the assets of which were in the receiver's hands, was served with summons in a suit against the bank, and suffered judgment by default to be taken without informing the receiver of the directors, held, that an application by the receiver within a month of the entry of judgment, and of notice to him to have the default opened, should be grantopened on a second motion after refusal of the first, on a proper showing. 1

Security Bank of New York v. National Bank of Commonwealth, Hun (N. Y.), 287; s. c., 4 T. & C. 518.

An affidavit by the book-keeper of the bank that a larger part of the claim for which judgment was entered did not appear to plaintiff's credit on the books of the bank, and affidavits of ten of the defendant's directors that they had no knowledge or information of the existence of the loan to the bank which plaintiff asserted, and some evidence that the loan was a personal one to the defendant's president, held a sufficient affidavit of merit. Security Bank of New York v. National Bank of Commonwealth. 2 Hun (N. Y.), 287; s. c., 4 N. Y. Supr. Ct. (4 T. & C.) 518.

1. Second Motion to Open.—After a mo-

tion to open a default on excuse shown had been denied, held, that the court might in its discretion grant a second motion on papers setting up additional matters as an excuse for the delay in making the first motion Fowler v. Huber, 7 Robt.

(N. Y.) 52.

2. Advice of Counsel.—A regular judgment suffered by default, under advice of counsel that there was no defence, upon a full knowledge of all the facts, should not be set aside without a full and clear affidavit, explaining on what particular ground the defence rests, and the nature of the counsel's mistake. Ellis v. Jones, 6 How. (N. Y.) Pr. 296.

Where one having a paramount title to 100 acres of certain mortgaged lands, and an interest in the residue, subject to the mortgage, had neglected to answer to a bill of foreclosure, because assured by couns lacquainted with the facts set up in the mortgagor's answer that it presented a complete defence, the judgment of foreclosure and sale was directed to be set aside and his answer let in.

Wicke v. Lake, 21 Wis. 410.

Advice of Foreign Counsel.—The fact that, through the advice of foreign coun sel followed by the corporate officers in good faith, an honest defence was not interposed, held to be proper ground for setting aside a judgment by default and letting in a foreign corporation to plead. National Condensed Milk Co. v. Bran-

denburgh, 40 N. J. L. (11 Vr.) 111.

Advice of Plaintiff's Counsel.—That the defendant was advised by the plaintiff's attorney that he had no defence to the

A default will be excused by showing that default was suffered because of the advice,2 mistake,3 negligence,4 or sick-

> action (when in fact he had), and that he was thereby dissuaded from entering an appearance or making a defence, held, to constitute a reasonable excuse for failing to appear and suffering a default. Ordway v. Suchard. 31 Iowa, 481; State 2. Elgin, 11 Jowa, 16.

> 3. Walsh v. Walsh, 114 Ill. 656; s. c., Walsh J. Walsh, 114 In. 250, St. V. V. V. V. V. Toledo, W. & W. R. Co., 49 Ind. 149; Mann v. Provost, 3 Abb. (N. Y.) Pr. 446; Ellis v. Jones, 6 How. (N. Y.) Pr. 296; English v. English, 87 N. C. 497; Wicke v. Lake,

21 Wis. 410.

Mistake of Attorney .- A default was entered and judgment obtained, because of the mistake of the defendant's attorney in supposing that after entering an appearance he would have sixty days within which to file an answer, in accordance with the rule in the county in which he ordinarily practised. Held, that defendant, upon filing an affidavit stating a prima facie defence, was entitled to an order setting the judgment aside. lish v. English, 87 N. C. 497.

Where, on motion to open a regular judgment on failure to answer, it appeared that an answer was prepared in season, but was not served because defendant's counsel believed that plaintiff's proceeding was irregular, and that he made repeated efforts to see plaintiff and have irregularity corrected, but failed, and understood from plaintiff's attorney that no further steps would be taken until he had an opportunity of seeing plaintiff, held a case of surprise or excusable neglect that authorized the court to open the judgment upon terms. Mann v. Provost, 3 Abb. (N. Y.) Pr. 446.

When by Mistake the Successor to a Deceased Attorney fails to appear at the term at which the case is placed on the calendar, it is in the discretion of the court to vacate the judgment therein. Walsh v. Walsh, 114 Ill. 656; s. c., I

West. Rep. 924.

4. Thompson v. Goulding, 87 Mass. (5 Allen) 82; Nash v. Wetmore, 33 Barb. (N. Y.) 159; Curtis v. Ballagh, 4 Edw. Ch. (N. Y.) 639; Clark v. Lyon, 2 Hilt. (N. Y.) 91; Philips v. Hawley, 6 Johns. (N. Y.) 129; Tripp v. Vincent, 8 Paige. Ch. (N. Y.) 180; Millspaugh v. McBride, 7 Paige Ch. (N. Y.) 180; Soy; s. c., 34 Am. Dec. 360; Meacham v. Dudley, 6 Wend. (N. Y.) 514; Bradford v. Coit, 77 N.C. 72;

ness¹ of counsel. So also would a misunderstanding of counsel² or a misapprehension between a defendant and his counsel as to the latter's employment; 3 misinformation of counsel as to time when case was to be tried.4 or as to character and residence of de.

Griel v. Vernon, 65 N. C. 76; Hanson v. Michelson, 19 Wis. 498; Babcock v. Perry, 4 Wis. 31. Vide infra. p. 496z48,

The Negligence of a Solicitor is good ground, though not of itself an imperative one, for the setting aside of a default, where the party himself has not been guilty of laches, and has a good defence in the suit, but not otherwise. Babcock v. Perry, 4 Wis. 31. Especially where otherwise he would be remediless by reason of the insolvency of the attorney. Meacham v. Dudley, 6 Wend. (N. Y.) 514.

Neglect of Attorney to Appear and File Pleas.-Where the defendant has employed an attorney to enter his pleas, and such attorney has neglected to do so, and the neglect of the client to examine the records, to see whether his pleas have been entered, is an excusable neglect authorizing opening the default. Clark v. Lyon, 2 Hilt. (N. Y.) 91; Bradford v. Coit, 77 N. C. 72; Griel v. Vernon, 65 N. C. 76.

In the Case of an Executor or Administrator, though a regular judgment has been obtained against him by default, and more than a term has elapsed, yet the court will set aside the default on payment of costs, to let in the defendant to plead, so as to prevent his being made liable de bonis propriis through the ignorance of his attorney. Philips v. Hawley, 6 Johns. (N. Y.) 129.

In North Carolina. - A judgment taken by default for want of a plea is, under the provisions of the North Carolina Code of Procedure, section 133, a surprise upon the defendant, when he has employed an attorney to file his plea, and the attorney has neglected to do so.

Griel v. Vernon, 65 N. C. 76.

In Wisconsin.—Neglect of a defendant's attorney to inform him that a cause has been noticed for trial would be ground, under sec. 38, ch. 125, Rev. Stat. 1858 (sec. 2832, Rev. Stat. 1878), for relieving him from default after judgment, and hence is good ground for granting him time to produce his witnesses on his application therefor made at the trial, af ter plaintiff's evidence has been put in without his appearance; and the facts that the plaintiff then states that he has other witnesess in court, whom he desires to ex-

amine if defendant offers any evidence. is no ground for refusing such application, where plaintiff does not show that such witnesses cannot be produced by him at a future date. Hanson v. Michel.

son, 19 Wis. 498.

1. Bristor v. Galvin, 62 Ind. 352; Stout v. Lewis, 11 Mo. 438; Wilmarth v. Gatfield, 1 How. (N. Y.) Pr. 52; Good-

hue v. Meyers, 58 Tex. 405.

2. Beatty v. O'Connor, 106 Ind. 81; s.

c., 3 West. Rep. 737.

Misunderstanding of Counsel.-In Beatty v. O'Connor the court say: "It is very evident that there was a misunderstanding all around, and that but for that misunderstanding, appellant's attorneys. as they were employed to do, would have defended the action. We think, therefore, that under the statute which provides that the court shall relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, the case is one of excusable neglect on the part of the appellant, and that he should be afforded an opportunity to defend. This conclusion is fully warranted by former decisions of this court. We need not extend this opinion to state the facts upon which the court acted in those cases. We content ourselves with the citations of some of the cases." Neitert v. Trentman, 104 Ind. 390; s. c., 2 West. v. Irentman, 104 Ind. 390; s. c., 2 West. Rep. 645; McGaughey v. Woods, 92 Ind. 296; Nash v. Cars, 92 Ind. 296; Taylor v. Watkins, 62 Ind. 511; Bristor v. Galvin, 62 Ind. 353; Cavanaugh v. Toledo, W. & W. R. Co., 49 Ind. 149; Harvey v. Wilson, 44 Ind. 231; Smith v. Noe, 30 Ind. 117; Hill v. Crump, 24 Ind. 291; Harvey v. Indiana C. P. R. Co., 18 Ind. Hannah v. Indiana C. R. R. Co., 18 Ind. 431; Frazier v. Williams, 18 Ind. 416; Alvord v. Gere, 10 Ind. 385.

3. Panesi v. Boswell, 12 Heisk. (Tenn.)

4. Announcement by Judge that Case would Not be Tried .- A default is properly taken off where counsel was told by the court that only criminal cases would be heard at the time, and counsel and client therefore went home. Ratliff v. Baldwin, 29 Ind. 16; Pickens v. Fox, 90 N. C. 369. And at a subsequent day a judge pro tem. allowed a default, and when their affidavit disclosed a defence. Ratliff v. Baldwin, 29 Ind. 16.

fendant; 1 unavoidable detention in the trial of another case, which was begun before defendant's case was called, 2 or a refusal to proceed in the case. 3

- (2) What is Not Sufficient.—Judgment by default will not be set aside to let in a defence which the party might have made had he used due diligence.⁴ As a general rule, the defendant can have no relief from a judgment rendered on default, unless he can show a good and meritorious defence,⁵ and good reasons why it
- 1. Foreign Transportation Co.—Libel for a collision was filed in September, the vessel attached in October, and default entered in November. Motion was made to set aside the default on a question of jurisdiction, argued and denied on the 4th of February. It appeared that respondents were a foreign transportation company, and the proctor was not apprised of the fact until March, when a motion to set aside was made. Held, that these facts sufficiently accounted for the laches. The Constitution v. Young America. I Newb. Adm. 107.

2. McArthur v. Slauson, 60 Wis. 293.
3. Refusal of Counsel to Proceed—Intervention of Stockholders of Corporation Defendant.—In an action against a corporation, judgment in which would be presumptive evidence against the stockholders in actions against them on their individual liability, the stockholders are interested to assist the defence; and if the attorneys of the corporation decline further defending on the ground of non-payment of their fees, the corporation may intervene; and at their instance the court will in a proper case relieve the corporation from default, and allow them to carry on the litigation. Peck v. New

York & L. U. S. M. S. Co., 3 Bosw. (N. Y.) 622. See s. c., 5 Bosw. (N. Y.) 226.

4. Weimer v. Morris, 7 Mo. 6.

5. United States v. Barnard, 1 Ariz.
31g; People v. Rains, 23 Cal. 127; Lee v. Basey, 85 Ind. 543; Jaeger v. Evans,
46 Iowa, 188; State v. Elgin, 11 Iowa,
216; Fritz v. Grosnicklaus, 20 Neb. 413;
Mills v. Miller, 3 Neb. 95; Macomber v.
Mayor, etc., of New York, 17 Abb. (N. Y.) Pr. 36; Catlin v. Latson, 4 Abb. (N. Y.) Pr. 248; Ferussac v. Thorn, 1 Barb.
(N. Y.) 42; McGaffigan v. Jenkins. 1
Barb (N. Y.) 31; Taylor v. Frost, 2 Den.
(N. Y.) 229; Catlin v. Billings, 13
How. (N. Y.) Pr. 511; White v. Featherstonhaugh, 7 How. (N. Y.) Pr. 257; Ellis v. Jones. 6 How. (N. Y.) Pr. 296; Tucker v. Black, 1 How. (N. Y.) Pr. 249;
Desobry v. Morange, 18 Johns. (N. Y.)
336; Rogers v. Beach, 18 Wend. (N. Y.)
533; Black v. Smith, 13 W. Va. 780;

Sayles v. Davis, 22 Wis. 225; Jenks v.

Garretson, 4 McL. C. C. 258.

Accident, Mistake, etc.—Default should not be opened unless the party has a good defence on the merits, and the omission to plead was the result of accident or mistake, without culpable negligence. Macomber v. Mayor, etc., of New York, 17 Abb. (N. Y.) Pr. 36.

Without allegation and proof that one

Without allegation and proof that one was prevented by some accident, mistake, trust or fraud from making a reasonable defence, he will not be relieved from a judgment by default rendered in a State court after his discharge in bankruptcy under proceedings instituted after the suit was brought. Coffee v. Ball, 49

Tex. 16.

A Default will Not be Set Aside, especially at a subsequent term, unless a sufficient excuse for the default is shown, accompanied by an affidavit of merits. McDonald v. Donaghue; 30 Iowa, 568. And the court is not required to set aside a default, even where the defendant has been guilty of no negligence, unless it is made to appear that he has a meritorious defence. Constantine v. Wells, 83 Ill. 102.

Admitting Good Cause of A tion as to Part.—An affidavit of merits averring that a specific sum should have been credited by plaintiff, is not a sufficient ground for opening a default, the plaintiff showing that defendant admitted the whole demand before the suit, and defendant making no excuse for not answering. White v. Featherstonhaugh, 7 How. (N. Y.) Pr. 357.

Where at the term after the return term the defendant being served afterwards appeared and moved on insufficient grounds to have the default taken off, and in his affidavit substantially admitted a good cause of action against himself, held, that a subsequent motion for the setting aside of the default and for leave to file an answer denying the facts claimed by the plaintiff, was properly overruled. Andrus v. Clark, 8 Iowa,

475. Where, in an action for money due upon an express contract, a defendant who is in default for want of an answer makes application for leave to file an anwer which states that "the defendant is indebted to said plaintiff in any sum whatever," and neither shows nor offers to show any excuse for his laches, it is not error for the court to refuse leave to file such answer, unless the defendant should verify the same as true. Johnson

v. Laughlin, 7 Kan. 359.

In Ejectment-Transfer of Interest --Where the defendants, after the commencement of an action in ejectment, and before default, had conveyed their interest in the land in controversy to another, who did not join in the motion or ask to have the action continued in the names of the defendants, held, that an order should be affirmed refusing to open the default. Moore v. Kellogg, 58 Cal. 385.

A Set-off is Not such a Meritorious **Defence**" as will justify setting aside a default. Wills v. Browning, 96 Ind. 149.

Sworn Answer of Respondent .- Where a bill has been taken for confessed, and final decree regularly entered, it will not be opened on the sworn answer of the respondent alone setting forth a defence, unless it also be shown that there is a probability that the defence may be established; and if from the answer itself the court is satisfied that the defence cannot be established, the decree will not Ferussac v. Thorn, I Barb. be opened. (N. Y.) 42.

On Demurrer to Specific Plea. - A judgment for the plaintiff on demurrer to a special plea, taken by default, will not be set aside though sufficiently excused. where there is a plea of the general issue under which the matter of the special plea can be given in evidence. Taylor

v. Frost. 2 Den. (N. Y.) 200.
On Frivolous Demurrer.—A default taken upon a motion to overrule a demurrer will not be opened if the demurrer Valleau v. Cahill, 1 City was frivolous.

Court (N. Y. City), 47.

To Let in Evidence in Mitigation of Damages. - Leave to answer after default may be denied if the object of putting in an answer is to enable the defendant to give evidence in mitigation of damages, since evidence in mitigation may be given by a defendant on the execution of a writ of inquiry. Hays v. Berryman, 6 Bosw. (N. Y.) 679; Saltus v. Kipp, 5 Duer (N. Y.), 646; Lane v. Gilbert, 9 How. (N. Y.) Pr. 150

What Defences will be Let in --- While a defendant was under a rule to plead, and was represented by two attorneys, a judgment by confession was entered.

At next term the defendant by his counsel moved to strike out the judgment as having been entered by mistake, and when he had a bona fide defence. He filed an affidavit to that effect, and also another affidavit alleging in addition that he had paid part of the pretended claim, or had a legal set-off for more than \$260. Held. that these affidavits were not a sufficient foundation to support the motion. Anders v. Devries, 26 Md. 222.

Where Defendant's Answer has been nut. in without Oath, it was held that his default should not be opened without his disclosing his defence and witnesses. Townsend v. Low, 4 Edw. Ch. (N. Y.)

Opening Ex Parte.-A default taken at a special term will not be opened at the same term in the absence of the party who took it, where the party suffering it did not attend until late in the term, and then found his default had been taken. He must move at the next term. Mather v. Wardell, I How. (N. Y.) Pr. 172.

Circumstances Considered to justify a refusal to take off a default entered under due notice that cases which have been upon the docket for one year, without any action in the same, will be dismissed unless good cause is shown to the con-Willey v. Durgin, 118 Mass. 65.

In Indiana. - On motion to set aside a default, and relieve from judgment, under 2 Ind. Rev. Stat. 1876, p. 82, sec. og, the affidavit showed that the default was taken November 6th, and that on November 4th and 5th defendant and his counsel had answer ready to be filed when the cause was called, but no reference was made to the day on which the default was taken, to explain the absence of counsel on that day. Held, not a case of excusable Bash v. Van Osdol, 75 Ind. neglect. 186.

Indiana Code, sec. 99, refers to cases in which the ground of relief is limited to the act of taking or rendering the judgment, as in cases of default, and does not look to errors occurring in the progress of a cause where both parties are present in court. Nelson v. Johnson,

18 Ind. 329.

10wa Code, sec. 1827, provides that a default shall not be set aside except upon an affidavit of merits, and a reasonable excuse shown. Held, that this applies to regular defaults, and not to cases where the default has been entered by mistake. Messenger v. Marsh, 6 Iowa,

Under Louisiana Act 1805, sec. 4, No. 26, a party could set aside a default only on showing, and not merely alleg-

was not seasonably interposed.1

ing under oath, that he had a good defence. Raoul v. Danbois, 2 Mart. (La.)

In Ohio. - That a defendant is out of the State at the time of the service of summons by leaving copy at his residence, and his ignorance of the pendency of the action until after judgment against him by default is not an "unavoidable casualty or misfortune" under section 534, 7, of the Code. Howard v. Abbey, I

West, L. Mon. 278.

In West Virginia .- In the absence of any showing of fraud, accident, or surprise, no relief will be granted by a court of equity against a judgment rendered by a court of law in West Virginia, based on a judgment rendered in Marvland on default of this complainant, if no other grounds of relief are presented than what he might have set up as a defence to the Maryland suit. It is not enough that his bill alleges adventitious mistake or surbill aleges aventuous instance of safe-prise; he must prove the allegations. Black v. Smith, 13 W. Va. 780. In Wisconsin.—A default cannot be

opened under sec. 38, ch. 125, Rev. Stat. 1858 (sec. 2832, Rev. Stat. 1878), unless a valid and meritorious defence is shown. Sayles v. Davis, 22 Wis. 225. And an answer showing such a defence must accompany the motion papers. Levy z.

Goldberg, 40 Wis. 308.

1. Lee v. Basey, 85 Ind. 543.

Omission to Plead or Answer was the result of accident or mistake without culpable negligence. Macomber v. Mayor. 17 Abb. (N. Y.) Pr. 36.

Not Set Aside when no Diligence is Shown .- Where a party is served with summons by a special deputy, who informs him that he is an officer in that case, and is given a copy of the summons showing the appointment of such deputy to serve the same, and he takes no steps to defend until after judgment is rendered against him by default, a motion by him to set aside the default will be properly overruled for want of diligence. Edwards v. McKay, 73 Ill. 570. The decision of the court below refus-

ing to set aside a default will not be reversed on appeal where the defendant's excuse really admits a want of diligence in preparing his case. Jarvis v. Worick,

10 Iowa, 29.

Neglect to Plead where there is a Meritorious Defence. - A default will not be set aside, even though the defendant has a meritorious defence, if it appears that he wilfully and grossly neglected to make such defence after being repeatA judgment by default should

edly informed by attorneys of the court of his rights, and of his duty as to make ing such defence. Thatcher v. Haun, 12 Iowa, 303; Duncan v. Gibson, 45 Mo. 352; Boernstein v. Heinrichs, 24 Mo. 26; Edwards v. Watkins, 17 Mo. 273; Zo, Edwalds v. Wakins, 17 Mb. 273, Carondelet v. Allen, 13 Mo. 556; Austin v. Nelson; 11 Mo. 192; Weimer v. Mor-ris, 7 Mo. 6; State v. O'Neill, 4 Mo. App. 221; Sang v. Lee, 20 Neb. 667; Smythe v. Kastler, 16 Neb. 264; Farper v. Mallory, 4 Neb. 447; Mills v. Miller, 3 Neb. 95; Orr v. Seaton, 1 Neb. 107; Miller v. Hild, 11 N. J. Eq. (3 Stockt.) 25; Metzger v. Waddell, 1 New Mex. 400; Voorhis v. French, 47 N. Y. Super. Ct. (15 J. & S.) 550; Macomber v. Mayor, etc., of New York, 17 Abb. (N. Y.) Pr. 36; Sheldon v. Campbell, 5 Hill (N. Y.), 508; Wilde v. New York & H. R.R. Co., 1 506; Wilde v. New York & H. K. C., 1 Hilt. (N. Y.) 302; Hawes v. Hoyt, 11 How. (N. Y.) Pr. 454; Cowton v. Ander-son, 1 How. (N. Y.) Pr. 145; Kivett v. Wynne, 89 N. C. 39; Norwood v. King, 86 N. C. 80; Cobb v. O'Hagan, 81 N. C. 203; Hodgin v. Matthews, 81 N. C. 280; 293; Hodgin v. Matthews, 51 N. C. 269; Burke v. Stokely, 65 N. C. 569; Howard v. Abbey (Ohio), I West. L. Mon. 278; Foster v. Jones, I McC. (S. C.) L. 116; Fanning v. Fly, 2 Cold. (Tenn.) 486; Coffee v. Ball, 49 Tex. 16; Tarrant v. Darling, 20 Tex. (Supp.) 399; Davis v. Darling, 20 Tex. (803; Jefferson Co. Bank v. Robbins, 67 Wis. 68; Stilson v. Hank v. Roddins, o7 Wis. 08; Suison v. Rankin, 40 Wis. 527; Grootemaat v. Tebel, 39 Wis. 576; Insurance Co. of North America v. Swineford, 28 Wis. 257; Ray v. Northrup, 55 Wis. 396; Sanderson v. Dox. 6 Wis. 164; Babcock v. Perry, 4 Wis. 31; Wagner v. Washington Mut. Ins. Co., 3 West. L. J. 305; Sherman County School District v. Lovejoy, 3 McCr. C. C. 558; s. c., 16 Fed. Rep. 323.

Money Lost at Gaming .- The defence that the debt sought to be recovered was money lost at play is no exception to the general rule that a party asking leave to open default and interpose a defence must show an excuse for the default. Cowton v. Anderson, I How. (N. Y.) Pr.

A Party will Not be Relieved against the legal consequences of his default, except to enable him to interpose a meritorious defence, and where his conduct has been unmixed with negligence or elay. Wilson v. Phillips, 5 Ark. 183. And if the court below refuse induldelay.

gence, this court is not warranted in interfering, unless the judgment of the court was a clear, palpable, and flagrant

not be set aside by the court unless the defendant shows by competent proof that the judgment was entered through mistake, inadvertence, surprise, or excusable neglect on his part; and the payment of costs should be imposed as a condition of setting aside the judgment. The application to set aside a judgment by 'default must always be accompanied by an affidavit of merits, but a regular default should not be set aside simply on affidavits excusing the default accompanied by an affidavit of merits.² An affidavit of merits without any averment, surprise, or excusable neglect is not sufficient to warrant the setting aside of a default,

And such affidavit will be defective if it fails to state the nature of the defence, or of the cause of action, if the motion is made by plaintiff.4 It will not be a cause for setting aside a default.

where personal service of summons was made.3

invasion of important rights of the party. Browning v. Roane, 9 Ark. (4 Eng.) 354; s. c., 50 Am. Dec. 218; Wilson v. Phil-

lips, 5 Ark. 183.

Where judgment by default has been taken on a bill in chancery, the defendant will not be permitted at a subsequent term to open the decree and file an answer, unless in addition to showing a meritorious defence they furnish a reasonable excuse for delay. An excuse for the neglect to defend, which would not be of avail for a defendant's individual rights, may be good when the neglect is by agents or trustees and affecting the rights of others, as in the case of neglect by the officers of a school company. Wagner v. Washington Mut. Ins. Co., 3 West. L. J. 305.
1. People v. O'Connell, 23 Cal. 281.

2. Hunt v. Wallis, 6 Paige Ch. (N. Y.)

Evasive Affidavit on Motion to Open .--An order setting aside a default and permitting an answer by defendant, held improperly granted on the ground that defendant's affidavit is evasive, and contains no express denial of his having received from his attorney an answer for verification, which failure alone could have been good ground for the application. McLaren v. Kehlor, 22 Wis. 297.

The Sworn Answer Proposed should be produced, and the nature of the defence, and defendant's belief in the truth of the matters constituting it, should be sworn to. Winship v. Jewett. 1 Barb. Ch. (N. Ch. (N. Y.) 596. So held in foreclosure. Powers v. Trenor. 3 Hun (N. Y.) 3; s. c., 5 T. & C. 231; Weston v. McCormick, 3 Month. L. Bul. 11. But on denying because of failure in these particulars. leave to renew will be allowed. Ludlow v. Coit, 3 Month. L. Bul. 102; Gulliver v. Newark Fire Ins. Co., 2 Month, L. Bul. 52,

Upon Excuse and as a Pavor.

Attorney's Affidavit .- An affidavit of an attorney that from his client's statement of the case to him he believes that his client has a good and substantial defence upon the merits is not a sufficient affidavit of merits. Stilson v. Rankin. 40 Wis. 527.

An affidavit of merits alleging that defendant has stated his defence to his counsel, not that he has stated "the case," is insufficient. Burnham v. Smith, II Wis. 258. So of an affidavit by the

attorney, similarly worded. Holden v. Kirby, 21 Wis. 149.

3. Harlan v. Smith, 6 Cal. 173.

The rule that a default will not be set aside except upon a sufficient excuse and affidavit of merits is not changed by an amendment merely bringing in the new parties, and not affecting the rights of the defendants in default. McDonald v. Donaghue, 30 Iowa, 568.

4. Williams v. Kessler, 82 Ind. 183. Nature of Defence. - A default regularly taken will not be opened on the mere general affidavit by the defendant of merits; but the nature of his defence must be set out, that the court may judge of its merits. McGaffigan v. Jenkins, I

Barb. (N. Y.) 31.

The action of the district court, in entering a default for failure to answer after appearance made, will not be disturbed when no affidavit of merits is filed, although an affidavit of defendant's attorney is filed, to the effect that he supposed the court had granted him sixty days from the date of his application in which to answer, on which he relied, whereas the docket entry was for sixty days from the date of completed service. Smith v. Watson, 28 Iowa, 218.

Against Firm .- An affidavit of a mem-

that because of the absence of the client and defendant his affidavit could not be procured in season to be used in opposing a motion: 1 neither will the loss of the papers in the case; 2 the inexperience of a clerk who was intrusted by counsel with the duty of moving for adjournment, where the default was taken because the affidavit such clerk drew was insufficient to oppose it; 3 the fact that the judgment was irregularly entered; 4 the absence of material witness or the engagement of counsel; 5 attendance on another court; 6 the erroneous supposition that the time for pleading had not expired; 7 failure to live up to an oral agreement not communicated to the court; 8 reliance upon the representations of

ber of a partnership, stating that he had been absent, and for that reason was unable to prepare his defence, but containing no excuse as to the other partners. makes no such showing as will justify the court in setting aside a default. Walker v. Clark, 8 Iowa, 474.

Where it is a Rule of the Court that

copies of affidavits offered in support of a motion to set aside a default shall be served upon the opposing counsel, which is neglected to be done, and the court refuses to entertain the motion, this is not

ror. Scales v. Labar, 51 Ill. 232.
Adjournment Procured by Falsehood.— Default will not be opened where as pure matter of favor, and with notice that the cause must be tried when again called, the cause was put over, and a further adjournment was procured by the falsehood of the party moving. Duncan v. DeWitt, 49 How. (N. Y.) Pr. 131.

1. The attorney should not have suffered the order to be taken by default, but should have appeared and asked a postponement. Van Alstrand ν . House, 3 Abb. (N. Y.) Pr. 226.

2. Loss of the Papers .- It is no excuse for failing to reply to a plea of set-off that plaintiff's attorney could not find the papers in the case, if he did not apply to the clerk for them; and a default entered for such cause need not be set aside. East St. Louis v. Thomas, 102 Ill. 453.

The loss of a note is not an unavoidable casualty or misfortune preventing the party from defending within the meaning of Iowa Rev. Stat. sec. 3499, subd. 7, which permits a judgment to be vacated by the district court on that ground. Miller v. Albaugh, 24 Iowa, 128.

3. Fake v. Edgerton, 6 Duer (N. Y.),

4. In an Action against Several Defendants commenced by capias the sheriff returned cepi corpus as to one and non est as to the others, who were out of the county; the plaintiff waived bail, filed

declaration, and took judgment by default against all. The court refused to open the judgment on the ground that it was irregularly entered, but did so upon affidavits of merits. Gulick v. Thomp-

son, 4 N. J. L. (1 South.) 292.

5. Absence of Witness or Engagement of Counsel. - A motion to open a default on the ground of absence of a material witness, or engagement of counsel, should be denied, where the excuses were offered and disregarded at the cir-Ward v. Ruckman, 23 How.

(N. Y.) Pr. 330.

6. Attendance on Another Court. - Where defendant by agreement with the plaintiff is allowed until the day of trial to file his answer, an application to set aside a default rendered against him for want of an answer is properly refused, where the reason for setting the same aside is, that defendant and his counsel were, during the day on which the case was set for trial, in attendance at another court, one as witness, the other as counsel, in a cause on trial in such court. Boernstein v. Heinrichs, 24 Mo. 26.

7. Upon a motion to set aside a judgment by default, it appeared by the defendant's affidavit that he was under the impression, when he retained counsel, that the time for answering had not expired; that he did not recollect the day on which the summons and complaint were served: that he was quite ill at the time, and did not as carefully note the time as he would have done. Held, that the motion was properly refused. Elliott v. Shaw, 16 Cal. 377.

8. An Oral Agreement between the Parties to delay or postpone the trial of a cause to a day beyond that set for trial. which is not communicated to the court whose action it is intended to govern, will be treated with but little favor in an application by the defendant to set aside a default. Dixon v. Brophey, 29 Iowa 460.

Where one who had been served with

the plaintiff.1 or of a third person;2 appearance without defence where the default was entered to be taken off if the defend ant should, within a given time, appear and show that the plaintiffs were barred of their action; ³ a discharge in bankruptcy: ⁴ a defence that is untenable, or has no foundation in fact: delay? upon simple affidavit of merits; where the party has any motive or interest in procuring such delay; 9 the pendency of a compro-

the summons and copy of complaint entered into an agreement with the plaintiff. in which he admitted that a certain sum was then due, and stipulated that it was to be settled in a particular manner, held, that the agreement afforded no ground for setting aside a default entered against the defendant, in the absence of any promise by the plaintiff to discontinue the suit or delay its progress.

Sweet v. Burdett, 40 Cal. 97.

Attempted Settlement.—In an action by L. against S., on a money demand, S. failed to appear or answer; his default was entered, L, proved up, and judgment was rendered in his favor. Two days thereafter, and before final adjournment of the term, the defendant appeared and filed a motion to set aside the default and judgment, accompanied by his affidavit and an answer to the merits. Plaintiff also filed an affidavit in resistance. Considering the affidavits together, it appears that there had been an attempt at negotiating a settlement-defendant claiming that negotiation was had after the suit began, while plaintiff's counsel claimed that such negotiation was had and failed before summons issued. The and failed before summons issued. judgment of the district court refusing to set aside the judgment and default was upheld. Sang v. Lee, 20 Neb. 667.

1. A judgment creditor of a husband suffered default in an action to foreclose a mortgage on the husband's real estate, executed by both husband and wife before the judgment became a lien, on the representation by the mortgagee that judgment would be taken against both husband and wife. Judgment was taken against the husband and creditor only, and provided that any surplus on the sale should be paid to the husband. Held, that he was not entitled to have the default set aside, as his judgment was no lien on the wife's interest, and if he had wanted payment out of the surplus he should have filed a cross-complaint. De Armond v. Preachers' Aid Society, 94

Ind. 59.

2. In an action of trespass for unloading stone on the plaintiff's dock he recovered a judgment for \$2000 by default. Held, that a statement by a third person to the defendant that he had arranged

the matter with the plaintiff was no sufficient excuse for the defendant's failure to make defence, or attend on the assessment of damages after being notified of the default, and he was not entitled to relief in equity. Walker v. Shreve. 87 Ill. 474. 3. Walters v. Munroe, 17 Md. 154, 501;

s. c., 77 Am. Dec. 328.
4. Desobry v. Morange, 18 Johns.
(N. Y.) 336; Coffee v. Ball, 49 Tex. 16.
Bankrupt Discharge.—Where a defend-

ant obtains an insolvent discharge, after declaration filed, he ought to plead his discharge in season; and if he neglects to do so, he will not be allowed to plead it, nunc pro tunc, after judgment. Deso-bry v. Morange, 18 Johns. (N. Y.) 336. 5. Miracle v. Lancaster, 46 Iowa, 179. 6. If a judgment is regular, it is not

usual, and it is rarely proper, to try upon affidavits whether defendant has a good defence on his motion to be let in and defend. But where it clearly appears that the defence suggested has no foundation in fact, that may be taken into view in disposing of the application. Catlin v. Latson, 4 Abb. (N. Y.) Pr. 248; Catlin v. Billings, 13 How. (N. Y.) Pr.

7. Yates v. Woodruff, 4 Edw. Ch. (N. Y.) 700.

8. Hunt v. Wallis, 6 Paige Ch. (N. Y.)

9. Motive for Delay .- A default will not be set aside where the defendant has any motive for delay. Winship v. Jewett, I Barb. Ch. (N. Y.) 173; Hunt v. Wallis, 6 Paige Ch. (N. Y.) 371.

A regular order to take a bill as confessed will not be set aside in any case where it is for the interest of the defendant to delay the proceedings unless the defendant either produces the sworn answer which he proposes to put in, or states, in his petition or affidavit, the nature of his defence, and his belief in the truth of the matters therein. Hunt v. Wallis, 6 Paige Ch. (N. Y.) 371. See Stockton v. Williams, Harr. (Mich.) 241; Hart v. Lindsay, Walk. Ch. (Mich.) 72.
Where a plea was served on the plain-

tiff's attorney, and a default for not pleading was entered by his agent on the same day, and the defendant's object in keeping mise: 1 failure to read summons, believing it to be a subpœna: 2 failure to leave home in time to reach court before the trial commenced; 3 ignorance of the law, 4 or of our language; 5 want of service of process at a time when the defendant was insane: 6 misnomer of plaintiff which did not mislead the defendant; 7 mistake in the notice as to the time to plead; 8 negotiations for settlement and arbitration; 9 neglect to engage counsel; 10 failure to answer hecause the preparation of the answer required more time than ordinary cases; 11 protracted and severe illness of the

back the plea was delay, the default will not be set aside, though it was not entered until an hour after the delivery of the plea. Rogers v. Beach, 18 Wend. (N. Y.) 533.

In an action of partition after judgment fixing the shares of the respective parties and ordering partition had been rendered, and referees to make partition had been appointed and made their report, the defendant asked leave to file an answer, but assigned no reason for the delay, nor did it appear that he had any defence whatever to the action. Held, that the application was properly refused. Mills v. Miller, 3 Neb. 95.

1. Pendency of a Compromise is not alone a sufficient excuse for failure to appear, and plead to action. The conduct or declarations of the parties to action must be shown. Goldsberry v.

Carter, 28 Ind. 59.
2. State v. O'Neill, 4 Mo. App. 221.

3. Where a case was set for trial by consent on a certain day, and it appeared that a party had not determined to attend court until after the term began, and not then unless advised by counsel that it was absolutely necessary; and that, after correspondence with his counsel concerning the trial of the case, he failed to leave home in time to reach court before the trial, and judgment was taken against him,—held, that this was not excusable, but gross neglect, and the court below erred in vacating the judgment. Bradford v. Coit, 77 N. C. 72.

4. Ignorance of the Law.—Ignorance of

the law is not sufficient cause for setting aside a judgment on default, unless clearly made out. Pierce v. Cole, 17 Tex. Thus it is no ground for setting aside a judgment by a default that the defendant was ignorant of the law requiring him to answer in ten days. Chase v.

Swain, o Cal. 130.

Non-Resident,-Want of Knowledge of Judicial Proceedings on the part of a nonresident defendant does not excuse a de-Abrams v. Virginia Fire Ins. Co., 93 N. C. 6o.

5. Ignorance of Language.—Judgment by default will not be set aside on affidavit of a good defence, and that the defendant was a German, not understanding the English language unless explained to him, where it appears that he knew a suit had been commenced against him and refused to hear the writ read to him. Heisterhagen v. Garland, 10 Mo.

6. Woods v. Brown, 93 Ind. 164; s. c.,

47 Am. Rep. 369.

7. National Condensed Milk Co. v. Brandenburgh, 40 N. J. L. (11 Vr.) 111.

8. Mistake in Notice.—An original no-

"on or before noon of the 29th day of September, 1864, being the second day, of the next term of the district court. The 29th of September was in fact the 4th day of the term. Held, in the absence of any evidence of prejudice to the defendant, that the court did not err in refusing to set aside a default granted on the 20th. Burr v. Wikox, 19 Iowa, 31.

9. Without an express agreement to suspend proceedings, neglect will not excuse a regular default. Orphan Asvlum v. McCartee, Hopk. Ch. (N. Y.) 106; Norton v. Kosboth, Hopk, Ch. (N. Y.)

10. Especially where he produces no evidence that he had a valid defence.

Wood v. Noyes, 27 Me. 230.

11. Excusable Neglect .- A judgment by default should not be set aside on the ground of excusable neglect, because the preparation of the answer required more time than ordinary cases, and during a portion of the time the attorney was absent from town. Bailey v. Taaffe, 29 Cal. 422.

An affidavit on motion to set aside a judgment on default, which states as the grounds of the motion that on account of the complicated condition of the defendant's title, and the fact that the complaint was verified, more time was required to prepare the answer than in ordinary cases, and that during a part of the time allowed for answering the defendant's party; 1 or threats of bodily harm; 2 or that service was made on the chairman of the board of trustees of a town, whose term of office expired before the term at which the summons was returnable.3

A motion to set aside a judgment by default upon grounds which would require the appellate court to review the evidence upon which the verdict was given will not in any instance be sustained.⁴ And where a default is taken against a married woman it will not be opened where it does not clearly appear to the court that the transaction did not relate to her separate estate.⁵ Laches ⁶

counsel was compelled to be absent from town, and that the latter from an examination of his client's title, so far as he has made such examination, verily believes it to be better than the plaintiff's, is sufficient. Bailey v. Taaffe, 29 Cal. 422.

1. Gardenhire v. Vinson, 39 Ark. 270; Cannon v. Harrold, 61 Ga. 158; Edwards v. McKay, 73 Ill. 570; Shaffer v. Sutton, 49 Ill. 506. Vide ante, p. 496z²⁸, note 1.

Sickness of a Party does not excuse him from diligence in defending his suit.

Shaffer v. Sutton, 49 Ill. 506.

A motion to set a judgment by default, on the ground that defendant was sick when it was rendered, and could not put in his plea, overruled, no reason being shown why the plea was not filed before the trial term. Cannon v. Harrold, 61 Ga. 158.

As an Excuse for Want of Diligence.—
On an application to set aside a judgment by default, the party applying showed in his affidavit that he was sick and confined to his house from the day of service for about two weeks, when he came out and was compelled to go in again and remain until the day after the default, but failed to state the nature of his sickness, or show that he could not have communicated with his attorney, and prepare for his defence. Held, that the showing was not sufficient to require the setting aside of the default. Edwards v. McKay, 73 Ill. 570.

Edwards v. McKay, 73 Ill. 570.

Wound in the Foot. — A judgment should not be vacated because defendant was confined to his house during the pendency of the action by a wound in the foot. Gardenhire v. Vinson, 39 Ark.

270.

2. Threats or Bodily Harm.—Where a party who is personally served with process permits judgment to go against him by default, he cannot enjoin its execution merely on the ground that he was prevented from attending court by threats of bodily harm. Such allegation shows no reasonable diligence on his part to defend. Duncan v. Gibson, 45 Mo. 352.

3. Against Town.—Where process was served on the chairman of the board of trustees of Carondelet, and his term of office expired before the return term, an affidavit to set aside a judgment by default rendered at such term which stated "that the late chairman had neglected to attend to the suit, and that affiant, his successor, had attended to the suit as soon as he had heard of it," disclosed a want of due diligence. Carondelet v. Allen, 13 Mo. 556.

Chambers v. Carthel, 35 Mo. 374.
 Jourdan v. Bernheim, I Week. Dig.

282.

A Married Woman on whom notice of an action was duly served, which she delivered to her husband on the supposition that it did not relate to her individual rights, and he neglected to defend, and judgment was given by default, held, that she could not have it set aside on the ground of "unavoidable casualty or misfortune," under Iowa Code, §§ 3154, 3157, 3158. Teabout v. Roper, 62 Iowa, 603.

6. Laches.—A judgment will not be opened where the defendant has been guilty of laches, unless he make out a strong prima facie case. Eshleman v. Bowers, I L. Bar. 19, Feb. 1870.

Where defendant who is personally served neglects to appear in person of by counsel, and set up grounds of defence then existing, he cannot afterwards be relieved from the effects of his own laches. Niblett v. Scott, 4 La. An. 246.

An order denying a defendant's motion to vacate a judgment rendered a year previously against him upon personal service, the motion papers showing that upon such service he retained an attorney to defend him, who failed so to do, but not showing that he thereafter communicated with such attorney, or that there was any trick or fraud on plaintiff's part, held properly denied on the ground of plaintiff's laches. Sanderson v. Dox, 6 Wis. 164.

A defendant who has put in a formal

or negligence 1 will defeat a motion to set aside a default.

answer, but failed to make any defence, in reliance on the assurance of the original creditor, to whom he claims to have paid the claim in suit after his assignment of it to the plaintiff, that he would arrange the matter, is guilty of such laches that a judgment will not be opened to let in a doubtful defence based on the dealings between the original creditor and the plaintiff respecting the claim in suit. Ray v. Northrup, 55 Wis.

1. Chase v. Swain, 9 Cal. 130; Union Hide & Leather Company v. Woodley, 75 Ill. 435; Kemp v. Mitchell, 29 Ind. 163; Ordway v. Suchard, 31 Iowa, 481; Thatcher v. Haun, 12 Iowa, 303; Grootemaat v. Tebel, 39 Wis. 576; Insurance Co. of North America v. Swineford, 28 Wis. 257; Babcock v. Perry, 4 Wis. 31. Negligence of Party—Will Defeat Mo-

tion to Open -A default which is the consequence of the neglect of the party against whom it is rendered should not be set aside on his application. Thatch-

er v. Haun, 12 Iowa, 303.

The court may well refuse to set aside a judgment by default where there has been great neglect, only excused by ignorance that an answer must be filed within a certain time. Chase v. Swain, o Cal.

The court should exercise the power of opening a judgment by default, when to permit it to stand would be unjust and oppressive if the defendant has shown reasonable diligence to avoid the effects of the But if the term is permitted to default. pass, or the defendant has been guilty of negligence, the court will refuse relief, even if the judgment is unjust. Union Hide & Leather Co. v. Woodley, 75 Ill.

Judgment by default was taken at the September term 1864 for want of a plea in a case which was entered at the January term 1860; there was no evidence that the defendant paid the slightest attention to the case until the September term 1864, when he made an unsuccessful attempt to have counsel present. Held, that he had shown such gross negligence that the default would not be set aside, although the court took notice of the effect of the civil war in closing the courts for a part of the time. Fanning v. Fly, 2 Coldw. (Tenn.) 486.

Same—Wish to Save Expense.—The

fact that a defendant neglected to appear to the suit because he did not wish to incur the expense of defending, and supposed that the court would fully protect

his rights without his appearance, is not good ground for setting aside his default. Babcock v. Perry, 4 Wis. 31.

Same-Misplacement of Papers.-While the rule is recognized that the discretion confided to the trial court in application to set aside defaults should not be exercised in favor of a party against whom a default has been entered in consequence of his own negligence or that of his attorneys,—McNulty v. Everett, 17 Iowa, 581; Kreisinger v. The Icarian Community, 16 Iowa, 586; Bolander v. Atwell, 14 Iowa, 35,—it was nevertheless held, where it was made to appear by affidavit of defendant's attorneys that the reason why they did not appear and file an answer was on account of an accidental misplacement of the petition and notice handed to them by the plaintiff, whereby the case was overlooked by them in examining their papers at the commencement of the term, in order to ascertain what cases they had to attend, that the case did not fall within the rule recognized, and that a judgment by default therein rendered should be set aside, the other requirements of the statute respecting the filing of an affidavit of merits, and the time within which such applications should be made, having been Ordway v. Suchard, 31 complied with. Iowa, 481.

It is Gross Neglect to pay no attention to an action for eighteen months after service of summons, and even against entry of judgment; and relief by opening the judgment will be denied. Groote-maat v. Tebel, 39 Wis. 576.

Where a corporation was duly served with summons six weeks before the entry of judgment by default against it, the service being by delivering a copy of the summons to the treasurer, and he delivered the same to a stockholder who forgot the matter, and no other steps were taken to retain counsel or prepare for defence until after judgment, held, that owing to the gross negligence of the defendant it was not entitled to have the default opened. Union Hide & Leather Co. v. Woodley, 75 Ill. 435.

Excusable Neglect.—One summoned to

appear to an action having allowed it to go by default under belief that suit was on a note, when in fact it was not, is not Kemp entitled to have default set aside.

v. Mitchell, 29 Ind. 163.

On Fire Insurance Policy .-- A default was entered, three months after the commencement of a suit, in an action upon a fire-insurance policy, commenced five

A default entered in an action on a promissory note will not be opened on a motion, unless accompanied by a special plea verified by affidavit denying the signature. And a regular default will not be opened to enable a party to raise technical objection.2 or to set up matters in tort against an account.3 And after default has been taken and set aside, the defendant cannot suffer another voluntarily, and have that set aside also.4

A default will not be set aside simply because it was suffered to be taken under advice of counsel: 5 neither will it be set aside

months after the loss, where several of the defendant's agents had investigated the loss before the action was brought, and ascertained all the facts relied upon as a defence. Held, that a motion to be relieved from the default and allowed to answer was properly denied. of North America v. Swineford, 28 Wis.

1. Or the existence of the partnership in a partnership note. Jenks v. Garretson, 4 McL. C. C. 258.

Equitable Defence.—Where judgment

has been confessed on a promissory note, the court will not set it aside to let in an equitable defence that would have been pertinent if no judgment had been entered. Sebring v. Rathbun, I Johns, (N.

Y.) Cas. 331. Default on a Promissory Note—Loss of Evidence. - In this case where the plaintiff after obtaining judgment by default upon promissory notes incurred expense in and about the issue and levy of execution, and where, after the judgment, important evidence for the plaintiff became incompetent by reason of the death of the defendant, it is held that there was no abuse of discretion in refusing to open the judgment. Jefferson Co. Bank v. Robbins, 67 Wis. 68.

2. People v. Rains, 23 Cal. 127; Win-E. People v. Rains, 23 Cal. 127; Winship v. Jewett, I Barb. Ch. (N. Y.) 173; Hawes v. Hoyt, II How. (N. Y.) Pr. 454; Gay v. Gay, Io Paige Ch. (N. Y.) 360; Champlin v. Mayor, etc., of N. Y., 3 Paige Ch. (N. Y.) 573.

Technical Defence.—On an application

to set aside a default it is necessary for the party to show that he has a good defence on the merits. Where the affidavit shows that the defence rests on matters appearing on the face of the complaint, it shows that the defence is of a technical character, and is therefore insufficient. People v. Rains, 23 Cal. 127.

Same—Pleading Statute of Limitations
-Limitation of Statute.—A defendant should not be allowed after default to put in an answer setting up the Statute of Limitations where it appears that the debt is still justly due. Indulgence should not be granted to the defendant's

because of laches of his

Hawes v. Hoyt, II How. (N. Y.) Pr. 454. 3. And this is true although sufficient. reason is shown for a failure to appear. Zeigelmueller v. Seamer, 63 Ind. 488.

Answer Filed on Day Default is Taken. -When a defendant is out of time with his answer, though it be filed on thesame day on which a judgment by default is taken against him, a motion to set aside the judgment will be overruled; especially if in his affidavit filed with his motion he shows no reason or excuse for his failure to plead in time. Edwards v. Watkins, 17 Mo. 273.

4. Smythe v. Kastler, 16 Neb. 264, Defendant Twice in Default.—A defendant being in default filed an answer. which was stricken from the files. Leavewas then given to answer by a specified. time. Defendant having failed to answer made second application for leaveto answer, which was refused. Held, no abuse of discretion. Orr v. Seaton, 1 Neb. 107.

A motion to set aside a judgment by default, and execution thereon, on the ground that the default had been opened: and a new judgment entered, was denied for the reason that the new judgment was to the same effect as the default. Tucker v. Black, r How. (N. Y.) Pr.

 Default Suffered on Advice of Counsel .- A regular judgment suffered by default, under advice of counsel that there was no defence, upon a full knowledge of all the facts, should not be set aside without a full and clear affidavit, explaining on what particular ground the defence rests, and the nature of the counsel's mistake. Ellis v. Jones, 6 How. (N. Y.)

A Surety on a Guardian's Bond Acting under Advice of his Counsel in a suit thereon, and of the other defendants, that the recovery would be small, etc., admitted the execution of the bond, and submitted to a reference to ascertain the extent of his liability. The report charged him a large sum, and his new counsel excepted thereto. Held, that he was not entitled to have the judgment.

hecause of the mere neglect, 1 mistake, 2 engagement in another set aside on the ground of "excusable neglect," under the North Carolina Code. \$ 133, in order to let in a plea of non est factum, Hodgin v. Matthews. 81 N. C.

1. Kreite v. Kreite, 93 Ind. 583; Brumbaugh v. Stockman, 83 Ind. 583; Jones v. Leech, 46 Iowa, 187; Ordway v. Suchard, 31 Iowa, 481; McNulty v. Everett, 17 Iowa. 581; Kreisinger v. The Icarian Community, 16 Iowa, 586; Bolander v. Atwell. 14 Iowa, 35; State v. Elgin, 11 Iowa, 216; Welch v. Challen, 31 Kan. 606; Bosbyshell v. Summers. 40 Mo. 172; Campbell v. Garton, 20 Mo. 313; Ridgley v. Steamboat Reindeer, 27 343, Ridgley v. Steamboat Keinderl, 13 Mo. Mo. 442; Webster v. McMahan, 13 Mo. 582; Austin v. Nelson, 11 Mo. 192; Kerby v. Chadwell, 10 Mo. 392; Field v. Matson, 8 Mo. 686; Harper v. Mallory, 4 Nev. 447; Foster v. Jones, 1 McC. (S. C.) 116; Tarrant Co. v. Lively, 25 Tex. But see ante, p. 496z81. (Supp.) 399. note 4.

Especially after the damages are as-Field v. Matson, 8 Mo. 686. But the fact that an attorney has been negligent should not induce the court to let one party perpetrate a fraud upon the Spalding v. Meier. 40 Mo. 176. other.

The Negligence of the Attorney of the defendant is not a sufficient cause for setting aside a judgment against him. Foster v. Jones, 1 McC. (S. C.) 116.

The supreme court will not interfere with an order of the court below, refusing to sustain a motion to set aside a default, when the affidavits show only the negligence of defendant's attorney in excuse for such default. Ordway v. Suchard, 31 Iowa, 481; State v. Elgin, 11 Iowa, 216.

Failure of Attorney to Appear .- Where an attorney was written to by the defendant to appear in a cause then returnable to a term of his court in 1861, and he failed to make an appearance, when a judgment by default and inquiry was obtained in 1863, held, that it did not make out such a case of "mistake, inadvertence, surprise, or excusable negligence" as to justify the court in setting aside said judgment. Burke v. Stokely, 65 N. C. 569.

Neglect of Attorney to Defend .- A judgment will not be set aside because of an attorney's neglect to defend, the client having informed him of the nature of the defence, but paying no further attention to the case. Kreite v. Kreite, 93 Ind. 583.

The negligence of an attorney in unnecessarily permitting a judgment to be taken against his client cannot be deemed ordinarily an "unavoidable casualty or misfortune" such as entitles the client to be let in to defend; nor does the fact that the attorney is insolvent affect the case. Welch v. Challen, 31 Kan. 696.

The attorney for the defendants in a suit being necessarily absent at the return term employed another attorney to appear for him, and gave him the name of the case, "Webster v. Harris & Williams." The case was entered upon the docket "Webster v. McMahan, etc." The substitute not knowing the cases to be the same did not enter an appearance, and judgment by default was entered, which the court refused to set aside. Webster v. McMahan, 13 Mo. 582.

Personal Attention by Party.—Where a party had time to have given personal attention to the defence of an action, and had failed to do so, held, that the fact that the counsel whom he supposed he had engaged to make his defence failed to do so did not make it imperative on the court to set such default aside. Schroer v. Wessell, 89 Ill. 113.

Neglect of Counsel to Plead .- On appeal from a refusal to set aside a judgment by default, held, that the carelessness of counsel in failing to plead, without showing that defendants had a good defence, was sufficient ground. State v. Elgin, II Iowa, 216.

The neglect of an attorney to file a plea to an action is no ground for setting aside a judgment by default. Austin v. Nelson, 11 Mo. 192; Kerby v. Chadwell. 10 Mo. 192; Harper v. Mallory, 4 Nev. 447; Tarrant Co. v. Lively, 25 Tex. (Supp.) 399. Negligence of a defendant's attorney

in failing to interpose a defence is not sufficient ground for disturbing a judgment. Jones v. Leech, 46 Iowa, 187.

Negligence of Attorney in Conducting Case .- A client will not be relieved from the operation of a judgment rendered by reason of the inexcusable neglect of his attorney in so conducting his case that it was defaulted, although there may have been a sufficient defence. Brumbaugh v. Stockman, 83 Ind. 583.

Under North Carolina Code. - Where a defendant remained at his home, thirtyseven miles from the place of trial, expecting his attorneys to notify him when the case would be reached, although they had not engaged to do so, and they failed to attend court, held, that he was not entitled to have the judgment rendered set aside because of "excusable neglect," under the North Carolina Code, § 133. Cobb v. O'Hagan, 81 N. C. 293. 2. People v. Rains, 23 Cal. 127; Smith suit or court.1 or sickness2 or death 3 of counsel. And of course mere negligence to employ counsel will not be a sufficient excuse in any instance, or under any circumstances, to justify setting aside a default: 4 neither will a misunderstanding as to payment

v. Watson, 28 Iowa, 218: Bosbyshell v. Summers, 40 Mo. 172; Campbell v. Gar-Reindeer, 27 Mo. 343; Ridgley v. Steamboat Reindeer, 27 Mo. 442; Austin v. Nelson, 11 Mo. 192; Kerby v. Chadwell, 10 Mo. 392; Field v. Matson, 8 Mo. 686; Ellis v. Jones, 6 How. (N. Y.) Pr. 296.

Mistake of Counsel as to Time in which to Answer .- A default entered for want of an answer will not be set aside because defendant's attorney supposed he had sixty days from date of his application in which to answer, whereas the docket entry showed sixty days from Śmith v. date of completed service. Watson, 28 Iowa, 218.

When a default has been entered for a failure to answer or demur, an affidavit by the attorney that he had prepared a demurrer, but failed to file it in time, in consequence of a mistake on his part as to the day on which the time of filing would expire, is insufficient to open default. People v. Rains, 23 Cal. 127.

1. Vide ante, X. 2. a (1).

Engagement of Counsel.—A motion to set aside a default on the ground of engagement of counsel should be denied when the excuses were offered and disregarded at the circuit. Ward v. Ruckman, 23 How. (N. Y.) Pr. 330.

2. Vide ante, X. 2. a (I).

Sickness of Counsel.—A party knowing that his counsel was sick, and that the time to plead had been extended over a month, held not to be entitled to relief against a judgment taken by default for want of a plea, he having neglected to employ other counsel. Clark v. Ewing, 93 111. 572.

Sickness of Counsel's Family-Affidavit showing Excuse for Default.-That a party employed counsel to conduct the defence of his case, who was compelled by family affliction to leave the court before the cause was reached, is not a ground upon which a judgment can be vacated in a court of law after the term at which it was rendered,

Washington, 15 Ala. 803.
3. Death of Attorney.—Where defendant employed a prominent attorney who died three weeks before the return term, and whose death was conspicuously noticed in the papers, and defendant then neglected to employ counsel, and suffered default, held, that he was not entitled to have the judgment set aside. Kivett v. Wynne, 89 N. C. 39.

4. Neglect to Employ Counsel. - Where it appeared that judgment was rendered by default in 1875, six months after return of summons; that defendant did not employ counsel, but relied on the assurance of another to do so; that no defence was made to the action by reason of the attorney's mistaking the case, and no further attention was given to the matter until a year after the judgment and eighteen months after the attorney was spoken to,—held, that the neglect was in-excusable. Norwood v. King, 86 N. C.

Defendant testified that he gave the summons served on him to his attorney to defend the action, while the attorney testified that the defendant did not deliver it to him, but gave him to understand that none had been served. appeared, however, defendant paid no attention to the action for some eighteen months, until served with order to show cause why judgment should not be rendered against him; that he then gave such order to his attorney to attend to it: but neither he nor his attorney paid any further attention to the subject until the execution had been issued. Held, that a refusal to set aside the judgment was proper, the defendant's neglect not being Grootemaat v. Tebel, 30 excusable. Wis. 576.

Calling at Office or Merely Consulting. Where a defendant who was summoned to appear in a suit, called at the office of an attorney, and not finding him, left a message for him to attend to his case, but did nothing further, and the attorney having been retained on the other side paid no attention to the message, and the defendant was defaulted, held, that this was negligence on his part, and that he was not entitled to have default Davis v. Darling, 20 Tex. taken off,

One who has been served with a subpœna in a suit, and has consulted counsel, and then paid no further attention to the matter, cannot have the decree against him opened on the ground of surprise, Miller v. Hild, 11 N. J. Eq. (3 Stockt.) 25.

Merely Writing to an Attorney to attend to one's case is not ground for setting aside a judgment by default, the attorney having neglected to appear. Hymans v. Capehart, 79 N. C. 511.

Defendant when sued wrote to a law-

of fees.1

h. Terms.—A defaulted party in a cause who has a good defence should, when prompt application is made, and all orders of the court for indemnity to the opposite side are complied with, he allowed to set it up, notwithstanding any negligence on the part of himself or counsel; but where the negligence has been extreme, the court should be well satisfied of the merits of the defence, and require a full statement of the facts upon which the defence rests, and impose such terms, as to payment of costs and the like, as will indemnify the plaintiff against the delay caused by the negligence.2

ver to defend him. The letter was miscarried and defendant was defaulted. Held, that he had failed to use sufficient diligence, and that the judgment would not be interfered with. Sherman County School District v. Lovejoy, 3 McCr.C.C.

558; s. c., 16 Fed. Rep. 323.

1. Misunderstanding as to Fees.— Where, owing to a misunderstanding as to the fees, a defendant's attorneys have declined to appear for him, and there being no response for him judgment is rendered against him, it will not be set aside because he expected them to suggest his bankruptcy and apply for a stay. Howell v. Glover, 65 Ga. 466.

2. Howe v. Coldren, 4 Nev. 171.

Terms and Conditions — Reasonable Terms are Imposed on the defendant as a condition to allowing his motion, such as that he pleads to the merits, that he pay the costs, etc. Mason v. McNamara, 57 Ill. 274.

Judgment on default will be opened and a defendant let in to defend, upon terms, when defendant shows an excusable neglect. Egan v. Rooney, 38 How. (N. Y.) Pr. 121. But a waiver of a material issue in the pleading cannot be made a condition, but only payment of costs, etc. Horn v. Brennan, 46 How. (N. Y.) Pr. 479.

Same-Payment into Court of Amount Admitted to be Due.-Leave to one in default to come in with an answer setting up invalidity of the instrument sued on may properly be conditioned upon payment into court of a sum admitted to have been borrowed on the strength of such instrument. Magoon v. Callahan, 39 Wis. 141. But the defendant should not be required, in such case, to deposit that part of the debt sued on which he claims has been paid. Id.

On opening a default for which both parties are in some degree responsible, payment of costs of former appeal, and of the amount admitted by the proposed answer to be due is a proper condition,

but payment of a sum alleged to be already paid should not be required. Pier

v. Amory, 42 Wis. 474.

The Power of Setting Aside defaults, as a general rule, is a discretionary one, and the court exercising it may impose on the party guilty of laches such terms as it may deem equitable and just under all the circumstances, and the order will not be reviewed in the appellate court. Hovey v. Middleton, 56 Ill. 468.

Default Suffered by Sheer Negligence.—

Parties not infrequently, in the progress of a cause, lose advantage in consequence of their own negligence or laches, to which they may or may not be restored on motion at the discretion of the court. If restored, it must be upon such terms as the court may think proper to impose. Where, however, an advantage has been lost to a party in consequence of sheer negligence, it is rare indeed that the court will on motion grant relief. instance, if a defendant neglects to plead and suffers judgment to go by default, it must be an extraordinary case that will induce the court to set aside the default, unless the defendant offers some plausible excuse at least for his neglect. Fowble v. Walker, 4 Ohio, 64.

In an Action against Executors there was a special count, and several money counts added as a matter of course, but no distinct causes of action assigned, After interlocutory judgment, damages were separately assessed on each count, and judgment arrested on the first. The inquisition on the other counts was set aside, and the defendant allowed to plead Livingston v. Livingston, upon terms.

3 Johns. (N. Y.) 254.

In Colorado.-It is error to require payment of the penalty adjudged upon overruling a demurrer or motion under section 57 of the Code, as a condition precedent to pleading over. Chivington v. Colorado Springs Co., 9 Colo. 597.

In Pennsylvania.—Under the practice

in Pennsylvania, there is no limitation of

(I) As to Costs.—An order vacating a judgment entered by default should require the defendant to pay the previous costs as a condition precedent to the reversal of the judgment. And a judgment by default will always be set aside at the term at which it is entered when there will be no delay on the trial, upon affidavit of merits and the payment of costs, though no excuse be made for not pleading.²

time to the power of a court to open a judgment entered by default. To open such a judgment upon terms which will protect the rights of the judgment creditor is within the discretion of the court, and the exercise of the power is not re-Breden v. Gilliland, 67 Pa. viewable.

1. Leet v. Grants, 36 Cal. 288; Bailey v. Taaffe, 29 Cal. 422; Howe v. Independence, etc., Co., 29 Cal. 72; People v. O'Connell, 23 Cal. 281; Roland v.

v. O'Connell, 23 Cal. 251; Roland v. Kreyenhagen, 18 Cal. 455.
2. Ryan v. Mooney, 49 Cal. 33; Carter v. Torrance, 11 Ga. 654; Mason v. McNamara, 57 Ill. 274; Oetgen v. Ross, 36 Ill. 335; Stivers v. Thompson, 15 Iowa, It; Burch v. Scott, I Bland (Md.), II2; Fore v. Folsom, 5 Miss. (4 How.) 282; Porter v. Johnson, 3 Miss. (2 How.) 736; Porter v. Johnson, 3 Miss. (2 How.) 736; Haggerty v. Walker, 21 Neb. 596; Oram v. Dennison, 13 N. J. L. (2 Beas.) 438; Slade v. Warren. 1 N. Y. 431; Neugrosche v. Manhattan R. Co., 1 N. Y. St. Rep. 302; Packard v. Hill. 4 Cow. (N. Y.) 55; Quinn v. Case, 2 Hilt. (N. Y.) 467; Riley v. Van Amrange, 1 How. (N. Y.) Pr. 43; Pugsley v. Van Alen, 8 John. (N. Y.) 352; Beekman v. Peck, 3 Johns. Ch. (N. Y.) 416; Messick v. Roxbury, 1 Handy (Ohio), 190; Pier v. Amory, 42 Wis. 474; Gilkensen v. Taggart, 1 Month. L. Bul. 92. Bul. 92.

Particularly when the opportunity for trial at the regular term has not been lost. Porter v. Johnson, 3 Miss. (2 How.) And where a writ of inquiry is awarded, the judgment is not final until the writ of inquiry is executed, and the adjournment of the term at which the writ was executed, and hence such a judgment may be set aside at a term subsequent to its entry, if the writ of inquiry has not been executed. Maury v.

Roberts, 27 Miss. 225.

Where the plaintiff in a decree obtained on the failure of the defendant to answer admitted that the amount of the decree was far too large a sum, and it did not appear that he had lost any evidence to sustain his case, it was held, on a bill filed by the defendant alleging on oath that he had a good defence to the whole claim on the merits, that the complainant in the latter bill might come in and answer the first on payment of costs. Burch

v. Scott, I Bland (Md.), 112.

Discretion of Court .- Application to let a party in to defend, after an order has been entered, taking the bill as confessed, is to the grace and favor of the court, and rests in its sound discretion; it will not be refused, however, upon a proper excuse being rendered and costs paid, provided there has not been an extravagantly long delay, and provided also its allowance will not work a greater injury to the plaintiff than its refusal would to the defendant. Carter v. Torrance, 11 Ga. 654.

May Answer as of Right on Payment of Costs. - Unless a default is caused by the gross laches of a defendant or his authorized attorney, he should be permitted to answer upon such terms as to the payment of costs as may be prescribed by the court at any time before judgment is rendered, and where it is apparent that the answer presents a meritorious defence, the court must permit the answer to be filed. Haggerty v. Walker, 21 Nev.

596.

On Demurrer to Frivolous Pleas .--Where special pleas are deemed frivolous, they should be noticed as frivolous, not demurred to. Where they were demurred to, a default was opened on excuse, on payment of costs of default of subsequent proceedings and of motion. Van Amrange, 1 Hów. (N. Y.) Pr. 43.

Where it Appeared that the Defendants had a Meritorious Defence, a judgment on default was set aside, the defendants first paying all the costs, and the plaintiffs having leave to reply at once and set the cases for hearing at the present term. Messick v. Roxbury, 1 Handy (Ohio), 190.

Default on an Appeal .- Where default was regularly taken by the counsel for the respondent on an appeal, he being in attendance, and the appellant moved at the next term to have his default opened on affidavits showing an excuse, the motion was granted on payment of the taxable costs of the terms, and of opposing the motion, and a counsel fee of \$50, for attending prepared to argue the cause, Slade v. Warren, I N. Y. 431.

Where a favor is granted to a party on payment of costs, the rule is conditional, and he must seek the other party and pay or tender the costs instanter.1

But where, after defendant has appeared by attorney, the plaintiff obtains a consent from the defendant in person for a discontinuance, and fails to notify the attorney or to enter an order for discontinuance, a default taken by such attorney will not be set aside except upon payment of costs.2 And in ordinary cases, if the defendant presents the plaintiff an affidavit, and makes him offers upon which he would be entitled to relief, should the plaintiff refuse to waive the default, the court will open it, without costs subsequent to the offer.3

(2) As to Security, Judgment Standing, etc.—In the exercise of the sound discretion lodged with them, the court may, in imposing terms, on the opening of a default, stipulate that the party pay accrued costs, and give security for those that may be thereafter made.4 or may order that the judgment already taken stand as se-

Vacating on Account of Surprise or Excusable Neglect .-- An order vacating a judgment, on account of surprise or excusable neglect, need not require as condition precedent the payment of all the opposing party's costs. Ryan v. Mooney, 49 Cal. 33.

If an order is made setting aside a judgment and default on condition that the moving party pay to the other a sum of money, and serve and file an answer within a certain time, the conditions must be complied with within the time fixed, or the judgment will remain in force in the same manner as if the order setting them aside had not been made. Hartman v. Olvera, 49 Cal. 101.

In Ejectment.—The payment of costs is a condition precedent to an absolute order setting aside a default in an action of ejectment, on an application under the statute. Oetgen v. Ross, 36 Ill. 335.

Ignorance of Attorney as to practice will be an excuse on his paying the costs. Gilkensen v. Taggart, I Month. L. Bul. 92. 1. Pugsley v. Van Alen, 8 Johns. (N. Y.) 352.

Costs After Default. - Upon setting aside a default, the courts will make such order in reference to costs as shall seem

equitable. Stivers v. Thompson, 15

Iowa, I. What Costs to be Paid—Legal Fees and Disbursements.—Imposing payment of "legal fees and disbursements" does not require payment of keeper's fees charged by sheriff. Townsend v. Ross, 45 N. Y. Super. Ct. (13 J. & S.) 447.

Failure to Pay Costs.—Where a rule

was granted to set aside a default on payment of costs, which were regularly demanded of the defendant, but not paid, and the plaintiff afterwards issued an execution on the judgment, the court refused to set aside the execution. Pugsley v. Van Alen, 8 Johns. (N. Y.) 352.

Where a Receiver Plaintiff had leave to open a default, on payment of costs and disbursements, and failed to pay, held, that entry of judgment and issue of execution without taxation of disbursements and demand of costs was regular. Smidtz v. Jones, 2 Month. L. Bul. 7.

 Pilger v. Gore, 12 Abb. (N. Y.) Pr.
 pilger v. Gore, 12 Abb. (N. Y.) Pr.
 s. c., 21 How. (N. Y.) Pr. 155.
 Packard v. Hill. 4 Cow. (N. Y.) 55.
 Approval of Bond by Judge.—Where a default is opened on condition of giving security, to be approved by one of the justices of the court, the approval of the court indorsed on the bond is conclusive evidence of the fact that such bond is a compliance with the order. Dolan v. Wilson, N. Y. Daily Reg., Feb. 5, 1886.

In New York.—Under the provisions

of the Code Civ. Proc. sec. 724, for relief against a default, if the court requires security, and if it is by bond, there will be no justification in court, as in case of a statutory undertaking; nor is such bond invalidated by failure to state the residence or occupation of the surety, as the plaintiff may by motion request the defendant to furnish such information. Dolan v. Wilson, N. Y. Daily Reg., Feb. 5, 1886.

For the terms on which the New York court of appeals opened a regular default upc. an ordinary excuse, see Conant v. Vedder, 4 How. (N. Y.) Pr. 141: Vanderheyden v. Mallary, 3 How. (N. Y.)

Pr. 295.

curity; 1 but it is severe and unusual to impose payment of the costs of the action, and require that the judgment stand as security, but is proper if it appear that the litigation was not continued in

good faith.2

c. Application, When Made.—The court have full power over judgments by default during the whole of the term at which they are rendered, and may set them aside in its discretion, except after writ of inquiry executed and judgment entered thereon, and then they can be set aside only for good cause shown therefor under oath.

Due diligence in pursuing rights is always necessary to the relief desired; consequently, where a defendant has suffered a default to be taken against him, to have it set aside he must be reasonably diligent in applying to the court for the relief contemplated, or his right to relief will be lost. Delay is always a good ground for denying a motion to set aside a default.⁵

Absent Defendants.—A regular default of absent defendants will not be opened, unless they give security for costs, see Thayer v. Mead, 2 N. Y. Code Rep. 18.

1. Judgment Allowed to Stand as Security.—On setting aside, on excuse, a default regularly entered against an administrator, the judgment was allowed to stand as security for the assets remaining, after payment of prior judgments confessed, and for assets quando acciderint, and defendant was required to disclose, by affidavit, the state of the assets. Nitchie v. Smith, 2 Johns. Cas. (N. Y.) 286.

Where there is a judgment by default, and the record does not show that process was served upon the defendant, but states that the parties appeared by their attorneys, on affidavit by the defendant at a subsequent term that he had no notice of the suit, did not authorize the appearance, and that he had a good defence, the judgment will not be set aside, but leave will be given to plead within a certain time, with a stay of proceedings in the mean time. Pierson v. Holman, 5 Blackf. (Ind.) 482.

If an attorney appear for a defendant (whether process has been served on him or not) without any authority from him, and confess judgment or let it go by default, the judgment is regular, and will not be set aside. But if there were fraud or collusion between the attorney and the plaintiff, or if the attorney is not responsible, or perfectly competent to answer to his assumed client, the court will relieve against the judgment. But the court will let the judgment stand as security, staying proceedings to let in the defendant to plead if he has any defence. Denton

v. Noyes, 6 Johns. (N. Y.) 296; s. c., 5.

Am. Dec. 237.
2. Brownell v. Rushman, 11 Rep.

3. Discretion of Court—Order Setting. Aside Default not Reviewed.—Defendant appeared by attorney and filed a sworn plea, but failed to appear on day of trial, and his attorney withdrew his appearance, and allowed judgment to go by default. Within four days afterwards defendant appeared, had the default set aside, and prevailed at the trial subsequently had. Held, that the supreme court could not say that the trial court erred in granting the trial for the excuse given by defendant, and that it would not on a technical defect in the showing, order the original judgment reinstated. Comstock v. Whitworth, 75 Ind. 129.

4. Taylor v. Lusk, 9 Iowa, 444; Barker

v. Justice, 41 Miss. 240.

At Common Law, a default could not be set aside at a term after one at which judgment was rendered. Carlisle v. Wilkinson, 12 Ind. 91. And a second application, made at next succeeding term, based upon first affidavit and affidavit of attorney that he did not understand that he was employed, was held to have been correctly overruled for reason that affidavit of attorney came too late, that ordinary diligence required it should have been filed at preceding term. Id. Quære: Whether if both affidavits had been filed on first application, it would have been error to overrule it, and whether an application can in any case be renewed upon an additional showing after having been once made and overruled. Id.

5. Bliss v. Treadway, 1 How. (N. Y.)

The motion to set aside a judgment by default should be made before the entry of final judgment. And the court will not set aside a judgment by default when the execution has been levied

and the money paid.2

A naked default, upon which no judgment or decree has ever heen entered, may be set aside at any time on proper grounds. The discretion of the court in this is not limited as to time.³ But when a judgment has been entered on it, a motion to open it must he made at the same time. 4 unless the judgment is shown to have

Pr. 245; De Wandelaer v. Hager, I How. (N. Y.) Pr. 61.

Motions Denied Because of Delay .- As denial of motions to set aside defaults on the ground of delay, see Bliss v. Treadway, I How. (N. Y.) Pr. 245; DeWandelaer v. Hager, I How. (N. Y.)

Pr. 61; Landon v. Burke, 33 Wis. 452.

An Unexplained Delay of seventeen months-Ammerman v. State, 98 Ind. 165 -or of seven years in making the application will justify the court in refusing to enforce the stipulation. Reese v. Mahoney, 21 Cal. 305. And if service of process appears by the proof of service filed with the judgment roll to have been made more than ten years before, and no excuse is offered for the delay, a motion to open the judgment should be denied, Weeks v. Merritt, 5 Rob. (N. Y.) 610.

Delay to Earn Money to Pay Costs.

A delay for more than eleven months to have a default set aside cannot be excused by the defendant on the ground that he had waited until he earned money to pay the necessary costs. Altmann v. Gabriel,

28 Minn. 132.

Where a Party Neglects for a Year to apply for the setting aside of a judgment of default, obtained by no unfair conduct of the plaintiff, where personal service has been made on the defendant, the judgment must stand. Sanderson v. Dox, 6 Wis.

Obtaining an Order to Stay Proceedings on a Judgment entered upon default until further order of the court, nine months after entry of the judgment, and moving to set aside sixteen months later, are not due diligence, and the motion is properly denied. Welch v. May, 14 Wis. 200.

1. Matthews v. Cook, 35 Mo. 286.

2. Cooper v. Galbraith, 24 N. J. L. (4 Zab.) 219.

3. Ordway v. Suchard, 31 Iowa, 487; Simmons v. Church, 31 Iowa, 284; Har-

per v. Drake, 14 Iowa, 534.

When Motion May be Made.—A motion may be made to set aside a default entered by the clerk, at any time before final judgment is rendered in the action, notwithstanding the court has adjourned for

the term at which the default was entered. before the motion is made to vacate it. Willson v. Cleaveland, 30 Cal. 192.

4. Rawdon υ. Rapley, 14 Ark. 203; s. c., 58 Am. Dec. 370; Smith v. Stinnett. r Ark. 497; Lattimer v. Ryan, 20 Cal. 628; Robb v. Robb, 6 Cal. 21; Suydam v. Pitcher, 4 Cal. 280; Trustees, etc., v. Bailey, 10 Fla. 238; Scales v. Labar, 51 Ill. 232; McKindley v. Buck, 43 Ill. 488; Messervey v. Beckwith, 41 Ill. 452; Cox v. Brackett, 41 Ill. 222; Smith v. Wilson, 26 Ill. 186; Cook v. Wood, 24 Ill. 295; Lampsett v. Whitney, 4 Ill. (3 Scam.) 170; Garner v. Crenshaw, 2 Ill. (1 Scam.) 143; Bland v. State, 2 Ind. 608; Blair v. Russell, I Ind. 516; Ordway v. Suchard, 31 Iowa, 487; Simmons v. Church, 31 Iowa, Iowa, 487; Simmons v. Church, 31 Iowa, 284; Harper v. Drake, 14 Iowa, 534; Kelly v. Keizer, 3 A. K. Marsh. (Ky.) 268; Bobb v. Bobb, 2 A. K. Marsh. (Ky.) 240; Brewer v. Dinwiddie, 25 Mo. 351; Ashby v. Glasgow, 7 Mo. 320; Murphy v. Merritt, 63 N. C. 502; Ramsour v. Raper, 7 Ired. (N. C.) L. 346; Wood v. Luse, 4 McL. C. C. 254.

Within What Time.—A motion to vacate a default entered by the clerk may be

cate a default entered by the clerk may be made at any time before final judgment is entered, although the court may have adjourned for the term at which the default was entered. Willson v. Cleaveland, 30

Cal. 192.

An Order Opening Default on Appeal contained the words "appeal to be heard at the next S. general term, without further notice, on condition, etc." Held, that the appeal might be brought on at an earlier general term in another county. Brotherson v. Consalus, 28 How. (N. Y.) Pr. 117.

When Opened .- Judgment of the court below, setting aside the default of the defendants, and allowing an answer to be filed, reversed on the ground that the application was heard during the absence of the plaintiff's attorney and without notice, and that no reasonable excuse was given by the defendant for the failure to answer within the proper time. Reilly v. Rud-dock, 41 Cal. 312.

Same-Judgment Nil Dicit. - A judg-

been obtained by fraud, surprise, or mistake, or that there is some authority for so doing. But the court does not lose jurisdiction to vacate a default because the term at which it was entered has adjourned, unless final judgment has been entered in the action? However, it is too late to make an application to set aside a default after one term has intervened between the term at which the default was taken, and that at which the motion was made.3

d. Application, Where and How Made.—An application to have a judgment opened up should be made to the court by which it was rendered, and should be made with notice; 4 and should, as a

ment nil dicit may be set aside at the term in which it was rendered, and the defendant may be allowed to plead by the first day of the next term. Martin v. Skehan.

2 Ćolo, 614.

An Attorney Overlooked a Case on the trial calendar, by reason of its being placed thereon under a title calculated to mislead. The case was called and defaulted. There was a meritorious defence. The attorney might have ascertained the status of his case by inquiring at the clerk's Held, that the default and judgment rendered thereon should be set aside, application having been made at the same term. Allen v. Hoffman, 12 Ill. App. 573.

Oral Stipulation for Additional Time. A default will not ordinarily be opened on the ground that there was an oral stipulation for additional time within which to file an answer, if the fact that there was such a stipulation is denied, defendant moreover having delayed after the entry of the default to move to have it taken off.

Moran v. Mackey. 32 Minn. 266.

Dismissing Motion to Open Default.—
A defendant who has moved to open a judgment against him may dismiss his motion after the judge has announced orally his purpose to grant it. Cherry v.

Home B. & L. Assoc., 55 Ga. 19.

In Iowa.—Under the provisions of the statute of Iowa limiting the setting aside

a judgment by default to the term at which it was taken, a simple default may be set aside at any term in which judgment is entered, or prior thereto. Harper v.

Drake, 14 Iowa, 533.

In New York, a judgment by default against a cestui que trust in favor of a trustee will be opened if he has not been guilty of laches. The lapse of a year does not necessarily preclude relief, for the court has power independent of the statute. Dinsmore v. Adams, 49 How. (N. Y.) Pr. 238; s. c., 5 Hun (N. Y.), 149. Approved in 66 N. Y. 618, affirming 48 How. (N.

In Vermont, a judgment rendered by default at a previous term of the county court will be vacated and the cause brought

forward upon affidavit that defendant's attorney mistook the term day, and alleging a good defence, briefly indicating its nature. Farmers' Mut. Fire Ins. Co. v. Reynolds, 52 Vt. 405.

1. Loney v. Bailey, 43 Md. 10; Turnbull v. Thompson, 27 Gratt. (Va.) 306; Salter v. Hilgen, 40 Wis. 363.
2. Willson v. Cleaveland, 30 Cal. 192.
3. Garner v. Crenshaw, 1 Scam. (Ill.)

At Subsequent Term.—An order to set aside a final judgment by default, made at a term subsequent to the one at which such judgment is rendered, is wholly illegal; and no fact stated in such an order can be noticed in this court.

Stinnett, I Ark. 497.

For instances of judgments vacated at a subsequent term under special cirat a subsequent term under special circumstances, see Bradley v. Eliot, 5 Cr. C. C. 293; United States v. Hastings, 5 Cr. C. C. 115; Reiling v. Bolier, 3 Cr. C. C. 212; Union Bank of Georgetown v. Crittenden, 2 Cr. C. 238; Pierce v. Turner, 1 Cr. C. C. 433; United States v. Smith, 1 Cr. C. C. 127; United States v. McKnight, 1 Cr. C. C. 84.

4. A judgment entered upon the default of the defendant which has been assigned for value should not be opened without notice of the assignee and opportunity to him to be heard. Robinson v. American Chemical Co., 9 N.Y. Civ. Pro.

R. (Browne) 78.

In New York, a judgment by default at a general term dismissing an appeal for not serving copies of the case in due time will be opened where the appellant shows that the action and all the proceedings therein were wholly neglected by his attorney and counsel in consequence of his being rendered by his habits incompetent to take charge of them. A court at special term is the proper tribunal to apply to for relief under such circumstances. Elston v. Schilling, 7 Robt. (N. Y.) 74.

In Indiana-Remedy.-A party against whom a judgment by default has been taken must seek relief under last clause

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rule, he made at the same term or the term immediately succeed-

ing the one at which the default was taken.1

To open a judgment is not to set it aside, and when it is closed by the action of the court it takes its place as if it had never been disturbed.² No particular form is required by the statute in which application shall be made for such relief. All that is required is that the facts shall be set forth, and if they show a case coming within the rule it is sufficient. The motion should be based on an affidavit 4 showing a meritorious defence and excusing neglect.5

of section 99 of the Ind. Code. Lake v. Jones, 49 Ind. 297; Fisk v. Baker, 47 Ind. 534; Harvey v. Wilson, 44 Ind. 231; Webster v. Maiden, 41 Ind. 124; Buck v. Havens, 40 Ind. 221; Yancy v. Teter, 39 Ind. 305; Barnes v. Conner, 39 Ind. 294; Phelps v. Osgood, 34 Ind. 150; Strader v. Manville, 33 Ind. 111; Çlegg v. Fithian, 32 Ind. 90; Smith v. Noe, 30 Ind. 117; Blake v. Stewart, 29 Ind. 318; Ratliff v. Baldwin, 29 Ind. 16; Goldsberry v. Carter, 28 Ind. 59; Hunter v. Elliott, 27 Ind. 93; Downey v. Hinchman, 25 Ind. 455; Gray v. Dickey, 20 Ind. 96; Frazier v. Williams, 18 Ind. 416; Goings v. Chapman, 18 Ind. 194; McQuary v. Cass, 16 Ind. 306; Durbon v. Connor, 15 Ind. 433; Lasselle v. Wilson, 13 Ind. 453; Harlan v. Edwards, 13 Ind. 430; Carlisle v. Wilkinson, 12 Ind. 91; Cincinnati, L. & C. R. R. Co. v. Knowlton, 11 Ind. 339; Robertson v. Bergen, 10 Ind. 402; Blair v. Davis, 9 Ind. 236.
The Complaint in an Action under Sec-

tion 99 of the Code to have a judgment set aside, which has been rendered by default through defendant's inadvertence, must allege facts constituting the inadvertence, and show that defendant has a meritorious defence. Bristor v. Galvin,

62 Ind. 352.

1. In New York, a motion to open, on excuse, a regular default taken at a general term is properly made at special term. Elston v. Schilling, 7 Robt. (N. Y.)

74.
Thus a court of special term is the proper tribunal to apply to for relief when judgment was taken by default at and neglect of the attorney to attend to the case, because rendered by his habits incompetent. Elston v. Schilling, 7 Robt. (N. Y.) 74.

A Judgment of a Justice entered in a common plea, on a transcript of the justice only, for the purpose of lien, cannot be opened there, no appeal being taken. Boyd v. Miller, 52 Pa. St. 431.

2. Gloniger v. Hazard, 4 Phila. (Pa.)

3. People v. Lafarge, 3 Cal. 130.

4. What Affidavit to Contain .- A full disclosure of the facts and grounds on which the merits of a defence arise is required in affidavits to set aside defaults. Rich v. Hathaway, 18 Ill. 548.

Construction of Affidavit.—In applica-

tion to set aside judgments entered by default or in ex parte proceedings, affidavits in support of such applications are to be construed most strongly against the party making the application. Crossman v. Wohlleben, 90 Ill. 537.

Who should make Affidavit to Set Aside

Default.-An affidavit, on motion to set aside default, should be made by the defendant, unless good reasons exist for having it made by some one else. Bailey v. Taaffe, 20 Cal. 422.

Affidavit by Attorney.-An affidavit, to open a judgment upon default, may be made by an attorney having personal Frankoviz v. Smith. 35 knowledge.

Minn. 278.

An Affidavit of the Attorney, on motion to set aside a default, which states that from the examination of the defendant's. case, so far as he has made such examination, he verily believes that it is betterthan the plaintiff's, does not show that the defendant has a meritorious defence. Bailey v. Taaffe, 29 Cal. 422.

Affidavits in Opposition .- When, in an application to open a default, merits areshown by affidavits, counter-affidavits cannot be feceived. Francis v. Cox, 33 Cal. 323; Bristor v. Galvin, 62 Ind. 352; Hanford v. McNair, 2 Wend. (N. Y.)

When Opened.-Upon a motion by a party defendant to set aside a default, and to be admitted to defend the action, the plaintiff will not be permitted to file affidavits contradicting the allegations of merits contained in the affidavits of the moving party. Gracier v. Weir, 45 Cal. 53.

5. Vide, ante, Affidavir of Merits.

The Defence Itself must be set out,

and also facts showing why an appearance was not made, and that default was taken "through his mistake, inadvertence, surprise, or excusable neglect.

e. To Let in an Unconscionable Defence.—Where an order taking judgment by default or a bill as confessed is technically regular the court will not set it aside to enable a defendant to set up an unconscionable or dishonest defence; neither will he be allowed to insist upon any grounds of defence which are in the nature of a penalty of forfeiture.2 And where in a case of default the defendant obtains leave to plead, he cannot put in a special demur-

The well-settled-rule that on opening a default the court may, at its discretion, restrict as to the defences which he may set up. should not be extended to defences other than those of usury 4

Yancy v. Teter, 39 Ind. 305; Phelps v. Osgood, 34 Ind. 150.

Bail.—On an application to set aside a

default, bail are not entitled to any peculiar indulgence. Gorham v. Lansing, 2 Johns. Cas. (N. Y.) 107.

1. Pennington v. Gibson, 6 Ark. (I Eng.) 447; Hazelrigg v. Wainwright, 17 Ind. 215; Marsh v. Lasher, 13 N. J. Eq. Ind. 215; Marsh v. Lasher, 13 N. J. Eq. (2 Beas.) 253; Lahey v. Kingon, 13 Abb. (N. Y.) Pr. 192; s. c., 22 How. (N. Y.) Pr. 209; Audubon v. Excelsior Fire Ins. Co., 10 Abb. (N. Y.) Pr. 64; Morris v. Slatery, 6 Abb. (N. Y.) Pr. 74; Bard v. Fort, 3 Barb. Ch. (N. Y.) 632; Watt v. Watt, 2 Barb. Ch. (N. Y.) 371; Quincy v. Foot, 1 Barb. Ch. (N. Y.) 371; Quincy v. Foot, 1 Barb. Ch. (N. Y.) 274; Douglas v. Corlies, 1 Daly (N. Y.), 274; Douglas v. Douglas, 3 Edw. Ch. (N. Y.) 390; Lovett v. Cowman, 6 Hill (N. Y.) 226; Hawes v. Hoyt, 11 How. (N. Y.) Pr. 454; Grant v. McCaughin, 4 How, (N. Y.) Pr. 216; Parker v. Grant, 1 Johns. Ch. (N. Y.) 630; National Fire Ins. Co. v. Sackett, 11 Parker v. Grant, I Johns. Ch. (N. Y.) 630; National Fire Ins. Co. v. Sackett, II Paige Ch. (N. Y.) 660; Gay v. Gay, Io Paige Ch. (N. Y.) 374; Wager v. Stickle, 3 Paige Ch. (N. Y.) 407; Candler v. Pettit, I Paige Ch. (N. Y.) 427; King v. Merchants' Exch. Co., 2 Sandf. (N. Y.) 693; Sands v. White, 3 Ch. Sent. (N. Y.) 39; Beach v. Fulton Bank, 3 Wend. (N. Y.) 573, aff'g I Paige Ch. (N. Y.) 429; Gourlay v. Hutton, Io Wend. (N. Y.) 595; Wood v. Ward, Io W. L. J. 505; Haines v. Lytle, 4 W. L. J. I; McCulloch v. Tapp, 4 West. L. M. 575. Compare Macqueen v. Babcock, I3 Abb. (N. Y.) Pr. 268.

Defence that Act was Ultra Vires.-The defence, on the part of a corporation, sued upon securities given by them, and for which they had received value, that giving such securities, was beyond their corporate powers, held, an unconscientious defence within this rule. Bard v. Fort. 3 Barb. Ch. (N. Y.) 632; King v. Merchants' Exch. Co., 2 Sandf. (N. Y.)

2. Wager v. Stickle, 3 Paige Ch. (N. Y.) .407.

3. Andrews v. Moore, Tapp. (Ohio)

3. Andrews v. Moore, Tapp. (Ohio) 183, 185.
4. Marsh v. Lasher, 13 N. J. Eq. (2 Beas.) 253; Morris v. Slatery, 6 Abb. (N. Y.) Pr. 74; Quincy v. Foot, 1 Barb. Ch. (N. Y.) 496; Farish v. Corlies, 1 Daly (N. Y.), 274; Lovett v. Cowman, 6 Hill (N. Y.), 226; Grant v. McCaughin, 4 How. (N. Y.) Pr. 216; Candler v. Petit, 1 Paige Ch. (N. Y.) 427.

Defence of Usury.—The defence of usury is an unconscionable one, and the

ry is an unconscionable one, and the courts will not usually open a judgment obtained by default to establish it, or allow the amendment of a pleading for allow the amendment of a pleading for that purpose,—Farish v. Corlies, I Daly (N. Y.), 274; Lovett v. Cowman, 6 Hill (N. Y.), 226; Candler v. Pettit, I Paige Ch. (N. Y.) 427,—either by a court of law or equity. Marsh v. Lasher, I3 N. J. Eq. (2 Beas.) 253; Morris v. Slatery, 6 Abb. (N. Y.) Pr. 74; Grant v. McCaughin, 4 How. (N. Y.) Pr. 216.

Where the defence is usury the court

Where the defence is usury, the court requires the defendant to undertake that he will not avail himself of that defence, except as to the amount of the usurious premium; but where such order is not technically regular the complainant is not entitled to retain it and to shut out any legal defence which the defendant had to

any part of the claim made by the bill.
Quincy v. Foot, r Barb. Ch. (N. Y.) 496.
Discretion of Court.—A judgment having been regularly entered by default on the second day of the term, defendant appeared on fifth day and moved on affidavit to set default and judgment aside. The affidavit disclosed defence of usury, and alleged that defendant had before first day employed counsel to make de-fence, etc. Held, such motions are left to the discretion of the court below, and that there was no abuse of such discretion in overruling motion, affidavit being defective in not showing that facts were Hazelrigg v. disclosed to attorney. Wainwright, 17 Ind. 215,

Must Offer to Pay Sum Equitably Due.— Regular default not to be opened to let

limitations, 1 Statute of Frauds, 2 counter-claim, 3 fraudulent speculation, 4 etc., which gave rise to the rule. 5 Thus on opening, on sufficient excuse, a default regularly taken against a defendant. the court should not, as terms of the favor, require the defendant not to interpose a former adjudication as a bar to the present

in unconscionable defence, e.g., usury, except on payment of the sum equitably due. Bard v. Fort, 3 Barb. Ch. (N. Y.) 632; Watt v. Watt, 2 Barb. Ch. (N. Y.) 371; Quincy v. Foot, 1 Barb. Ch. (N. Y.) 576; National Fire Ins. Co. v. Sackett, 11 Paige Ch. (N. Y.) 660. To same effect, Paige Ch. (N. Y.) 000. To same enect, Wager v. Stickle, 3 Paige Ch. (N. Y.) 407; Beach v. Fulton Bank, 3 Wend. (N. Y.) 573, affig I Paige Ch. (N. Y.) 429; Sands v. White, 3 Ch. Sent. (N. Y.) 39. Or offer to consent to a decree for the payment of what is equitable. Watt v. Watt, 2 Barb. Ch. (N. Y.) 371.

Waiver of Forfeiture. - A regular decree entered by default will not be opened to let in the defence of usury without an offer on the part of the defendant to waive the forfeiture, and to consent to a decree for the payment of what is equitably due. Watt v. Watt, 2 Barb. Ch.

(N. Y) 37i.

1. Pleading Statute of Limitations After Default.-Where a defendant after legal notice fails to appear and defend, a judgment by default will not be set aside for the purpose of letting in the plea of the Statute of Limitations. Pennington v. Gibson, 6 Ark. (1 Eng.) 447. It is otherwise where the judgment is rendered against him without notice. Id.

A defendant should not be allowed after default to put in an answer setting up the Statute of Limitations, where it appears that the debt is still justly due. Indulgence should not be granted for the defendant's laches merely to enable him to deny the like indulgence to the laches of his adversary. Hawes v. Hoyt, 11 How.

(N. Y.) Pr. 454.

Leave to file a plea of the Statute of Limitations will not generally be granted after default, not being a plea to the merits. A plea of the Statute of Limitations of fifteen years is not applicable to money counts in a declaration of assump-sit. Haines v. Lytle, 4 W. L. J. I. However, on an ordinary application to set aside a default, the court will not generally impose the condition that the party shall not plead the Statute of Limitations. Gourlay v. Hutton, 10 Wend. (N. Y.) 595. Unless complainant shows his ability to meet the defence has been jeoparded or impaired by the delay. Douglas v. Douglas, 3 Edw. Ch. (N. Y.) 390. Or where the plaintiff has, by the

defendant's delay, been deprived of evidence to rebut the defence of the statute.

Upon Excuse and as a Favor

Discretion of Court .- It is within the discretion of the court to receive or reject a plea of the Statute of Limitations after the rule day for pleading has expired, and the party is in default. New-

som's Adm. v. Ran. 18 Ohio, 240.

Defence Not to be Favored.—The plea of the Statute of Limitations is a defence not to be favored. Where an issue has been made up, or the defendant is in default, he will not, unless under peculiar circumstances, be allowed to put in that plea. Sheets v. Baldwin's Admrs., 12 Ohio, 120.

When Cannot be Refused. - Under a rule of court that a defendant in default shall, if required, show that he has a meritorious defence, and he shall then plead issuably, the plea of the Statute of Limitations cannot be refused; it is a legal right. Wood v. Ward, 10 W. L. J. 505,

Suit to Cancel County Taxes.—On an

opening default in a suit to cancel taxes the defendant county will be allowed to plead the Statute of Limitations. consin Cent. R. R. Co. v. Lincoln Co., 57

Wis. 137.
2. Setting Up Statute of Frauds.—Without special circumstances, the court will not open up a default to permit a defence of the Statute of Frauds to be made either by demurrer or plea, nor will a new issue be permitted for that purpose. McCulloch v. Tapp, 4 West. L. M. 575.

3. Counter-Claim .- A judgment should not be opened to the prejudice of the plaintiff merely to enable the defendant to interpose a counter-claim, which he may enforce by action, where there is no doubt as to the plaintiff's responsibility. Lahey v. Kingon. 13 Abb. (N. Y.) Pr. 192; s. c., 22 How. (N. Y.) Pr. 209, 4. Fraudulent Speculation.—A decree

fairly and regularly obtained by default, for want of answer, will not be set aside to let in a defence founded on a fraudulent speculation undeserving the favor of the court. 1 Ch. (N. Y.) 630. Parker v. Grant, 1 Johns.

5. Audubon v. Excelsior Fire Ins. Co., 10 Abb. (N. Y.) Pr. 64. Compare Macqueen v. Babcock, 13 Abb. (N. Y.) Pr. 268; s. c., 22 How. (N. Y.) Pr. 229; aff'd

in 3 Keyes (N. Y.), 428.

action. 1 nor the defence that the note was given for money won at play.2

3. FOR MATERIAL DEFECTS.—Judgments taken by default, which are erroneous, will be set aside for material defects or error. And

1. Audubon v. Excelsior Fire Ins. Co.,

10 Abb. (N. Y.) Pr. 64.

2. Ruckman v. Pitcher, I N. Y. 392, 308: Bank of Kinderhook v. Gifford, 40 Barb. (N. Y.) 659; Grant v. McGaughin, 44 How. (N. Y.) Pr. 216; Gourlay v. Hutton, 10 Wend. (N. Y.) 595.

Money Lost at Play.— A default for

want of an answer will be set aside, and an answer allowed, on showing sufficient excuse, though the answer to be set up is that the note sued on was given for

money won at play. Bank of Kinderhook v. Gifford, 40 Barb. (N. Y.) 659.

3. Wharton v. Harlan, 68 Cal. 422; Hallock v. Jaudin, 34 Cal. 167; Vallejo v. Green, 16 Cal. 160; Porter v. Herronson C. 16 Cal. 160; Por mann, 8 Cal. 619; Joyce v. Joyce, 5 Cal. 449; People v. Woodlief, 2 Cal. 241; Burt v. Scrantom, 1 Cal. 416; Brown v. Brown, 59 Ill. 315; Neitert v. Trentman, 104 Ind. 390; s. c., 2 West. Rep. 645; Houk v. Barthold, 73 Ind. 21; Rice v. Griffith, 9 Iowa, 539; Messenger v. Marsh, 6 Iowa, 491; Diltz v. Chambers, 2 Greene (Iowa), 479; Brown v. Holmes, 19 Kan. 567; Parker v. Elder, 8 Kan. 460; People v. Bacon, 18 Mich. 247; Mackubin v. Smith, 5 Minn. 367; Janney v. Spedden, 38 Mo. 395; Mason v. Barnard, 36 Mo. 384; Campbell v. Garton, 29 Mo. 343; Blodgett v. Brewer, cited 20 N. H. 56; Sawyer v. Chadwick, cited 20 N. H. 56; Hadlock v. Clement, 12 N. H. 74; Rangely v. Webster, 11 N. H. 299; 306; Andrews v. Monilaws, 8 Hun (N. Y.), 65; Teaz v. Chrystie, 2 E. D. Smith (N.Y.), 621, 635; Carroll v. Goslin, 2 E. D. Smith (N. Y.), 376; Bender v. Askew, 3 Dev. (N. C.) L. 149; s. c., 22 Am. Dec. 714; Hooker v. Kilgaur, 2 Cip. Super C. 714; Hooker v. Kilgour, 2 Cin. Super. Ct. Rep. (Ohio) 350; Wood v. Smith, 11 Tex. 367; Midkiff v. Lusher, 27 W. Va. 439; Gerster v. Hilbert, 38 Wis. 609; Alexandria v. Fairfax, 95 U. S. (5 Otto) 774; bk. 24, L. Ed. 583; s. c., 4 Am. L. Rep. 517; 5 Cent. L. J. 450. When Reversed.—A judgment by de-

fault, not objected to below, will be reversed on error where the complaint shows no substantial cause of action, Childress v. Mann, 33 Ala. 206.

Discretion of Court.—Granting or refusing a motion to set aside a default, and giving leave to answer, is a matter resting to a great extent in the sound discretion of the court; and where there is no showing made in excuse of the default, and no merits are shown, no error or abuse of discretion will be presumed. Haight v. Schuck, 6 Kan, 102.

Counter Affidavits .- On a motion to set aside a default based on the ground of want of authority in the plaintiff's at-torney to bring the suit, it is regular to hear counter-affidavits. Reed v. Curry.

35 Ill. 536.

Default without Summons-Petition for Review. - A petition for review is the appropriate remedy when a final judgment has been rendered upon default against a defendant who has not been summoned, or who has not appeared without summons, or who has not been made a party as the representative of one who has been summoned or who has ap-Campbell v. Garton, 20 Mo. 343. But if summons has been served. the defendant is confined to his remedy by motion to set aside the default. Id.

If defendant is in court either by summons or voluntary appearance, a petition by him for review will be properly dis-Tennison v. Tennison, 40 Mo.

IIO,

The case of Carroll v. Goslin, 2 E. D. Smith (N. Y.), 376, cited and approved in Neitert v. Trentman, 104 Ind. 392; s. c., 2 West. Rep. 645, 651, to the point that the defaulting party, as excuse for not appearing and defending the action, may show that the summons was not infact served upon him.

Debt Not Due .- A judgment rendered upon a debt not due would be set aside even after default. Mason v. Barnard,

36 Mo. 384.

Defective Complaint .- Where a complaint fails to state facts sufficient to constitute a cause of action, judgment thereon by default will be reversed on appeal.

Hallock v. Jaudin, 34 Cal. 167.

In a proceeding to recover from a stockholder on his statutory liability to pay the debts of the corporation, the petition should aver that the defendant was a stockholder while the debt for which judgment against the corporation had been obtained was incurred, this being a fact constitutive of the cause of action. And such averment being omitted, and it appearing by other pleadings that this defendant was not such a stockholder, a judgment against him for default must be set aside, for such fact cannot be presumed to have been proved when there was no trial had and no proof shown, and therefore the petition cannot be amended so as to make the judgment good. Hooker W. Kilgour, 2 Cin. Super. Ct. Rep. (Ohio)

Defective Record .- An appeal may be taken in vacation from commissioner's court to circuit court. The appellant defaulted appellee. Motion to set aside default was overruled. Supreme court may reverse such ruling on the ground that the record did not show that a summons had been issued and served on appellee. Record should show that summons was issued and served. Houk v. Barthold, 73 Ind. 21. The affidavit need not show that appellee had any merit in his case. Id:

Where a party against whom a judgment has been rendered in his absence, without proof of notice to him appearing on the files of the court, moves at the first opportunity to vacate it, he is legally entitled to that relief, unless it is then made to appear that legal notice was in fact given. People v. Bacon, 18 Mich.

Defective Service. - A judgment by default entered without legal service of process will be set aside. Diltz Chambers, 2 G. Greene (Iowa), 479. Thus a judgment by default will be reversed by the supreme court where the record shows that the defendant has not been legally served with process. Toyce v.

Joyce, 5 Cal. 449.
Where judgment by default is entered in an action against a party for fraudulently converting money of the plaintiff, the summons must have apprised the defendant that, on failure to answer, judgment would be taken against him for the fraud; a mere notice in the summons that a money judgment would be taken will not support a judgment for fraud. Porter v. Hermann, 8 Cal. 619.

Such a proceeding is, in its essential character, a quasi-criminal proceeding, and the defendant should be distinctly apprised of the facts intended to be proved against him. Porter v. Her-

mann, 8 Cal. 619.

Where the court makes an order requiring plaintiff to appear at a certain time, and show cause why a judgment in his favor should not be set aside, and it does not appear that a copy of the order was served on plaintiff or his attorney, or any notice was given of the time at which the matter was to be heard, it is error for the court to set aside the judgment, and its order to that effect will be reversed on appeal. Vallejo v. Green, 16 Cal. 160.

Bill for Divorce.—The next day after

the default, the defendant filed affidavits. proving satisfactorily that the person with whom the copy of the summons was left was not a member of his family. Held error to overrule motion to set aside the default. Brown v. Brown, 50 Ill. 315.

For Material Defects:

Same-When Not Reversed on Appeal. -Where a judgment by default is rendered against a defendant who has not been served with sufficient notice, he will not be entitled to a reversal on appeal until he has first moved for the correction of error in the court below. McKinley v. Betchtel, 12 Iowa, 561; Pigman v. Denney, 12 Iowa, 306.

Same-In Iowa Code, Section 3150 of the Revision has reference to cases where the court had authority to enter the default; and where default has been without legal authority, as upon an insufficient notice, no affidavit of merits is necessary. Boals

v. Shules, 29 Iowa, 507.

Defective Return—West Virginia Code. -A judgment on a fatally defective return of service may be set aside on motion, under West Virginia Code, ch. 134, sec. 5. Midkiff v. Lusher, 27 W. Va.

Defective Summons .- If the summons be defective it will not support a judgment by default. People v. Woodlief, 2

Cal. 241.

Error and Omission of Clerk.-Where leave has been given to a party to amend, and the clerk fails to record the amendment whereby the party is erroneously defaulted, the court will remove the deult. Wood v. Smith, 11 Tex. 367.

Judgment by Default Without Adjudica-

tion.-Judgments by default, signed by the attorney, without an actual adjudication by the court, may be set aside at any time, even after the term at which they are entered. Bender v. Askew. 3 Dev. (N. C.) L. 149; s. c., 22 Am. Dec. 714.

Judgment by Default After Arbitration and Settlement .- And so where judgment was taken by default against a party after the action had been arbitrated on and settled. Sawyer v. Chadwick cited,

20 N. H. 56.

Judgment Taken in Violation of Agreement. -But where a judgment was taken by default in violation of the agreement of the party, it was summarily set aside by this court upon petition. Blodg-

ett v. Brewer cited, 20 N. H. 56.

Judgment by Mistake Without Notice. -Where a judgment by default has been entered by mistake or without notice to the party or rule upon him to answer, or it is apparent to the court that it was improvidently rendered, it may be set aside without an affidavit of merits or reason-Messenger v. Marsh, 6 able excuse.

Iowa, 491.

Where through a mistake or inadvertence a party is in default of an answer to a petition, he should (if he desires to answer) promptly apply to the opposite party, or to the judge of the court, for leave to file an answer, and not wait until the court convenes to make his applica-Where the opposite party does not consent that an answer may be filed. diligence must be shown, merits must appear, and terms may be imposed; but the court or judge cannot act oppressively or arbitrarily on the question of granting leave to answer. Brown v. Holmes, 19 Kan. 567.
Same—Kentucky Practice.—A judg-

ment by default when there has been no service on the defendant is a clerical misprision, and by Kentucky Civ. Code. sec. 577, is no ground for appeal until it has been presented and acted on by the court that renders it. Robinson v. Mob-

ley, I Bush (Ky.), 196.

Judgment granting Relief not asked for in Petition .- A judgment taken by default, giving greater relief than is demanded in the complaint, should be set Andrews v. Monilaws, 8 Hun aside.

(N. Y.), 65.

Judgment against Lunatic with Appointment of Guardian Ad Litem -On a motion by a guardian ad litem of a lunatic to set aside the summons, judgment, etc., in an action where formal service on the lunatic and judgment by default without appointment of a guardian ad litem were had, the judgment should be set aside, and the guardian appointed since the judgment be let in to defend, but the summons and service should not be set aside. Gerster v. Hilbert, 38 Wis.

Judgment in Marine Court-New York Practice.—Unless a judgment in a marine court was obtained by default, the common pleas can only reverse for error. Teaz v. Chrystie, 2 E. D. Smith (N. Y.),

Want of Jurisdiction.—Judgment by default before the court has acquired jurisdiction in the case may be set aside without an affidavit of meritorious defence. Rice v. Griffith, 9 Iowa, 539.

Motion to set aside default and dismissal was no such appearance as to waive want of jurisdiction. Houk v. Barthold,

73 Ind. 21.

Want of Jurisdiction-Imposing Conditions. - Where a court has jurisdiction of a kind of cases, but from some circumstances has no jurisdiction of a particu-

lar case, in which a judgment has been entered by default, it is not error for the court, in opening the judgment at the defendant's request, to impose the condition that he shall waive the want of jurisdiction. Putney v. Collins, 3 Grant

(Pa.) Cas. 72.

Ohio Code, sec. 538, providing that a indement shall not be vacated on motion until it is adjudged that there is a good defence, does not apply to cases where the judgment was obtained on a warrant of attorney which applied only to another and distinct cause of action, or where the court has no jurisdiction over the person of the defendants. Knox County Bank v. Doty, o Ohio St. 505; s. c., 75 Am. Dec. 479

Loss of Document-Not Error of Fact Inability to find document, the contents of which were not known to defendant, but were material to the defence. in consequence of which it was not pleaded, held, an error of facts not arising on the trial within Code Civ. Pro. sec. 1790. Northern Dispensary v. Merriam.

2 Month. L. Bul. 90.

Misnomer of Plaintiff—In Arkansas— Voidable Only—Void and Voidable.—Held, that where the defendant was summoned to answer William Cunnington, and judgment was rendered by default in favor of William Cunningham, the judgment was void. Cheatham ex parte, 6 Ark. (I Eng.) 531; s. c., 44 Am. Dec. 525; overruled by Borden v. State, II Ark. (6 Eng.) 519; s. c., 54 Am. Dec. 217, and held that such judgment is voidable merely. This case also overruled Ex parte Pile, 9 Ark. (4 Eng.) 336; Miller v. Barkeloo, 8 Ark. (3 Eng.) 318; Ex parte Cross, 7 Ark. (2 Eng.) 41; Wise v. Yell, 7 Ark. (2 Eng.) 11, and indirectly many others. This vexed question as to whether judgment is void or voidable merely for want of notice, has been settled by act of February 17, 1859, which provides that all orders, judgments, sentences, and decrees, without notice, actual or constructive, and all proceedings under them, shall be absolutely void; but that recital of notice in the record shall be evidence of that fact. See Acts 1858, p. 172.

Premature Judgment.—A judgment by default before the expiration of the full time will be reversed on appeal.

v. Scrantom, 1 Cal. 416.

A judgment rendered by default before the court acquired jurisdiction may be set aside without a showing of a merito-Rice v. rious defence to the action. Griffith, 9 Iowa, 539.
Same—California Practice.—When suit a default will be set aside where it is made clearly to appear that the defendant suffered a default to be taken because of an erroneous impression as to the subject-matter of the action.¹

But a judgment taken by default cannot be attacked collaterally for a mere irregularity; 2 and the error in a judgment ren-

dered by default may be corrected on appeal.3

is against a person in a county other than that in which he resides, he has thirty (now twenty) days within which to answer, exclusive of the day on which the summons is served; and a judgment by default before the expiration of the full time will be reversed on appeal.

Burt v. Scrantom, I Cal. 416.

Proceedings to Confiscate Property-Conduct of Presiding Judge. -- In a proceeding to confiscate property of F., a person charged with being in rebellion, the counsel of F. did not enter an appearance for him, because in three cases against the same party before the same judge. he was informed by the judge from the bench that it was a rule of his court not to allow any appearance and defence by rebels and traitors; and in these cases the appearance and defence were stricken from the docket, and this a short time before the last case was acted on. counsel was not in default for failing to enter an appearance for F., and the decree of confiscation is void and of no effect. Alexandria v. Fairfax, 95 U. S. (5 Otto) 774; bk. 24. L. Ed. 583; s. c., 4 Am. L. T. Rep. 517; 5 Cent. L. J.

Several Defendants—Void as to One, Void as to All.—If there be an entire judgment against several defendants, and it is void as to one, it will be void as to all. Rangely v. Webster, II N.

H. 299, 306.

Service by Publication.—Where the defendant was only served by publication, and judgment was rendered before the answer day and before thirty-one days after the first publication had expired, held, it was error to refuse to set aside the judgment. Parker v. Elder, 8 Kan.

460.

Where an order for service of summons by publication has been obtained upon an insufficient affidavit, a judgment by default obtained thereon will be set aside upon defendant's motion, without a showing upon his part that he has not received the summons, or has been in any way injured by the proceedings, or has a defence upon the merits. Mackubin v. Smith. 5 Minn. 367.

kubin v. Smith, 5 Minn, 367.

Same—Amendment of Petition.—If a non-resident is served by publication, and does not appear, and after publica-

tion plaintiff amends his petition, the judgment will be null and void. Janney

v. Spedden, 38 Mo. 395.

Unauthorized Entry by Clerk—Setting Aside—California Practice.—The court may at any time set aside a judgment by default entered by the clerk, when it appears upon the face of the judgment roll that the clerk had no power to enter it. In such a case, section 473 of the Code of Civil Procedure, limiting the time within which a motion to set aside a judgment can be made to six months after its entry, has no application. Wharton v. Harlan. 68 Cal. 422.

In Trover—Writ of Inquiry and Assessment of Damages.—If the plaintiff in an action of trover upon default enter up judgment without an inquiry or assessment of damages, the complainant may be relieved on motion in the common pleas where the judgment was rendered. Hadlock v. Clement, 12 N. H. 68.

1. Mistake as to Cause of Action .- An action on a note was continued for default. When called, the defendant moved to have the docket-entry stricken out; and the court observing that a motion to remove the default might be afterwards made, the default was entered. quently, on the defendant's affidavit that he had consented to the default, supposing the action was on a note like that described in the declaration which he had given, that he had since paid and then taken up that note, and now found that the note offered in evidence by the plaintiff was a copy or counterfeit of that he had taken up, and both notes being exhibited, the default was stricken off. Sewall v. Weeman, 31 Me. 589.

2. Irregular Service.—A judgment by default, where summons has been served on defendant, cannot be attacked collaterally for a mere irregularity of service, or for a defective return. The defendant should assert his rights by appeal from judgment. Dorente v. Sullivan, 7 Cal.

270.

3. Correction of Error.—There may be error in a judgment by default, as well as in a judgment rendered upon issue joined in the pleadings and tried by a jury; and in the former as well as in the latter case the error may be corrected on appeal. Stevens v. Ross, I Cal. 94.

4. POWER OF COURT.—A legislature may pass an act authorizing judgments of the courts, although previously rendered to be opened, and a new trial to be had in the action: 1 but this power should be confined to allowing cross-actions, equitable defences, and rights which have accrued since the judgment, to be set up. It does not extend to matters which were or by law should have been heard before the court by which the judgment was rendered. As to these the judgment is conclusive.2

The settled power of the court to set aside inquests, and to open default in its discretion, for the purpose of attaining justice by a fair trial, may be exercised even after open and confessed negligence; 3 and may even after enrolment open a regular de-

1. Ex parte Norton, 44 Ala. 177; Ex

parte Bibb, 44 Ala. 140.

2. White v. Herndon, 40 Ga. 493. See also Kite v. Lumpkin, 40 Ga. 506; Bon-

ner v. Martin, 40 Ga. 501.

If a judgment by default, interlocutory or final, be signed according to the course of the court, then it is the judge's judg-ment, because it is entered according to his directions. And although the former is always under the control of the court, vet from its nature the court ought not to interfere with the latter; that is a final judgment after the term at which it is taken. Winslow v. Anderson, 3 Dev. & B. (N. C.) L. 9; s. c., 32 Am. Dec. 651.

3. Leighton v. Wood, 17 Abb. (N. Y.)

Pr. 177.

The court has power to allow the defendants to put in answer though they neglected to answer within the twenty days prescribed by the Code. Lynde v. Verity, 3 How. (N. Y.) Pr. 350; s. c., I N. Y. Code Rep. 97; Allen v. Ackley, 4 How. (N. Y.) Pr. 5.

Defence Must be Stated.—A refusal to

set aside a default will not be revised, unless the discretion of the court in doing so has worked gross injustice. A simple averment of merits in a defence is not sufficient to procure the setting aside of a default. The grounds of the defence should be stated. Rich v. Hathaway, 18

Ill. 548, Judgment Reversed and Case Remanded -Effect on Default.-Where the plaintiff takes a judgment by default against the defendant for failing to answer interrogatories as provided by statute, and a trial is had and judgment rendered on verdict for the plaintiff, which is reversed and the cause remanded, the judgment of reversal does not vacate the judgment by default; yet it is competent for the primary court, after the cause is remanded, to set it aside on the plaintiff's motion, but a refusal to do so is not revisable on error. Hogan v. Alston, 9 Ala. 627.

In Iowa.-Under the Iowa Code, providing that "where a judgment has been rendered upon service by publication only" it may be set aside within two years, held, that a judgment so rendered before a justice's court might be set aside. sec. 3543 being applicable only in case of personal service. Taylor & Farley Organ Co. v. Plumb, 57 Iowa, 33.

Power of Justice.—Where, in an action

before a justice of the peace, on the day set for the trial the defendant demanded a jury, which was impanelled and sworn: and where, after the witnesses for the plaintiff had been sworn, the plaintiff moved for judgment for the amount claimed by him, for want of an answer or denial of the plaintiff's claim, which motion was sustained, and a judgment rendered against the defendant; and where the defendant four days afterward made oath that he had orally denied the plain-tiff's claim on the trial, and that the justice had failed to enter the denial in his docket, on which affidavit the justice set aside the judgment and appointed another day for the trial, -held, that the judgment rendered by the justice was not a judgment by default, within Iowa Code, sec. 2296, and that the justice had no power to set it aside. Rhodes v. De Bow, 5 Iowa, 260.

In New York-In Ejectment.-Upon an action in ejectment for non-payment of rent judgment was recovered by default, and without notice on the part of one who subsequently paid mortgages upon the property and so conducted himself regarding it that unless the judgment should be set aside great injustice would be done him. *Held*, that the court had power, under New York Code, sec. 724, and 3 N. Y. Rev. Stat. (6th Ed.) p. 576. sec. 34, to set aside the judgment (disapproving Christie v. Bloomingdale, 18 How. (N. Y.) Pr. 12). Reed v. Loucks, 61 How. (N. Y.) Pr. 434. The provision of Code Pro. sec. 135,

cree obtained by default to let in a meritorious defence, which the defendant had been prevented from making either by mistake or accident, or by the negligence of his solicitor, although there has been a sale under the decree, if the plaintiff became the purchaser and has not parted with his interest to a bona fide purchaser or mortgagee.1

Courts in setting aside default judgments may impose such con-

ditions as the circumstances of the case may render proper.2

On opening, upon sufficient excuse, a default regularly taken against the defendant, the courts should not impose as term of the favor a requirement that the defendant shall not interpose a former adjudication as a bar to the present action.3

Motions to set aside defaults are addressed to the discretion of the court: 4 and the exercise of that discretion will not

fixing a time in which a defendant, except in an action for divorce, may be allowed to come in and defend, does not deprive the court of all other power to open a default in a divorce case, where summons was served by publication; that provision does not take away the common-law power of courts over their own judgments. Compare Code Civ. Pro. sec. 1838. See Mr. Thorpe's note to sec. 445, and see Brown v. Brown, 58 N. Y. 609, rev'g I Hun (N. Y.), 443; s. c., 3 T. & C. 477; People v. Hektograph Co., 10 Abb. (N. Y.) N. C. 358, note.

1. See Graham v. Elmore, Harr. (Mich.) 265; Tripp v. Vincent, 8 Paige Ch. (N. Y.) Y. 75; Millenpurch v. M. Bride

Ch. (N. Y.) 176; Millspaugh v. McBride, 7 Paige Ch. (N. Y.) 509; s. c., 34 Am.

Dec. 360.
2. Young v. Bircher, 31 Mo. 136; s. c., 77 Am. Dec. 638; vide supra, X. 2, b.

The Terms to be imposed upon granting a favor are within the discretion of the court where the application is made; and the exercise of such discretion will not be interfered with unless there was an abuse of the discretion or it was mistakenly exercised. Flannery v. James, 18 Week. Dig. 587.

3. Audubon v. Excelsior Fire Ins. Co.,

10 Abb. (N. Y.) Pr. 64. 4. Bailey v. Taaffe, 29 Cal. 422; Howe v. Independence Co., 29 Cal. 72; Constantine v. Wells, 83 Ill. 192; Powell v. Clement, 78 Ill. 20; Union Hide & Leather Co. v. Woodley, 75 Ill. 435; Peoria & R. I. R. Co. v. Mitchell, 74 Ill. Peoria & R. I. R. Co. v. Mitchell, 74 III.
394; Thielmann v. Burg, 73 III. 293;
Boyle v. Levi, 73 III. 175; Fergus v.
Garden City Mfg. Co., 71 III. 51; Freibroth v. Mann, 70 III. 523; Bowman v.
Bowman, 64 III. 76; Mason v. Mc.
Namara, 57 III. 274; Scales v. Labar, 51
III. 232; Bell v. Nims, 51 III. 171; Bowman v. Wood, 41 III. 203; City of Chicago

v. Adams, 24 Ill. 492; Greenleaf v. Roe, 17 Ill. 474; Woodruff v. Tyler, 10 Ill. (5 Gil.) 457; Buckmaster v. Drake, 10 Ill. (5 Gilm.) 324; Gillet v. Stone, 2 Ill. (1 Scam.) 539; Wallace v. Jerome, 2 Ill. Scam.) 539; Wallace v. Jerome, 2 III. (I Scam.) 524; Garner v. Crenshaw, 2 III. (I Scam.) 143; Harmison v. Clark, 2 III. (I Scam.) 131; McNulty v. Everett, 17 Iowa, 581; Kreisinger v. Icarian Community, I6 Iowa, 586; Bolander v. Atwell, 14 Iowa, 35; Rogers v. Cummings, 11 Iowa, 459; Clarke v. Hedge, 10 Iowa, 38; Stephene v. Poelshutt. Iowa, 528; Stephens v. Parkhurst, 10 Iowa, 70; King v. Kinney, 8 Iowa, 521; Harrison v. Kramer, 3 Iowa, 543; National Bank v. Wentworth, 28 Kan. National Bank v. Wentworth, 28 Kan. 183; Seddan v. Templeton, 7 La. An. 126; Kribben v. Ecklekamp, 34 Mo. 480; Wagemann v. Jordan, 19 Mo. 503; Orr v. Seaton, 1 Neb. 106; Martin v. Gould, 41 N. Y. Super. Ct. (9 J. & S.) 544; Ramsey v. Gould, 4 Lans. (N. Y.) 476; Knight v. Bunker, 7 Ohio St. 77; Fowble v. Walker, 4 Ohio, 64; Bank of Tennessee v. Skillern, 2 Sneed (Tenn.), 698; Crebler v. Eidelbuch at Wie 169.

v. Eidelbush, 24 Wis. 162.

What are Discretionary.—Motions to set aside nonsuits or defaults for new trials, to amend pleadings, etc., are within every-day practice, and it is dis-cretionary with the court to grant or refuse them. They are addressed to the sound discretion of the court, by which is meant not an arbitrary discretion, but such a discretion as may be exercised without the violation of any principle of law. Fowble v. Walker, 4 Ohio, 64.

When Motion to Set Aside Default Should be Granted .- When a defendant, three days after a judgment by default, moves to have it set aside, and presents affidavits to the effect that he had been unable to attend court himself on account of the dangerous illness of his wife, that his counsel had been unable because be interfered with unless an issue of it is made manifest:1

busily engaged in enforcing a draft as provost-marshal, that he had summoned witnesses, and that he had a meritorious defence, such motion should be granted. and if refused will be allowed an appeal.

Hill v. Crump, 24 Ind. 291.
When Should Not be Set Aside.—The question of setting aside a default is addressed to the discretion of the court. which will be exercised according to the circumstances of each particular case, but it should never be set aside when it is the consequence of the defendant's own negligence. Harrison v. Kramer, 3 Iowa,

543.
Extent of Discretion—Illinois Practice Act. sec. 40 .- As to the extent of the discretion allowed by the Illinois Practice Act, sec. 40, to set aside a judgment, see Wyman v. Yeomans, 84 Ill. 403.

What Court May Not Consider .- On a motion to set aside a default, the court cannot look to see if the amount claimed in the petition corresponds with the amount of the instrument sued on. Chambers v. Carthel, 35 Mo. 374.

On a Motion to Reinstate a Cause Dismissed for Want of Prosecution .- Where affidavits are flatly contradictory, the action of the court in giving credence to those on one side, instead of the other, cannot be held to be error. Boyle v.

Levi, 73 Ill. 175.
Extension of Time to Answer.—Though the judge have orally expressed his satisfaction with the evidence offered to confirm a default, and told plaintiff's attorney to take judgment, yet if, before the entry is actually ordered and made, defendant should appear and apply for an extension of time, the judge has a discretionary power to grant it. Seddan v. Templeton, 7 La. An. 126.

Ignorance or Mistake of Defendant .-Such discretion was properly exercised in refusing to set aside a judgment by default on account of the ignorance or mistake of defendant in regard to the place of filing his answer. Wagemann v.

Jordan, 19 Mo. 503.
Setting Aside in Mechanic's Lien Case. -Where the defendant in a proceeding to enforce a mechanic's lien fails to answer on or before the day on which the cause is set for trial on docket, and his default is taken in the absence of sufficient cause shown, it is not error to refuse to set aside the default either at the same or the next succeeding term. in such case, if the court imposes terms as a condition to opening the default, it is no error. Freibroth v. Mann, 70 Ill. 523.

Motion-Where Made.-When a judgment has been taken by default, the defendant having been personally served. a motion to set aside default, showing merits in defence, or proceedings for relief from judgments, or to review it, must be made in lower court before an appeal. or no question will be raised in supreme court. Johnson v. Ikerd, 48 Ind. 380; Yancy v. Teter, 39 Ind. 305; Barnes v. Conner, 39 Ind. 294; Skeen v. Huntington, 25 Ind. 510; De Armond v. Adams 25 Ind. 455; Gibson v. Green, 22 Ind. 422; Gray v. Dickey, 20 Ind. 96; Lawshe v. McClain, 19 Ind. 67; Durbin v. Conner, 16 Ind. 163; Frost v. Purdue, 15 Ind. 446; Durbon v. Connor, 15 Ind. 433; Veasey v. Reynolds, 15 Ind. 382; Sturgis v. Rodman, 14 Ind. 604; Darlington v. Warner, 14 Ind. 449; Kirby v. Robbins, 13 Ind. 470; Lasselle v. Wilson, 13 Ind. 453; Frasier v. Hubble, 13 Ind. 432.

Indiana Statute -Under sec. 99 of the Indiana Code of Practice, as amended by the act of March 4, 1867, it is made the imperative duty of the court, where application is made within the statutory period, to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. Cavanaugh v. Toledo, W. &

W. R. Co., 49 Ind. 149.
In North Carolina.—A party seeking, under North Carolina Code, sec. 133, to vacate a judgment, is always at default, and the onus is upon him to present facts showing the refusal to vacate to be an abuse of discretion. Hiatt v. Waggoner, 82 N. C. 173; Kerchner v. Baker, 82 N.

C. 16a.

Under Ohio Practice Act. - Where, on a proceeding by scire facias to revive a judgment under the Practice Act of 1831, two writs were returned nihil at the same term, one having been issued in vacation, and upon its return, the second having been issued during term, returnable forthwith, and judgment was taken by default at the same term to which both writs were returned, the record not showing any general rule of the court applicable to the case, no such abuse of discretion is disclosed as can be reviewed upon Knight v. Bunker, 7 Ohio St. 77.

1. Boyle v. Levi, 73 Ill. 175; City of v. Levi, 73 III. 175; City of Chicago v. Adams, 24 III. 492; McNulty v. Everett, 17 Iowa, 581; Kreisinger v. Icarian Community, 16 Iowa, 586; Bolander v. Atwell, 14 Iowa, 35; Rogers v. Cummings, 11 Iowa, 459; Clarke v. Hedge, 10 Iowa, 528; Stephens v. Park hurst. 10 Iowa, 70; King v. Kinger 8 hurst, 10 Iowa, 70; King v. Kinney, 8 some of the authorities say only in cases of gross abuse of discretion.1

Iowa, 521; National Bank v. Wentworth. 98 Kan. 183; Orr v. Seaton, 1 Neb. 106; Ramsey v. Gould, 4 Lans. (N. Y.) 476; Crebler v. Eidelbush, 24 Wis. 162.

It is a matter resting in the sound discretion of the court to whom the application is made whether a default shall be set aside, and an appellate court will not interfere unless there has been a gross abuse of that discretion. Constantine v. wells, 83 Ill. 192; Union Hide & Leather Co. v. Woodley, 75 Ill. 435; Peoria & R. I. R. R. Co. v. Mitchell, 74 Ill. 301.

The exercise by an inferior court of its discretion in setting aside a default will be rarely, if ever, interfered with by the supreme court. City of Chicago v.

Adams, 24 Ill. 492.

In a Chancery Suit .- The setting aside of a default in a chancery suit is a matter of discretion, the exercise of which by the court cannot be inquired into by the supreme court on appeal or writ of error.

Powell v. Clement, 78 Ill. 20.

In Actions at Law .- An application to set aside a default is addressed to the sound discretion of the court. The decision of the court on such application cannot be assigned for error. v. Tyler, 10 Ill. (5 Gilm.) 457; Gillet v. Stone, 2 Ill. (1 Scam.) 539; Wallace v. Jerome, 2 Ill. (1 Scam.) 524; Garner v. Crenshaw, 2 Ill. (I Scam.) 143; Harmison v. Clark, 2 Ill. (1 Scam) 131.

Abuse of Discretion.—But where the

court below has abused the discretion confided to it, or misapprehended its duty in the premises in refusing to set aside a default, the supreme court will interfere on appeal. Simmons v. Church,

31 Iowa, 284.

In an action to recover a personal judgment on three promissory notes for an amount in excess of \$2000, where the summons recites the answer-day as December 6th, and bears an indorsement on the back by the clerk that the answer-day is December 10th, and the copy served also contains this indorsement, and the defendant being misled thereby delays to December 10th to consult an attorney in regard to filing an answer for him in the action, and then is first advised that he is in default, and that his answer was due December 6th, and before judgment is taken in the action, and at the first term of the court thereafter, makes his application to set aside the default and for leave to file his answer, and shows he was misled by the erroneous indorsement on the copy of the summons served, and presents an affidavit of merits to the

effect that he never executed and delivered the notes alleged in the petition, and the court arbitrarily overrules the motion and proceeds to render judgment by default against said defendant, held, that there was such an abuse of discretion on the part of the district court as to require. upon review, its ruling to be reversed. Brown v. Holmes, 19 Kan. 567.

It is Not an Abuse of Discretion for the court, upon a proper showing, to set aside a default and refuse to reinstate a judgment of dismissal on defendant's motion: nor is it error to entertain a motion to set aside a judgment of dismissal without notice to defendant; where the error is a technical one, it is cured by the subsequent appearance of defendant, and permission given to him to be heard upon his motion to reinstate the judgment. Yetzer v. Martin, 58 Iowa, 612; s. c., 12 N. W. Rep. 63; 15 Cent. L. J. 116.

It is not an abuse of discretion for a trial court to set aside a judgment by default rendered in the absence of the plaintiff and his attorney, when the latter resided at a considerable distance from the place of trial, and had reason to believe that the case would not be tried at the time it was taken up. Cameron v. Carroll, 67 Cal. 500.

And where the ground relied on for setting aside a default is that the defendant has a cross action against the plaintiff, a refusal to set aside the default cannot work injustice. Bowman o. Wood.

41 Ill. 203.

Negligence of Attorney-Refusal to Set Aside Default for .- The setting aside of a default is discretionary with the court; and where the court refused to set aside a default upon the ground that defendant had engaged an attorney to attend to the suit, and the attorney neglected to do so, it was held not such an abuse of discretion as to require the interference of the supreme court. Thielmann v. Burg, 73 Ill. 293.

Arbitrary Action.—The supreme court will not interfere with the discretion exercised by the court below in refusing to set aside a judgment by default unless it clearly appears that the action of the lower court was arbitrary; and it must appear that defendant disclosed to that court a good reason for his failure to answer seasonably, and that he stated a meritorious defence, the facts constitut-Pry v. ing which must be set forth. Hannibal & St. Joseph R. R. Co., 73 Mo. 123.

1. Howe v. Independence Co., 29 Cal. 72.

An application to set aside default is addressed to the discretion of the court, and is not granted as a matter of course. Each case must be determined to a great extent upon its own circumstances, and no precise rule can be given which will govern the action of the court in such cases. But a different rule prevails in some cases. Thus where a divorce has been granted, after default taken, it has been held improper to set the default aside because the party may have remarried in the interval.2

It has been said that an order opening a default taken upon the trial and allowing a new trial is a matter of discretion, and does. not affect a substantial right, and is not reviewable upon appeal.

where there is no palpable abuse of discretion.3

On the other hand, it is held that an order setting aside judgment by default is an order "affecting a substantial right" which may be vacated, modified, or reversed upon a petition in error.4 But as a general rule, a default cannot be reviewed by appeal. The defendant's remedy is to move, upon excuse, to have the default opened.⁵ However, an order denying a motion to set aside: a default irregularly taken will be reversed on appeal.6

Discretion Not to be Exercised Ex Gratia. -Although an order of the court below, with an order of the court below refusing setting aside or refusing to set aside a judgment by default, rests much in the discretion of the court, and will not be disturbed by the appellate court unless plainly erroneous, yet the discretion of the court below is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the law. Bailey v. Taaffe, 20 Cal. 422.

1. Harrison v. Kramer, 3 Iowa, 543. The circuit court may at their discretion set aside judgments by default for sufficient cause shown by affidavit of defendant or one not a party. Bank of Tennessee v. Skillern, 2 Sneed (Tenn.), 698.

 Davis v. Davis, 30 Ill. 180.
 Meloy v. Grant, 4 Mackey (D. C.), 486; s. c., 2 Cent. Rep. 665; Ramsay v. Erie R. R. Co., 9 Abb. (N. Y.) Pr. N. S. 242; Ramsey v. Gould, 4 Lans. (N. Y.) 476.

In District of Columbia. -An order vacating a judgment by default under Rule 72 is not appealable. Meloy v. Grant, 4 Mackey (D. C.), 486; s, c., 2 Cent. Rep.

Setting Aside Discretionary .- Error cannot be assigned for overruling a motion to set aside a default, as such a motion is discretionary. Fergus v. Garden City Manufg. Co., 71 Ill. 51; Mitchell v. City of Chicago, 40 Ill. 174.

4. Johnson v. Taylor, 2 Hand. (Ohio) 178.

5. Pope v. Dinsmore, 8 Abb. (N. Y.) Pr. 429; Stewart v. Morton, 8 Abb. (N. Y.) 429, note.

The supreme court will not interfereto set aside a default where the only excuse shown by the defendant for the failure to answer exhibits a delay or want of diligence in preparing his defence. Jarvis v. Worick, 10 Iowa, 20,

When Refusal to Set Aside Default Confirmed.-Where it does not appear that the district court has improperly exercised the discretion vested in it in refusing to set aside a judgment by default, the judgment will be affirmed. Clarke v. Hedge, 10 Iowa, 528; King v. Kinney, 8 Iowa, 521.

When Refusal Reviewed,-It is discretionary in a court to set aside a default, and an appellate court rarely reviews the exercise of the discretion, and then only to prevent gross injustice. Scales v. Labar, 51 Ill. 232; Bell v. Nims, 51 Ill. 171; Bowman v. Wood, 41 Ill. 203.

In New York.—A judgment of affirm

ance taken by default is not an actual determination; and therefore, by sec. 352 of the Code, such a judgment by default taken at the general term of the New York marine court cannot be reviewed on appeal by the general term of the New York common pleas. McMahon v. Rauhr, 47 N. Y. 67, rev'g 3 Daly (N. Y.).

6. Seaman v. McReynolds (opinion not reported), 40 N. Y. Super. Ct. (8 J. & S.) 545; McGuin v. Cace, 9 Abb. (N. Y.) Pr. 160. See Clark v. Lyon, 2 Hilt. Pr. 160. (N. Y.) 91.

Where the application to open default is made before judgment, and an excuse

While, as a general rule, the setting aside a default by the circuit court is not the subject-matter of review in the appellate court. yet that court will examine the question whether the circuit court has gone beyond its jurisdiction. But, notwithstanding it is a matter of discretion in the trial court whether a default should be set aside, cases may arise in which the exercise of such discretion will be reviewed by an appellate court.2

However, after a judgment by default has been set aside another court cannot inquire collaterally whether it was set aside properly

or not.3

Error in adjudging a default is not reached by a motion for a new trial.4 And where a motion is made to set aside a judgment by default at a term subsequent to that at which it was rendered, in order to review the decision of the court upon that motion, an exception must be taken at the time, and a bill of exceptions filed within the term. Where the order setting aside the judgment is allowed to pass without exceptions, but a motion is filed, that order, and a bill of exceptions taken to the refusal to vacate the remedy, is lost, as the court cannot on that bill examine the decision of the court setting aside the default.5

XI. Default in Equity.—1. EFFECT OF.—a. As an Admission.— (1) By a Sole Party.—When a bill is taken as confessed, all distinct and positive allegations are to be taken as true, 6 and the

is shown, and a substantial defence made to appear, the application should be granted; and if refused, the order may be reversed on appeal. McGuin v. Cace, 9 Abb. (N. Y.) Pr. 160. Lyon, 2 Hilt. (N. Y.) 91. See Clark v.

1. Oetgen v. Ross, 36 Ill. 335. 2. Mason v. McNamara, 57 Ill. 274; O'Fallon v. Davis, 38 Mo. 269.

Thus an order of the district court setting aside a judgment rendered on a default, and allowing the defendants to an swer to the petition of the plaintiffs, is not such an order as may be reviewed by the supreme court while the suit is still pending in the district court. McCulloch

u. Dodge, 8 Kan. 476.

Discretion Reviewed and Controlled. -Appellant was sued jointly with another in trespass. His co defendant employed counsel, who filed a plea of the general issue for both, there being no service. The case lingered along three years, when the counsel procured the entry of a nolle as to the co-defendant and abandoned the defence of the appellant, on the ground that he had paid no fee, and his default was taken and his damages assessed at \$500, upon which judgment was rendered. Appellant at the same term moved to set aside the judgment, and for leave to defend, showing that he was not guilty, and that the other defendant, who had committed the trespass, had agreed to defend. Held, that the court should have granted the motion.

Sowerbry v. Fisher, 62 Ill. 135.

Failure of Attorney to Plead-Sickness in Family.-Defendant sued for libel and slander had a valid defence in that in a previous suit for the same cause of action judgment had been rendered in his favor. He employed an attorney to defend, but the attorney, before filing the necessary plea, was suddenly called to a distant city on account of the dangerous illness of his wife. The case was defaulted because of failure to file the plea. Held, that the action of the court below in refusing to take off the default should be revised, and defendant let in to defend. Tidwell v. Witherspoon, 18 Fla. 282.

3. Bender v. Askew, 3 Dev. (N. C.) L. 149; s. c., 22 Am. Dec. 714. 4. Reed v. Spayde, 56 Ind. 394.

5. Johnson v. Taylor, 2 Hand. (Ohio)

6. Harrison v. Kramer, 3 Iowa, 543; Atterberry v. Knox, 8 Dana (Ky.), 282; Baltzell v. Hall, I Litt. (Ky.) 97; Fitz-hugh v. McPherson. 3 Gill (Md.), 408.

A Bill taken Pro Confesso is viewed as true as to all matters of fact. Colerick v. Hooper, 3 Ind. 316; s. c., 56 Am. Dec. 505; Platt v. Judson, 3 Blackf. (Ind.) 235; Craig v. Horine, 1 Bibb (Ky.), 113; Atterberry v. Knox, 8 Dana (Ky.), 282; Luckett v. White, 10 Gill & J. (Md.) 480; Ward v. Jewett, Walk. (Mich.) 45; Ramsey v. Barbaro, 12 Smed. & M. (Miss.) 293; Williams v. Corwin, Hopk. Ch. (N. Y.) 471; Douglass v. Evans, I Overt. (Tenn.) 82; Jackson v. Honevcut, I Overt. (Tenn.) 30.

Upon a Decree Pro Confesso. - A decree pro confesso against a defendant for failing to appear is not evidence as an admission of the truth of the allegation of the bill if the bill is afterwards dismissed.

Garrett v. Ricketts, 9 Ala. 529.

The Neglect of a Defendant to Answer, and a pro-confesso, are equivalent to an admission of the allegations of the bill as to all parties against whom such decree passes. Luckett v. White, 10 Gill & J. (Md.) 480.

Bill taken as Confessed against Adults -No Proof Necessary. - Where a bill is taken as confessed, the presumption is that on the hearing the court had all the evidence necessary to sustain the decree. Indeed, in such case proof beyond the exhibits and a pro confesso order is unnecessary. It is entirely discretionary with the court whether it will hear any evidence on a bill taken as confessed. Cronan v. Frizell, 42 Ill. 319; Suliivan v. Sullivan, 42 Ill. 316; Moore v. Titman, 33 Ill. 358.

Default by Non-Resident.—In the case

of a non-resident a decree pro confesso is an admission of the truth of the allegations of the bill. Butler v. Butler, II

Ala. 668.

Alabama Practice. - Where a bill against absent defendants is taken for confessed in Alabama, it is not necessary for the complainant to prove the allegations of his bill. Wellborn v. Tiller, 10 Ala. 305; Arnold v. Sheppard, 6 Ala. 200; Humph-

rey v. Darlington, 15 Iowa, 207.

Devise and Legacy. - Land was devised on condition that the devisee should pay certain legacies, and the legacies remaining unpaid, the legatee filed a bill against the devisee who had taken possession of the estate for payment by him of the legacies, or a sale of the estate for that purpose. The bill was taken pro confesso, and a sale of the land was decreed. Held, that the devisee was not by the decree to pay the balance of the legacies after deducting the proceeds of the sale. Cook v. Grant, I Paige Ch. (N. Y.) 407.

Effect of Decree Pro Confesso. -- A decree in chancery pro confesso concludes the defendant to the extent of the averments in the bill. The defendant in such case cannot object to the sufficiency of the proof; but he may, on error, insist that the averments in the bill do not justify Harmon v. Campbell, 30 the decree. Ill. 25; Stephens v. Bichnell, 27 Ill. 444; Gault v. Hoagland, 25 Ill. 266.

Leave to Amend-Failure to Answer -Where the defendant allows the bill to be taken bro confesso, he is subject to the court as to the terms of his defence. The court may give the plaintiff leave to amend, and require the defendant to answer the bill as amended during the term, and on his failure to do so makes a decree against him. Scott v. Davis. o Rich. (S. C.) Eq. 38.

Refusal to Answer-Not an Admission The refusal of a defendant to answer is not to be taken as an admission of the allegations of the bill which have not been answered: but this rule of chancery practice will not exempt a defendant from some degree of suspicion, because of his declining to answer interrogatories to which he might easily have answered. without subjecting him, so far as the court can see, to the slightest annovance McDowell v. Goldor inconvenience.

smith, 24 Md. 214.

Suit for Share of Estate .- A father dying intestate, one of his children filed a bill against the administratrix for her share of the estate, the bill alleging that there were four children. The bill was taken pro confesso, and the death of one of the four children intestate and without issue being suggested, the estate was decreed to be distributed among the three remaining children. Held, that this de-If one of the chilcree was erroneous. dren died after the father, the complainant can claim only one fourth from his administratrix; the share of the deceased brother's estate must be obtained from his administrator; and if the son died before the father, the complainant cannot, under a bill denying that fact, claim one third of the estate. Buckley v. Buckley, 9 Gill (Md.), 497.

Suit by Tobacco Inspector. - Where a bill brought by one tobacco inspector against another for an account of fees charged that the amount due the complainant was at least a certain sum stated, held, that the complainant might have a decree for that amount on the defendant's failure to answer, and that the "additional inspector," whose services were required in special cases only, was Neal v. Keel, 4 not a necessary party.

B. Mon. (Ky.) 162.

Practice-In the United States Supreme Court .- A decree pro confesso, under the rules and practice of this court, is not a decree as of course according to the prayer of the bill. It is made by the matter thereof decreed without the production of proof by the complainant, whether they involve a penalty, forfeiture, infamous nunishment, or not, or are confined to the defendant's knowledge or not.2

In judgment on default damages cannot be given in excess of amount claimed in complaint. But if the allegations are indefinite, or the demand of the plaintiff is in its nature uncertain. the certainty requisite to a proper decree must be furnished by the proof.4 And if a defendant fails to answer a part of a bill, judgment will be taken against him pro confesso, or a commission will issue for the taking of evidence at the discretion of the court.5

A default admits the allegations of the declaration, but not the amount of damages; the party in default may introduce testimony and preserve the rulings of the court by a bill of exceptions. And a defendant who is in default, and against whom a decree pro confesso has been entered on the original bill, is, nevertheless, entitled to notice of a material amendment alleging additional

court according to what is proper to be decreed upon the statements of the bill assumed to be true. Thomson v. Wooster, 114 U. S. 104; bk. 29, L. Ed, 105.

1. Platt v. Judson, 3 Blackf. (Ind.) 235

Colerick v. Hooper, 3 Ind. 316; Baltzell v. Hall, I Litt. (Ky.) 97; Fitzhugh v. McPherson, 3 Gill (Md.), 408; Ramsey v. Barbaro, 12 Smed. & M. (Miss.) 293; Williams v. Corwin, Hopk. Ch. (N. Y.)

2. Atterberry v. Knox, 8 Dana (Ky.),

3. May v. State Bank, 9 Ind. 233.
4. Laney v. Laney, 4 Ind. 149; Close v. Hunt, 8 Blackf. (Ind.) 254; Fellows v. Shelmire, 5 Blackf. (Ind.) 48; Harrison v. Kramer, 3 Iowa, 543; Marshall v. Tenant, 2 J. J. Marsh. (Ky.) 155; s. c., 19 Am. Dec. 126.

Allegations Uncertain and Indefinite.— When the allegations of a bill are uncertain and indefinite, though taken as confessed, no decree should be rendered unless the uncertainty be removed by evidence. Laney v. Laney, 4 Ind. 149.

If the allegations in a bill taken pro confesso are not specific and certain, no decree can be correctly rendered. Marshall v. Tenant, 2 J. J. Marsh. (Ky.) 155;

s. c., 19 Am. Dec. 126.

Where there is any uncertainty in the statements of a bill, a final decree cannot be had for the complainant on a pro confesso, without proof of the allegation of the bill. Close v. Hunt, 8 Blackf. (Ind.) 254; Fellows v. Shelmire, 5 Blackf. (Ind.) 48.

5. Supplemental Bill—Failure to Note

Filing-Default.-Though the filing of a supplemental bill was not noted on the order book by a formal entry, yet was recognized and acted on by the court and parties, and such bill was taken for confessed at the proper time, the court have a right to consider all the material allegations not responded to as confessed Story v. Moon. 3 Dana (Ky.), 331.
In Maryland, if a defendant, when prop-

erly required, fails to answer the whole or a part of the bill, the part unanswered may be taken pro confesso, or a commission issued for taking depositions ex parte at the discretion of the chancellor. Hagthorpe v. Hook, I Gill & J. (Md.)

6. Cairo & St. Louis R. R. Co. v. Holbrook, 72 Ill. 419.

Objections to Evidence on Default -Where a decree pro confesso has been entered after default, the defendant cannot make any objection that the proof does not sustain the allegations of the bill. The allegations are taken as confessed, and the court may enter the decree without proof. Harmon v. Campbell, 30 Ill. 25; Manchester v. McKee, o Ill. (4 Gilm.) 511.

Objecting to Amount of Decree.-Default having been taken and judgment rendered on a good complaint, the question of "too large a judgment" cannot be assigned for error for first time in the supreme court. Barnes v. Bell, 39 Ind. 328. The party aggrieved should first make application to court below to modify or correct judgment. Id. 7. McClenney v. Ward, 80 Ala. 243.

(2) By One of Several Parties.—Where one of several defendants suffers the bill to be taken pro confesso, and the others successfully resist the claim altogether, the defence inures to the benefit of all.¹

In a bill against two, where one answers, denying the material allegations of the bill, and a decree pro confesso is taken against the other, this does not entitle the plaintiff to a final decree against the party answering: he must first prove the allegations in the bill; but he may dismiss his bill as to him who answers, and take a decree pro confesso against him who does not answer.

- b. As to the Judgment or Decree.—A decree pro confesso, until appealed or set aside, is as binding upon the parties properly before the court as a decree after issues joined and on a full hearing. But in some of the States a judgment entered pro confesso on a warrant of attorney to confess judgment is not accorded "full faith and credit."
- 2. ENTRY OF.—a. On Failure to Appear and Plead.—A bill may be taken as confessed if the defendant, after service of process,

1. Farmers' Bank v. Gilpin, 1 Harr. (Del.) 561; Higgins v. Commissioners of Washington Co.. 1 Blackf. (2d Ed.) Ind. 532; Curts v. Hill, 3 Bibb (Ky.), 463; Cunningham v. Steele, 1 Litt. (Ky.) 52; Walsh v. Smyth, 3 Bland (Md.), 9; Mc-Caskill v. McBryde, 2 Ired. (N. C.) Eq. 52; Andres v. Lee, 1 Dev. & B. (N. C.) Eq. 318; Clason v. Morris, 10 Johns. (N. Y.) 524; Cartigne v. Raymond, 4 Leigh (Va.), 579.

Where Part of the Defendants deny the allegations of the bill, and the bill is taken pro confesso as to the rest, no decree can be entered against the latter without proof of the material allegations of the bill. Cunningham v. Steele, I

Litt. (Ky.) 52.

A brought a bill for conveyance of a lot of land, showing a conveyance of the lot by his father to himself, alleging that his father was entitled to a conveyance from one B, the former owner. C, one of the defendants, proved a title from B through D. The other defendants, who were non-residents, not appearing, the bill was taken as confessed as to them, but dismissed as to C. Held, that the bill should be dismissed as to all the defendants, A having failed to prove his claim to the land upon which alone the jurisdiction could attach. Curts v. Hill, 3 Bibb (Ky.). 463.

Bibb (Ky.). 463.

Action of Debt against Four.—One of defendants filed a plea to which there was no replication. At next term judgment by default was taken against all defendants. *Held*, judgment erroneous.

Higgins v. Board of Commissioners of Washington Co., 1 Blackf. (2d Ed.) Ind. 532.

In a Suit against Two Persons for an Account, the bill was taken pro confesso against one of them who was out of the jurisdiction, and an order was entered for taking an account against him only "without prejudice." Held, that such an order was in the nature of a consent rule for speeding the cause, and would not bind the parties if injustice would thereby be done. McCaskill v. McBryde, 2 Ired. (N. C.) Eq. 52.

Jordan v. Brunough, 11 Ark. 702.
 Evans v. Menefee, 1 Mo. 442.

4. On an Appeal from a Judgment by Default not taken within sixty days after the entry of the judgment, nothing can be reviewed except what appears on the judgment-roll. Savings and Loan Society v. Meeks, 66 Cal. 371; s. c., 5 Pac. Rep. 624.

5. Judgment Pro Confesso on Warrant of Attorney.—Where a judgment was entered in New Jersey, pro confesso, by virtue of a warrant of attorney signed by the defendant, empowering any attorney to the United States to confess judgment, the whole proceeding being consistent with the laws of said State, held, that such a judgment is entitled to "full faith and credit," within the meaning of the constitution of the United States, although it did not appear that any of the parties were residents of that State, or had ever been there. Randolph 2 Keiler, 21 Mo. 557.

does not demur, plead, or answer in time. 1 But a final decree

1. Bonham v. Galloway, 13 Ill. 68; Elston v. Drake, 5 Blackf. (Ind.) 540; Allen v. Coffman, 1 Bibb (Ky.), 469; Ayers v. Scott, Ky. Dec. 162; Fellows v. Hall. 3 McL. C. C. 281, 487.

Taking a Bill Pro Confesso upon the

rules at the clerk's office on failure to appear, the subpoena being returned executed, is correct. Allen v. Coffman. I

Bibb (Ky.), 469.

A complainant may take his bill pro confesso, the subpoena being returned executed, and a copy of the bill having been delivered on the rule day next after the return. Ayers v. Scott, Ky. Dec.

Action on Bill of Exchange-Amendment.-A bill in chancery to recover upon a bill of exchange, in which demand and notice have not been averred, was amended, averring that the drawer, indorser, and acceptor knew there were no funds to meet its payment. *Held*, that as the defendant had not answered, a decree pro confesso upon the subpœna in chancery before amendment might be taken against them, if the complainant has used due diligence in the prosecution of the case. Trustees of R. E. Bank v. Bozeman, 15 Ark. 316.

Amendments after Decree. -- Where. after a bill was taken as confessed by a defendant, a merely technical amendment was made, the defendant having had no notice of the motion to amend, and no copy of the amended bill being served on him, held, that such amendment did not rénder a subsequent decree against him Clason v. Corley, 5 irregular and void.

Sandf. (N. Y.) 454.

An Order Remanding a Cause to the Rules, with Leave to Answer, does not vacate an order taking the bill pro con-fesso when no answer is made. Barnes

v. Lee, 1 Bibb (Ky.), 526.

Entry of Decree Pro Confesso-Practice in Federal Courts. - Where a subpoena is returned executed, if the answer is not filed within three months after the day of appearance and bill filed the defendant is to be ruled to answer; and failing to do so, the bill may be taken for confessed, and the matter thereof decreed immediately; but this decree is only nisi, to be made absolute at the term succeeding that to which service of a copy of the decree shall be returned executed, unless cause to the contrary be shown. Pendleton v. Evans, 4 Wash. C. C. 336.

Good Practice Requires an affirmative

showing of the non-appearance of the defendant as a preliminary to an order pro confesso. Eaton v. Eaton, 33 Mich. 305

Non-resident Defendant.-Where the rights of a defendant in equity, residing out of the State and notified of the suit, but not appearing or answering, will not be prejudiced by the decree, the bill may be taken pro confesso as to him. Adams

v. Stevens, 49 Me. 362.

Noticing Demurrer for Argument-Rule to Answer.-Where a complainant does not take advantage of the failure of the defendant to notice his demurrer for argument at the following term, he may do so at a subsequent term without first taking an order on the defendant to argue it. Nesbit v. St. Patrick's Church, 9 N. J. Eq. (1 Stock.) 76. But in this case the complainant must serve the rule to answer on the defendant before taking a decree pro confesso. Id.

Rule to Answer Instanter. - There is no one rule of practice which requires a rule to answer instanter before a decree pro confesso can be taken, if defendant fails to appear at the return day and interpose his defence. Grob v. Cushman, 45 Ill.

In Alabama.—The complainant in a bill is not entitled to a decree pro confesso until thirty days after service of the sub-Pitfield v. Gazzam, 2 Ala. 325.

In Georgia, a bill in equity which is not answered may be taken pro confesso at the second term, and decree had thereon.

Guerry v. Durham, 11 Ga. 9.
Under Louisiana Act 1805, in all cases of liquidated accounts or demands, when no answer was filed, the allegations in the petition were taken pro confessis, and the default became final after three days without any action of the court. Hughey v. Barrow, 4 La. An. 249; Allard v. Ganushau, 4 Mart. (La.) 662; Bargebur v. Creditors, 2 Mart. (La.) N. S. 265; Torregano v. Segura's Syndic., 2 Mart. (La.) N. S. 83.

Under Maryland Statute 1820, ch. 161, an ex parte commission must lie in court an entire term before final decree; and if a decree be rendered before that time it is irregular, and ground for reversal on appeal. Hatton v. Weems, 12 Gill & J.

(Md.) 83.

In Ohio, when a demurrer to a bill is overruled, the bill may be taken pro confesso and a final decree entered, or the court may, on affidavit of merits, permit

cannot be rendered against a defendant who has not answered until the case is in a state to have a bill taken pro confesso against him. 1 And where a decree pro confesso is taken before the expiration of the time given to answer, it is irregular.² And it is also erroneous to enter a decree ascertaining the amount due a party and directing the payment of it, when that party is not in court.

If after appearance, no answer is put in according to the rules of the court, the defendant will be ordered to file his answer by the first day of the next term; and on proof of service of order in default of answer, the bill will be taken pro confesso. Process for contempt is necessary merely to compel an answer.4 And an order absolute that a bill be taken pro confesso if not answered on a certain day cannot be made at the first term. But a decree pro confesso may be taken at any time as of course after the time has expired within which the defendant is required to plead, demur, or answer, and without notice, unless it appear that some prejudice will thereby accrue to the adverse party.

A decree pro confesso cannot be entered before all issues are disposed of. Hence, if an issue be formed in equity by a plea to the bill and a replication to the plea, a default cannot be entered against the defendant, and the bill be taken as confessed, while the

issue is undisposed of.8

an answer to be filed, and hear the cause. Baldwin v. Creed, Wright (Ohio), 729.

In Vermont, if the defendant does not enter an appearance agreeably to Rules 4 and 25 of chancery, the complainant is entitled, on proof of notice to the defendant of the pendency of the suit, to a decree that the bill will be taken as confessed, although he enter an appearance immediately after such proofs are given. Miller v. Moore, I Aik. (Vt.) given.

1. Hoye v. Penn, I Bland (Md.), 28. 2. Fitzhugh v. McPherson, 9 Gill & J. (Md.) 51; Fellows v. Hall, 3 McL. C. C.

Decree Before Time Fixed for Answer. -An order to take a bill pro confesso, unless answered before a day fixed, cannot be anticipated, and a decree pro confesso passed before the day, although fixed beyond the period allowed by the statute, will be void. Fitzhugh v. McPherson, q Gill & J. (Md.) 51.

3. Bonham v. Galloway, 13 Ill. 68.

4. Caines v. Fisher, I Johns. Ch. (N. Y.) 8.

5. Carter v. Jordan, 15 Ga. 76.

Absent Defendant.—A bill should not be taken for confessed against an absent defendant at the term to which he is ordered to appear. Bedford v. Duly, 1 A. K. Marsh. (Ky.) 220.

Commission of Rebellion .-- A court of equity may order a commission of rebellion to be returned immediately, and may set down the cause for a hearing at the same term and direct the bill to be taken pro confesso. Boudinot v. Symmes. Wall. Jr. C. C. 139.

6. Oakley v. O'Neill, 3 N. J. Eq. (1 H.

W. Gr.) 287.

Further Time to Answer.—A decree pro confesso, signed after the time for answering has expired, is regular, though an order for further time to answer be signed and filed on the same day with the signing of the decree. Emery v. Downing, 13 N. J. Eq. (2 Beas.) 59.
7. Plea in Bar.—While a plea in bar remains undisposed of, a bill cannot be

taken pro confesso. Jordan v. Jordan, 16

8. Sampson v. Hendricks, 8 Blackf.

(Ind.) 288.

Replication-Effect of .- The effect of a replication, in such case, is to admit the plea to be good, and to confine the inquiry to the truth of the matter in issue. Sampson v. Hendricks, 8 Blackf. (Ind.)

Establishing Rights by Evidence.-A party, to recover in chancery, if the allegations in the bill are denied, must establish his rights by evidence. James

v. Bushnell, 28 Ill. 158.

h. On Insufficient Pleading.—Although a court of chancery cannot grant a decree pro confesso while pleas to the bill are pending.1 vet when the pleas to a bill are manifestly frivolous the chancellor may set them aside and grant a decree pro confesso.2 Where an answer is held to be insufficient on exceptions thereto, it is to be regarded as no answer; and if the defendant neglects to file a sufficient answer after the former is adjudged insufficient, the bill may be taken pro confesso.3 And where a defendant files his pleas, and puts in his answer to a bill at the same time, and the pleas are overruled, it is error to take the bill for confessed: the course should be to take the bill for confessed as to so much as was unanswered, and to set the cause for hearing on so much of the bill as was answered.4

The rendition of a decree on the overruling of a demurrer to a bill, without first ruling the defendant to answer, is not error; because the rendition of a decree upon a bill taken as confessed is matter of discretion.5

c. Notice of Subsequent Proceedings .- A defendant who has appeared in the cause is entitled to notice of all subsequent proceedings, though he has suffered the bill to be taken pro confesso for want of an answer. Otherwise if there has been no appear-

d. The Order Pro Confesso .- Where a defendant has not answered, it is error to enter a final decree pro confesso against him without previous service on him of a decree nisi. And a cause

1. Smith v. Cozart, 45 Miss. 698.

2. Smith v. Cozart, 45 Miss. 693.

3. Mayer v. Tyson, I Bland Ch. (Md.)

Where Part Only Sufficiently Answered. -Such parts of a bill of discovery as are not answered, or not sufficiently answerered, cannot be taken as confessed. The party seeking the discovery, if he considers the answer insufficient, must except to it and have the decision of the court upon his exception. Roussin v. St. Louis Perpetual Ins. Co., 15 Mo. 244.

As to When Bill Should be Dismissed.—

See Bell v. Simonds, 14 Mo. 100; Mead v. Knox, 12 Mo. 284; Doggett v. Lane,

12 Mo. 215.

As to Rules Governing Practice in equity, see also Ulrici v. Papin, 11 Mo. 42; Arnett v. Dodson, 10 Mo. 783; Roundtree v. Gordon, 8 Mo. 19; Easton v. Collier, 3 Mo. 379.

4. Easton v. Collier, 3 Mo. 379.

5. Roach v. Chapin, 27 Ill. 194. Upon Demurrer—In the United States Supreme Court.—The 20th of the rules made by the supreme court of the United States in 1822, to regulate the practice of vides that "if a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received, but the defendant shall proceed to answer the plain-tiff's bill; and if he fail to do so within two calendar months, the same, or so much thereof, be decreed accordingly." Under this rule no service of an interlocutory decree, taking the bill for con-Bank of U. S. v. White, 33 U. S. (8 Pet.) 262; bk. 8, L. Ed. 938. See Deford v. Mehaffy, 13 Fed. Rep. 486.

6. Hart v. Small, 4 Paige Ch. (N. Y.)

Notice of Subsequent Proceedings-Practice in New York .- If a solicitor, or other officer of the court, on being served with subpœna for that purpose, neglects to enter his appearance within the time limited by the rule, he will not be entitled to notice of the subsequent proceedings. Wells v. Cruger, 5 Paige Ch. (N. Y.) 164. 7. Legrand v. Francisco, 3 Munf. (Va.)

Awarding Writ of Inquiry Without Default.-The awarding of a writ of inquiry after defendant's failure to appear on the circuit courts in equity causes, pro- being called, without previous entry of cannot be set down for hearing before a decree pro confesso has been entered against the defendant, if he has failed to appear.

On a pro confesso taken to a bill, a decree may be entered at the return term of the summons.2 It is not error that a formal order. taking a bill for confessed, was not entered on the record: 3 for where the lower court has omitted to enter a formal default against a party who has been duly served with process and made default. such omission may be corrected at any time while proceedings are in fieri in that court, and if not corrected there, the same will be regarded by the appellate court as amended.4

e. Proof of Demand.—It is held by some courts that where a bill is taken as confessed, the court may, in its discretion, require proof as to all or any portions of the allegations in the bill, and the evidence need not be preserved in the record; it may render a decree on the pro confesso order without evidence; 5 but the better and more general doctrine seems to be that a cause must be regularly set down for hearing, though the bill be taken pro confesso, but that it is not necessary to notify the defendant of the hearing, or to affix notice in either of the public offices. However.

an interlocutory judgment, is a mere informality, and cannot be assigned for error. White v. Rankin, 2 Blackf. (Ind.)

1. Beville v. McIntosh, 41 Miss. 516.

2. Delahay v. McConnel, 5 Ill. (4 Scam.) 156; Grubb v. Crane, 5 Ill. (4 Scam.) 153.

Where parties had been duly served with process, whether they had appeared or had not, it is not ground for reversal that a judgment was taken against them without having been defaulted by calling, the damages having been assessed by a pury. Nor ground for a bill of review. Doherty v. Chase, 64 Ind. 73.

In Attachment Proceedings.—If defend-

ant in attachment do not appear and put in bail, judgment against him may be good without his having been previously called and his default entered. Harlow

v. Becktle, 7 Blackf. (Ind.) 237.
3. Savage v. Berry, 3 Ill. (2 Scam.)

Presumption as to Record. - If the record show an entry to have been made to the "satisfaction of the court," the supreme court will presume that it was properly

made. Round v. State, 14 Ind. 493.
Questions Dehors the Record Not Examined on Appeal.—Where judgment has been rendered by default, and the record fails to show that defendant moved to set aside the default, the supreme court cannot examine questions arising dehors the record Holmes v. Fitch, 16 Ind. 358.

4. Torr v. Torr, 20 Ind. 118.

5. Bennson v. Bill, 62 Ill. 408; Harmon v. Campbell, 30 Ill. 25; Smith v. Trimble, 27 Ill. 152; Thatcher v. Haun, 12 Iowa, 303; Humphreys v. Darlington, 3 G. Greene (Iowa), 588.

If a defendant makes default, a decree pro confesso may be rendered against him without evidence in support of the bill, Humphreys v. Darlington, 3 G. Greene (Iowa), 588. And the court may, in its discretion, require proof as to all or any portion of its allegations, and the evidence need not be preserved in the record; or it may render a decree on the order pro confesso, without evidence. Cronan v. Frizell, 42 Ill. 319.

6. Carradine v. O'Connor, 21 Ala. 573; Wilkins v. Wilkins, 4 Port. (Ala.) 245; Stanton v. Henderson, I Ind. 69; Starbuck v. Lazenby, 7 Blackf. (Ind.) 268; McFall v. Wilson, 6 Blackf. (Ind.) 260; McKay v. Craig. 6 Blackf. (Ind.) 168; Thompson v. Wilson, 1 Blackf. (Ind.) 358; Tannehill v. Thomas, 1 Blackf. (Ind.) 144; Rose v. Woodruff, 4 Johns. (N. Y.) 547; Pendleton v. Evans, 4 Wash.

Verdict must be for Plaintiff, and whatever the proof may be, the jury cannot find for the defendant. Ellis v. State, 2

Action of Account. - Where a bill for a balance of an account is taken pro confesso, it is erroneous to decree the sum claimed without reference to a master. Pendleton v. Evans. 4 Wash. C. C. 391. Action on Penal Bond conditioned for

a defendant in chancery, being in court, has a right, in a case where the hill is taken as confessed, to appear before the master on a reference if he thinks proper; although in such case the practice does not require notice to him to appear on the reference. Or, upon some report of the master being made, the defendant may, if he choose, file exceptions and resist its approval.¹

A chancery cause need not be referred to a master to take proofs; the court has the power to hear the whole case without a reference.² Thus if the sum to which plaintiff was entitled depended on the amount due on a judgment, the court can assess the damages, after judgment for plaintiff on demurrer, without a jury: and so wherever there are records or other undisputed documents to determine amount due.3

Where a bill has been taken pro confesso against all the defendants, and one of them is out of the State, a clause may be inserted

performance of covenants.-If plaintiff obtain judgment by default or on demurrer, damages should be assessed by jury. If on a note or bill of exchange, or a covenant for payment of a certain sum, damages may be assessed by court. Stanton v. Henderson, I Ind. 69; McKay v. Craig, 6 Blackf. (Ind.) 168; Thompson v. Wilson, I Blackf. (Ind.) 358; Tannehill v. Thomas, I Blackf. (Ind.) 144.

In suits on penal bonds it is only upon determination of questions of law in favor of plaintiff, or upon a default, that the interlocutory judgment is given. But the court may be substituted for the jury to assess damages by agreement. State v.

Cross, 6 Ind. 387.

Declaration on Note-Common Counts.-If a declaration on a note contain the common counts, and there be a judgment by default for plaintiff, there must be a writ of inquiry, unless parties submit the case to the court or a nolle prosequi be entered as to the common counts. McFall v. Wilson, 6 Blackf. (Ind.) 260

A declaration in assumpsit contained a count on a note, and a general count for goods sold and delivered. Judgment by default. Held, a writ of inquiry was Starbuck v. Lazenby, 7 necessary.

Blackf. (Ind.) 268.

Special and Common Counts. - Where the declaration consists of a special and common count, and defendant had made default under Rev. Stat. 1843, the latter should be dismissed or damages assessed by a jury; otherwise judgment will be erroneous. May v. State Bank, 9 Ind. 233; Langdon v. Bullock, 8 Ind. 341; Carter v. Spencer, 4 Ind. 78; Sacket v. Johnson, 3 Blackf. (Ind.) 61.

In Alabama, where a bill is taken for confessed, a decree cannot be rendered thereon without any evidence to sustain its allegations. Carradine v. O'Connor, 21 Ala. 573; Singleton v. Gayle, 8 Port. (Ala.) 270; Wilkins v. Wilkins, 4 Port. (Ala.) 245.

Indiana Statute 1843 (Rev. Stat. 836). which permits the court, where a bill is taken as confessed, to proceed to a decree at the same term, and such decree shall be deemed absolute, etc., prescribes the manner of proceeding, and does not preclude the court, in all cases, from requiring proof of the facts alleged in the bill before the rendition of a final decree for the complainants. Bowman v. Hall, 2 Ind. 206.

In New York .- The provisions of the Revised Statutes of New York relating to proceedings in chancery, with respect to defendants who are not personally served with process, and who do not appear, making it the duty of the court to direct a reference to the master to take proof of the facts and circumstances stated in the bill before any decree can be made, affected those cases pending when the Revised Statutes went into operation. Aymer v. Gault, 2 Paige Ch. (N. Y.) 284.

1. Moore v. Titman, 33 Ill. 358.

Failure to Appear when Called—Assessment of Damages.—If defendants, having pleaded in barl on being called fail to appear, the plaintiff can have damages assessed as if defendants had appeared and defended. Kirby v. Holmes, 6 Ind.

2. Carter v. Lewis, 29 Ill. 500.

3. Harrington v. Witherow, 2 Blackf. (Ind.) 37.

of course, in the common order of reference, directing the master to examine the plaintiff as to any payments that may have been made to him, or for his use, on account of the demand mentioned in the bill.1

3. REQUISITES OF.—a. Jurisdiction by Service or Appearance.— A decree pro confesso cannot be rendered against a defendant who has not been served with process,2 or appeared in the action.3 An order pro confesso entered before the proof of service of the sub-

1. Southwick v. Van Bussum, I Paige Ch. (N. Y.) 648.

2. Hurter v. Robbins, 21 Ala. 585; Maulsby v. Wolf, 14 Ind. 457.

To Authorize a Bill to be Taken for Confessed for want of an answer, it must appear that the defendant had notice of the Reed v. Glover, 6 Blackf. (Ind.)

Return on Subpœna-What not Sufficient.-The return on a subpœna "executed on A.M. March 20, 1826, R.J. P. not found, March 20, 1826, R. J. Sheriff," is not sufficient to authorize a decree on a pro confesso. Pegg v. Capp, 2 Blackf.

(Ind.) 257.

Where a sheriff failed to make return of execution of subpœna by leaving a copy, the bill should not be taken pro confesso. Taylor v. Jackson, 2 Bibb (Ky.), 572. And where a sheriff returns that he left a copy of the complainant's bill and a subpœna at defendant's place of residence, the bill should not be taken pro confesso. Johnston v. Macconnell, 3 Bibb (Kv.), 1.

Service of Process-What Sufficient .-To entitle a party to a decree pro confesso on the chancery side of the circuit court the process to bring the defendant in the court must have been served twenty days before return day. Mobley v. Buchanan,

30 Miss. 174

Service by Publication-Defective Notice -Proof of Publication. —Where a decree was entered upon a bill taken pro confesso against a non-resident, it appearing that the notice required by statute to be published was silent as to the most material object of the bill, and that the fact of publication was verified by the affidavit of the editor, and not by that of the printer or publisher of the paper in which the notice appeared, the decree was reversed. Saffold v. Saffold, 14 Ark.

A bill taken pro confesso against absent defendants, publication not having been made two months before the day of appearance, was held erroneous. Brown v. Humphreys, I J. J. Marsh. (Ky.) 392.

A decree taking a bill pro confesso is erroneous when passed on an order of publication directing publication for three weeks only, instead of one month as required by Maryland Act 1842, ch. 229. Central Bank v. Copeland, 18 Md.

Residence Within State-Inability to Find .- Proceedings to take a bill as confessed against a defendant having a known place of residence in the State. and who is not absent or concealed, will be set aside as irregular, though the plaintiff was unable to discover such place of residence in order to serve pro-Evarts v. Becker, 8 Paige Ch. (N. Y.) 506.

Partition-Service by Publication.-A default should not be entered against parties to a bill in chancery for partition upon publication without a return of summons "not found" as to them. Cost v. Rose, 17 Ill. 276.

Judgment on Insufficient Service .-Judgment by default against a defendant on an insufficient service, to wit, nine days' notice instead of ten, is simply an error for which judgment would be reversed on appeal, and may be waived by a release of errors and irregularities. Helphenstine v. Vincennes Nat. Bank, 65 Ind. 582.

Appeal on Insufficient Service and Defective Complaint .- From a judgment taken on default without jurisdiction, a party may appeal without applying to the court below to set aside said judgment. Kyle v. Kyle, 55 Ind. 387; Cochnower v. Cochnower, 27 Ind. 253; Abdil v. Abdil, 26 Ind. 287; Harlan v. Edwards, 13 Ind. 430; Blair v. Davis, 9 Ind. 236. Also when complaint does not state facts sufficient to constitute a cause of action. Strader v. Manville, 33 Ill. III.

Appearance—Motion to Dismiss Injunction. - A mere motion in court to dissolve an injunction is not that formal entry of appearance which will justify the taking a pro confesso against the defendant. Chewning v. Nichols, I Smed. & M. (Miss.) Ch. 122.

poena has been made or filed is premature and irregular. And where the service against defendant is a nullity, the court has no jurisdiction, and judgment by default is void.2

A decree against infants who have not been served with process is erroneous; they are not before the court, and the appointment of a guardian ad litem by the court, in such case, is

erroneous, and does not cure the defect of service.3

A bill cannot be taken pro confesso against the defendant, on substituted service of the subpœna; the plaintiff must proceed to compel an appearance. 4 But where a final decree has been entered for the complainant on the bill being taken for confessed, and the court has jurisdiction of the subject-matter of the bill, and no objection has been taken to the jurisdiction, the decree will not be disturbed on error, though the jurisdiction of the parties defendant may be doubtful.⁵ And where a default has been taken and a decree entered pro confesso, which recites that the defendants have been regularly notified of the pendency of the suit, by summons or advertisement, a bona fide purchaser under the decree will be protected, although the record may not furnish any evidence of a summons or advertisement.6

b. As to the Bill or Complaint.—The bill or complaint, to support a decree pro confesso, must state a cause of action,7 and contain the requisite allegation, that is, be formally sufficient; 8 for a decree on an implied confession must be taken strictly, the facts on which it is based should be distinctly alleged, and it should be confined to the facts so alleged. No intendment of a fact, not within the allegations, can be made to support it.9

c. Subsequent Proceedings.—Where a defendant does not answer, a decree against him, without taking the bill pro confesso, is irregular; 10 and it is error to hear the cause and pronounce a final decree, upon a commissioner's report, which has not been returned

1. Eaton v. Eaton, 33 Mich. 305.

2. Divilbis v. Whitmire, 20 Ill. 425; Brooks v. Allen, 62 Ind. 401.

3. Hendricks v. McLean, 18 Mo. 32. As to Texas Practice in this respect, see Cannon v. Hemphill, 7 Tex. 184.

4. Sawyer v. Sawyer, 3 Paige Ch. (N.

Y.) 263.

5. Ramsey v. Barbaro, 20 Miss. (12 Smed. & M.) 293.

6. Reddick v. State Bank, 27 Ill. 145. 7. Bill or Complaint Must State a Cause of Action. - Where a bill is without equity. and the answer thereto is framed as a demurrer, and upon exceptions to the answer it is ruled insufficient and a pro confesso is taken upon failure to answer further, such pro confesso will not justify a decree against the defendant, because the bill makes no case against him. Garland v. Hull, 21 Miss. (13 Smed. & M.) 76: s. c., 51 Am. Dec. 140.

8. Exception to Insufficient Bill.-A

bill will lie for review of a judgment rendered by default on an insufficient complaint though no exception is in record. Berkshire v. Young, 45 Ind.

A decree on a bill pro confesso, where an execution on a judgment rendered in one county and sent into another, and returned "no property," is the foundation for the bill, which contains no allegation that the defendant resides in the latter county, is erroneous. Rhodes v. Cobb, 4 Dana (Ky.), 23. 9. Brodie v. Skelton, 11 Ark. (6 Eng.)

10. Shields v. Bryant, 3 Bibb (Ky.), 525; Carman v. Watson, 2 Miss. (I How.)

Where no judgment by default has been taken prior to rendering a final judgment, it is a nullity, and will be so declared when attacked by a third party. Washington v. Hackett, 19 La. An. 146.

to the court the requisite number of days preceding the term at which the cause was heard. But a bill may be taken for confessed without first filing the exhibits.2

On appeal to the supreme court, no question as to sufficiency of evidence is raised, unless the bill of exceptions affirmatively

shows that it contains all the evidence.3

d. As to Absentee, Infants, Lunatics, etc.—A decree pro confesso against an absentee or non-resident infants, lunatics, etc., to be valid, the service of process and proceedings in the case must have been in strict conformity with the requirements of the statutes. Thus where the record does not contain the evidence on which a decree pro confesso against a non-resident defendant was rendered, a mere statement in the decree that the publication was made in due form is insufficient to sustain it.4 And a decree in chancery against an infant, for want of answer, and without proof of the statements of the bill, is erroneous.⁵ Full proof must be made and preserved on the record.6

4. OPENING.—a. For Irregularity.—A decree pro confesso, when irregularly entered, as a matter of course will be set aside on motion. And where a suit is waiting for a master's report, it cannot be put upon the calendar for a hearing, though the report

1. Gray v. Dickenson, 4 Gratt. (Va.) 87.

2. Gwin v. Stone, II Smed. & M.

(Miss.) Ch. 124.
Alabama Practice—"Note in Writing." The note in writing required by the Alabama chancery practice, Rule 16, at the foot of a bill, is indispensable to make the decree pro confesso equal in force as evidence to one "legally taken." O'Neal

v. Robinson, 45 Ala. 526.

Under Maryland Statute 1820, ch. 161, sec. 1, the chancellor is not authorized to take a bill pro confesso and entirely disregard the testimony which the interlocutory order, directed in that act, requires to be taken under an ex parte commission to support the allegations of the bill. there be also a non-resident defendant, against whom an order of publication has been passed, the bill must be taken pro confesso against him, the proof under the commission not being binding upon him, although it cannot be so taken as to the former. Grove v. Fresh, o Gill & J. (Md.)

3. Franklin Ins. Co. v. Cook, 57 Ind. 11. Available Error .- After answer filed defendant withdrew his appearance, whereupon court proceeded to try the cause upon evidence, and found for plaintiff. No exception was taken. Held, no v. Evansville & C. R. Co., 7 Ind. 413.

4. Hartley v. Bloodgood, 16 Ala. 233.

Non resident Infant.—An order in

chancery made at the second term after filing of the bill, reciting that publication was duly made of an order of the former term, requiring a non-resident infant defendant to appear and answer, etc., appointing a guardian ad litem, taking the bill for confessed, and referring the matter to a master to take and report and account at the same term, is irregular. Dunning v. Stanton, o Port. (Ala.) 513.

Non-resident Executrix .- In a bill in chancery against an executrix to obtain payment of certain accounts against a decedent, where the defendant was nonresident, and publication of the pending of the suit was made, and afterwards proved, the bill was taken as confessed, and final decree, without proof, rendered for the complainants. Held, that the decree was erroneous. Trimble v. White, 2 Ind. 205.

5. Knox v. Coffey, 2 Ind. 161; Carneal v. Streshley, 1 A. K. Marsh. (Ky.) 471;

Heath v. Ashley, 15 Mo. 393.

Practice - Neither a default nor a decree pro confesso can be entered against an infant. Where infants are defendants in chancery proceedings, the proper practice is for the court to refer the matter which requires to be proved to the master in chancery, that he may take the evidence and report the facts to the court for its final determination. Chaffin v. Kimball, 23 Ill. 36; Cost v. Rose, 17 Ill. 276; Enos v. Capps, 12 Ill. 255; McClay,

Admr v. Norris, 9 III. (4 Gilm.), 370.

6. Chaffin v. Kimball, 23 III. 36.

7. Fellows v. Hall, 3 McL. C. C. 281.

When Complainant Failed to Attach

will be obtained before a hearing can be had, and a decree of default so obtained will be set 'aside, though the defendant had notice of the hearing.1

A party against whom a judgment by default has been rendered may, it seems, appeal directly therefrom to the supreme court

without applying to the trial court to set aside judgment.2

b. Upon Excuse and as a Favor.—A decree by default may be set aside on motion, and the court decides a question on motion where the facts appear, and there is nothing to dispute about but the law of the court.³ The decree will be opened and the defendant let in to answer, even after a decree pro confesso, order of reference, and the master's report, if the equity of the case requires such relaxation of the rules.4 And even after enrolment of the decree the default will be opened to let in a defence upon the merits.⁵ Applications to set aside a judgment pro confessos are addressed

the required Revenue Stamp to the Original Writ, and after the expiration of the time limited for the defendant to file his answer, attached the stamp and took a decree pro confesso and the defendant moved to set aside the decree, it was held that the motion should be denied with costs; but, under the circumstances of the case, without prejudice to the motion being renewed within 15 days, if the defendant could make affidavit of a good defence, and show what that defence was, such affidavit should be entitled in the cause. Disbrow v. Johnson, 18 N. J. Eq. (3 C. E. Gr.) 36.

In Divorce Case. - An application was made to set aside a decree of divorce on the ground of irregularity in the proceedings, stating that a solicitor who appeared for the husband, the defendant, and waived the irregularity by consenting that the bill might be taken pro confesso, was unauthorized. Held, that in the absence of fraud or collusion on the part of the plaintiff in procuring such unauthorized appearance, it was no ground for setting aside the proceedings. Hoffmire v. Hoffmire, 3 Edw. Ch. (N. Y.) 173.

Motion to Set Aside a Default for want

of notice is no such appearance as to waive the want of notice. Houk v. Barthold, 73 Ind. 21.

1. Mix v. Mackie, 2 Edw. Ch. (N. Y.)

2. Odell v. Carpenter, 71 Ind. 463.

A New Trial cannot be had in cases of default. Savings & Loan Society v. Meeks, 66 Cal. 371; s. c., 5 Pac. Rep.

3. Beekman v. Peck, 3 Johns. Ch. (N. Y.) 415. See Tripp v. Vincent, 8 Paige Ch. (N. Y.) 180; Graham v. Elmore,

Harr. Ch. (Mich.) 265. 4. Williamson v. Sykes, 13 N. J. Eq.

(2 Beas.) 182.

The Remedy, -After a default and inquest of the damages, defendant moved for a new trial. Held, motion not proper. It should have been to set aside inquest. Marion & L. R. R. Co. v. Lomax, 7 Ind.

When Defendant Allowed to Answer after Default .- As to under what circumstances a defendant will be allowed to answer in equity after a default. Thornton v. Hightower, 17 Ga. 1.

The Granting Leave to Answer after a decree pro confesso, order of reference to a master and his report of evidence does not affect the order of reference nor the evidence taken under it. Grob v. Cushman. 45 Ill. 119.

Interlocutory Judgment-What Is .-Where a decree ordering the payment of money, on the conveyance of land, has been pronounced, and a commissioner appointed to make the deeds, such decree cannot be regarded as interlocutory on the ground that the deeds were not made by the commissioners before application was made to the court to permit an answer to be filed by a party against

answer to be filed by a party against whom the bill was taken pro confesso. Larue v. Larue, 2 Litt. (Ky.) 268.

5. Beekman v. Peck, 3 Johns. Ch. (N. Y.) 415; Tripp v. Vincent, 8 Paige Ch. (N. Y.) 176; Millspaugh v. McBride, 7 Paige Ch. (N. Y.) 509; s. c., 34 Am. Dec. 360; Hall v. Lamb. 28 Vt. 85.

Opening Decree after Enrolment.-The general rule is, that a decree regularly enrolled cannot be altered except by a bill of review. Lilly v. Shaw, 59 Ill. 76. But a decree by default may without doubt be opened to let in a defence, on the merits of which a party has been deprived by the negligence of his counsel. Thompson v. Goulding, 87 Mass. (5 Allen) 82; Nash v. Wetmore, 33 Barb. (N. Y.) 159; Curtis v. Ballagh, 4 Edw. Ch. (N. Y.) 639; to the discretion of the court upon the circumstances of each case. and will be granted where it will not cause injurious delay, or the

applicant has not been guilty of culpable negligence.1

A motion to set aside a default, for not filing an answer in chancery, should be based upon an affidavit setting forth clearly and specifically the reasons for setting it aside, and be accompanied by an answer and offer to file the same.2

An enrolment will be vacated and a decree opened when the decree has been made unjustly against a right or interest that has not been done without laches or that has not been done without laches or fault of the party who applies. Beekman v. Peck, 3 Johns. Ch. (N. Y.) 415. See Brinkerhoff v. Franklin, 21 N. J. Eq. (6 C. E. Gr.) 336, Carpenter v. Muchmore, 15 N. J. Eq. (2 McCar.) 123; Miller v. Hild, 11 N. J. Eq. (3 Stockt.) 25; Wooster v. Woodhull, 1 Johns. Ch. (N. Y.) 539; Collins v. Taylor, 4 N. J. Eq. (3 H. W. Gr.) 163; Robertson v. Miller, 3 N. J. Eq. (2 H. W. Gr.) 452; Robson v. Cranwell, 1 Dick. 61; Hargrave v. Hargrave, 2 Man. & G. 218; Kemp. v. Squire. 1 3 Man. & G. 348; Kemp v. Squire, I Ves. Sr. 205; Wright v. Wright, I Ves.

In New York .- Before the Code of Chancery had power, even after enrol-ment, to open a regular decree obtained by default, and to discharge the enrollment for the purpose of giving the defendant an opportunity to make a defence upon the merits when he had been deprived of such defence either by mistake or accident, or by the negligence of hissolicitor. Beekman v. Peck, 3 Johns. Ch. (N. Y.) 415. See Nash v. Wetmore, 33 Barb. (N. Y.) 159; Tripp v. Vincent, 8 Paige Ch. (N. Y.) 176: Millspaugh v. McBride, 6 Paige Ch. (N. Y.) 512; s. c., 34 Am. Dec. 360; Erwin v. Vint, 6 Munf. (Va.) 267.

In Vermont. - The chancellor has power, at his discretion, after enrolment, to vacate a decree entered pro confesso, to allow a defence upon the merits when it has been omitted through mistake, accident, or even negligence. Hall v. Lamb,

28 Vt. 85.

1. Graham v. Elmore, Harr. (Mich.) 265; Hart v. Linsday, Walker Ch. (Mich.) 72; Russell v. Waite, Walker Ch. (Mich.) 31; Gwin v. McCarroll, 1 Smed. & M. (Miss.) 351.

Discretion of Court. - Supreme court will not review exercise of the power to set aside a judgment unless discretion has been plainly abused. Ferris v. Johnson, 26 Ind. 247.

Where the court below, in the exercise

Tripp v. Vincent, 8 Paige Ch. (N. Y.) 180; of the discretion on the showing of the Millspaugh v. McBride, 7 Paige Ch. (N. Y.) 509; s. c., 34 Am. Dec. 360; Hall v. Lamb, 28 Vt. 85. the court, after the bill was filed, to allow the complainant to take his hill org confesso, held, that in such a case the supreme court would not control the discretion of the court below, especially as no order had been entered on the minutes of the court requiring the defendants to answer the complainant's bill at the next term. Dougherty v. Jones, 11 Ga.

In Mississippi-When Refusal Error .-Where a bill to foreclose a mortgage was served on the 18th day of May, and taken for confessed on the 21st day of June, the amount due on the mortgage computed. and judgment of foreclosure entered the same day, and on a showing of want of notice to the respondent and a sufficient defence to the claim of the plaintiff, the chancellor refused to set aside the pro confesso, held by the high court of Mississippi, that such refusal was erroneous. McGowan 7. James, 20 Miss, (12 Smed. & M.) 445.

On Error. - The supreme court will not decide whether reasons for a motion to set aside a default are a part of the record unless it appear whether the motion was overruled. If such reasons be sufficient in law, yet it will be presumed, the contrary not appearing, that they were not shown to be true in fact. Round v. State, 14 Ind. 493. See Spencer v. Russell, 9 Ind. 157.

2. Norton v. Hixon, 25 Ill. 440; Grubb v. Crane, 4 Scam. (Ill.) 153; Dunn v.

Keegin, 3 Scam. (Ill.) 292.

A court of chancery will not set aside a pro confesso decree, though the affidavit is satisfactory, and the answer, if such answer does not disclose a valid defence. Lewis v. Simonton, 8 Humph. (Tenn.)

Affidavit of Merits.—The affidavit is required in cases in equity as well as law.

Mowry v. Hill, 11 Wis. 146.

Affidavit of Attorney as to Merits of Defence.-A motion to open a default on the affidavit of the solicitor that the defendant had, as he believed, a good defence, by way of set off to a part at least of the amount claimed in the bill, was refused

- c. Terms.—It is within the discretion of a court of equity upon a proper showing to set aside a decree pro confesso upon such terms as it may see fit to prescribe. Although where a decree has been taken against a defendant for want of appearance, after personal service, the court may impose such terms as it thinks proper, as a condition for opening the decree, yet where the bill is taken as confessed against the defendant as an absentee, without actual service, the court has no right to require payment of anything bevond the necessary costs and expenses of the suit, as a condition of letting him in to defend, provided he makes his application within the time prescribed by the statute.2
- d. To Let in Unconscionable Defence.—A default will not be opened in equity for the purpose of letting in an unconscionable or dishonest defence.³ Thus where the defendant's solicitor, by an alleged mistake as to practice, suffered the bill to be taken pro confesso for want of appearance after personal service of the subpæna upon the defendant, the court refused to open the decree after enrolment to let in a defence, the only effect of which would be to enable the defendant to enforce a forfeiture.4
- 5. WAIVER OF DEFAULT.—A failure to take advantage of a default by proper plea and going to trial works a waiver of the default.5

on the ground that no reason was shown why the affidavit was not made by the party defendant instead of the solicitor. Bank of Michigan v. Williams, Harr. (Mich.) 219.

Cause having been dismissed for want of prosecution, plaintiff produced affidavits of his attorneys showing that their failure to appear at call was accidental, they being delayed by a storm, etc. Held, motion to set aside default and reinstate cause rightly sustained. Cooper v. Johnson, 26 Ind. 247.

Presenting Answer .- After default and final decree, the party asking to have the decree opened and for leave to file an answer should present his answer on

making his motion. Schneider v. Seibert, 50 Ill. 284.

1. Beekman v. Peck, 3 Johns. Ch. (N. Y.) 415. See French v. Stewart. 89 U. S. (22 Wall.) 248; bk. 22. L. Ed. 857.

Not Set Aside as a Matter of Course. -It is not a matter of course to set aside an order to take a bill pro confesso, upon an affidavit of merits, but the court will impose terms; and if the final decree is actually entered, the defendant is usually required to exhibit the sworn answer which he proposes to file. Wells v. Cruger, 5 Paige Ch. (N. Y.) 164. But a court of equity will not permit a bill to be taken pro confesso when the defendant appears and offers his answer; but it may impose terms upon the defendant. Halderman v. Halderman, I Hempst. C. C.

Conditions Imposed-Payment of Costs. -A defendant coming in without unnecessary delay, by motion or petition, after decree pro confesso regularly taken, will, upon any reasonable ground for in-dulgence, be permitted to answer upon payment of costs. Emery v. Downing,

13 N. J. Eq. (2 Beas.) 59.
Consent of Parties-Furnishing Bail. Judgment by default was set aside by the consent of the parties on condition that defendant should, within twenty days, give sufficient bail to sheriff, or that execution should issue on judgment. Held, proceeding incorrect. Freeman v. Hukill, 4 Blackf. (Ind.) 9.

2. Gerard v. Gerard, 2 Barb. Ch. (N.

Y.) 73.
 3. King v. Merchants' Exchange Co.,
 2 Sandf. (N. Y.) 693.

In a Bill to Foreclose Mortgages, given by a corporation to secure their bonds. after the corporation have suffered a default it will not be set aside to enable the defendants to show that they had no power to execute the bonds. King v. Merchants' Exchange Co., 2 Sandf. (N.

Y.) 693. 4. Baxter v. Lansing, 7 Paige Ch. (N.

Y.) 350.

5. Thus where the court ordered a petition to be filed on a certain day, and upon default ordered that the cause stand dismissed, held, that the defendant, by answering and going to trial, had waived the default. Hill v. Supervisors, 10 Ohio St. 621.

DEFEASANCE. (See also CONDITIONS; DEEDS; ESTATES; MORTGAGES.)—A collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. Used also of a "defeasance on a bond,"

1. 2 Blackst. Com. 327.

To be valid, the defeasance must be made between the same persons who were parties to the first deed; for, said Tenney, C. J.: "As in other cases, we resort to the common law, in order to know with precision the definition of the term 'defeasance.' 'A defeasance is a collateral deed, made at the same time with a feoffment or grant, containing certain conditions, upon the performance of which the estate created by such feoffment or grant may be defeated. The word is derived from the French defaire, to defeat or undo, infectum reddere quod fac-tum est.' 4 Cruise Dig. 82. The foregoing definition does not embrace the case of a bond of the grantee in an absolute deed of conveyance of real estate, given to convey the estate to a stranger, or third party. This would be quite a different transaction from that in which the absolute conveyance would be simply defeated. And it has been so held by elementary writers. To make a good de-feasance, it must be by deed. It must recite the deed it relates to, or at least the most material part thereof. It is to be made between the same persons that were parties to the first deed. It must be made at the time, or after the first deed, and not before. It ought to be made of a thing defeasible." Shaw v. Erskine, 43 Me. 371.

In Massachusetts, under the common law, the courts having no equitable jurisdiction, it was held that a writing without seal could not operate as a defeasance of a deed under seal; for, said Parsons, C. J.: "A defeasance of any instrument of conveyance must be of as high a nature as the conveyance, must be executed at the same time, and is to be considered as a part of it; so that the conveyance and defeasance must be taken together, and considered as parts of one contract. If, therefore, the conveyance is by deed, the defeasance must be by deed." Kelleran v. Brown, 4 Mass. 443.

This view was followed in a Maine case, in which Weston, J., said: "On the day that the deed was executed, Owen undertook, by a written instrument, not under seal, to reconvey to Vining, upon the payment of certain sums, within a limited period. In England, according to the law and practice of the court of

chancery, this constitutes a mortgage. But in this State and in Massachusetts it has been held that to constitute a mortgage the condition must be part of the deed, or that there must be a 'defeasance,' which is an instrument of as high a nature, and executed at the same time Upon such only has relief been afforded in equity, under our statute. This may well be regarded as a modification of the English law, as applied in chancery, if it ever obtained in this country. And no other equities, except such as may be enforced under our statute respecting mortgages and the right in equity of redemption, have heretofore been recognized by our law. This view of the law was taken in Kelleran v. Brown, 4 Mass. 443. It is true Chief Justice Parsons in that case admits the chancery doctrine, but says that it cannot be applied here, by reason of the limited equity jurisdiction of the court. He intimates that it would be otherwise if the court held all the equity powers of a court of chancery." French v. Sturdivant, 8 Me. 246. See also Eaton v. Green, 22 Pick. (Mass.) 526.

On the same principle the New Hampshire court held, that a parol agreement between a grantor and grantee, at the time of the execution and delivery of a deed of bargain and sale of lands, that the grantee should at a subsequent time give to the grantor a bond to reconvey upon the payment of a sum of money, and a bond subsequently given in pursuance of such agreement does not make the conveyance a mortgage, and therefore the grantor having died, and his administrator having, on payment of the said sum of money, received from the grantee a deed for the land, the grantor's widow, who had joined in the original deed of conveyance, and thereby released her right of dower, was precluded from a recovery of her dower in the premises; Bell, J., saying: "If the deed gave to the grantee an estate in mortgage only, the debt secured by the mortgage having been repaid by the administrator, who is the legal representative of the grantor, the estate revested in those who would have been by law entitled to it, if the original deed had never been made, and consequently the demandant is entitled to dower. Had the bond from the grantee to the grantor been executed at the same

time with the original deed, they must have been construed together as parts of the same conveyance, and would have amounted to a mortgage; as a defeasance constituting a conveyance of lands. a mortgage may be made as well by a sengrate deed as by a condition in the same deed which conveys the land. . . . The bond given by the grantee to the grantor to reconvey upon the payment of certain money was not made till nearly three months after the original deed, and therefore cannot operate as a defeasance of that deed, which took effect by its delivery at the time of its date. In a court of chancery this deed would without doubt be considered as a mortgage. In chancery, when it appears by deed or any other instrument in writing, whether executed at or after the conveyance, that such conveyance was originally intended as a pledge to secure the payment of money, it is held to be a mortgage. But the rules and principles of decision on this question in courts of equity and courts of common law are different. . . . At common law a mortgage is defined to be a deed conveying lands conditioned to be void upon the payment of a sum of money, or the doing of some other act. This condition may be included in the deed of conveyance, or it may be by a separate deed executed, or at least taking effect at the same time, so as to be part of one and the same transaction. It must be by deed, and cannot be by parol, or instrument in writing not under seal. It must take effect at the time the deed of conveyance takes effect, and not at a subsequent time. A deed, or even any instrument in writing, made at a subsequent time, may be a valid contract, but cannot operate as a 'defeasance,' cannot affect or qualify the title vested by the prior conveyance. . . . A conveyance must be a mortgage at the time of its inception; it never can become such by any subsequent act of the parties. It cannot be an absolute conveyance at one time, and a mortgage at a subsequent time. Had the grantee, after the original deed, refused to give a bond to reconvey, or had either the grantee or the grantor died before such a bond was given, this court must have pronounced this an absolute conveyance, and if there was a moment when it could be considered only as an absolute estate in fee, it must ever remain so." Lund v. Lund, I N. H. 39. See also Swetland v. Swetland, 3 Mich.

In Pennsylvania such a bond has been held to be a defeasance, the bond reciting the deed, and parol evidence being intro-

duced as to the intentions of the parties. For, said Thompson, J.: "Did these instruments constitute a mortgage or a conditional sale? The defeasance bore even date with the deed, but was subsequently executed. Under these circumstances parol evidence was offered and received, under exception, to show what the transaction really was, from first to last, and that the parties treated as for security for money, and not as fixing terms of sale. It was not introduced to contradict or vary the writings, but as showing that the papers constituted one arrangement, agreed upon at one and the same time. This, proved to the satthe same time. This, proved to the satisfaction of a jury, would undoubtedly establish the fact that they constituted a mortgage and not a conditional sale. . . The defeasance signed by the defendant recited that it was an agreement of even date with the deed, although it was executed a short time afterwards. It is well settled that, if the deed and defeasance bear even date, or are agreed upon at the same time, and in the form of the papers in the case, they constitute a mortgage. That they were so agreed upon, the instrument showed: the execution afterwards did not negative this.' Reitenbaugh v. Ludwick, 31 Pa. St. 131. See Lovering v. Fogg, 18 Pick. (Mass.)

Where, upon a loan of money, a scrivener drafted an absolute deed of land, and a bond of defeasance of the same date, and the parties executed them, and the deed was delivered to the grantee, but by the agreement of the parties at the same time the bond was left in the hands of the scrivener, to be delivered to the obligee, if he should within a limited time repay the money, but otherwise to the obligor, and the money was not repaid, it was held that the bond was an escrow, that it was rightfully delivered up to the obligor, after the time for the repayment of the money had expired, and that the transaction did not constitute a mortgage; Putnam, J., saying: "The instrument, to make a valid defeasance, must be signed, sealed and delivered at the same time when the deed to which it refers was executed, so that it should be taken to be a part of the same, as if it were contained in the same deed. . . It is not material that it should bear the same date with the deed, but it must be delivered at the same time when the deed is delivered. And deeds take effect from the delivery, and not from the dates which they bear." Bodwell v. Webster, 13 Pick. 411. See Kelly v. Thompson, 7 Watts (Pa.), 401. which differs only from the common condition of a bond in that the one is always inserted in the deed or bond itself. The other is made between the same parties by a separate and frequently a subsequent deed,¹

DEFEATED.—Past participle of the verb 'to defeat,' which as regards things usually means to render null and void, to undo; and as regards persons, to overcome, baffle, resist successfully; but sometimes where this word has been used in statutes the courts have been compelled of necessity to modify this extreme meaning.²

A defeasance, therefore, is good if made and delivered at the same time as the original deed, and failure to put it on record will vitiate only as to bona fide purchasers without notice. Thus, Parker, C.J., said: "We think the instrument executed was in truth what it was intended to be, viz., a legal defeasance of the deed on the performance of the conditions mentioned in it. The only objection to viewing it in this light is, that it was not executed at the same time with the deed. It is true that it bears date of a different day, and that it was not executed until a month after the deed was signed and sealed. But we do not hold it to be necessary that the dates of the two instruments should be alike, in order to make the bond a defeasance. is to be executed at the same time, that it may be a part of the same transaction. and so operate to defeat the conveyance as effectually as if it had been made a condition of the deed. This bond was made and delivered at the same time that the deed was delivered: so that the instant the grantee became seized, the grantor held the instrument, by which he might afterwards defeat the seizin and revest it in himself. This was to all useful purposes executing the two instruments at the same time; for the delivery is the effectual execution of the bargain between the parties. It is held that so insignificant is the mere date of a deed, that the delivery may be averred and proved to be either before or after the date; and that if an absurd or impossible date, or no date at all, be found, the grantee may prove the time of execution, if important to be proved, by witnesses. Now if a deed were dated a month before its delivery, and the grantee was to execute a defeasance according to his bargain, it would seem absurd to require that the bond should be dated back, in order to produce a formal correspondence with the deed. All that is necessary to make a bond with condition to recovery a defeasance, is that it shall appear to be one and the same transaction with the

deed-part, indeed, of the same convey ance. And this purpose is fully answered if when the deed is delivered the bond is also made and delivered, although the former may be of a much older date than the latter. . . . But it is said that this bond of defeasance was a mere private security in the hands of the grantor, and that his creditors, seeing an absolute deed on record, would have no means of knowing that the conveyance was condi-If this creates a difficulty, it is tional. the fault of the law, and not of the He was not obliged to put the defeasance on record. Indeed the record of such an instrument is required for no other purpose than to secure purchasers under grantee, who holds by an absolute conveyance, against secret defeasances. The non-registry of a defeasance operates to make the estate, which was really be-tween the parties conditional, absolute against everybody but the original parties and their heirs." Harrison et al. v. The Trustees of Phillips Academy, 12 Mass. 456. See Jackson v. Ford, 40 Me. 381.

1. 2 Blackst. Com. 342. See also Fowell v. Forrest, 2 Saund. 47, dd. and notes; Allen v. Coxe, 2 Halst. (N. J.) 89.

2. Thus, where the flowage act (Gen. Statutes, tit. 1, § 390) provided that no dam should be erected under its provisions to the injury of any mill-site on the same stream on which a mill-dam shall have been lawfully erected and used, "unless the right to maintain a mill on such mill-site shall have been lost or defeated by abandonment or otherwise;" it was held that the statute by these terms did not intend a literal loss of the right to use such mill-site, but only such a neglect to use it on the part of the owner as showed that he had no intention of improving it again for milling purposes. Curtiss v. Smith, 35 Conn. 156.

So where the eighth section of the United States Bankrupt Act enacted that "no appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the assignee or to the defeated party in equity

DEFECT—DEFECTIVE.—The want or absence of something necessary or required by law; deficiency.¹

within ten days," etc., the court, Miller, J., said: "There is in the statute, as printed in the statutes at large, what seems to us a manifest clerical error or verbal mistake in the use of the words 'defeated party' as one to be notified of the appeal, and the error is also found in the Revised Statutes, § 4981. The 'defeated party in equity' is generally the one who takes the appeal, and does not therefore require notice, but must give it, We can see no use or sense in that word in that connection. The purpose of the act, the remainder of the section in which the word is used, and the impossibility of any other reasonable meaning require that the word should be construed posite party; or 'successful party,' or adverse party,' in a word, the party who does not appeal in an equity suit, and who is interested to oppose the appeal. Wood v. Bailey, 21 Wall. (U. S.) 640.

Defeat or Obstruct. - In construing the Kentucky statute of 1838 (3 Stat. Law, 550), which releases a surety upon a written obligation, after a lapse of seven years without suit thereon, but provides that "if any person or persons, etc., . . shall abscond, . . . or by any other indirect ways or means defeat or obstruct any person or persons who have title thereto from bringing or maintaining any of the aforesaid actions within the respective times limited by this act, then and in such case such defendant or defendants are not admitted to plead this act in bar to any of the aforesaid actions," the court, Stiles, J., said: "The words 'defeat or obstruct,' as used in the act, signify the performance of some act on the part of the sureties which will amount to a prevention or hindrance of a suit in opposition to the will and rights of the creditor, such as he cannot with reasonable diligence overcome. terms import resistance and obstruction to his rights; and unless the acts complained of are, in point of fact, such as would hinder and prevent him from bringing the suit, notwithstanding his desire to do so, they cannot properly be said to 'defeat or obstruct' such suit. Here there seems to have been no attempt to thwart or hinder the creditor from suing on the note in opposition to his own desire. On the contrary, application was made for his indulgence, and his consent thereto obtained. He was not, there-fore, 'defeated' or obstructed from bringing the suit, but could at any time after the maturity of the note have commenced proceedings thereon." Coleman v. Walker, 3 Metc. (Ky.) 65.

But where a later statute, 1850 (15 chap. 97, Rev. Stat., 2 Stant. 401), provided, "If such surety shall abscond, conceal himself, or by removal from the State or otherwise obstruct or hinder his being sued, the time of such obstruction shall not be computed as part of the time of limitation" of seven years, the court held that a promise made by a surety to a confiding creditor, that the debt should be paid at a named time, which the creditor relied upon, is such an obstruction and hindrance as is embraced by that statute; Williams, C. J., saying: "We draw a distinction between the statute of 1838 and the one found in our revision of 1850. The terms used in this latter statute are 'or otherwise obstruct or hinder, and not, as in the former, 'obstruct and defeat.' There is certainly a distinction between the words 'defeat' and 'hinder.'
The latter, says Webster, means 'to interpose obstacles or impediments,' whilst the former means 'frustration; a rendering null and void, to resist with success.' etc. Now there is nothing clearer than that a promise made to a confiding creditor that the debt should be paid at a named time, and which the creditor relied upon, is both an obstacle and impediment to the bringing the suit." Walker and Wife v. Sayers et. al., 5 Bush (Ky.),

1. Bouv. Law Dict.

Defect in Highway-Defective Highway. -A large piece of cloth suspended across a highway, twelve feet above the ground, with iron weights attached to it so insecurely as by the force of the wind to be projected upon a passer-by, is not a defect within the meaning of a statute placing the liability for injury caused by a defective road or bridge upon the town, person, or corporation which ought to keep the road or bridge in repair. "Any object in, upon, or near the travelled path which would necessarily obstruct or hinder one in the use of the road for the purpose of travelling thereon, or which from its nature and position would be likely to produce that result, would generally constitute a defect in the highway. For example, branches of a tree hanging over the roadbed near the ground necessarily obstruct the use of the way and should be removed by the town; and any object upon or near the travelled path which in its nature is calculated to frighten horses of ordinary gentleness, being likely to

obstruct the use of the way, may constitute a defect in the way itself. . . . On the other hand, those objects which have no necessary connection with the roadbed, or the public travel thereon, and which may expose a person to danger, not as a traveller but independent of the highway, do not ordinarily render the road defective." Hewison v. New Haven. 34 Conn. 136. Accordingly, under a similar statute, a mass of snow and ice overhanging a street, from a building not owned by the city, was held not to be a defect in the highway. "The traveller may be subjected to inconveniences and hazard from various sources, none of which would constitute a 'defect or want of repair' in the way for which the town would be responsible." Hixon v. City of Lowell, 13 Gray (Mass.), 59.

"The want of a sufficient railing, barrier, and protection to prevent travellers passing upon a highway from running into some dangerous excavation or pond, or against a wall, stones, or other dangerous obstruction without its limits but in the general direction of travel thereon, may properly be alleged as a defect in the highway itself." Davis v. Hill, 41 N. H. 329; Willey v. Portsmouth, 35 N. H. 303. Where a portion of a highway was discontinued and a new road parallel to it substituted, and the old road became impassable and dangerous, and a traveller at night, being unable to distinguish the roads, got upon the old and there sustained injury, the town was held liable under the Connecticut statute above referred to. As the old road was not closed, it was apparently an open public highway, and was to be regarded as such until the public were actually excluded therefrom. "A fence or its equivalent to keep the public from the old track was essential. It was their duty to see not only that the new road was in proper condition, but that the two combined did not endanger the lives and property of those using the new." "Surely a highway so situated that travellers will be likely to be allured from it into dangerous paths, must be defective." Munson v. Town of Derby, 37 Conn. 298. See various titles on the law of negligence.

Defect in the Condition of the Ways, etc.

—By the Employers' Liability Act, 43 & 44 Vict. c. 42, employers are liable for injuries caused to workmen (1) "By reason of any defect in the ways, works, machinery, or plant connected with or used in the business of the employer." Where the duty of a workman in ironworks was to take heated iron on a car along a roadway of iron plates, and an

iniury was caused by the car's striking an obstruction which projected into the way: it was held that there was not a defect in the condition of the way. "Here the defect" said Field, J., "is not in the way, the defect is that some person carelessly " Here the deput something on the way which he ought not to have put there. This was an obstruction. . . . I cannot help thinking. therefore, that the construction to be put on sub.-sec. I is that the defect must be something in the permanent or quasi-permanent condition." And Stephen, J.: "A defect in the machinery would be the absence of some part of the machinery, or crack, or anything of that kind, A defect in the condition of the way, or works, or machinery, or plant, is cer-tainly wider, but I do not think it very much wider. It means, I should be inclined to say, such a state of things that the power and quality of the subject to which the word 'condition' is applied are for the time being altered in such a manner as to interfere with their use. . . . I do not think we ought to put so wide a construction on the words 'condition of the way' as to include obstacles lying upon the way, which obstacles do not in any degree alter the powers of the way, or alter its fitness for the purpose for which it is generally employed, and cannot be said to be incorporated with it." McGriffin v. Palmer's S. & I. Co. Lim., to Q. B. D. 5; s. c., 47 L. T. N. S. 346. As to machinery, "the condition of the machine must be a condition with relation to the purpose for which it is applied." "If it was not in a proper condition for the purpose for which it was applied, there was a defect in its condition within the meaning of the act." Heske v. Samuelson, 12 Q. B. D. 30. "Although each part might be sufficient, yet if the whole arrangement was defective for the purpose for which it was applied, there would be a defect so as to bring it within the act." Cripps v. Judge, 13 Q. B. D. 583; s. c., 51 L. T. N. S. 182. "A defect which is such an arrangement of the works as produces danger to the workmen on the premises is a defect in the condition of the works. . . . Here a vat of scalding liquid is placed level with the floor, and it is for the county court judge to say whether it ought to have been guarded by a rail, or whether the rail, if there was one, was sufficient." Thomas v. Quartermaine, 56 L. J. R., Q. B. D. 340. And see Smith on Negligence,

Defect of Parties.—In the codes of procedure in the different States where such codes have been adopted, "defect of par

DEFENCE.—(See also PLEADING; SELF-DEFENCE.)—The denial of the truth or validity of the plaintiff's complaint, which is extended and maintained by the defendant in his plea.1

ties" is given as a ground of demurrer. "This ground does not reach a cause of action where there are too many plaintiffs or too many defendants, but only to those cases in which, from the statement of the cause of action, it appears that there are parties omitted who should have been made parties plaintiff or defendant. It is the same as non joinder of a necessary party in an action at law, under the superseded system, or the omission of a necessary party in a suit in equity where it was said the suit was defective and a demurrer could be interposed for want of parties." Palmer v Davis, 28 N. Y. 242. It never includes a case of misjoinder of parties. "This word 'defect' is taken in its literal sense of 'deficiency;' and not in a broader sense as meaning any error in the selection of parties. Upon this point the courts are nearly unanimous." Pomeroy on Remedies, etc., § 206; Bennett v. Presson, 17 Ind. 201; Berkshire v. Shultz. 25 Ind. 523; Hill v. Marsh, 46 Ind. 218; Mornan v. Carroll, 35 Iowa, 32; Powers v. Bumcratz, 12 Ohio St. 273; Neil v. Ag. & Mech. Col. 31 Ohio St. 15; Case v. Carroll, 35 N. Y. 385; Bank of Havana v. Magee, 20 N. Y. 355; Voorhis v. Baxter, 18 Barb. 592; s. r., 17 N. Y. v. Baxter, 18 Barb. 592; s. r., 17 N. Y. 354; Peabody v. Insurance Co., 20 Barb. (N. Y.) 339; Richtmeyer v. Richtmeyer, 50 Barb. (N. Y.) 55: Willard v. Reas, 26 Wis. 540; Marsh v. Board of Supervisors, 38 Wis. 250; G. W. C. Co. v. Ætna Ins. Co., 40 Wis. 373; Lowry v. Jackson (S. Car.), 3 S. E. Rep. 473. The contrary was at first held in New York and Wisconsin in Dunderdale v. Grymes, 16 How. Pr. (N. Y.) 195, and Read v. Sary, 21 Wis 678, both of which were overruled.

Clerical or Other Defects. - In an act providing that certain proof by affidavit shall not be invalidated by "clerical or other defects," the latter phrase means "clerical, or formal, or defects of a like description." The act does not mean that an affidavit containing no statement of facts shall be taken to contain requisite proofs. Duanesburgh v. Jenkins, 40 Barb. (N. Y.) 574.

Defective Description .- An oath by an alien that he is a citizen of the United States, made inadvertently or in ignorance of his status in order to obtain a patent, is not such a "defective or insufficient description or specification" as will authorize the commissioners, under Act Cong. 4 July, 1836, § 13, to receive a sur-

render of the patent and grant a reissue. Mini's Assignee v. Adams, 3 Wall. Ir.

(C. C.) 20.

1. "After the statement of the appearance follows that of the defence, which has been defined to be the denial of the truth or validity of the complaint, and does not merely signify a justification. It is a general assertion that the plaintiff has no ground of action, and which assertion is afterwards extended to and sertion is afterwards extended to and maintained in the body of the plea." I Chitty Pldgs. 428; 3 Bl. Com. 296; Gould Pldg. c. 2, § 6; Stewart v. Travis, 10 How. Pr. (N. Y.) 148; Wilson v. Poole, 33 Ind. 448. This definition was adopted in the last case in construing an act which required that in actions for the recovery of real estate, "the answer of the defendant should contain a denial of each material statement, etc., under which denial the defendant should be permitted to give in evidence every defence to the action that he may have, either legal or equitable." "'Defence' in the statute," the court, "includes every matter in bar of the action, whether of denial or of confession and avoidance, but not matter of abatement. The pendency of a prior action between the same parties for the same cause is no 'defence' to a subsequent action, but it is merely a reason why the defendant in the subsequent action should not be compelled to make his defence."

"In a less technical sense the word 'defence' is used as well in legal as in popular language to signify-not a clause or form in pleading-but the subject of the plea." Gould Pldg. c. 2, § 15; Stewart v. Travis, 10 How. Pr. (N. Y.) 148; Houghton v. Townsend, 8 How. Pr. (N. Y.) 441.

A statute gave assignees of policies of marine insurance a right of action there-on, and provided that "the defendant in any action shall be entitled to make any defence which he would have been entitled to make, if the said action had been brought in the name of the person by whom or for whose account the policy sued on was effected." To a suit by an assignee, the defendant sought to set off an indebtedness of the assignor for premiums on other policies, but this was held not to be an admissible defence under the act. The object of the statute was to give the same remedy as if the action had been in equity; and this was

DEFENDANT.—(See also PARTIES TO ACTIONS: PLEADING.)— Strictly, a party sued in a personal action. It is more frequently used at present to denote the party sued or called to answer in any suit, civil or criminal, at law or in equity.1

no defence there. Pallas v. Neptune M. I. Co., L. R. 5 C. P. Div. 34.

Plaintiff obtained an award under an arbitration act, and defendant, instead of appealing, agreed to let it stand as security for what, if anything, should be found due, on condition of being "let into a defence on the merits, without being in any degree prejudiced by the award." The effect of this was to place defendants in the position in which an appeal would have placed them. They might plead non est factum, and under this denythe covenant on which plaintiff had recovered before the arbitrators. Hart v. Withers, I P. & W. (Pa.) 285; s. c., 21 Am. Dec.

1. Bouv. Law Dict.

"Ordinarily a law which in general terms speaks of plaintiffs and defendants applies to persons only; and States, counties, and municipal corporations are not affected by its provisions, unless expressly named and brought within them." This language was made use of in Schuyler Co. v. Mercer Co., o Ill. 20, in construing an act authorizing process in certain cases against defendants residing in foreign counties. rule is elsewhere stated to be that the term "defendant" in a statute is confined to persons, and does not include corporations, where there is a separate and distinct statutory provision relating to them; but otherwise it does. Morgan v. N. Y. & A. R. Co., 10 Paige (N. Y.),

"Defendant" in a judgment is a collective word, and embraces all who by the record are liable to judgment. Claggett v. Blanchard, 8 Dana (Ky.), 41. Under a statute providing that where some of the defendants were resident within the county where the action was brought, process might issue to non-residents into other counties, "defendants" was held to mean necessary parties defendant, i.e., those having a real and substantial interest in the subject of the action adverse to the plaintiff, and against whom substantial relief was sought. Allen v.

Miller, 11 O. St. 374.

A garnishee is a defendant within an act authorizing courts to grant injunctions during litigation, when the defendant is doing or is threatening or about to do some act in violation of the plaintiff's rights respecting the subject of the action. Malley v. Altman, 14 Wis, 22: Almy v Platt, 16 Wis. 160.

A statute required that notice and an opportunity for trial and defence be given in proceedings for the forfeiture of intoxicating liquors illegally kept and intended for sale, to the person against whom complaint is made, who or any person interested might appear and make his claim and be admitted as a party at the trial. Such a claimant is a defendant within the meaning of another statute providing that "in all criminal prosecu-tions in which the defendant relies for his justification upon any license, appointment, or authority, he shall prove the same; and until such proof the presumption shall be that he is not so authorized. Comm. v. Certain Intox, Ligs., 122 Mass.

In an act providing that the court might upon the petition of the defendant. grant a supersedeas or stay of execution, if the petitioner should give security for the prosecution of the proceedings in error, the term "defendant" refers to the party against whom the judgment sought to be reversed was rendered, and not to the defendant in the original action. Leavitt v. Lyons, 118 Mass. 470. The English Judiciary Act of 1873 provides that "'defendant' shall include

every person served with any writ of summons or process, or served with notice of or entitled to attend any proceeding." Sec. 100. A brought suit against B for the specific performance of a lease, which B declined to accept in consequence of a claim of ownership by C. B served notice on C, claiming indemnity in case A was successful. C entered an appearance and obtained an order for leave to file a counter-claim in the action and a statement of defence. The counter-claim was subsequently struck out as not within the power of the court to allow, Held, C and B were defendants within an order, allowing plaintiffs and defendants to interro-They were gate the opposite parties. persons entitled to attend the proceedings at the trial of the action." Eden v. W. I. & C. Co., Lim., 56 L. T. N. S. 464; s. c., 56 L. J. R. Ch. D. 400.

"Absent Defendant," in a statute giving

such a one a right of review of a judgment rendered against him within one year, includes not only those not resident in the State, but also those not served **DEFICIENCY**. See note I.

DEFINE. See note 2.

DEFINITE. (See also DEVISE; WILLS.)—See note 3.

with process because their residence was not known. This provision was construed together with another section of the same act providing for special further notice to those whose residence was unknown, and to non-residents. James v. Howard, 104 Mass. 367.

Defendant in Error.—The party against whom a writ of error is sued out. Bouv.

Law Dict.

Material Defendant. - Under a statutory provision that a bill in equity "must be filed in the district in which the defendant or a material defendant resides," he is a "material defendant" whose interest is antagonistic to the complainant's, and against whom relief is prayed. Where a bill was filed by an administrator to have a deed of the decedents set aside on the ground of fraud and undue influence, and the heir was made a party defendant, she was held to be a necessary party, and such a defendant as, under the statute, would warrant the bringing of suit in the district of her residence, the grantee being resident out of the State. Waddell v. Lanier, 54 Ala. 440; Lewis v. Elrod, 38 Ala. 17

Said Defendant.—In pleading, it is sufficient after the parties have been first named to describe them as "the said plaintiff" and "the said defendant." Davison v. Savage, 6 Taunt. 121; Steven-

son v. Hunter, 6 Taunt, 406.

1. When, in an assignment of a mortgage, the assignor covenants to pay the assignee any deficiency, whenever a sale of the mortgaged premises shall take place on foreclosure and a deficiency shall occur, "this word 'deficiency,' as used in this contract, has a technical meaning, and signifies that part of the debt or sum of money which the mortgage was made to secure, and which is not realized and collected from the subject mortgaged, and which is chargeable under the practice of our courts in the form of a personal judgment against the debtor." Goldsmith v. Brown, 35 Barb. (N. Y.) 484.

A ship's captain signed a bill of lading for 5589 bushels of wheat, a clause of which bill contained a stipulation that "any damage or deficiency in quantity the consignee will deduct from balance of freight due the captain." The word "deficiency" was held to relate to the quantity actually shipped; and on deliv-

ery, the quantity being found 124 bushels short, evidence was admitted to show that the whole amount received was delivered. Meyer v. Peck, 28 N. Y. 590.

2. It being contended that the word "define," in the title of an act to define the boundaries of a certain city, "does not indicate an intention to enlarge or extend, but merely to make clear and certain what was before then uncertain, ambiguous or indefinite;" the court said: "While the word 'define' may be, and frequently is, used in the sense and for the purpose claimed, and while we may concede such to be the general and more popular use of the word, yet it is not used exclusively in such a sense. It has a broader and different meaning. . . . In legislation it is frequently used in the creation, enlarging and extending the powers and duties of boards and officers. in defining certain offences and providing punishment for the same, and thus enlarging and extending the scope of the criminal law. And it is properly used in the title where the object of the act is to determine or fix boundaries, more especially where a dispute has arisen concerning them. . . . Indeed it is a word of very frequent and general use, and although even the settlement of a disputed boundary must necessarily and inevitably extend the line and take in new or additional territory, within the understanding of one of the claimants. we have never heard of any question being made as to the want of authority to enlarge the possessions of another under a power given to define them." People v. Bradley, 36 Mich. 447.

A district formed for ecclesiastical purposes is "a place having a known and defined boundary" within the meaning of a section of a Local Government Act, providing that the act may be adopted in such places. The Queen v. Ratepayers of Northowram, etc., L. R. I Q. B. 110.

3. A definite failure of issue is when a precise time is fixed by the will for the failure of issue, as in the case where there is a devise to one, but if he dies without issue or lawful issue living at the time of his death, then over. 4 Kent's Com. 274; Huxford v. Milligan, 50 Ind. 54b; Hall v. Chaffee, 14 N. H. 220; Downing v. Wherrin, 19 N. H. 84; Anderson v. Jackson, 16 Johns. (N. Y.) 399; Newton v. Griffith, I Har. & G.

DEFINITION. (See also STATUTORY CONSTRUCTION.)—The process of stating the exact meaning of a word by means of other words. An enumeration of the principal ideas of which a compound idea is formed to ascertain and explain its nature.2

DEFINITIVE — Final.3

(Md.) 111: Vaughan v. Dickes, 20 Pa, St.

Under a provision in a joint stock company act that the purpose of the company should be "distinctly and definitely specified" in the articles, the following is a sufficient specification: "Manufacturing and selling daguerreotype mattings and preservers, and all other goods, wares, merchandise, and articles, made of brass. silver, gold, iron, or other metals, or any compounds thereof." Bird v. Doggett, 07 Mass. 404.

1. Worcester's Dict. 2. Bouv. Law Dict.

By logical definition "we determine the common qualities or marks of the objects belonging to any given class of objects. We must give in a definition the briefest possible statement of such qualities as are sufficient to distinguish the class from other classes, and determine its position in the general classifica-tion of conceptions. Now this will be fulfilled by regarding the class as a species, and giving the proximate genus and the difference." A definition should state the essential attributes of, and be exactly equivalent to, the species defined. It must not contain the name defined, nor be expressed in obscure or figurative language; and it must not be negative where it can be affirmative. Jevons' Logic, p. 109: Bouv. Law Dict.

"Legal definitions are for the most part generalizations derived from our juridical experience; and in order to be complete and adequate, they must sum up the results of all that experience as they are found in the special cases that belong to the class to be defined." Lowrie, J., in Mickle v. Miles, 31 Pa. St. 20;

s. c., I Grant's Cases, 328.
"Naming a crime is not defining it; but a definition is an enumeration of the particular acts included by or under the name." Marvin v. State, 19 Ind. 184.
"A definition is ex vi termini an ex-

clusion of everything not expressed. The law, therefore, which defines a right, a crime or incapacity, excludes everything not contained in the definition as completely as if it had used regular words, and said that nothing should confer the right, incur the guilt of the crime, or make one subject to the incapacity, but the circumstances contained in the defin-

ition." Cottin v. Cottin, 5 Mart. (La.) 99.
"Except in mathematics, said Grove,
J., in Wakefield v. Lee, L. R. 1 Ex. D. 343, 'it is difficult to frame exhaustive definitions of words; consequently, as Abbott, C. J., said in R. v. Hall, I B. & C. 136, 'the meaning of ordinary words, when used in acts of parliament, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object which is intended to be attained.' For. as Lord Blackburn said in Edinburgh v. Torban, L. R. 3 App. Cas. 68, 'words used with reference to one set of circumstances may convey an intention quite different from what the self-same set of words used in reference to another set of circumstances would or might have pro-And indeed it is quite possible, as Turner, L. J., observed in Re National Savings Bank, L. R. I Ch. 550, 'if suffi-cient reason can be assigned, to construe a word in one part of an act in a different sense from that which it bears in another part of the same act." Hardcastle's Construction, etc., of Statutory Law, 76; and see Intro. to Browne's Legal Interpre-tation. But "if certain words in an act of parliament have once received a judicial construction in one of the superior courts, and the legislature has repeated them in a subsequent statute without any alteration, the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given them." Ex parte Campbell, L. R. 5 Ch. 706.

3. Definitive decrees are final decrees,

as distinguished from interlocutory or intermediate decrees. An order of sale of the real estate of a decedent to pay debts, and an award of an inquest of partition are not definitive decrees, under an act confining appeals to such. Snod-grass's App., 96 Pa. St. 420; Gesell's App., 84 Pa. St. 238.

A final condemnation by an inferior court of admiralty, from which an appeal lay and had been claimed, is not a definitive condemnation within the meaning of a convention by which property cap-tured and not definitively condemned is to be mutually restored. "Every condem**DEFORCE—DEFORCEMENT.**—The withholding any lands or tenements to which another has a right.¹

DEFRAUD.—(See also CHEAT; CRIMINAL CONSPIRACY; FRAUD). To cheat; to deprive another of a right, to withhold wrongfully what is due to him, or to prevent him wrongfully from obtaining what he may justly claim.²

nation is final as to the court which pronounces it, and no other difference is perceived between a condemnation and a final condemnation than that the one terminates definitively the controversy between the parties, and the other leaves that controversy still depending." U. S. w. Schooner Peggy, I Cr. (U. S.) 103.

v. Schooner Peggy, T. Cr. (U. S.) 103.

1. Co. Litt. 277. "This, in its most extensive sense, is nomen generalissimum.

... it then signifying the holding of any lands or tenements to which another person hath a right, so that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever whereby he that hath right to the freehold is kept out of possession. But as contradistinguished from the former, it is only such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries above mentioned." 3 Bl. Com. 172.

Under a statute giving a widow, deforced of her dower, damages therefor, a deforcement, according to the precise and technical meaning of the term, was held necessary. "By a deforcement is understood a wrongful withholding of lands from the rightful owner, or in case of dower, a denial of the widow's right. Such deforcement, therefore, could not be established against the heir, who pleaded 'tout temps prist' without proof that a demand had been made upon him, and of his refusal to comply with it." Woodruff v. Brown. 2 Harr. (N. J.) 269. "A deforcement of a widow's dower is simply the withholding the dower by the heir or alienee." Hopper v. Hopper, I Zab (N. J.) 543.

Zab (N. J.) 543.

From the allegation in a proceeding for forcible detainer, that the defendants, peaceably and without the consent of the complainant, entered, and unlawfully and unjustly and with strong hand, did deforce and keep the complainant out of possession; it does not appear that the complainant was in possession at the time of the defendant's entry. "It is said, indeed, that the word 'deforce' implies that the plaintiff had been in possession; but this word signifieth, says Lord

Coke, to withhold lands or tenements from the rightful owner. Co. Litt. 3316." Phelphs v. Baldwin, 17 Conn. 212.

2. Webster. State v. Rickey, 4 Halst. (N. J.) 293. The words "cheat and defraud" in an indictment do not, of themselves, impart any common-law offence. Comm. v. Eastman, I Cush. (Mass.) 227; Comm. v. Wallace, 16 Gray (Mass.), 223; State v. Parker, 43 N. H. 83; State v. Rickey, 4 Halst. (N. J.) 293. "Hinder," "delay," and "defraud,"

"Hinder," "delay," and "defraud," in the statute against fraudulent conveyances, were said to be substantially synonymous in Burdick v. Post, 12 Barb. (N. Y.) 186; contra, Crow v. Beardsley, 68 Mo. 435. In the former case, it was said: "To defraud is to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice."

Under an indictment, under the section of the National Banking Act which imposes a penalty upon one who embezzles, abstracts, and wilfully misapplies the moneys and funds of a bank of which he is cashier, with intent to injure and defraud the bank, evidence to show that the acts charged were not done with intent to injure or defraud is inadmissible.
"The phrase 'intent to injure and defraud' is the same one used in indictments for forgery. There it refers to a general guilty intent, and such indictments are held conclusively proved when the act is proved to have been knowingly committed. The phrase should be considered to have the same meaning in this statute and to be proved in the same way." U. S. v. Taintor, II Blatchf. (C. C.) 374.

Where a mechanic's lien law provided that a contractor who should purchase materials on credit, and represent at the time that they were to be used in a designated building, and should use them in another building, with intent to defraud the person from whom they were purchased, should be deemed guilty of a misdemeanor; "with intent to defraud, etc.," was held to mean "with intent to deprive the materialman of the lien on which he relied at the time of making the sales." Timmons v. Carrier, 60 Mo. 581.

DEGREE.—(1) A remove or step in the line of descent or relationship. Each generation lengthens the line of descent one degree. (2) The status or condition of a person. (3) A state or condition of distinction to which a person is advanced for proficiency in some art or science. (4) A particular grade of crime.¹

DEL CREDERE.—See AGENCY: COMMISSION MERCHANTS

DELIBERATE.—(See also HOMICIDE; MURDER.)—Weighing facts and arguments with a view to a choice or decision; considering the probable consequences of an act; done after such weighing of facts and arguments, and consideration of consequences.3

Dict.

2. Webster.

3. "By the use of the word 'deliberate' in describing the crime (of murder in the first degree), the idea is conveyed that the perpetrator weighs the motives for the act, and its consequences, the nature of the crime, or other things connected with his intentions, with a view to a decision thereon; that he carefully considers all these, and the act is not suddenly com mitted. It implies that the perpetrator must be capable of the exercise of such mental powers as are called into use by deliberation, and the consideration and weighing of motives and consequences." State v. Boyle, 28 Iowa, 524; Comm. v. Perrier, 3 Phila. (Pa.) 229; Milton τ. State, 6 Neb. 136. A limitation is placed upon this meaning in State v. Wieners, 66 Mo. 13. where it is said: "Deliberation does not mean brooded over, considered, reflected upon for a week, a day, or an hour; but it means an intent to kill, executed by the party, not under the influence of a violent passion suddenly aroused, amounting to a temporary dethronement of reason, but in the furtherance of a formed design, to gratify a feeling of revenge, or to accomplish some other unlawful purpose." Accordingly it was held not to be error to charge that deliberate "signified done in a cool state of the blood; that is, not in a sudden passion caused by a lawful or reasonable provocation, or by some just cause or provocation." State v. Sneed (Mo.), 91 Mo. 552, State v. Talbot, 73 Mo. 347. It was likewise held proper to charge that the word "means in a cool state of blood, and is used to characterize what are ordinarily termed cold-blooded murders, such as proceed from deep malignity of heart, and are prompted by motives of meart, and are prompted by motives or revenge or gain." State v. Curtis, 70 Mo. 594; State v. Ellis, 74 Mo. 220; Anthony v. State, Meigs (Tenn.), 265;

1. Bouv. Law Dict.; Rap. & L. Law Nye v. People, 35 Mich. 16; State v. O'Harra, 92 Mo. 59.

Premeditated and Deliberate. - The words were said to be of similar import, so that it made no difference whether they were used distinctively or conjunctively in instructions to the jury, in State v. Lopez, 15 Nev. 178; and they were said to mean about the same thing in State v. Bower. 5 Mo. 364; s. c., 32 Am. Dec. 325. But the better opinion is that they are not synonymous, and that "a homicide may be premeditated without being deliberately committed." State v. Wieners, 66 Mo. 13. "Deliberation is but prolonged premeditation. In other words, in law, deliberation is premeditation in a cool state of the blood, or, where there has been heat of passion, it is premeditation continued beyond the period within which there has been time for the blood to cool, in the given case." Premeditation is "thought beforehand, for any length of time, however short. . . De-liberation is also premeditation, but it is something more. It is not only to think of beforehand, which may be but for an instant, but that the inclination to do the act is considered, weighed, pondered upon for such a length of time after a provocation is given, as the jury may find was sufficient for the blood to cool." State v. Kotovsky, 74 Mo. 247. "The ordinary meaning of the word 'premeditated' is 'previously considered or meditated,' and of 'deliberate' is 'not sudden or rash,' 'carefully considering the probable consequence of a step.' These able consequence of a step. words, although prefixed to the act of 'killing,' necessarily refer to the state of mind of the slayer at the time of the 'killing;' and taken together, in their full force, imply that the killing is designed before the act, and that such design is not the sudden rash design of an enraged mind, but that the mind is sufficiently cool and self-possessed to consider and contemplate the nature of the act that is

TRIIVERY -See BILLS AND NOTES, BILLS OF LADING, BONDS. CARRIERS OF GOODS, DEEDS OF CONVEYANCE. EQUITABLE AS-SIGNMENTS, GIFTS, SALES, STATUTE OF FRAUDS. ETC.

(Of Deeds.)-The transfer of a deed from the grantor to the grantee or some person for him, in such a manner as to deprive the grantor of the right to recall his action.

(Of Chattels.)—The tradition or transfer of the possession of a

thing personal from one person to another.2

Delivery is an important element in every sale, and an essential element in every gift. In the law of sales the term is used in a number of senses, expressing shades of meaning which vary with the aspect in which the sale is regarded. For a full exposition of the subject of delivery as connected with the contract of sale, that title should be consulted.3

Actual and symbolic delivery where the thing which is the subiect of the delivery is a corporeal chattel and capable of manual delivery, such a delivery is requisite.4 But where the thing, although corporeal, is, by reason of its bulk or situation, incapable of actual delivery, the requirements of law are satisfied by a symholical or constructive delivery, that is, a delivery of some symbol or evidence of ownership.5

As to incorporeal chattels or choses in action, so far as they can he transferred at all, a symbolical delivery, that is, a delivery of the evidences of title, is, where the nature of the thing allows it,

admitted as the substitute for manual delivery.6

1. Bour. Law Dict.

2. Bour. Law Dict. To constitute a legal delivery it is necessary that all present and future dominion over the thing delivered pass from the person making the delivery. Roberts v. Draper, 18 Ill. App. 167; 2 Kent's Com. 439. There must be such delivery of possession as makes the disposal of the thing irrevocable. Campbell's Est. 7 Pa. St. 101: Zimmerman v. Streeper, 75 Pa. St. 150 There must be a positive change of possession and the donor be in no position to repossess himself of the subject matter of the gift, or to recall the same. Little v. Willetts, 55 Barb. (N. Y.) 125; Reeves v. Capper, 5 Bing (N. C.) 136; Peeler v. Guilkey, 27 Tex. 356.

3. The word, in this connection, is sometimes used with reference to the passing of the property in the chattel, sometimes to the change of the possession of the chattel, that is, to denote, in turn, transfer of title, and transfer of possession. Benj. on Sales, § 675; Morse v.

Sherman, 106 Mass. 433.
"The word 'delivery' is unfortunately used in various senses and to express various shades of meaning:

"(I.) Delivery sufficient to pass the

property and the risk from the seller to

the buyer.

"(2.) Delivery sufficient to enable the vendor to sue for goods, sold and de-livered, instead of for 'goods bargained and sold.

"(3.) Delivery sufficient to destroy the vendor's lien for the price, whether the buyer be solvent or insolvent.

"(4.) Delivery sufficient to determine rights of stoppage in transitu where the buyer is insolvent.

"(5.) Delivery sufficient to comply with the Statute of Frauds, of which 'acceptance and receipt' is of course the more appropriate term.

"(6.) Delivery sufficient to pass title as against creditors or subsequent pur-

chasers of the vendor.

"Unless the sense in which the words used in each particular case be steadily borne in mind, confusion will be sure to follow in reading the many decisions on the subject." Benj. on Sales, p. 649, Bennett's note: 2 Kent's Com. 505, Holme's note.

Under the first of these senses the meaning of delivery is satisfied by a deposit of the article in some suitable place for the buyer to take away when

he chooses. Leonard v. Davis, I Black (U. S.) 476; Dugan v. Nichols, 125 Mass. 43; McNamara v. Edmister, 11 Hun (N. Y.) 597; Merrill v. Parker, 24 Me. 89; L. R. & F. S. Ry. Co. v. Page; 35 Ark. 304; Rattary v. Cook, 50 Ala. 352; Sanborn v. Benedict, 78 III. 309. Under the second there must be an actual tradition to the vendee or his agent. Messer v. Woodman, 22 N. H. 173; Stearns v. Washburn, 7 Gray (Mass.) 187; Hart v. Summers, 38 Mich. 300. Under the sixth, there must be a transfer of possession and an assumption of control by the vendee, but the intent, the consideration and the good faith are essential elements. Cessna v. Nimick, 113 Pa. St. 70; McClure v. Forney, 107 Pa. St. 415.
4. 1 Schouler on Pers. Prop. 87. 2 id.

67: Bogan v. Finley, 19 La. Ann. 94. Where the chattels are numerous it is sufficient to point them out and allow the donee to take them. Allen v. Cowan, 23 N. Y. 502. The separation and identification of them may be sufficient. Hillebrant v. Brewer, 6 Tex. 45; Stoveld v. Hughes, 14 East. 308; Michener v. Dale, 23 Pa. St. 59.
5 I Schouler on Pers. Prop. 87; 2

Kent's Com. 500; Ricker v. Cross, 5 N.

H. 570. It would appear that in this class of cases symbolical delivery is accepted instead of actual, on the supposition that actual delivery can presently follow, for sooner or later the actual delivery of a personal thing corporeal, or moveable proper would be possible. I Schouler

on Pers. Prop. 87.

Goods in a warehouse may be delivered, by delivery of the key of the house. Vining v. Gillath, 39 Me. 496; Packard v. Dunsmore, 11 Cush (Mass.) 282. So may grain in a granary. Sharp v. Carroll, 66 Wis. 62. A trunk, chest or other receptacle and its contents may pass by the delivery of the key. Marsh v. Fuller, 18 N. H. 360; Cooper v. Burr, 45 Barb. (N. Y.) 9.

A delivery of an order for goods, when the goods themselves are not susceptible of immediate delivery, is tantamount to a delivery of the goods.

Stevens v. Stewart, 3 Cal. 140.

Delivery may be made by the assignment and delivery of a warehouse receipt. Adams v. Foley, 4 Clarke (Ia.) 52. "The delivery of the evidences of title and the order indorsed upon them was equivalent, in the then situation of the property, to the delivery of the property itself." Gibson v. Stevens, 8 How. (U. S.) 399; Wilkes v. Ferris, 5 Johns (N. Y.) 335. A sale of cotton may be made by the assignment and delivery of a ginner's receipt. Waller v. Parker, 5 Coldw. (Tenn.) 476; Prickett v. Reed, 31 Ark. 31. Sugar stored in hogsheads on a wharf, by delivery of a city weigher's certificate and the bill of price. Glasgow v. Nickolson, 25 Mo. 29. Goods generally by the delivery of a bill of lading. Wood v. Manley, 11 A. & E. 34; Jordan v. James, 5 Ohio 88; Tilden v. Minor, 45 Vt. 106. Usage has made the possession of such documents equivalent to the possession of the property itself.

Broadwell v. Howard, 77 Ill. 305, 6. I Schouler on Pers. Prop. 87. Gifts of incorporeal chattels were not at all contemplated by early English jurists. Debts, choses in action were anciently not assignable. But when bills and notes gained a footing in the courts, delivery of the writing with or without indorsement, according to the tenor of the instrument, became the rule of transfer. Later still was developed the doctrine of assignment, whereby a money right could be transferred by the delivery of a suitable formal document. And the law, accordingly, demands, in the case of incorporeal chattels, when delivery is an essential of transfer, such a delivery as the nature of the property admits. 2 Schouler on Pers. Prop. 72. "If the thing be not capable of actual delivery, there must be something equivalent to it. The donor must part not only with the possession but with the dominion of the property. If the thing be a chose in action the law requires an assignment or some equivalent, and the transfer must be executed." 2 Kent's Com. 439; Bond v. Bunting, 78 Pa. St. 210; Phipps v. Hope, 16 Ohio St. 586; Jones v. Deyer, 16 Ala. 221; Gray v. Barton, 55 N. Y. 68. Notes, bonds, certificates of deposit thus become susceptible of delivery. Dunbar v. Woodcock, 10 Leigh. (Va.) 628; Mc-Nulty v. Cooper, 3 Gill & J. (Md.) 214; Bedell v. Carll, 33 N. Y. 581; Grover v. Grover, 24 Pick (Mass.) 261; Stewart v. Hidden, 13 Minn. 43; Wilson v. Carpenter, 17 Wis. 512, Camp's App. 33 Conn. 88. So life insurance policies, Witt v. Amis. 1 B. & S. 109; Trough's App. 75 Pa. St. 115; and certificates of stock. Walsh v. Dexton, 55 Barb. (N. Y.) 251; Trymes v. Hone, 49 N. Y. 17; s. c., 10 Am. Rep. 313.

DELICATE—DELINEATE—DELINOUENCY—DELIVER.

DELICATE. - Feeble: tender.1

DELINEATE.—To mark out with lines; to sketch or design.²

DELINQUENCY.—Failure or omission of duty; a fault; a misdeed: and positively an offence; a crime.3

DELIVER.—(See also Delivery.)—To give or transfer; to put into another's power: to pass from one to another.4

about to be done. Atkinson v. State, 20 Tex. 522.

It was therefore error to charge that

"deliberately means intentionally, purposely, considerately; therefore, if the defendant formed a design to kill, and was conscious of such a purpose, it was deliberate." State v. Sharp, 71 Mo. 218.

In Perjury Act.—A false statement made under oath, through inadvertence, or under agitation, or by mistake, will not support a conviction for deliberate and wilful false swearing. Steher v. State (Tex.), 4 S. W. Rep. 881.

1. Webster.

A statement in a petition for divorce. that the petitioner, as a result of marital relations, was "in a delicate condition." is not equivalent to saying that she was pregnant. "A woman may be in a delicate condition without being with child; the two things are by no means synonymous." Dwyer v. Dwyer, 2 Mo. App. 17.

2. Webster,

An act authorizing the construction of a certain railway empowered it to construct its road, etc., "upon the lands de-lineated" on certain deposited plans. Lands not entirely bounded by lines on the plans, but within a line of deviation marked thereon, were held to be "delineated." "I consider," said Hall, V. C., "that 'delineated' cannot in this act be interpreted as meaning surrounded in every part by lines. . . . If it is necessary to say what it does mean, I say I think it means sketched or represented. or so shown that land-owners would have notice that the land might be taken." Dowling v. P. C. & N. R. Co., L. R. 18 Eq. Cas. 714. 3. Webster.

Neall, J., in an opinion in Boyce v. Ewart, 1 Rice (S. Car.), 140, in which he dissented from the judgment of the court that an undertaking by the defendants that if the plaintiffs would render aid and indulgence to the brother of defendants, who was about to commence business, they (in case of his failure or delinquency) would indemnify plaintiffs to the amount of \$1000, was not a continuing guaranty,

said: "'Delinquency 'cannot mean, when applied to a merchant, anything less than that he has proved to be dishonest, and attempted to evade the payment of his debts.

4. Webster.

As title to personal property passes by delivery, an agreement to deliver certain goods for a consideration expressed, imports a delivery which will pass the title. unless there is something in the character of the article or the attending circumstances to qualify the language. v. French, 33 Conn. 489.

Under a statute which provides that every person who, for a loan or forbear-ance of money, "shall have paid or delivered any greater sum or value" than is allowed by law, may recover treble damages, the delivery of property as for usurious interest must be such a delivery as will pass title. Howe v. Carpenter,

49 Wis. 697.
"Delivered" does not mean merely "brought;" and it was held to be a breach of a contract to deliver goods alongside a sloop "in April or sooner," to bring them into the dock on April 29, when it would take four days to unload them. Cox v. Todd, 7 Dowl. & Ry. 131.

An agreement by which a vendor was to supply his vendee with straw, to be delivered at the rate of three loads a fort-night, and the latter contracted to pay "thirty-three shillings per load for each load so delivered," is an agreement to pay on delivery. Wither v. Reynolds, 2 B. & Ad. 884.

The condition of a bond for the performance of an award, that the award shall be made and ready to be delivered by a certain day, does not involve that it should be in writing. A parol award may be delivered. Oates v. Bromal, 6

Mod. 160.

Under a statute which exempts a bankrupt from actions for use and occupation of premises leased by him, if he shall have offered to "deliver up such lease or agreement," an offer to deliver possession of the leased premises is an offer to deliver the lease. Slack v. Sharp, 8 A. & E. 366.

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I. DEFINITION.—" Demand" is said to be a word of art, more comprehensive in its meaning than any other word known to the law, with the possible exception of the word "claim." As used in this article, demand signifies a requisition or request to do a particular thing specified under a claim of right on the part of the person requesting. The discussion will be limited to (1) the demand necessary to be made before an action or suit is brought; (2) demand in proceedings in replevin; (3) in actions in trover; (4) in suits to secure devises and legacies; (5) in dower proceedings; (6) to entitle to, and in actions to recover interest; and (7) in actions upon bills and notes.

II. In Action.—An action may be defined to be, in practice, the formal demand of one's rights from another person or party, made and insisted on in a court of justice. As used in the common sense, it includes all the formal proceedings of a court of justice,

1. In re Denny, 2 Hill (N. Y.), 220; is of much broader import than 'debt,' Levy v. Peters, 9 Serg. & R. (Pa.) 124; and would embrace rights of action best. C., 11 Am. Dec. 679; Murphy's Appeal, 6 Watts & S. (Pa.) 223, 226; Co. Litt. 291; 1 Bouv. L. Dict. (15th Ed.) 504. The court, In re Denny, 2 Hill (N. Y.), 220, 1 in speaking of the word 'demand," most so, indeed, of any known to the say: "It is clear that the word 'demand." say: "It is clear that the word 'demand'

law."

attendant upon the demand of a right made by one person or party of another, in such court, including of course an adjudication upon the demanded right, and its enforcement or denial by the court. 1 Used as a word of art, action means the "lawful demand of one's rights in the form given by law;"2 or "the rightful method of obtaining in court what is due to any one." 3

1. Cause of Action Arises on Demand, when,-In order to secure a party his rights, as well as to enable him to institute legal proceedings, in causes of action arising ex contractu, it is necessary that a demand be made upon the party who is bound to discharge the obligation or perform the contract; unless, indeed, such party has incapacitated himself to discharge the one or perform the other.4 Thus, if no time is fixed for its payment, money acknowledged to be owing is payable on demand. And where no time of payment is limited in the mortgage or note, it is navable within a reasonable time, and is generally regarded as due upon demand.6 Where a party stipulates to do a certain thing which lies within the peculiar knowledge of the opposite party, notice ought to be given to him. A demand is also sometimes

I Bouv. L. Dict. (15th Ed.) III.
 Hall v. Decker, 48 Me. 255.
 Bass v. Elliott, 105 Ind. 517; s. c.,
 West. Rep. 780; Evans v. Evans, 105

2 west. Kep. 780; Evans v. Evans, 105 Ind. 204; s. c., 3 West. Rep. 330; Badger v. Gilmore. 37 N. H. 458. Action Defined.—Any judicial proceed-ings which conducted to a termination will result in a judgment, is an action. People v. County Judge, 13 How. (N. Y.) Pr. 398, 400. See also Evans v. Evans,

105 Ind. 204; s. c., 3 West. Rep. 330.

In Divorce Cases.—The statutes in Indiana have joined with an action for divorce the question of settling and fixing the custody of the children, and the settlement of all property rights between the parties. It sometimes happens that the parties are indifferent to the divorce. but wage the severest litigation over the question of alimony, and the settlement of property rights. It would not be reasonable to say that in a case involving the questions of divorce and custody of children, the amount of alimony, and the final settlement of property rights, that the proceeding is in no sense "an action for the enforcement or protection of private rights and the redress of private wrongs. Evans v. Evans, 105 Ind.
204; s. c., 3 West. Rep. 330. See also
Badger v. Gilmore, 37 N. H. 458.
4. Wilmouth v. Patton, 2 Bibb (Ky.),

280; Hosmer v. Clarke, 2 Me. (2 Greenl.) 308; Mason v. Briggs, 16 Mass. 453; Jewett v. Bacon, 6 Mass. 61; Robbins v. Luce, 4 Mass. 474; Brown v. Cook, 9 Johns. (N. Y.) 361; Stevens v. Chamber-

lain, 1 Vt. 25; Jones v. Stevenson, 5 Munf. (Va.) 1; Benners v. Howard's, Ex'rs, 1 Tayl. (N. C.) 149; s. c., 1 Am. Dec. 583; Amory v. Brodrick, 5 Barn. & Ald. 712: Bowdell v. Parsons, 10 East. 359; Grant v. Austin, 3 Price, 58; Bach v. Owen, 5 T. R. 409. 5. Sweetland v. Barrett, 4 Mont. Ter.

6. Triebert v. Burgess, II Md. 452.

7. Hayden v. Bradley, 72 Mass. (6 Gray) 425; s. c., 66 Am. Dec. 421. See Glay 425, S. C., 60 Alli, Bec. 421. See also Hatch v. White, 39 Mass. (22 Pick.) 518; Farwell v. Smith, 29 Mass. (12 Pick.) 83; Hobart v. Hilliard, 28 Mass. (11 Pick.) 143; Lent v. Padelford, 10 Mass. 230; s. c., 6 Am. Dec. 119.

Waiver of Demand. - A person entitled to notice, but who has not received it, waives the omission by subsequently recognizing his engagement as still subsisting, and by putting his objection on another ground. Bryant v. Goodnow, 22

Mass. (5 Pick.) 228.

Refusal Waives Demand, -An absolute refusal to fulfil, or other denial of the party's right, by pleading or oral statement, is a waiver of an omission to give notice or make demand, or of an insuffiv. Lodge, 37 Mass. (20 Pick.) 53; s. c., 32 Am. Dec. 197; Brigham v. Clark, 37 Mass. (20 Pick.) 43; Ayer v. Ayer, 33 Mass. (16 Pick.) 327; Sheldon v. Purple, 32 Mass. (15 Pick.) 528; Miles v. Boyden, 32 Mass. (15 Pick.) 528; Miles v. Boyden, 20 Mass. (3 Pick.) 213.

A Second Demand is not a waiver of a

preceding sufficient demand. Winter-

necessary in causes of action arising ex delicto, as in a case of nuisance, or enticing away of wife, servant, or apprentice.2

2. Necessary, when -a. GENERALLY.—Whenever the fact by which the defendant's liability is incurred lies peculiarly within the knowledge and the privity of the plaintiff, notice thereof must be given to the defendant. But where the matter lies as much within the cognizance of the one party as the other, notice is not necessary.3 And if no time is fixed in the contract, or byany other agreement of the parties, either express or implied, for the doing of the thing, a request is essential to the cause of action.4

b. To HOLD SECURITY.—In all cases where the undertaking is collateral, a demand and notice are essential; but in an action on an undertaking in the usual form, which does not in terms call for notice to the sureties of affirmance, nor for demand or payment, it is not necessary to make or aver notice or demand before suit

brought.6

WHEN CONTRACT PAYABLE IN GOODS.—A suit is a legal · demand for money only, and an action will not lie on a contract

bottom v. Morehouse, 70 Mass. (4 Gray)

An Agreement to Pay a Sum of Money, when Collected out of certain funds, does not render the promisor liable to an action for each small sum collected, at least without a demand. West v. Chamberlin, 25 Mass. (8 Pick.) 336.

Where One Enters, under an Agreement for a Lease, and holds possession unmolested during the full term, he cannot maintain an action for a breach of the agreement, without proof of a demand of the lease or a waiver thereof. v. West, 60 Mass. (6 Cush.) 463.

1. Private Nuisance.-Where a private nuisance has been erected or continued upon another's land, it is obligatory upon the person affected injuriously to give notice of the fact, and request its discontinuance before commencing an action either against the wrongdoer or to abate the nuisance. Lonsdale v. Nelson, 2 Barn. & Cress. 302; Brent v. Haddon, Cro. Jac. 555; Penruddock's Case, 5 Co. Ioo, Io1; I Ayliff Pand. 494; Bacon's Abr. Rent, I.; 5 Viner Abr. 506.
2. Ex parte Landsdown. 5 East, 38;

Betniff v. Pepple, 2 Lev. 63; Gunter v. Astor, 4 J. B. Moore, 12; Fores v. Wilson, I Peak Cas. 55; Ashcroft v. Bertles, 6 T. R. 652; Winsmore v. Greenbank,

Willes, 582.

8. Watson v. Walker, 23 N. H. (3)

Fost.) 471.

A quantity of wheat was delivered to A. by D., consigned to B. A. executed a bill of lading for the amount represented to have been shipped, and delivered it to the consignee. The wheat fell short, and A. made up the deficiency to short, and A. made up the deficiency to the consignee. There was no imputation of fraud. *Held*, that for A. to support an action against D. for the deficiency, a previous demand was necessary to en-able D. to correct the mistake. Norris v. Milwaukee Dock Co., 21 Wis. 130.

Under a Contract to purchase all the lumber sawed at a mill, damages for the purchaser's neglect to remove the lumber from the mill held not allowable, because no notice or request to remove it had been given him. Chapin v. Norton, 6 McL. C. C. 500.

One Entitled to a Franchise cannot recover damages for disturbance therein,

until demand and refusal. Reddin v. Maddox, r B. Mon. (Ky.) 193.
Under the Louisiana Code, secs. 1911, 1933, before a party can be held in damages for failing to do what he has contracted to do, he must be put in default by a written demand, or a verbal demand in the presence of two witnesses. Berard v. Boagni, 30 La. An. Part II.

1125. 4. Boody v. Rutland & B. R.R. Co., 3

Blatchf. C. C. 25; s. c., 24 Vt. 660.
5. January v. Duncan, 3 McL. C. C.

Thus in an action against one who is liable by indorsement on a receipt given by a constable taking a note for collection. no action can be maintained without first demanding payment of the maker of the note. Rhodes v. Morgan, I Baxt. (Tenn.)

Heebner v. Townsend, 8 Abb. (N. Y.) Pr. 234. Vide, infra, UNNECESSARY,

WHEN.

navable in anything other than money until after a special demand made; and the plaintiff must allege and prove a demand before

suit is brought.2

d WHEN CONTRACT PROVIDES FOR DEMAND.—No action can he maintained for the price of goods delivered to the defendant upon his promise to account for them at certain prices, or return

them on demand without proving such demand.3

3. Unnecessary, when. -a. WHEN USELESS.—Neither notice nor demand is necessary before bringing an action where by the terms of a contract a definite time is fixed for performance, even though such performance is payment in advance of the receipt of the consideration; 4 and a failure to make the requisite demand

1. Wyatt v. Bailey, 1 Morr. (Iowa) 396. Demand Before Suit-When Necessary. -In order to support an action on a contract to be performed by delivery of property a special demand must be alleged. Bradley v. Farrington, 4 Ark. 532; Martin v. Chauvin, 7 Mo. 277.

An Action does not Lie for the Value of Whest which is to be delivered when threshed, until demand has been made for the wheat, State v. Mooney, 65 Mo. 494.

Where the Holder of a Due Bill, given for 14,000 Brick, due thirty days after date, had received part of the brick from time to time, thereby severing the contract, held, that he could not maintain an action for the residue undelivered without showing a demand and refusal. Widner v. Walsh, 3 Colo. 548.

Neither Time nor Place Specified .- Before a suit on a contract payable in goods, neither the time nor the place of payment being specified, a demand is necessary. Frazee v. McChord, 1 Ind. 224.
2. Decker v. Birhap, 1 Morr. (Iowa)

Payable in Goods to Suit Purchasers .-Upon a contract for payment in such goods as should suit the payee, he is bound to demand such goods specifically, and in a reasonable variety, before action. Frazee v. McChord, I Ind. 224. 3. Bolles v. Sterns, 65 Mass.

Cush.) 320.

On Contracts Providing for Demand .-The court say in Bolles v. Sterns, supra, that "the defendant is not liable on his promise of April 11th, 1845, because no demand was made on him before action brought. That promise was that he would account for certain articles at certain prices, or return them, on demand. Before demand made on him, he is in no default, within the terms of his promise, either for not accounting for the articles, or for not returning them. He has not promised to do either, except on demand. If the plaintiff had sued the defendant on

the promise, he must have alleged a special demand before action brought (Gould Pl. ch. 4, sec. 15), and must have proved it before he could have recovered."

4. Clarke v. Charter, 128 Mass. 483; Negus v. Simpson, 99 Mass. 388. See also Lent v. Padelford, 10 Mass. 230; s.

c., 6 Am. Dec. 119.

Where Money is Due, no demand before suit is necessary. Olvey v. Jackson, 106 Ind. 286.

So where the time is fixed by the happening of a future event. Dyer v. Rich, 42 Mass. (1 Metc.) 180.

So of an agreement to pay taxes. Brackett v. Evans, 55 Mass. (I Cush.) 79.

An Agreement to Pay the Promisee's

Note is broken by failure to pay it at maturity, and the promisor is liable without notice or demand. Andrews v. Frye, 104 Mass. 234.

In an Action Against an Agent for Money not Paid Over .- The rule requiring a demand, etc., in order to maintain an action against an agent for money collected and not paid over, does not apply, where the agent denies his liability, or otherwise shows that a demand would have been fruitless. Hammett v. Brown, 60 Ala. 498.

Agreement to Pay on Certificate of a Third Person .- So where one agrees to pay for certain work, "from time to time. by certificates from the engineer, as the work advances," he is liable without notice of the certificates. Punderson v. Shepherd, 25 Mass. (8 Pick.) 379.

A Lessee may Maintain an Action upon

His Lessor's Covenant to Repair, without notice of want of repair, especially if the lease contains a covenant that the lessor may enter "to view or make improve-ments." Hayden v. Bradley, 72 Mass. (6 Gray) 425; s. c., 66 Am. Dec. 421.
Where Money of Another should have

been Paid Over .- Where the defendant holds, and claims as his own, money which in equity and good conscience he

will be excused where a refusal 1 or an inability 2 to comply is shown, or where the demand is waived.3

Where a party stipulates to do a certain thing in a specific event. which may become known to him, or with which he may make himself acquainted, he is not entitled to any notice unless he stinulates for it.4 And where a party is required to give notice, to enable the other party to perform, he is liable without notice, if he does an act which disables him or the other from performance 5

ought immediately to have repaid to the plaintiff, no notice or demand is necessary to enable the plaintiff to maintain his action therefor. Sturgis v. Preston, 134 Mass. 372. See also Earle v. Bickford, 88 Mass. (6 Allen) 549; Dill v. Ware-

ham, 48 Mass. (7 Metc.) 438.

Money Received on a Consideration which Fails.-Where money is received in advance, upon a consideration which afterwards fails, it may be recovered back without a demand. Earle v. Bickford, 88 Mass. (6 Allen) 549; Dill v. Wareham, 48 Mass. (7 Metc.) 438. See also Law-rence υ. Carter. 33 Mass. (16 Pick.) 12.

1. Refusal to Perform .- A party is not required to demand performance of him who has already expressly refused to perform his obligation. Lex neminem cogit ad vana. Abels v. Glover, 15 La. An.

724.2. Waiver of Demand takes place when the party entitled to it shows that it would be disregarded or would prove useless. Heard v. Lodge, 37 Mass. (20 Pick.) 53; s. c., 32 Am. Dec. 197. The court say: "It is a familiar legal principle, that the necessity of a formal demand is often waived or obviated by the conduct of the other party, or where the state of the case is such as to show that a demand would have been entirely unavailing. is particularly true in a case where the party wholly denies the right of him who seeks performance, that the demand need not have all the formalities that would be essential if the party conceded the right of the other, and only claimed the privilege of performing the contract or duty devolved on him at a different time or place. Many cases to this point are found in the books. In the case of Richardson v. Learned, 27 Mass. (10 Pick.) 262, a demand was made six miles from the dwelling-house of the defendant, for the delivery of property which he was bound to deliver at his dwelling-house. The defendant replied to the demand that he meant to keep the property; and this was held, under the circumstances, a sufficient demand. A very strong case of the extent of this principle of waiver of legal demand on the part of an executor is that of Miles v. Boyden, 20 Mass. (3 Pick.) 262. In that case the executor, being called upon by the father of the legatee, who was an infant, for the payment of a legacy, refused paying the same, assigning as a reason that there was no legacy given to the infant by the will of the testator, but making no objection to the authority of the father to make demand; and it was held by the court that the executor had thereby waived the necessity of any other demand, although by law the father had not, by virtue of that relation to the legatee, a legal right to demand payment of the legacy. Heard v. Lodge. 37 Mass. (20 Pick.) 53; s. c.,

32 Am. Dec. 201.

The Legitimate Object of a Demand is to enable the party to perform his contract or discharge his liability, agreeable to the nature of it, without a suit at law; and whenever one party wholly denies the right of the other, a demand must be use-The rule in chancery seems to be, that if the defendant in his answer denies the right of the plaintiff, he cannot also insist in his defence that there was no legal demand, as was held in Ayer v. Ayer, 33 Mass. (16 Pick.) 327. But at law it is otherwise to this extent, that if the defendant does not by his declarations and conduct furnish any evidence from which the jury can infer a waiver, or in the circumstances of the case do not clearly show a demand could not have been complied with, the defendant may on trial insist upon proof of a demand, although he also denies the right of the plaintiff. Heard v. Lodge, 37 Mass. (20 Pick.) 53; s. c., 32 Am. Dec. 202. 3. Inability to Comply with Demand.—

In actions of contract the failure to make a necessary demand before suit is cured by proof that the defendant could not have complied with the demand. Wil-

4. Hayden v. Bradley, 72 Mass. (6 Gray) 425; s. c., 66 Am. Dec. 421. See also Hatch v. White, 39 Mass. (22 Pick.) 518; Farwell v. Smith. 29 Mass. (12 Pick.) 83; Hobart v. Hilliard, 28 Mass. (II Pick.) 143; Lent v. Padelford, 10 Mass. 230; s. c., 6 Am. Dec. 119.

5. Spooner v. Baxter, 33 Mass. (16 Pick.) 409.

And where he has broken a special agreement, by doing an act which renders performance impossible, no demand of performance

is necessary before bringing an action thereon.1

Where an account is payable in goods out of the store of a party, it is not necessary to demand the goods before a suit is brought to recover the amount of the account, if such party has ceased trading before suit brought, and was not in a situation to pay the goods, and there has been no unreasonable delay on the part of the creditor in calling for them.2

b. WHEN DEFENDANT CONCEALED.—A demand is not neces-

sary before bringing a suit where the defendant is concealed.3

c. BECAUSE OF DUTY OR CONTRACT.—Where a promise was made to do a certain act or pay a sum of money, and the defendant has not done the act, a special request to pay the money need not be alleged.4 Where it is the duty of a party, by contract or other-

1. Colburn v. Phillips, 79 Mass. (13

Gray) 64.
2. Where an accountable receipt is given, by which the receiptor agrees to pay to A. the amount of a note collected by him, part in cash and part in goods, no demand of the goods is necessary if the receiptor, after receiving payment of the note, insists upon applying the money to a demand to him by A. and another person; and although the receiptor in such case had a joint demand against A. and such third person, he was not entitled in an action by A. against him, to set off the money collected on the note. Walsh v. Ostrander, 22 Wend. (N. Y.) 178.

Agreement to Deliver Goods. - Where A agreed to deliver to B certain merchandise, at stipulated prices, payable on de-livery, at any time within a certain period, giving him six days' previous notice of the delivery, it was held that A was liable for non-delivery within the period, although he had given no notice; and the damages were to be computed as of the last day of the period. Quarles v. George, 40 Mass. (23 Pick.) 400.

3. Suit on Official Bond—Defendant Con-

cealed .- Thus no demand is necessary before bringing suit on an official bond of a treasurer of a school district, for moneys of the school fund he neglects to pay over, where he has resigned office, and removed, and conceals his residence. Jenks v. School District, 18 Kan. 356

4. Henley v. Bush, 33 Ala. 636; Niemeyer v. Brooks, 44 Ill. 77; Pennington v. Clifton, 10 Ind. 172; Ross v. Lafayette & I. R. Co., 6 Ind. 297; Wood v. Barstow, 27 Mass. (10 Pick.) 368; Holden v. Eaton, 24 Mass. (7 Pick.) 15; Lent v. Padelford to Mass. 220; S. C. 6 Am. Padelford, 10 Mass. 230; s. c., 6 Am. Dec. 119; Watson v. Walker, 23 N. H. (3 Fost) 471; Gillett v. Balcom, 6 Barb.

(N. Y.) 370; Union Cent. Life Ins. Co. v. Curtis, 35 Ohio St. 357; Hill v. Henry, 17 Ohio, 9; Darling v. Wooster, 9 Ohio St. 517; White v. Swift, 1 Cr. C. C. 442; Wyman v. Fowler, 3 McL. C. C. 467.

When an obligation to pay is complete. a cause of action at once arises, and no formal demand is necessary. Watson v.

Walker, 23 N. H. (3 Fost.) 471.

In an Action Against a Surety on a Bond given to perform a decree in chancery, notice to the principal is unnecessary. White v. Swift, I Cr. C. C. 442.

A previous demand on a surety on a bond is not necessary in order to maintain an action upon it against him. Wood v. Barstow, 27 Mass. (10 Pick.)

An Agreement to Return a Note will. after a reasonable time, support an action without any demand or refusal. Henley v. Bush. 33 Ala. 636.

Suit on Promise to Pay a Demand .- No demand need be proved in a suit on a promise to pay on demand. Ross v. Lafayette & I. R. Co., 6 Ind. 297.

Suit Against a Tax-collector.—Where

no return had been made to the clerk of the district court of a sale of land for the United States direct tax of 1815, so that he could not give a deed thereof, held, that no demand on him therefor by the purchaser was necessary to support an action against the collector for not making such return. Holden v. Eaton. 24 Mass. (7 Pick.) 15.

Suit-Where No Time of Payment Specified.-No demand is necessary before bringing a suit upon a promise to pay money which does not specify the time of payment, when a reasonable time has elapsed. Niemeyer v. Brooks, 44 Ill. 77.
Where Goods are to be Sold or Returned.

-When goods are received to be sold at

wise, to remit or apply money in his hands, no demand is necessary before bringing suit against him for such money. And where a debt is payable in personal property, to be delivered at a particular time, and the debtor fails to deliver it at such time, the creditor may sue for the money due without demanding the propertv.2

d. WHERE FACTS EQUALLY KNOWN TO DEFENDANT.—Where a matter alleged lies equally in the knowledge of the plaintiff and defendant, an averment of notice is not necessary, as if it be an act to be done by a stranger. Neither demand nor notice nor other diligence is necessary when the party to be charged had no right to expect it, and could not have been injured by the omission of

e. IN SUIT TO RESTRAIN TRANSFER OF NOTE.—An injunction lies to restrain a wrongful holder of a note-from transferring it without first demanding the note or inquiring of the defendant whether he intended to negotiate it.5

4. Sufficiency.—a. GENERALLY.—Where a demand and refusal are necessary to sustain an action, it is not necessary that the

refusal be of a definite character.6

b. By Whom.—To constitute a legal demand, it must appear that the person who made it was authorized to do so by the principal; and where made of an agent, that the demand was made after the latter received the money.7

certain prices, or returned on demand, and the goods are sold and the money received, no special demand need be alleged in an action for the money. ter if the action was for a failure to remcl. C. C. 467.

Mortgage Payable upon Demand—Foreclosure.—Where a debt secured by mort-

gage is payable upon demand, the mortgagee may proceed at any time to fore-close, and need not make or allege a previous demand. Gillett v. Balcom, 6 Barb. (N. Y.) 370; Union Central Life Ins. Co. v. Curtis, 35 Ohio St. 357; Hill v. Henry, 17 Ohio, 9; Darling v. Wooster, 9 Ohio St. 517.
On an Entire Failure of the Considera-

tion upon which plaintiff paid defendant's debt, defendant became at once liable to refund, and no demand need precede the suit. Pennington v. Clifton, 10 Ind. 172.

1. Ferguson v. Dunn, 28 Ind. 58; Catterlin v. Somerville, 22 Ind. 482; Stacy v. Graham, 14 N. Y. 492.

2. Crabtree v. Messersmith, 19 Iowa, 179; Campbell v. Clark, 1 Hempst. C. C.

3. Lent v. Padelford, 10 Mass. 230; s. c., 6 Am. Dec. 119.

In an Action on a Promise to Pay Money, if a stranger should fail to do a certain. action, no special averment of a demand is necessary. Dyer v. Rich, 42 Mass. (1 Metc.) 180.
4. Randon v. Barton, 4 Tex. 289.

5. Crandall v. Grow, 41 N. J. Eq. (14 Stew.) 482.

6. Kyle v. Hoyle, 6 Mo. 526.

7. Warner v. Bridges, 6 Ark. 385; Taylor v. Spears, 6 Ark. 381; s. c., 44 Am. Dec. 519; Newman v. Bennett, 23 Ill. 427; Sebrell v. Couch, 55 Ind. 122; Clough v. Unity, 18 N. H. 75; Grafton v. Follansbee. 16 N. H. 450; Payne v. Smith, 12 N. H. 34.

Demand by an Attorney.—Where a de-

mand is made by an attorney, the party has a right at the time to require reasonable evidence of the authority of the in-dividual to make it; but if no exception is taken at the time then a subsequent commencement of a suit by the party in whose behalf it was made, claiming under such demand, is a ratification of the demand, and is prima facie evidence that it was made by his authority. Payne v.

Smith, 12 N. H. 34.

A demand by one standing in loco parentis and having the care of the property. is enough. Newman v. Bennett, 23 Ill.

Damages-Demand by Administrator. A demand by an administrator for

c. UPON WHOM.—The demand must be made upon the party whose duty it is to perform the contract, do the act, or pay the money, or upon the agent, attorney, or other representative duly authorized to act in the premises. But where two persons are iointly liable, a demand-made upon or notice given to one is binding upon both.2

d. As to Time.—A demand must be made at the proper time; but if one whose duty it is to make a demand in a right of action by a certain day is prevented from so doing by a restraining order procured by the debtor, he may make it, with full effect, imme-

diately after the restraining order has been dissolved.3

e. As to Manner of Making.—(1) Generally.—To be binding, a demand must be made at a reasonable time,4 in a suitable place,5

damages which have been awarded for laving out a highway over decedent's land is sufficient if its purport is understood by the parties on whom it is made, and they know the office he holds, although no formal explanation is made. Clough v.

Unity, 18 N. H. 75.

A Demand Made by One Assuming to Act for the Town, if afterwards ratified by the town, by bringing the action, or by adopting it after it has been brought in its name, will be sufficient, provided that a payment made to the party demanding at the time would have discharged the indebtedness to the town. Grafton v.

Follansbee, 16 N. H. 450.

Mortgages—Demand by Administrator. -Where by the terms of a mortgage, which was itself the only evidence of indebtedness secured by it, the debt was "to be paid by the mortgagor to the mortgagee when called on by the said mortgagee; and the mortgagor does not agree to pay the above sum to no" (any) one else except the mortgee. And the mortgagorexpressly agrees to pay the sum of money above secured without any relief from the valuation or appraisement laws, in an action brought by the administrator of the estate of the deceased mortgagee, it was held by the court that it must be alleged in the complaint and proven on the trial that a demand for the payment of the debt secured was made on such mortgagor during the lifetime of the mortgagee, by him or his agent; and that proof of a demand made by the administor as such was not sufficient. Sebrell v. Couch, 55 Ind. 122.

1. See Bridgeport Bank v. New York & N. H. R. Co., 30 Conn. 237; Holbrook v. Holbrook, 15 Me. 9; Morgan v. Gregg, 46 Barb. (N. Y.) 183.

Demand upon Clerk .- M. contracted to sell D. a quantity of barley for cash. In accordance with the contract he delivered

the barley at G.'s storehouse, and demanded the price of the person in charge of the storehouse, who was G.'s clerk. Held, that this was a sufficient demand, as G., with whom the money was to be left, was not present when the delivery was completed. Morgan v. Gregg, 46 Barb. (N. Y.) 183.

Demand upon Officers of a Company .-Sufficiency of a demand upon the officers of a railroad company to procure a transfer of stock upon the company's books, determined in a case depending upon par ticular facts. Bridgeport Bank v. New York & N. H. R. Co., 30 Conn. 231.

2. Holbrook v. Holbrook, 15 Me. 9.

Pay v. Shanks, 56 Ind. 554.
 See Heard v. Lodge, 37 Mass. (20

Pick.) 53; s. c., 32 Am. Dec. 197.

What a Reasonable Time and Place. The demand, which was made on the defendant at six miles distance from his place of residence, and after sunset and about five hours before the suit was commenced, was held to be reasonable under the circumstances, S. having repeatedly declared that he meant to keep the property for his own use, and the other defendant, whose estate was attached, having declared that if he had had notice, the plaintiff would not have got his property to attach. Richardson v. Learned, 27 Mass. (10 Pick.) 261. See also Heard v. Lodge, 37 Mass. (20 Pick.) 53, 61; s. c., 32 Am. Dec. 197.
5. Demand at Defendant's House.—The

house of the defendant is an appropriate place to make a demand, particularly where he has no office at which his business can be transacted. See Morse v. Aldrich, 42 Mass. (1 Metc.) 544; Spencer

v. Storrs, 38 Vt. 156.

Demand Made in the Street.—Where a demand was made in the street, held, that if the creditor intended to make a demand, and the administrator so understood it,

in the proper manner, and by the right person.2

(2) As to Writing.—An oral demand of performance of a written contract is sufficient, where the contract does not contain a stipulation that the demand shall be in writing.3 If the statute requires a demand in writing, it must be by leaving a written demand, not by reading a demand. Where the owner of land, by a covenant which binds his heirs and assigns, engages to do a certain act when thereto requested, a written request to do such act, addressed to

and did not object to the time or place, nor propose any other for that purpose, but expressed an intention not to pay, it was a sufficient demand. Heard v. Lodge, 37 Mass. (20 Pick.) 53; s. c., 32 Am. Dec.

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Objection to Place of Demand.-If the demand is made at an improper time or in an objectionable place, it is incumbent upon the party of whom the demand is made to object and set another time or appoint a different place. Heard v. Lodge, 37 Mass. (20 Pick.) 53, 60; s. c., 32 Am. Dec. 197.

1. Demanding Settlement — Driving from Premises.—Where the plaintiff went to the house of the defendant, and requested a settlement for work done, but was driven from the premises by the defendant with threats of bodily injury, held, that this was equivalent to a demand by the plaintiff, and a denial on the part of the defendant of all liability to pay the plaintiff for his labor, and that the plaintiff had a right so to regard it. Spencer v. Storrs, 38 Vt. 156.

Showing a Bill to a Debtor, asking him

to pay it, and his refusal to do so, are sufficient evidence of a demand of payment to be submitted to a jury. People's Mut. F. Ins. Co. v. Clark, 78 Mass. (12

Gray) 165.

A Demand Accompanied by Abuse or Insult is not a legal demand. But a subsequent demand cannot be refused on the ground of prior misconduct, and to compel an apology. Boyden v. Burke, 55 U.S.

(14 How.) 575; bk. 14, L. Ed. 548.

Demand of Public Officer. — Where there is a right on the one side, and a corresponding duty imposed on the other, a refusal to perform such duty, on the reasonable request of the party entitled to demand it, will subject the officer to an action. But the party entitled to such services must request it in a proper manner. He has no right to accompany his demand with personal insult or vulgar abuse of the officer. Those to whom people have committed high trusts are entitled at least to common courtesy, and are not bound to submit to the insolence

or ill-temper of those who disregard the decencies of social intercourse. A demand accompanied with rudeness and insult is not a legal demand. Boyden v. Burke, 55 U. S. (14 How.) 575, 583; bk. 14, L. Ed. 551. But where a demand has been coupled with an insult, such insult will not relieve the officer of the duty of performance when the demand is legally made. The court say, in the case last above cited: "The plaintiff showed another demand, some two weeks after the first, by his agent, which was made in a proper manner, and unaccompanied with an insulting missive. The defendant was not justified in refusing this demand on account of the former misconduct of the plaintiff, or to enforce an apology by with-holding his rights. Ill manners or bad temper do not work a forfeiture of men's civil rights. While the want of an apology for his previous rudeness and insult might well justify the defendant in refusing all social intercourse with the plaintiff, yet it could not release him from the obligations imposed upon him by the official station, or entitle him to disregard the rights guaranteed to the plaintiff by the laws of the land."

2. Demand by Agent .- Where the plaintiff's agent demanded payment and the defendant not paying nor offering to pay, replied that he was willing to leave the matter to the agent, held, that the legal effect of the demand was not nullified thereby. Burkhalter v. Bullock, 20 Ga. 257.

Demand by Partner .-- McB. and F. were copartners in the manufacture and sale of pumps, and F. sold to A. a pump to be paid for in personal property, to be delivered only on the order of F.; and afterwards McB.. without such order demanded it of A., who did not know that McB. and F. were copartners, except from McB.'s assertion. Held, that such was not a proper demand, and that A was not obliged to comply with it by delivering the property. Austin, 16 Wis. 87. McBain v.

3. Colby v. Reed, 99 U.S. (9 Otto) 560; bk. 25. L. Ed. 484.

4. Seem v. McLees, 24 Ill. 192.

all the heirs or assigns, and seasonably delivered at the dwelling-

house of one of them, is sufficient.¹
(3) By Suit.—A previous suit for the same cause of action, in which the plaintiff has been nonsuited, is both a notice and a demand of his claim.² Where a bill in equity has been filed in

vacation and process issued, and a demand afterwards, but before

service, made upon the defendant, with the purpose of making service only in case of refusal, such demand is sufficient.³

f. EFFECT OF EXCESSIVE DEMAND.—Where the amount to which the plaintiff is entitled is clear, an action by him for a breach of the contract will not be defeated solely on the ground that his demand upon the plaintiff was in excess of that amount.4

5. Effect of Specific Objection.—Where a demand is necessary before bringing suit, if, when a demand is made, a specific objection is made as a reason for not complying with the demand, all other objections, which if made might be readily obviated, are waived.⁵ And where the demand is not made of the proper person,⁶ or in the proper manner,⁷ or is made by the wrong person,⁸ objection should be taken at the time.

1. Morse v. Aldrich, 42 Mass. (1 Metc.)

544. 2. Linn v. McClelland, 4 Dev. & B. (N. C.) L. 458; Nixon v. Long, 11 Ired.

(N. C.) L. 428.

Where an Action of Assumpsit was Brought on a Guaranty under Seal, it was held, in a subsequent action of covenant, that the former action, though there was a nonsuit, amounted to a demand in the strongest form. Nixon v. Long, II Ired. (N. C.) L. 428.

(N. C.) L. 428.

3. Leach v. Noyes, 45 N. H. 364.

4. Colby v. Reed, 99 U. S. (9 Otto)

560; bk. 25, L. Ed. 484.

5. Bartlett v. Adams, 43 Ind. 447.

Waiver by Denial of Right.—D. procured a conveyance of land to himself, promising that upon a resale he would divide the profits thereof with A. A resale was made, partly for cash, partly for notes. Before the maturity of the notes, A demanded his share of the profits of the transaction, which D. refused to pay, denying the agreement, whereupon A. brought suit. Held, that D. could not for the first time then set up the defence that the demand and suit were premature. Benjamin v. Zell, 100 Pa. St. 33.

Demand of Claim—Denial of Liability.
—Where a demand of payment was made of certain claims, which had been taken up at the request of the defendant, and a general refusal of payment was made without any cause assigned, held, that the demand was good, notwithstanding it included a claim which the defendant

was not bound to pay, and no precise sum was named as the amount due. Kimball v. Bellows 13 N. H. 58

Kimball v. Bellows, 13 N. H. 58.

Partition Fence.—Where a defendant had enclosed his hitherto unenclosed land, and by so doing a fence owned by the plaintiff became a partition fence, and the plaintiff thereafter called upon the defendant and demanded pay for one half the value of such partition fence, and the defendant did not object that the value had not been estimated, but denied his liability and stated that he would pay no amount whatever, such refusal waived an estimate of the value as a prerequisite to the maintenance of the action. Bartlett v. Adams. 43 Ind. 447.

6. In Case of a Demand on the Secretary of a Corporation, under the provisions of 2 Ind. Rev. Stat. 93, sec. 284, the objection that the demandant was not authorized to administer oaths, and tender no copy fee, if ever available, is certainly not so when the secretary answers that he will not, in a case against the company, furnish copies unless by order of the president or attorney thereof. Indianapolis & C. R. Co. v. lewett. 16 Ind. 273.

apolis & C. R. Co. v. Jewett, 16 Ind. 273. 7. Demand Not Made or Required by Statute.—Where a demand of payment is not made as required by statute, yet if treated by the other party as a legal demand, and payment refused for other causes, this is a waiver of objection to the legality of the demand. Weymouth v. Gorham, 22 Me. 385.

8. Where the Authority of an Agent Making a Demand is not Questioned at

6. Right of Action After Demand, how Waived .- A right of action accruing upon demand and refusal is waived by a subsequent demand met by an offer of compliance.1

7. Offer to Pay a Waiver.—An offer to pay is a waiver of any

objection to the form of the demand.2

- 8. Advantage Taken of Want of how. Want of amicable demand to be available must be pleaded before issue is joined.3 A defendant cannot avail himself of a want of a demand, unless it is set up as a defence in the answer, accompanied with a tender of the amount due.4
- III. IN REPLEVIN.—1. Necessary.—Where the defendant is in the rightful possession of money or property, making no claim to it. but ready to pay or deliver it over to the rightful owner, no right of action arises against him until after a demand upon him by the party entitled to it, and a refusal.⁵ And in an action for the recovery of specific personal property, where it appears from the complaint that the defendant came rightfully to the possession of the property, and there is no allegation of a demand upon defendant by plaintiff for its delivery, or of any refusal by defendant to deliver, the complaint is fatally defective.6

A purchaser of goods at a sheriff's sale may maintain replevin

for them, after a demand and refusal to give them up.7

a. In Case of one Lawfully in Possession.—Before an action of replevin will lie for personal property which has lawfully come into the possession of the party from whom it is claimed, a demand must be made for it after it is due.8

that Time, the objection that the authority was not shown when the demand was made cannot be taken at the trial at which the demand is offered in evidence. Baxter v. McKinlay, 16 Cal. 76.

1. Widner v. Walsh, 3 Colo. 548.

2. Bank of Commonwealth of Kentucky v. Wister, 27 U. S. (2 Pet.) 318; bk. 7, L. Ed. 437.
3. Marrionneaux v. Downs, 19 La.

An. 208.

4. State v. Grupe, 36 Mo. 365.

5. Sturgis v. Preston, 134 Mass. 372. See also French v. Merrill, 132 Mass. See also French v. Merrin, 132 mass. 525; Jones v. McDermott, 114 Mass. 400; Scofield v. Whitelegge, 49 N. Y. 259; Stevens v. Hyde, 32 Barb. (N. Y.) 181; Pierce v. Van Dyke, 6 Hill (N. Y.), 613; Barrett v. Warren, 3 Hill (N. Y.), 348; Talcott v. Belding, 46 How. (N. Y.) Pr. 419; Jessop v. Miller, I Keyes (N. Y.), 321; White v. Brown, 5 Lans. (N. Y.), 78; Sluyter v. Williams, 1 Sweeny (N. Y.), 215.

6. Campbell v. Jones, 38 Cal. 507.

7. Hazzard v. Burton, 4 Harr. (Del.)

Proof of a Demand by the Vendee and a Refusal to Deliver is necessary to entitle

the purchaser of the chattel, which at the time of the purchase was in the possession of a third party, to recover against such third party for its wrongful detention. Howell v. Kroose, 4 E. D. detention. Howell v. Kroose, 4 E. D. Smith (N. Y.), 357.

8. Covenant in Lease.—Hence a cove-

nant in a lease of real and personal property by which it is agreed that the latter shall be delivered at the termination of the lease does not obviate the necessity for demand after such termination as a foundation for replevin. White

v. Brown, 5 Lans. (N. Y.) 78.

Lease of a Sewing-machine.—A delivered to B a sewing-machine, under a contract for the sale thereof, by which the title was not to pass to B until full payment was made in specified instalments, and on default of any payment A was to be at liberty to take the machine away at his option. Held (1), that on such a default A could not replevy the machine from B's possession without demand or notice of his option, and refusal by B to surrender it. (2) That the possession of the machine by B's wife, living with him as such, was B's possession. (3) That in the absence of any (1) From Plaintiff.—Where the defendant has the goods by the leave and license of the plaintiff, a demand may be necessary in

order to make the possession wrongful.1

(2) From Stranger.—The owner of chattels cannot maintain his suit in replevin to recover them from a purchaser in good faith from a wrongful taker, until after demand made for the delivery.² But possession of property acquired by a person purchasing from a bailee who had no authority to sell is tortious, and the owner may maintain replevin therefor without demand or notice.³

Where the defendant in replevin with the general issues pleads also property in himself, and in third parties whose bailiff he is, avows the taking and demands a return, it is necessary for the plaintiff to prove a demand for the goods previous to suing out

the writ of replevin.4

b. In Case of Officer in Possession.—If an officer levies an execution on property in the possession of the defendant in the execution as his property, and another party claims the goods, he must make a demand before he can maintain replevin for them, but if the goods are in possession of the party so claiming them when levied on, then no demand is necessary.⁵

proof that B was keeping out of the way to avoid notice and demand, a demand upon his wife, and her refusal to surrender the machine and claim that it belonged to B, was not a demand upon and the refusal and claim by B, unless she was especially authorized to act for him in that behalf; and the fact that she had nade all the previous payments was not sufficient to establish such agency. Wheeler & Wilson Manf. Co. v. Teetzlaff, 53 Wis. 211.

1. Lewis v. Masters, 8 Blackf. (Ind.)

244.

Where Notes are Delivered as Collateral Security for the payment of another note made upon an usurious agreement, the party depositing the notes may repudiate the agreement and bring an action of replevin for their recovery; but there must be a demand before suit. Boughton v. Bruce, 20 Wend. (N. Y.) 234.

Where Parties have Entered into an

Where Parties have Entered into an Oral Agreement for the Sale of Lumber to an amount within the Statute of Frauds, and the vendor having placed the lumber on the vendee's premises, insists that the latter shall take it at his inspection, and the vendee declines to accept it except on a different inspection, the vendor is not entitled to bring replevin for the lumber until after a refusal by the vendee on reasonable demand to permit him to remove it; the property having been voluntarily put on the vendee's premises by the vendor's procurement and consent. the former cannot be made a wrong-doer

in regard to it by simply permitting it to remain there. Darling v. Tegler, 30 Mich. 54.

2. Conner v. Comstock, 17 Ind. 90; Wood v. Cohen, 6 Ind. 455; s. c., 63 Am. Dec. 389; Gilchrist v. Moore. 7 Iowa, 9; Stanchfield v. Palmer, 4 G. Greene (Iowa), 23; Lewis v. Smart, 67 Me. 206; Newman v. Jenne, 47 Me. 520; Galvin v. Bacon, 11 Me. (2 Fairf.) 28; s. c., 25 Am. Dec. 258; Pierce v. Benjamin, 31 Mass. (14 Pick.) 356; s. c., 25 Am. Dec. 396; Stratton v. Allen, 7 Minn. 502; Millspaugh v. Mitchell, 8 Barb. (N. Y.) 333; Surles v. Sweeney, 11 Oreg. 21.

In replevin against one who innocently acquired possession of the plaintiff's property from one who wrongfully took it from the plaintiff, the defendant had no greater rights against the plaintiff than had the original wrongful taker, except that the defendant is entitled to a demand. Surles v. Sweeney, 11 Oreg. 21.

3. Galvin v. Bacon, 11 Me. 28; s. c.,

3. Galvin v. Bacon, 11 Me. 28; s. c., 25 Am. Dec. 258; Pierce v. Benjamin, 31 Mass. (14 Pick.) 356; s. c., 25 Am.

Dec. 396.

Trover Lies without Demand and on Refusal where an original taking was tortious or there has been an actual conversion. Woodbury v. Long, 25 Mass. (8 Pick.) 543; s. c., 19 Am. Dec. 345; Newsum v. Newsum, I Leigh (Va.), 86; s. c., 19 Am. Dec. 739.

4. Lewis v. Smart, 67 Me. 206.

5. Stone v. O'Brien, 7 Colo. 458; Tuttle v. Robinson, 78 Ill. 332.

c. UNDER STATUTE.—In an action of replevin under the statute for the wrongful detention of property, proof of a demand and refusal is necessary to establish such detention.1

d. AFTER PURCHASE.-A tender of the purchase-money and demand are essential to replevying chattels bargained but not paid

for, where no time or place is fixed for the delivery.2

2. Unnecessary.—In an action of replevin it is not indispens. ably necessary to show a demand upon the defendant to return the property before suit brought. The demand serves only to establish a conversion or wrongful detention; and when that can be established without showing a demand, a demand is unnecessary.³ Thus a demand is not necessary where the person in whose possession they are found has no title.⁴ And no previous demand is necessary to maintain replevin against one holding the property under a trespasser.5

a. When Goods Obtained from One having no Title.— (1) By Purchase.—Where property is found in the possession of a third person who has purchased it, and believes he has a good title, the owner may maintain replevin for it without a demand.6 Thus the transfer of property conditionally sold from one city to another, without the consent of the vendors, and there pawned for money borrowed by the vendee, is a direct violation of his duty as bailee; and the vendors may bring replevin against the pawnee without making a previous demand, as his possession originates in a tortious taking.

(2) By Process of Law.—Where the defendant in replevin obtained possession of the goods in controversy by virtue of a writ of replevin against a third person, in whose possession they were, this will not effect the plaintiff's right to maintain the action without a demand if he is the owner of the goods and entitled to

In an Action of Replevin the Sheriff stands in the same position as the fraudulent vendee, as respects the necessity of the demand where the plaintiff claims that the purchase of the goods was fraud-Farwell v. Hanchett (Ill.), 9 West. Rep. 498; s. c., 6 West. Rep.

1. Windsor v. Boyce, I Houst. (Del.) 605; Ingalls v. Bulkley, 13 Ill. 315.

2. Hart v. Livingston, 29 Iowa, 217. Demand by Purchaser.—Where a sawyer fraudulently drew into his boom and manufactured into lumber logs belonging to other parties, who then transferred their rights to R., held, that R. could not maintain an action against him for the lumber, without showing a notice and demand after the transfer. Root v. Bonnema, 22 Wis. 539.
3. Perkins v. Barnes. 3 Nev. 557.

4. The rule that replevin may be maintained without demand against one having no title, applied against a bona fide

purchaser of a horse. Prime v. Cobb, 63 Me. 200.

Ballou v. O'Brien, 20 Mich. 304.
 McNeill v. Arnold, 17 Ark. 154.
 Thus where A Entrusted his Horse to B

for Sale, and B gave the horse to his servant, who exchanged it, held, that a demand and refusal were not necessary preliminaries to a suit by A in replevin against the holder of the horse. Trudo v. Anderson, 10 Mich. 357.

Bailment of Property. - The plaintiff being the owner of a horse bailed him to A. for use for a limited period, under the expectation of a purchase by the latter. During the time, A for a valuable consideration and without notice sold the horse to B, and he in the like manner to the defendant. Held, that no previous demand was necessary to enable the owner to maintain replevin against the last purchaser. Galvin v. Bacon, 11 Me. (2 Fairf.) 28.

7. Whitney v. McConnell, 29 Mich. 12.

the immediate possession of them.1 Thus where plaintiff's horse in the possession of a third person has been sold under an execution against such third person, he can maintain replevin therefor against the purchaser, or the proprietor of the stable in whose charge he was placed, and no demand is necessary before such And the vendor of goods sold for cash and duly shipped, but attached by the vendee's creditors after arrival and before payment, may maintain replevin therefor without previous demand.3

(3) By Judicial Sale.—Where property is wrongfully sold which has been attached as the property of one other than the owner, an action may be maintained for its recovery by the rightful owner

without a previous demand.4

b. WHERE HOLDER CLAIMS TITLE.—No demand need be alleged or proved where the holder of the property claims the title thereto.5 where the defendant sets up title in himself,6 or has continued to exercise ownership over the property.7 And no demand need be proved when the defendant pleads property in himself, avows

the taking, and demands a return.8

Whenever one person obtains possession of the personal property of another without the consent of the owner, and then, without any right which the law will recognize, asserts a claim to the property inconsistent with the owner's right of property and right of possession, the possession of such person will immediately become illegal and wrongful, and no demand for the property will be required to be made by the owner before he commences an action of replevin for the recovery of the same, although the pos-

1. Kelleher v. Clark, 135 Mass.

45. 2. Hicks v. Britt, 21 Ark. 422.

3. Stone v. Perry, 60 Me. 48.

4. Thus where a person acting as the agent of another buys at a sale property which has been attached as the property of a person other than the owner, and takes possession of and claims to hold it for his principal, no demand upon him by the owner is necessary before commencing an action of replevin therefor. Edmunds v. Hill, 133 Mass. 445.

Demand and refusal are never necessary, except as furnishing evidence of an unlawful taking or detention against the rights of the true owner; therefore in an action of replevin, where the circumstances without these are sufficient to prove such taking or detention demand and refusal are superfluous. As upon the finding of the jury the property was that of the plaintiff, the officer was but a trespasser, who could convey no title, and the possession of it by the defendant was an unlawful detention. Gilmore v. Newton, 91 Mass. (9 Allen) 171. See also Edmunds v. Hill, 133 Mass. 445; Blanchard v. Child, 73 Mass.

(7 Gray) 155.

5. Iowa Practice .- Proof of demand of possession is required at the trial of an action of replevin, in this State, only where it is necessary to terminate the defendant's right of possession, or confer on the plaintiff that right—not where both parties claim title, and the right of possession is incident thereto. Smith v. McLean, 24 Iowa, 322.

Where Both Parties Claim the Property. -In an action of replevin, where both parties claim the title, the plaintiff need not show that he made a demand for the property before bringing suit. Redding v. Page, 52 Iowa, 406. Thus where D. and H, both claimed to be the owners of a steer, and D., who had possession, refused to allow H. to take away the animal, and H. separated it from D.'s drove and took it away, held, that no demand was necessary in order that D. might maintain replevin. Delancey v. Holcomb, 26 Iowa, 94.

Newell v. Newell, 34 Miss. 385.

7. Henry v. Fine, 23 Ark. 417. 8. O'Neil v. Bailey, 68 Me. 429. sessor thereof may ever so honestly entertain a belief that his claim to the property is both legal and just.¹

c. IN CASE OF FRAUD.—The owner may maintain replevin for personal property obtained from him by fraud, without a previous demand.²

No demand before suit is necessary to sustain replevin against one who bought the property in suit fraudulently; or against one who acquired it in bad faith, and without parting with value from such a purchaser. As against the title of a bona fide purchaser for value, a demand before suit must be shown.³ And if the vendee of goods sold on condition procures them to be sold, on execution against him, to one who has knowledge of the condition, the original vendor may maintain replevin against the second purchaser, without a previous demand.⁴

d. WHEN UNLAWFULLY OBTAINED.—If goods have been unlawfully obtained, proof of demand by the true owner and a refusal to deliver them up is not necessary,⁵ or purchased by a detainer privy to his vendor's fraud, or held in violation of an agreement

to sell them and deliver the proceeds to the true owner.

1. Shoemaker v. Simpson, 16 Kan. 43.
2. Parrish v. Thurston, 87 Ind. 437.
See Lewis v. Masters, 8 Blackf. (Ind.)
244; Ayers v. Hewett, 19 Me. 281; Bussing v. Rice, 56 Mass. (2 Cush.) 48; Carl

v. McGonigal, 58 Mich. 576.

Possession by Force, Fraud, etc.—Where there is a wrongful possession of goods, obtained by force, fraud, or otherwise.

obtained by force, fraud, or otherwise, without the owner's consent, no demand need be made. Lewis v. Masters, 8 Blackf. (Ind.) 244.

Obtaining Goods by Fraudulent Pretences is a tortious taking, and replevin will lie for them without a demand. Ayers v. Hewett, 19 Me. 281.

Fraudulent Promise to Pay.—Demand before bringing replevin is unnecessary where defendant has deliberately obtained the goods by a fraudulent promise to pay for them, which he did not mean to perform. Carl v. McGonigal, 58 Mich.

Goods Seized under Warrant of Insolvency.—Where goods which have been obtained by means of a fraudulent purchase are seized under warrant of insolvency as the property of the buyer, the seller may maintain replevin therefor against the messenger, without a previous demand. Bussing v. Rice, 56 Mass. (2 Cush.) 48.

3. Lynch v. Beecher, 38 Conn. 490.

4. Blanchard v. Child, 73 Mass. (7

Gray) 155.
5. Moriarty v. Stofferan, 89 Ill. 528;
Butters v. Haughwout, 42 Ill. 18; Clark
v. Lewis, 35 Ill. 417; Farwell v. Hanchett,

9 West. Rep. 498; s. c., 6 West. Rep. 349; Purves v. Moltz, 2 Abb. (N. Y.) Pr. N. S. 409; s. c., 32 How. (N. Y.) Pr. 478; New York Car Oil Co. v. Richmond, 6 Bosw. (N. Y.) 213; Stillman v. Squire, 1 Den. (N. Y.) 327.

Where Goods are Delivered by Mistake to One who has no Right to the Possession, and he, instead of endeavoring to correct the mistake, lends himself to favor it, and without authority performs services respecting them, and claims thereby lien. he may be regarded as a wrongdoer from the beginning, and action will lie against him without demand. Purves v. Moltz, z Abb. (N. Y.) Pr. N. S. 400; s. c., 32 How. (N. Y.) Pr. 478.

Illegal Sale by a Pound-master.—No

Illegal Sale by a Pound-master.—No demand is necessary before bringing a replevin suit for a horse purchased by the defendant at an illegal sale by a pound-master. Clark v. Lewis, 35 Ill.

Unlawful Detention.—It is not often that a demand is necessary to sustain an action of replevin for an unlawful detainer of goods. Lewis v. Masters, 8 Blackf. (Ind.) 244.

Infant Misrepresenting his Age.—An action lies to recover goods obtained by a minor, made by false representations as to his age, even though in the hands of a third person, who obtained them without collusion. Neff v. Landis, 110 Pa. St. 204; Tainter v. Hyneman, 6 Phila. (Pa.) 202.

6. Butters v. Haughwout, 42 Ill. 18; Stillman v. Squire, I Den. (N. Y.) 327.

However, in those cases of fraud on the part of the vendee of chattels, where the vendor has received the note of the vendee, he must rescind the sale and return the note before an action in re-

plevin is brought; otherwise it will be premature.1

WHEN IN CUSTODY OF OFFICER.—Demand is not necessary to enable one whose property has been taken upon an execution against another person, and is claimed and held as his property, to maintain replevin against the officer.2 Thus, where property in the possession of the agent of the owner is levied on by an officer under an execution against a third party, and then turned over by the officer to such agent of the owner, to hold as his custodian, it is not necessary for the owner to make a demand before bringing replevin.3

f. Upon Breach of Condition.—Where by the terms of a trust deed the trustee was granted right of possession on default in payment, held that no precedent demand was necessary to an

action of replevin for the goods.4

g. UPON JUDGMENT TO RETURN.—The property must, in discharge of the bond, be returned in as good order as when received, and within a reasonable time after a return has been awarded, and without a demand; but what is reasonable time must, to a considerable extent, depend upon the circumstances attending each particular case.5

h. UNDER STATUTE.—Demand, under the various statutes, is not necessary where the property is unlawfully detained, or where the plaintiff has a special and specific lien upon the property, such

as a duly recorded mortgage.6

1. Doane v. Lockwood, 115 Ill. 490; Moriarty v. Stofferan, 89 Ill. 538; Bowen v. Schuler, 41 Ill. 192; Smith v. Doty, 24 Ill. 163; Whitney v. Roberts, 22 Ill. 381; Buchenau v. Horney, 12 Ill. 336; Farwell v. Hanchett, 9 West. Rep. 498; s. c., 6 West. Rep. 349; Williamson v. New Jersey S. R. Co., 29 N. J. Eq. (2 Stew.)

211; Whitcomb v. Denio, 52 Vt. 382.
2. Ledley v. Hays, I Cal. 160; Dickson v. Randal, 19 Kan. 212; Stone v. Bird, 16 Kan.488; Bancroft v. Blizzard, 31 Ohio, 30.

Thus where an officer, under process against the property of B., seizes property belonging to A., and at the time of the seizure is notified by A. that it is his property, and forbidden to take it, A. can maintain replevin against the officer for the property, without any other or further demand. Stone v. Bird, 16 Kan. 488.

In Action against Constable. - No demand is necessary to sustain replevin against a constable who levies on goods in possession of the debtor, but which are not his property. Bancroft v. Bliz-

zard, 13 Ohio, 30.

In Action against Sheriff.-In an action of replevin brought against a sheriff to recover property illegally seized on execution, no demand before suit brought need be proved. Ledley v. Hays, I Cal. 160.

3. Tuttle v. Robinson, 78 Ill. 332.

4. Morris v. Rucks, 62 Miss. 76. Lease of Property-Breach of Lease -Where defendants were husband and wife, and the goods in controversy had been hired by the wife under a lease providing that if she changed her residence the lease should terminate, and that she should give notice to plaintiff of a contemplated removal, and return the goods to him; in such case the husband, after her removal, was charged with the same duty, and his refusal to return the property made him a wrongful holder, and plaintiff was under no obligations to give notice or make demand before suit.

Brown v. Poland, 54 Conn. 313.
5. June v. Payne, 107 Ind. 307.
6. In Massachusetts.—A mortgagee of chattels may maintain replevin for them after their attachment by trustee process

3. Upon Whom to be Made. — The demand for the return of goods before instituting proceedings for their recovery must be made of the person or persons having them in possession or under his control, or of his agent or attorney, duly authorized to act in the premises.1

4. Sufficiency.—a. As to TIME.—The demand should be made at a reasonable time² before suit is brought.³ But a plaintiff

against the mortgagor, without making the demand required by Massachusetts Rev. Stat. ch. 90, secs. 78, 79. Putnam v. Cushing, 76 Mass. (10 Gray) 334.

In Mississippi, no demand is essential to recovery in an action of replevin, by statute; but if after suit brought the defendant, whose original possession was lawful, tenders the property to the plaintiff, and delivers it with a proper plea, the action of replevin will be discharged. Dearing v. Ford, 21 Miss. (13 Smed. & M.) 260.

Under the Nebraska Code, secs. 191, 192, in an action of replevin, where ownership in the plaintiff is established, proof of demand by him of the defendant of the property before suit is not necessary to maintain the action. Homan v. Laboo.

I Neb. 204.
In New York.—In a complaint under the New York Code for the unlawful detention of personal property, it is unnecessary to allege any demand or refusal. It is enough to charge the defendant with taking or with having wrongfully detained the property of the plaintiff. But even if the complaint were defective in not stating a demand and refusal, in the absence of a demurrer it would be competent for the court to admit evidence of it on the trial. Simser v. Cowan, 56 Barb. (N. Y.) 395.

In Oregon, -The action for the recovery of personal property, under the Oregon Code, is substantially the former action of replevin, and is governed by the same principles and rules, especially in relation to demand and refusal. The affi-lavit under which an immediate delivery is sought is no part of the pleading, and the facts therein set forth no part of the issues in the case. Moser v. .

Jenkins, 5 Oreg. 447.

In Tennessee. - Demand of the property is not a prerequisite of the right of replevin under the Tennessee Code, sec. 3384. Draper v. Moseley, 3 Baxt. (Tenn.)

1. Demand where Property in Possession of Sheriff.-Plaintiff sued to recover personal property in the hands of a sheriff under an attachment against third parties, who had hired the same of plain-When attached, the property was in possession of the plaintiff, who made a demand therefor upon the sheriff, Held that the demand, if necessary at all, was rightly made upon the sheriff, and that demand upon the third parties not in possession was unnecessary. worth v. Knowlton, 22 Cal. 164.

Demand of Sheriff—When Property Sur-

rendered under a Delivery Bond. -On replevin by a mortgagee of chattels levied upon by a sheriff, after execution and delivery of a delivery bond by the mortgagor and mortgagee, the sheriff, by agreeing to treat the property as in his possession, is estopped to deny possession at the time of demand. Gaff v.

Harding, 66 Ill, 61,

2. Time, Place, and Manner of Making. -A demand by a wife, of a person holding the estate for her separate use, for such estate, made at six miles distance from his place of residence, and after sunset, and about five hours before the suit was commenced, held to be reasonable under the circumstances, he having repeatedly declared that he meant to keep the property for his own use; and another defendant whose property was attached having declared that if he had had notice the plaintiff would not have got his property to attach. Richardson v. Learned, 27 Mass. (10 Pick.) 261.

Demand of Sheriff. - Where a sheriff has attached property on two writs, and in a suit against him by a mortgagee has prevailed, on the ground that the demand was limited to property attached on one writ, in suche case a new demand within twenty days after the rendition of the judgment is within a reasonable time, if it appears that the situation of the defendant has not changed in the mean time. Crosby v. Baker, 88 Mass.

(6 Allen) 295. 3. See Crosby v. Baker, 88 Mass. (6 Allen) 295; Darling v. Tegler, 30 Mich.

In Michigan. —Where demand is necessary before bringing replevin, a demand made by the officer after the issuing of the writ, and while he has it in his posafter demand, need not delay serving his writ in order that the defendant may satisfy himself that the demand is rightfully made.1

Where a demand against a sheriff wrongfully levying on property is necessary to create a cause of action, it need not be made at the time of the levy in all cases, but within such time as the circomstances of the case render reasonable.2

b. As to Manner.—A demand should not only be made at the proper time, in a proper place, but also in a proper manner. There is no stereotyped manner of demand recognized by the law : but any demand which indicates clearly what is demanded, who are the parties, and the authority of the person making the demand, will be sufficient. Thus it is not essential to a sufficient demand in a replevin of numerous and widely scattered articles of personal property, after a peremptory refusal to surrender, that the plaintiff should try to compel the defendant to hear a list thereof read, or to go with him from place to place to have them pointed out.4

c. UPON WHOM.—The demand in an action of replevin must be made upon the person who has the possession of the goods as

owner, professed owner, or as custodian.5

session ready for service, is insufficient under Michigan statutes, which expressly require an affidavit to be made after the cause of action has accrued. Darling v. Tegler, 30 Mich. 54.

1. Parker v Palmer, 13 R. I. 359.

2. Lynd v. Picket, 7 Minn. 184.
3. See, generally, Henry v. Harbison,
23 Ark. 25; Kiefer v. Carrier, 53 Wis.
404; Merriam v. Lynch, 53 Wis. 82;
Appleton v. Barrett, 29 Wis. 221.

Requisites and Sufficiency. — Thus where a person undertakes in a lawful manner to remove chattels as his own from the possession of another, and the latter objects to his doing so, denying that the former has any property there, this is equivalent to a formal demand and refusal, and sufficient to lay the foundation for an action of replevin. Merriam v. Lynch, 53 Wis. 82.

A demand and refusal being prerequisites to a certain action, and the defendant having admitted upon a record a demand, a regular return upon the writ that the property was found in his possession is sufficient evidence of a refusal to deliver. Henry v. Harbison, 23 Ark.

Demand and Refusal.—After each of the parties had notified the other to keep off his premises, plaintiff's horses escaped upon defendant's adjoining land through a defective line fence which it was defendant's duty to maintain. Plaintiff's servant, sent for the purpose, meeting defendant near the latter's house, inquired if plaintiff's horses were there, stating that he was after them. Defendant. knowing that there were horses upon his premises which he thought might be plaintiff's, answered that there were horses in a certain field which he pointed out, but nothing was said about the servant or plaintiff taking them. Held, that there was a sufficient demand, and the defendant's failure to give plaintiff express license to go upon the premises and take the horses was equivalent to a fusal. Kiefer v. Carrier, 53 Wis. 404. 4. Appleton v. Barrett, 29 Wis. 221. refusal.

5. Demand on Attachment-Officer out of State. - Where a constable who had attached property upon mesne process had removed from the State, held, a sufficient demand of property attached, to charge it upon the execution, to demand it of the selectmen and town agent of the town, and of one of the persons whose accountable receipt the constable had taken for the property. Austin v. Burlington, 34 Vt. 506.

Where Possession Taken under an Extrajudicial Order - Demand made of a person who, under an extrajudicial order of the county court, has taken charge of the effects of a deceased intestate, by the owner of the property lawfully in the in-

- 5. What Constitutes.—A demand may be either oral or in writing. Anything which gives the defendant to understand that the demandant claims the ownership and right to possession of a particular article or property, and that inquiry is made of him for the purpose of securing such possession, constitutes a demand.1 Where money is due the plaintiff on a contract, a suit thereon constitutes a sufficient demand.² And demand of bills of lading of cotton is equivalent to a demand of the cotton itself, and is sufficient to support replevin for the cotton, though the possession of the defendant did not originate in tort.3
- 6. Effect of Failure to Allege.—When a demand is necessary in replevin and the plaintiff fails to allege a demand, he may suffer nonsuit and bring another suit after demand.4

testate's possession at his death, is sufficient to sustain replevin against such person and against an administrator impleaded with him. Lills, etc., Co. v. Rus-

sell, 22 Wis. 178.

1. Inquiry Regarding Strayed Horses .-Where adjoining proprietors had notified each other to keep off their premises, and the horse of one broke over a defective line fence, and the owner sent servant to inquire for and return them, and to the servant's inquiry the defendant replied that there were some strayed horses in a field, which he supposed were the ones he was after, but gave no leave to the servant to take them out, this was held to constitute a sufficient demand. Kiefer v.

Carrier, 53 Wis. 404.

2. Western U. Tel. Co. v. Jones, 95 Ind. 220; s. c., 48 Am. Rep. 713; Ferguson v. State, 90 Ind. 40; School Town v. Gebhart, 61 Ind. 187; Olvey v. Jackson, 106 Ind. 286; s. c., 2 West Rep. 282; Frazee v. McChord, 11nd. 224; Bradfield v. McCormick, 3 Blackf. (Ind.) 161; Pendexter v. Carleton, 16 N. H. 482.

Demand by Suit. - The sixth paragraph of appellant's answer set up a contract requiring the claim for damages to be made in writing, within sixty days after sending the message. It was held that the institution of the suit and service of summons are a sufficient demand in writing. Olvey v. Jackson, 106 Ind. 286; s. c., 2 West. Rep. 282; Western U. Tel. Co. v. Jones, 95 Ind. 229; s. c., 48 Am. Rep. 713; Pendexter v. Carleton, 16 N. H. 482.
3. Zachrisson v. Ahman, 2 Sandf. (N.

4. Daggett v. Robins, 2 Blackf. (Ind.)

415; s. c., 21 Am. Dec. 752.
Nonsuit in Replevin Bar to a Second Replevin.—The court say in Daggett v. Robins that "the principal question is, whether a nonsuit in replevin is a bar to a second replevin. By the common law it would be no bar; but the Statute of Westminster 2 (13 Ed. I. stat. 1), c. 2. restrains the plaintiff in replevin from a second replevin after nonsuit, but permits him to proceed with his first action by a writ of second delivery, and if he should become nonsuited after the writ of second delivery, no further proceedings can be had. The counsel for the appellant insists that the record in this case shows it to be an action founded on the statute of the State, authorizing the Statute of Replevin in all cases where goods and chattels are unlawfully taken or detained, and not governed by the Statute of Westminster, which relates only to replevins founded on a distress for rent. The record does not show whether the action is founded on a distress for rent or not, nor is it material that it should; the action in either case, when once in court, is governed by the same principles and rules of practice. The record in an action of replevin never shows whether it is bottomed on a distress for rent or not, unless the defendant in replevin spreads that fact upon the record by his avowry, cogniz-ance, or other defence which he may make to the action. It is true that the time those proceedings were had in the Vigo circuit court there were two statutes authorizing the action of replevinthe one founded on a distress for rent, and the other regulating the proceedings, when the action is founded on any other unlawful and unjust taking or detaining of goods and chattels. But these acts only provide for the issue and service of the writ, the disposition to be made of the goods and chattels replevied, and the condition and effect of the replevin bond, The pleadings, prosecution, and proceedings in each action, and the judgment rendered and the execution award-

7 Time of Making.—Where a demand is necessary in a replevin suit it must be made before suit is commenced. The issuing of a writ of replevin to the sheriff is the commencement of the suit, and demand must be made before that time.1

8. Action Before Demand.—An action of replevin brought before demand, the writ being made provisionally, to be used only in case of the defendant's refusal to give up the property upon demand, is not to be regarded as prematurely brought.2

ed, are the same, except as to costs." Daggett v. Robins, 2 Blackf. (Ind.) 415.

In England there are Two Kinds of Replevin: (1) By common law, when the writ issues out of the court of chancery; (2) By the Statute of Marlbridge, 52 Hen. III., which enables the sheriff to make replevins without any writ, and then, having taken security, proceed on the complaint of the plaintiff, either by parol or precept to his bailiff, and if a claim of property is put in, the writ de proprietate probanda at once issues, and is tried by an inquest, and if found for the plaintiff, the sheriff goes on to make the replevin, but if for the defendant, he forbears. the writ issues out of chancery at common law, it is only directory to the sheriff to make replevin, and proceed in the county court, and is not a returnable process. In that case the writ de proprietate probanda cannot issue until a pluries is issued and returned into the king's bench or the common pleas, when a judicial writ may issue. Any of these suits are removable by either party into the king's bench or common pleas, to be there determined. If the replevin be by writ in the county court, it must be removed by a pone; if by plaint, it must be removed by a recordari facias loquelam; if in a court of record that may hold pleas in replevin, it must be removed by a writ of certiorari; and if in the court of another lord, it may be removed by recordari to the sheriff.

"This much of the law of England is stated to show that there can be no replevin under either the common law or the Statute of Marlbridge without the aid of our statutes. The English law is founded on the usages and customs of that kingdom, growing out of the relation of landlord and tenant under the feudal system and the aristocratical doctrines of primogeniture, and is local to that kingdom and cannot be in force here. are two kinds of replevin in this State, as in England—one by plaint and another by writ; nor is the writ in replevin liable to be defeated by a claim of property, as it is in England, where such claim, as before observed, puts an end to the suit, unless it is revived by the writ de proprietate probanda. Our writs of replevin are returnable writs, and the party is required to appear on the return day. They issue out of the circuit courts as other writs do, and are returnable; and the suit is docketed. proceeded in, set down for trial, and tried agreeably to the laws and practice of the court, as other actions are. The Statute of Westminster 2 (13 Ed. I. stat. 1), c. 2, is applicable only to actions of replevin founded on a distress for rent, and is not of a general nature, but is local to that kingdom and inconsistent with the laws, practice, and policy of this State, and therefore not in force. Daggett v. Robins, 2 Blackf. (Ind.) 415."

1. Underwood v. Tatham, 1 Ind. 276.

A Bailee cannot, as a general rule, be sued by the bailor for the deposit till after demand; nor is the bailee always bound to deliver his deposit on demand. Underwood v. Tatham, I Ind. 276.

2. O'Neil v. Bailey, 68 Me. 429. See Grimes v. Briggs, 110 Mass. 446; Federhen v. Smith, 85 Mass, (3 Allen) 119; Seaver v. Lincoln. 38 Mass. (21 Pick.) 267; Badger v. Phinney, 15 Mass. 359;

s. c., 8 Am. Dec. 105.

Action Before Demand-When not Premature.-Where a writ is made provisional to be used only in case of refusal by the defendant to give up the property, the suit is not prematurely brought. Grimes v. Briggs, 110 Mass, 446; Seaver v. Lincoln, 38 Mass. (21 Pick.) 267; Badger v. Phinney, 15 Mass. 359; s. c., 8 Am. Dec. 105.

When Suit Commenced. - Where a writ is filed up provisionally and delivered to an officer, with the instruction not to serve it until after a certain date or until the happening of a certain event, the action will not be deemed to have commenced until the service of the writ. Seaver v. Lincoln, 38 Mass. (21 Pick.) 267; Badger v. Phinney, 15 Mass. 359; s. c., 8 Am. Dec. 105.

The date of a writ of replevin is not conclusive evidence of the time when the IV. IN TROVER.—1. Necessary.—a. GENERALLY.—In an action of trover, demand and refusal may or may not be necessary to support the action. Generally, however, a demand and refusal, or actual conversion, are necessary to maintain an action of trover; and in all cases where there is no evidence of a conversion in fact, trover cannot be maintained without notice and demand.

b. WHEN PROPERTY IN HANDS OF ONE ENTITLED TO ITS CUSTODY.—Where property is placed in the hands of those entitled to its custody, trover cannot be brought without proof of

an actual conversion or demand and refusal.4

c. WHEN HOLDER IN POSSESSION WITHOUT FAULT.—(1) Generally.—Where a person has come lawfully into the possession of personal property, a demand must be made before trover will lie.⁵ Thus trover will not lie against a mere naked bailee of goods until after demand and refusal of them.⁶

(2) From Owner.—When property comes lawfully into the hands of a person, that is, when he has received it from the owner or other person authorized to put it in his possession, he will not be liable in an action for its conversion until after the owner or some one duly authorized by him has made a demand for its return, and that the defendant neglected or refused to deliver it. The same rule prevails where a chattel is gratuitously left with a person. S

action was commenced, and if the cause of action had not accrued on the day of the date, but did accrue before the commencement of the services thereto, and there is no evidence of the time when the writ was given to the officer, the action may properly be considered as having been commenced after the cause of action accrued. Federhen v. Smith, 85 Mass. (3 Allen) 119.

1. Blakely v. Ruddell, I Hempst. C. C.

18.

Chapin v. Siger, 4 McL. C. C. 378.
 Metcalf v. McLaughlin, 122 Mass.
 Pitlock v. Wells, F. & Co., 109 Mass.

547.

Action Against Officer for a Conversion—Subsequent Restoration.—Where an officer is sued by a mortgagee of personal property for a conversion by attaching the same, and has failed to restore the property to him within the time limited by the statute, or pay the amount due upon the mortgage on demand, evidence of a subsequent restoration is not admissible in mitigation of the damages. Robinson v. Sprague, 125 Mass. 582. See Howe v. Bartlett, 90 Mass. (8 Allen) 20; Alden v. Lincoin, 53 Mass. (13 Metc.) 204; Forbes v. Parker, 33 Mass. (16 Pick.) 462.

4. Morris v. Bills, Wright (Ohio), 343. 5. Tripp v. Pulver, 2 Hun (N. Y.), 511.

Necessity of Demand.—In trover, if the original taking of the goods was tortious, no demand is necessary; but if they come to defendant's possession from plaintiff or a third party, and are merely detained, a demand and refusal of delivery is necessary before suit. Hardy v. Keeler, 56 Ill. 152; Witherspoon v. Blewett, 47 Miss. 570.

6. Mitchell v. Williams, 4 Hill (N. Y.),

13.
7. Thompson v. Rose, 16 Conn. 71; Hardy v. Keeler, 56 Ill. 152; Sherry v. Picken, 10 Ind. 375; Kennet v. Robinson, 2 J. J. Marsh. (Ky.) 84; Carleton v. Lovejoy, 54 Me. 445; Stewart v. Spedden, 5 Md. 433; Witherspoon v. Blewett, 47 Miss. 570; Hall v. Robinson, 2 N. Y. 293; Andrews v. Shattuck, 32 Barb. (N. Y.) 396; Mitchell v. Williams, 4 Hill (N. Y.), 13; Sluyter v. Williams, 37 How. (N. Y.) Pr. 109; Wilson v. Cook, 3 E. D. Smith (N. Y.). 252; Morris v. Bills, Wright (Ohio), 343; Waring v. Pennsylvania R. Co., 76 Pa. St. 491; Yeager v. Wallace, 57 Pa. St. 305; Chapin v. Siger, 4 McL. C. C. 378; Wilton v. Girdlestone, 5 Barn. & Ald. 847.

5 Barn. & Ald. 847.

8. Kennet v. Robinson, 2 J. J. Marsh. (Ky.) 84; Polk v. Allen, 19 Mo. 467; Brown v. Cook, 9 Johns. (N. Y.) 361.

Gratuitous Bailee. - If a party turns his

(3) From Stranger.—A bona fide purchaser of personal property wrongfully taken from the possession of the owner is not liable for conversion until after demand and refusal. Thus where the defendant purchased property of a party to whom the plaintiff's intestate conveyed it, his possession will be held to have commenced and to continue under the contract, and he cannot be made liable therefor in trover without a demand and refusal. though the sale by the intestate may have been void.2

d. In Case of Intermingling of Goods.—In case of an intermingling of goods, a demand must be made, whether there has been

an actual conversion or not.3

horse into the inclosure of another and refuses to take him away, and the other party uses the horse as an equivalent for feeding him, the owner cannot maintain trover without proving a demand and refusal. Kennet v. Robinson, 2 J. J. Marsh. (Ky.) 84.

Accidental Mixing of Property. - Where the property of the plaintiff by accident becomes mixed with that of the defendant, and he after due diligence cannot separate them, he cannot be made chargeable in trover until a demand has been made upon him for the property mixed, that is known. Cutter v. Fanning, 2 Iowa, 580; Bond v. Ward, 7 Mass. 123; s. c., 5 Am. Dec. 28.

Sale on Credit Procured by Fraud .-Where goods have been sold to a person who procured them upon credit by fraud. the vendor must demand the goods of him before instituting suit for the con-Lacker v. Rhoades, 45 Barb.

(N. Y.) 499.

Sale of Goods Conditional. - Where a person sells goods conditionally, retaining the title until paid for, and they are subsequently attached as the property of the vendee, the vendor having previously assigned the claim, the assignor must demand the property of the officer before Barb. (N. Y.) 573; Wilson v. Cook, 3 E. D. Smith (N. Y.), 252.

1. Gillet v. Roberts, 57 N. Y. 28; Ely v. Ehle. 3 N. Y. 506; Barrett v. Warren, 3 Hill (N. Y.). 348; Twinam v. Swart, 4 Lans. (N. Y.) 263.

Thus where A lent property to B, and while it was in B's possession sold it to C; C sold to D; D brought his action against B for unlawful detention of the property from him: held, that the action could not be maintained without proof of demand by D, or a person authorized to make demand for him, and notice to B of D's acquisition of title. Wilson v. Cook. 3 E. D. Smith (N. Y.), 252. Conversion of Fence Rails.—Thus where

one who had purchased lands, converted to his own use, without knowledge of the true ownership, certain fence-rails which had been borrowed and placed upon the land by a tenant of the land under the vendor, it was held that the remedy of the true owner of the rails was (after demand and refusal) by action of trover, not trespass. Ogden v. Lucas, 48 Ill. 492.

Stolen Goods,-In an action for stolen goods sold to defendant's wife, the defendant is entitled to a demand, for he comes into constructive possession without fault on his part. Gurney v. Kenny, 2 E. D. Smith (N. Y.), 132.

An Insolvent firm Purchased Goods with the Preconceived Design of Not Paying for them, and two or three days afterwards executed a general assignment of their property. The goods were delivered to the assignee, and sold by him. Held that no action could be maintained against him by the vendor, who had made no demand for the goods while in his possession. Lacker v. Rhoades, 45 Barb. (N. Ŷ.) 499.

The Assignee of Stock already Converted may maintain an action for the conversion, after a tender of the debt for which the stock had been pledged, and demand made upon the defendant, the pledgee. Genet v. Howland, 45 Barb.

(N. Y.) 560. 2. Stewart v. Spedden, 5 Md. 433. 3. Bond v. Ward, 7 Mass. 123; s. c.,

Am. Dec. 28.

Confusion of Goods .- Thus where goods which are exempt from attachment or execution are so mingled with other similar goods, not exempt, that the officer cannot distinguish them, it is the duty of the owner to give notice to the officer and demand the statutory exemption. Copp Williams, 135 Mass. 401. See also Woods v. Keyes, 96 Mass. (14 Allen) 236; Eager v. Taylor, 91 Mass. (9 Allen) 156; Clapp v. Thomas, 87 Mass. (5 Allen) 158; Stevenson v. White, 87 Mass. (5 Allen) 148; Nash v. Farrington, 86 Mass. (4 Al-

e. IN CASE OF LAWFUL SEIZURE BY OFFICER.—A plaintiff in an execution under which an officer has seized personal property cannot be sued in trover without a demand made upon him and a refusal. Demand on the officer who has made the seizure is not enough. And the seizure of goods fraudulently purchased, on regular process, in favor of a creditor of the vendee, is not a tortious act; and a demand by the vendor, accompanied by a statement of his title, is necessary to entitle him to sustain trover against the officer.2

f. In Case of Mortgagee Out of Possession.—Where one who has no title to personal property mortgages it to secure a bona fide debt, and the mortgage is duly recorded, but the mortgagee has never had possession of such property or asserted any right or claim to it, or intermeddled or interfered with it in any way, except to take said mortgage, and no demand has been made on him therefor, and it does not appear that he had any knowledge of the situation of the property or of the owner's claim to it, he will not

be liable for the same in trover to the true owner.3

g. When Conversion Cannot be Otherwise Shown.—In the absence of an actual conversion a demand and refusal must be proved to maintain trover against a defendant who came lawfully into possession of the goods.4

2. Unnecessary.—No demand is necessary before commencing a suit in trover where there has been an actual conversion and it can

len) 157. However, this doctrine is not applicable to such articles as have a separate identity, and are easily distinguishable from all others, as animals, household furniture, and the like. See Copp v. Williams, 135 Mass. 401. See also Savage v. Davis 134 Mass. 401; Stickney v. Davis, 33 Mass. (16 Pick.) 19.

Mixing of Sheep.—If the plaintiff's sheep become mixed with those of the defendants, and the latter, after due diligence, cannot separate them, he will not be held liable for them without demand and refusal. Cutter v. Fanning, 2 Iowa,

1. Mulheisen v. Lane, 82 Ill. 117.

2. Thompson v. Rose, 16 Conn. 71; s.

c., 41 Am. Dec. 121.
Rights of Vendor to Follow Goods or Sue Officer.-Where goods were sold on a condition which was not complied with, and were attached as the property of the vendee after the failure to comply with the condition, held, that the vendor, at his election, had the right either to follow the goods or to sue for damages for the conversion by the attaching officer, either of which rights he might sell; but that his sale of the property did not carry to his vendee a right of action for the previous conversion, nor could the vendee

sue in trover without a previous demand. Hicks v. Cleveland, 30 Barb, (N. Y.)

3. Burnside v. Twitchell, 43 N. H. 390. 4. Sherry v. Picken, 10 Ind. 375; Carleton v. Lovejoy, 54 Me. 445; Metcalf v. McLaughlin, 122 Mass. 87; Pitlock v. Wells, F. & Co., 109 Mass. 547; Walsh v. Sichler, 20 Mo. App. 374; s. c., 2 West. Rep. 565; Sluyter v. Williams, 37 How. (N. Y.) Pr. 109; Powers v. Bassford, 19 How. (N. Y.) Pr. 309; Yeager v. Wallace, 57 Pa. St. 365; Blakey v. Douglass (Pa.) 5 Cent. Rep. 274.

To Maintain Trover there must be

either (1) a taking from the owner without his consent; (2) an assumption of ownership; (3) an illegal use or abuse of it; (4) proof of demand and refusal. Rand v. Oxford, 34 Ala. 477; Kennet v. Robinson, 2 J. J. Marsh. (Ky.) 84; Walsh v.

Sichler. 20 Mo. App. 374; s. c., 2 West. Rep. 565.

Proof Necessary .- In trover, if actual conversion be shown, evidence of demand and refusal is unnecessary; but if not, there must be proof of such a demand and refusal by defendant as will warrant the inference of actual conversion. Blakey v. Douglass (Pa.), 5 Cent. Rep. 274.

he proved, for demand and refusal are only evidences of conversion.1

No demand previous to institution of suit for the recovery of property is necessary where the possession of it was originally acquired by a tort. It is only when the original possession is lawful and the action depends upon the unlawful detention that a demand is required.² And an officer attaching the property of a stranger to the writ is liable in trover without a demand for its release and return.3

1. Dent v. Chiles, 5 Stew. & P. (Ala.) 383; s. c., 26 Am. Dec. 326; Zachary v. Pace, 9 Ark. (4 Eng.) 212; s. c., 47 Am. Dec. 744; Whitlock v. Heard, 13 Ala. 776; s. c., 48 Am. Dec. 73; Thompson v. Rose, 16 Conn. 71; s. c., 41 Am. Dec. 121; Webber v. Davis, 44 Me. 147; s. c., 60 Am. Dec. 87; Moody v. Whitney, 38 Me. 174; s. c., 61 Am. Dec. 239; Porter v. Foster, 20 Me. 391; s. c., 37 Am. Dec. 59; Jewett v. Patridge, 12 Me. 243; s. c., 28 Am. Dec. 173; Magee v. Scott, 63 Mass. 28 Am. Dec. 173; Magee v. Scott, 63 Mass. (9 Cush.) 148; s. c., 55 Am. Dec. 49; Pierce v. Benjamin, 31 Mass. (14 Pick.) 356; s. c., 25 Am. Dec. 396; Woodbury v. Long. 25 Mass. (8 Pick.) 543; s. c., 19 Am. Dec. 345; Carr v. Clough, 26 N. H. 280; s. c., 59 Am. Dec. 345; Bradley v. Spofford, 23 N. H. 444; s. c., 55 Am. Dec. 205; Pattee v. Gilmore, 18 N. Noble, 13 N. H. 494; s. c., 38 Am. Dec. 508; Fletcher v. Fletcher, 7 N. H. 452; s. c., 28 Am. Dec. 359; Doty v. Hawkins, 6 N. H. 247; s. c., 25 Am. Dec. 459; Packard v. Getman, 6 Cow. (N. Y.) 757; s. c., 16 Am. Dec. 475; Lockwood v. Bull, 1 Cow. (N. Y.) 332; s. c., 13 Am. Dec. 539; Hawkins v. Hoffman, 6 Hill (N. Y.), 586; 3. C., 41 Am. Dec. 767; Dezell v. Odell, Hill (N. Y.), 215; s. c., 38 Am. Dec. 628; Holbrook v. Wight, 24 Wend. (N. Y.) 169; s. c., 35 Am. Dec. 607; Dowd v. Wadsworth, 2 Dev. (N. C.) L. 130; s. 2. Walsworth, 2 Dev. (N. C.) L. 130; S. (r. 180 Am. Dec. 567; Blakey v. Douglass (Pa.), 5 Cent. Rep. 274; Houston v. Dvche, Meigs (Tenn.), 76; s. c., 33 Am. Dec. 130; Courtis v. Cane, 32 Vt. 232; s. c., 76 Am. Dec. 174; Irish v. Cloyes, 8 Vt. 30; s. c., 30 Am. Dec. 446; Newsym v. Newsym v. Ligh (Vs.) 86; s. c. sum v. Newsum, I Leigh (Va.), 86; s. c., 19 Am. Dec. 739.

Defendant's Control and Possession .-The defendant must be in a condition to deliver the property in order that demand and refusal may be evidence of a conversion. Hawkins v. Hoffman, 6 Hill (N. Y.), 586; s. c., 41 Am. Dec. 767; Hallen-bake v. Fish, 8 Wend. (N. Y.) 547; s. c., 24 Am. Dec. 88; Baker v. Wheeler, 8 Wend. (N. Y.) 505; s. c., 24 Am. Dec. 66; Irish v. Cloyes, 8 Vt. 30; s. c., 30

Am. Dec. 446. Thus it has been held that "trover will lie where goods have been lost to the owner by the act of the carrier, though there may have been no intention for wrong, as where the goods are by mistake or under the mortgaged order delivered to the wrong person. Devereux v. Barclay, 2 Barn. & Ald. 702; Stephenson v. Hart, 4 Bing. 476; Youl v. Harbottle, Peak Cas. 68; Lubbock v. Inglis, 1 Stark, 104. But it will not lie for the mere omission of the carrier: as where the property has been stolen or lost through his negligence, and so cannot be delivered to the owner. The remedy in such case is assumpsit or special action on the case. Ross v. Johnson, 5 Burr. 2825; Anon., 2 Salk. 655. And see Mc-Combie v. Davies, 5 East, 538; Dewell v. Moxon, I Taunt. 391; s. c., cited in note, 2 Saund. 47f. Mere nonfeasance does not work a conversion of the property; and although the owner may have another action he may not maintain trover."

2. Sargent v. Sturm, 23 Cal. 359; s. c., 83 Am. Dec. 118. See Paige v O'Neal, 12 Cal. 483; Hardy v. Keeler, 56 Ill. 152; Buel v. Pumphrey, 2 Md. 261; s. c., 56 Am. Dec. 714; Harker v. Dement, 9 Gill (Md.), 7; s. c., 52 Am. Dec. 670; Witherspoon v. Blewett, 47 Miss. 570.

Tortious Conversion consists in wrong-

ful asportation of chattels with the intent to appropriate them to the taker's use. Harker v. Dement, 9 Gill (Md.), 7; s. c.,

52 Am. Dec. 670.

Part of a Raft of Logs which plaintiff had sold to A. and was running to market came into the defendant's possession, and were then resold by A. to the plaintiff, and afterwards disposed of by defendant. Held, that no demand was necessary to enable plaintiff to maintain his action for a conversion. Couillard v. Johnson, 24 Wis. 533.

3. Jamison v. Hendricks, 2 Blackf. (Ind.) 94; s. c., 18 Am. Dec. 131; Owings v. Frier, 2 A. K. Marsh. (Ky.) 268; s. c., 12 Am. Dec. 393: Woodbury v. Long, 25 Mass. (8 Pick.) 543; s. c., 19 Am. Dec 340. So is a sheriff who sells property

a. WHEN IT WOULD BE UNAVAILING.—In trover no demand need be proved if the evidence shows that it would have been

unavailing.1 or that the taking was illegal.2

b. Where Goods are Sold Without the Owner's Au-THORITY.—(1) Generally.—Trover for goods sold without the owner's authority or ratification may be brought against the purchaser without formally demanding the goods beforehand; 3 for when a purchaser of property from one who has no power to sell takes a delivery of it, and retains the possession, claiming it under the sale, this amounts to a conversion of it. It is only where a party obtains the possession lawfully that it is necessary to show a demand and refusal.4

(2) By Agent.—Where goods are entrusted to an agent to be sold, and such agent, instead of selling the goods as directed, transfers or pawns them to secure his own indebtedness, the owner may maintain an action in trover against the creditor or vendee without a previous demand.5

(3) By Vendee in Conditional Sale.—Where a vendor has sold goods on a conditional sale, the title remaining in the vendor until the performance of a stipulated act, such vendor may maintain an

without notice,--Wright v. Spencer, 1 Stew. (Ala.) 576; s. c., 18 Am. Dec. 76,or the goods of a stranger. Jamison v. Hendricks, 2 Blackf. (Ind.) 04; s. c., 18

Am. Dec. 131.

Officer Levying upon the Property of a Stranger.-Freeman says in the work on Executions, sec. 254, that "the officer has no authority for touching the property of any person except that of the defendant. If he does so, the writ affords no justification, for the act is not in obedience to its tion, for the act is not in obedience to its mandate. Van Pelt v. Littler, 14 Cal. 194; Rhodes v. Patterson, 3 Cal. 469; Harris v. Hanson, 11 Me. 241; Archer v. Noble, 3 Me. (3 Greenl.) 418; State v. Moore, 19 Mo. 369; s. c., 61 Am. Dec. 563; People v. Schuyler, 4 N. Y. 173; State v. Tstom 60 N. C. st. Carrack v. 503; People v. Schuyler, 4 N. Y. 173; State v. Tatom, 69 N. C. 35; Carmack v. Com., 5 Binn. (Pa.) 184; Sangster v. Com., 17 Gratt. (Va) 124; Pacific Ins. Co. v. Conard, I Bald. C. C. 138; Ackworth v. Kempe, I Doug. 40; Jarmain v. Hooper, 7 Scott N. R. 663; S. c., I D. & L. 769; 6 M. & G. 827; 8 Jur. 127; 13 L. L. C. P. 63: Saunderson v. Baber, 2 Wils. J. C. P. 63; Saunderson v. Baker, 3 Wils. 309; s. c., 2 W. Bi. 832**. His act makes him a trespasser, and being such, he is entitled to no indulgence." The sheriff entitled to no indulgence." having misapplied his process, and whether by mistake or design will make no difference, stands in the position of every other trespasser, and is liable to an action the instant the trespass is committed. The circumstance that the property was in the possession of the execution debtor at the date of the signature amounts to nothing, except upon proof of fraud or commixture. Boulware v. Craddock, 30 Cal. 190. Contra: Dodge v. Chandler, 9 Minn. 97; Vose v. Sticknev. 8 Minn. 75.

The owner whose property has been taken under a writ to which he was not a party has his choice of remedies by which to seek redress. Yarborough v. Harper, 25 Miss. 112. He may sue in trespass or in trover, - Lyon v. Goree, 15 Ala. 360,—or he may recover the property taken. Gimble v. Ackley, 12 Iowa, 27; Smith v. Montgomery, 5 Iowa, 370; Freeman on Ex. sec. 254.

1. Gottlieb v. Hartman, 3 Colo. 53 2. Rhoades v. Drummond, 3 Colo.

3. Hake v. Buell, 50 Mich. 80.

Suit to Recover Fire-wood-Bona Fide Purchaser .- In an action by the owner to recover the value of a large amount of fire-wood from a party who was a bona fide purchaser from one having no authority to sell, no demand before suit is Whitman, etc., Co. v. Tritle, necessarv. 4 Nev. 494.

4. Hyde v. Noble, 13 N. H. 494; s. c.,

38 Am. Dec. 508; Deering v. Austin, 34 Vt. 330.
5. Thus, where an agent to whom a watch was delivered to sell gave it to his own creditor in payment of a debt, held, that the principal might maintain trover against the creditor therefor without a previous demand. Rodick v. Coburn, 68 Me. 170.

action in trover for the possession of the property without first making a demand of the purchaser from the vendee.1

(A) By One Stealing Them.—No demand is necessary to be made for the possession of stolen goods upon an innocent purchaser for value after he has sold them to another person, for the reason that such sale is an actual conversion, and in such case a demand is not necessary.2 And one who, having purchased stolen goods in the ordinary course of business in good faith, before knowledge of the owner's rights sells and delivers them to a third person, is liable to the owner without demand; and this although the goods were never in his actual possession.3

Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for the simple reason that it is an act inconsistent with the general right of dominion, which the owner of a chattel has in it, who is entitled to the use of it at

all times and in all places.4

(5) By Void Judicial Sale.—Where property not owned by an execution debtor is sold on the execution, the purchaser is liable to the owner in trover against the second purchaser, without a demand and refusal.⁵ And a sale by an administrator under an order not within the jurisdiction of the court, being a nullity, the purchaser's possession is unlawful ab initio, and consequently no demand is necessary.6

c. In Case of Actual Conversion.—(1) Generally.—Where there is an actual tortious taking,7 or where an actual conversion is shown, a demand and refusal are not necessary,8 although de-

1. Conditional Sale of Property. - Where A had possession of oxen, under a contract that he was to own them when he had paid for them, and before payment he sold them to the defendant's brother, the defendant being present, assisting in the bargain, payment, and driving off, held, that an action of trover could be maintained by the original owners against the defendant, and that no demand was necessary. Fisk v. Ewen. 46 N. H. 173.
2. Courtis v. Cane, 32 Vt. 232; s. c.,

76 Am. Dec. 174.

Bons Fide Purchaser.—When a thief sells stolen property to an honest purchaser no title passes, and the true owner may maintain an action for the owner may maintain an action for the property without a previous demand Moody v. Blake, 117 Mass. 23; s. c., 19 Am. Rep. 574; Bearce v. Bowker, 115 Mass. 132; Carter v. Kingman, 103 Mass. 519; Heckle v. Survey, 101 Mass. 345; s. c., 3 Am. Rep. 366; Gilmore v. Newton, 91 Mass. (9 Allen) 171; s. c., 85 Am. Dec. 749.

Exercising Rights of Ownership—Letting for Hire.—The purchaser of a horse who exercises rights of ownership by let-

who exercises rights of ownership by letting him to another is liable to the rightful owner in trover without a previous demand. Spooner v. Holmes, 102 Mass.

demand. Spooner v. Holmes, 102 Mass. 507; s. c., 3 Am. Rep. 491.

3. Pease v. Smith, 61 N. Y. 477.

4. Pease v. Smith, 61 N. Y. 477; Fouldes v. Willoughby, 8 Mees. & W. 540. See also Boyce v. Brockway, 31 N. Y. 490; Bristol v. Burt, 7 Johns. (N. Y.) 254; s. c., 5 Am. Dec. 264; Connah v. Hale, 23 Wend. (N. Y.) 462; Harris v. Saunders, 2 Strob. (S. C.) Eq. 370 (note); Hiort v. Bott, L. R. 9 Ex. 86.

5. Whipple v. Gilpatrick, 19 Me. 427.

6. Hall v. Chapman, 35 Ala. 553.

7. Gentry v. Madden, 3 Ark. 127.

7. Gentry v. Madden, 3 Ark. 127. 8. Powell v. Olds, 9 Ala. 861; Dunnahoe v. Williams, 24 Ark. 264; Gentry v. Madden, 3 Ark. 127; Monmouth Bank v. Dunbar, 19 Ill. App. 558; Jewett v. Patridge, 12 Me. (3 Fairf.) 243; s. c, 27 Am. Dec 173; Kronschnoble v. Knoblenbart Mij. lauch, 21 Minn. 56; Himes v. McKinney, 3 Mo. 382; Earle v. Van Buren, 7 N. J. 3 Mo. 302, Earle v. Van Bulett, 7 N. J.
L. (2 Halst.) 344; Hallett v. Carter, 19
Hun (N. Y.), 629; Durell v. Mosher, 8
Johns. (N. Y.) 445; Davison v. Donadi,
2 E. D. Smith (N. Y.), 121; Tompkins v.
Haile, 3 Wend. (N. Y.) 406; Garvin v. Luttrell, 10 Humph (Tenn.) 16; Newsum

fendant's original possession was lawful. Demand and refusal being only a means of proving conversion.1

(2) By Agent.—An agent may be sued for a conversion or misappropriation without a previous demand for the return of the

property.2

(3) By Partner.—In a suit by one partner against another, after dissolution and settlement, alleging that defendant agreed to collect the firm assets and apply them to the payment of the firm's outstanding liabilities, but that he had collected the money and converted it to his use and that of others, it is unnecessary to aver demand before commencement of the suit 3

v. Newsum, I Leigh (Va.), 86; Carr v. Gale, Dav. (2 Ware) U. S. D. C. 328.

No evidence of demand and refusal is necessary where a distinct act of conversion is proved. Garvin v. Buttrell, 10

Humph, (Tenn.) 16,

Conversion by Stranger. - Where property has been converted to his own use by a stranger, a demand before suit is not necessary. Dunnahoe v. Williams, 24 Ark. 264.

Notice of Title. - In an action for conversion no demand is prerequisite if the defendant before the taking had notice that the title was in the plaintiff. Hallett v. Carter, 19 Hun (N. Y.), 629.

1. Davison v. Donadi, 2 E. D. Smith (N. Y.), 121.

Evidence of Conversion. - A promise to the defendant to return the goods, and a failure to do so, are sufficient evidence of a conversion without a demand and refusal. Durell v. Mosher, 8 Johns, (N.

Claiming Title.-No demand is necessary in trover where the defendant has employed a slave for some time previous to the suit in the ordinary domestic avocations, and upon the trial asserts a title in himself. Powell v. Olds. 9 Ala. 861.

If a Bank treats a Special Deposit as a Part of its General Funds, transferring it and putting it among them, the owner may sue in trover without a demand. Monmouth Bank v. Dunbar, 19 Ill. App.

Threat to Hold by Force. - After a lease of certain premises had been executed. the lessor gave the lessee a written permit to move certain buildings on the premises, and erect others, with a stipulation that at the expiration of the lease the lessee might take away or sell upon the premises the new buildings, after the restoration of the old ones to their original position. A new building having been erected, and the position of the old ones altered, the lease was surrendered. The lessee sold the new building, and his vendee before the expiration of the time

for which the lease was given, and without entering on the premises for the purpose of restoration, demanded the new building of the grantee of the original lessor, saying that he was the owner of the building, and was ready to comply with all the conditions of the original The defendant who was the permit grantee of the lessor replied that he should hold by force if any attempt was made to remove the building. An action of tort for the conversion of the building having been brought, held, that no demand was necessary. Parker v. Go-d dard, 39 Me. 1.14.
2. Where One Receives Notes for a

Special Purpose, and misappropriates them, he may be sued for a conversion, or for money had and received, and no demand is necessary before bringing suit. Hynes v. Patterson, 28 Hun (N. Y.), 528.

Money Received for Special Purpose .-Where A lets B have a sum of money to pay a certain note, and B converts it to his own use, A need not make a demand on B before bringing suit to recover the oney. Bunger v. Roddy, 70 Ind 26. Stock Received to Sell on Commission. money.

Defendant receipted to plaintiff for three shares of stock "to sell for him on commission," which defendant exchanged for other property. Held, that the exchange so far established a conversion as to render proof of demand on the part of the plaintiff, before suit for recovery, unnecessary. Haas v. Damon, 9 Iowa,

Article Manufactured to Order. - C. contracted to make a cotton-press for R., and after it was made placed it in his foundry, and pointed it out as R.'s prop-R. did not take it away at the time, but afterwards went to C. to get it, when he discovered that C. had sold it to a third person. In an action by R. to recover the money paid for the press, held, that no demand was necessary to put the defendant in default. Robinson v. Clark, 20 La. An. 384.

3. Snyder v. Baber, 74 Ind. 47.

(4) By Pledgee.—Where the pledgee of personalty converts it to his own use, the pledgeor can sue at once without previous demand, and without having tendered the amount of the debt.1

1. Cox v. Albert, 78 Ind. 241. See Stearns v. Marsh, 4 Den (N. Y.) 227; s. c., 47 Am. Dec. 248; Luckett v. Townsend, 3 Tex. 119; s. c., 49 Am. Dec. 723. See also Worthington v. Tormey, 34 Md. 182; Jarvis v. Rogers, 15 Mass. 389; Steary v. Machanics' Benking Assaction Strong v. Mechanics' Banking Assoc...
45 N. Y. 718; Wheeler v. Newbould, 16 N. Y. 302; Haskins v. Patterson, I Edm. (N. Y.) 120; Brownell v. Hawkins, 4 Barb. (N. Y.) 491; Dykers v. Allen, 7 Hill (N. Y.), 497; s. c., 42 Am. Dec. 87; Willoughby v. Comstock, 3 Hill (N. Y.), 389; Garlick v. James, 12 Johns. (N. Y.) 146, 150; s. c., 7 Am. Dec. 204.

Duty of Pledgee .- The primary duty of the pledgee is to return the article pledged to the pledgeor immediately upon the performance of the obligation for which the security was given, or on tender of such performance; and a refusal to do so amounts to a wrongful conversion, for which he is liable to the pledgeor in an action of trover. Geron v. Geron. 15 Ala. 558; s. c., I Am. Dec. 143; Elliott v. Armstrong, 2 Blackf. (Ind.) 198; Parks v. Hall, 19 Mass. (2 Pick.) 206; Butts v. Burnett, 6 Abb. (N. Y.) Pr. N. S. 302; Luckey v. Gannon, 37 How. (N. Y.) Pr. 134; Hardy v. Jaudon, I Robt. (N. Y.) 261; Haskins v. Kelly, I Robt. (N. Y.) 160; Coggs v. Bernard, 2 Ld. Raym. 909. The same result follows whenever the pledgee has so placed himself that he cannot return the article pledged, as by wrongfully selling or by using and consuming it and the like, and under such circumstances the pledgeor may maintain an action in trover without a tender of the debt secured. Gay v. Moss, 34 Cal. 125; Kitchell v. Vanadar, I Blackf. (Ind.) 356; s. c., 12 Am. Dec. 249; Strong v. Mechanics' Banking Assoc., 45 N. Y 718; Wheeler v. Newbould, 16 N. Y. 392; Wilson v. Little, 2 N. Y. 443; s. c., 51 Am. Dec. 307; Read v. Lambert, 10 Abb. (N. Y.) Pr. N. S. 428; Lewis v. Graham, 4 Abb. (N. Y.) Pr. 106; Cortelyou v. Lansing, 2 Cai. Cas. 200; Dykers v. Allen. 7 Hill (N. Y.), 497; s. c., 42 Am. Dec. 87; Hope v. Lawrence, I Hun (N. Y.). 317; Ogden v. Lathrop, I Sweeny (N. Y.), 643; Gallaher v. Cohen, I Browne (Pa.), 43; Ainsworth v. Bowen, 9 Wis. 348.

Not only must the pledgeor return the article pledged at the termination of the bailment, but he must also account for rents, profits, and increase of the things pledged, unless there has been a special agreement to the contrary. Geron v. Geron, 15 Ala. 558; s. c., 1 Am. Dec. 143; Hunsaker v. Sturgis, 29 Cal. 142; Houton v. Holliday, 2 Murph. (N. C.) 111; s. c., 5 Am. Dec. 522; Gilson v. Martin, 49 Vt. 474. Thus where A borrowed of B \$200, and to secure payment pledged a negro slave, whose services were worth \$60 a year, and A paid B the money borrowed and received back the slave, and A then demanded of B satisfaction for the services of the slave, and upon refusal brought an action declaring upon quantum meruit, and also for money he had received, it was held that he was entitled to recover. Houton v. Holliday, 2 Murph. (N. C.) 111; s. c., 5 Am. Dec. 522. Such increase, however, is in all cases subject to the lien of the bailment, and 'the pledgee is entitled to its possession. Gady v. Holiday, 8 Mo. App. 118. The pledgee must deliver the identical article pledged where it is distinctive in its character, and capable of being recognized among other things of a like nature, or where a mark is set upon it with a view to its discrimination, but not where from its very nature it is incapable of identification if once mingled with other things of the same kind. Gilpin v. Howell, 5 Dykers v. Allen, 7 Hill (N. Y.), 497; s. c., 42 Am. Dec. 87; Garlick v. James. 12 Johns. (N. Y.) 146; s. c., 7 Am. Dec. 294; Nourse v. Prime, 4 Johns. Ch. (N. Y.) 490; s. c., 8 Am. Dec. 606.

Return of Stock Pledged. - But a pledgee of certificates of stock is not required to keep and return the identical shares pledged. Nourse v. Prime, 4 Johns. Ch. (N. Y.) 490; s. c., 8 Am. Dec. 294; Gilpin v. Howell, 5 Pa. St. 41; s. c., 4 Am. Dec. 730. Thus where shares, agreed to be held as collateral security, were mingled with other stock without certificates taken out, it will be sufficient if the pledgee has had taken in his name an amount equal to the shares deposited. Horton v. Morgan, 6 Duer (N. Y.), 61. For all the pledgeor can demand is a return of shares of the stock. If he desired to have any specific shares returned, he should have so provided in his contract. Atkins v. Gamble, 42 Cal. 103; Le Croy v. Eastman, 10 Mod. 499.

Intermingling Pledged Goods. - A pledgee is liable for intermingling the pledged goods with his own property so that they cannot be distinguished. Hart (5) Through Mistake.—Where a person converts the goods of another to his own use, mistakenly supposing them to be his own, the true owner may maintain an action in trover without showing a previous demand.¹

v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62. See Gunter v. Janes, 9 Cal. 660; Malone v. Kelley, 54 Ala. 532; De Jarnette v. De Jarnette, 41 Ala. 710; Blackenridge v. Holland, 2 Blackf. (Ind.) 383; s. c., 20 Am. Dec. 128; Davis v. Coburn, 128 Mass. 377; Ringgold v. Ringgold, 1 Har. & G. (Md.). 11; s. c., 18 Am. Dec. 250; Jewett v. Dringer, 30 N. J. Eq. (3 Stew.) 308; Kipp v. Bank of New York, 10 Johns. (N. Y.) 63; Mumford v. Murray, 6 Johns. (N. Y.) 63; Mumford v. Murray, 6 Johns. (N. Y.) Ch. 1; Case v. Abeel, 1 Paige Ch. (N. Y.) 393; Com. v. McAlister, 28 Pa. St. 480; Livingston v. Wells, 8 S. C. 347; Davis v. Harman, 21 Gratt. (Va.) 200; Blakeley v. Tuttle, 3 W. Va. 126.

Deposit of Bonds—The plaintiff de-

posited with the defendant certain bonds as security for loan payable on demand, and subsequently made overdrafts upon his account with the defendant to a large amount. The defendant, learning of such overdrafts and claiming a banker's lien upon the bonds therefor, as well as for the loan, and being unable to give notice or make demand upon the plaintiff, sold the bonds, without any demand or notice, and at private sale. The surplus of avails, after satisfying the loan, was credited upon the overdraft, but afterwards the defendant sold and transferred to a third person the whole amount of such The plaintiff, after tender of the amount of the loan and demand of the bonds, sued for the conversion thereof. Held, that the sale of the bonds at private sale was unauthorized, and the plaintiff could elect either to affirm such sale and claim the benefit of the surplus in reduction of his overdraft, or repudiate the sale and credit of surplus, and hold the defendant responsible for the bonds. Strong v. National Mechanics' Banking Assoc., 45 N. Y. 718.

Right of Pledgee to Sell.—On default by the pledgeor in his secured undertaking, the pledgee may sell the pledge in the absence of an express waiver of such demand and notice in the contract. He must first demand performance of the undertaking, and serve notice on the pledgeor of the time and place of the sale, which must be public. Gay v. Moss, 34 Cal. 125; Stevens v. Hurlbut Bank, 31 Conn. 146; Cushman v. Hayes, 46 Ill. 145; Worthington v. Tormev, 34 Md 182; Maryland F. Ins. Co. v. Dalrymple, 25 Md. 242; Ogden v. Lathrop. 65 N. Y. 162; Bryan v. Baldwin, 52 N. Y. 234;

Porter v. Parks, 49 N. Y. 569; Strong v. National Banking Assoc., 45 N. Y. 720; Markham v. Jaudon, 41 N. Y. 235; Wheeler v. Newbould, 16 N. Y. 400; Wilson v. Little, 2 N. Y. 448; s. c., 51 Am. Dec. 307; Lewis v. Varnum, 12 Abb. (N. Y.) Pr. 308; Lewis v. Graham, 4 Abb. (N. Y.) Pr. 110; Genet v. Howland, 45 Barb. (N. Y.) 560; s. c., 30 How. (N. Y.) Pr. 360; Brass v. Worth, 40 Barb. (N. Y.) 648; McEachron v. Randles, 34 Barb. (N. Y.) 307; Millikin v. Dehon, 10 Bosw. (N. Y.) 325; Dykers v. Allen, 7 Hill (N. Y.), 497; s. c., 43 Am. Dec. 87; Conyngham's Appeal, 57 Pa. St. 474; Davis v. Funk, 39 Pa. St. 243; s. c., 80 Am. Dec. 510; Alexandria, L. & H. R. Co. v. Burke, 22 Gratt. (Va.) 254; Mowry v. Wood, 12 Wis. 413.

A pledgee cannot, unless authorized by the agreement, sell property pledged to him as security for a debt before the debt is due, and if he does, he will be liable to the pledgeor in an action of trover for the conversion. See Wheeler v. Newbould, 16 N. Y. 400; Butts v. Burnett, 6 Abb. (N. Y.) Pr. N. S. 303; McNeil v. Tenth National Bank, 55 Barb. (N. Y.) 65; Campbell v. Parker, 9 Bosw. (N. Y.) 329; Atlantic, etc., Ins. Co. v. Boies, 6 Duer (N. Y.), 587; Wilson v. Little, I Sandf. (N. Y.) 351.

Measure of Damages for Conversion.—

Measure of Damages for Conversion.—Respecting the measure of damages in an action for the conversion by the pledgee of property of the fluctuating value, some cases hold that the value of the property at the time of the conversion, with interest, is the proper amount to be recovered, while others hold that the highest market value between the time of conversion and the commencement of the suit should be allowed. The tendency of the more recent cases seems to be somewhat against the latter rule, but the former is by no means universally followed. Prince v. Conner, 69 N. Y. 608; Wehle v. Haviland, 69 N. Y. 448; Tyng v. Com. Warehouse Co., 58 N. Y. 308; Ormsby v. Vermont Copper Mining Co., 56 N. Y. 623; Baker v. Drake, 53 N. Y. 211; s. c., 13 Am. Rep. 507; 66 N. Y. 518; 23 Am. Rep. 80; Lobdell v. Stowell, 51 N. Y. 70; Matthews v. Coe, 49 N. Y. 57; Clark v. Pinney, 7 Cow. (N. Y.) 681. See Southard on Damages, 496.

1. Thus where the defendant carried away from a railroad depot the plaintiff's

(6) Through Wrongful Taking.—(a) By Stranger.—A wrongful taking or a wrongful refusal constitutes an actual conversion, and no demand is necessary before suing therefor.1

(b) By Officer.—The removal and retention of the personal property of a stranger by an officer acting by direction of the party is a conversion by both, aside from any demand and refusal.2

(7) Through Misuse.—(a) Abuse.—The misuse or abuse of a thing is evidence of a conversion, and no demand and refusal is necessary in such case, though the original taking was lawful.3

(b) Sale.—If one wrongfully uses or sells the goods of another it is a direct conversion, and in general no demand or refusal, or offer to pay charges, is necessary before bringing an action.⁴ And where a sale is made under an order of court, no demand is necessary when the order is a nullity; 5 or upon an execution where the property belongs to a stranger; or where sold by a conditional vendee before performance of the condition.7

hav, supposing it to be his own, held that trover could be maintained without Bartlett v. Hoyt, 33 N. H. demand. 151.

1. Howitt v. Estelle, 92 Ill. 218.

2. Calkins v. Lockwood, 17 Conn. 154. The defendant, who was an officer, having a writ against one G., on August 22d attached property of his, which was intermixed with similar property of the plaintiffs'. On the same day, after the attachment, he was informed of the plaintiffs' claim, but subsequently removed the whole property without making any inquiry as to the interest of the plaintiffs, or attempting to separate the goods. On August 31st the plaintiffs commenced an action of trover against the defendant, In November following, the defendant advertised and sold the whole property as the property of G. Held, that the evidence was competent to show a conversion, without showing a demand and refusal, Gilman v. Hill, 36 N. H. 311.

Sale by Sheriff -A sheriff who, under an execution, sells the property of a stranger to the writ, is liable in trover without demand. Van Pelt v. Littler, 14 Cal. 194; Rhodes v. Patterson, 3 Cal. 469; Jamison v. Hendricks, 2 Blackf. (Ind.) 94; s c., 18 Am. Dec. 131: Owings v. Frier, 2 A. K. Marsh. (Ky.) 268; s. c., 12 Am. Dec. 393; Harris v. Hanson, 11 Me. 241; Archer v. Noble, 3 Me (3 Greenl.) 418; State v. Moore, 19 Mo. 369; People v. Schuyler, 4 N. Y. 173; 509, Teopie v. Schulyfer, 4 N. 1. 1/3; State v. Tatom, 69 N. C. 35; Carmack v. Com., 5 Binn. (Pa.) 184; Sangster v. Com., 17 Gratt. (Va.) 134; Pacific Ins. Co. v. Conard, 1 Bald. C. C. 138; Ack-worth v. Kempe, 1 Doug. 40; Jarmain v. Hooper, 7 Scott N. R. 663; s. c., I D. & L. 769; 6 M. & G. 827; 8 Jur. 127; 13 L.

J. C. P. 63; Saunderson v. Baker, 3
 Wils. 309; s. c., 2 W. Bl. 832.
 Maguyer v. Hawthorn, 2 Harr.

(Del.) 71.

A Wrongful Use of the property being shown, it is unnecessary to allege and prove a demand before the institution of the action,—McPherson v. Neuffer, 11 Rich. (S. C.) L 267;—the same as where it has been converted to the defendant's own use. Dunnahoe v. Williams, 24 Ark. 264; Dudley v. Sawyer, 41 N. H.

320.
4. Kyle v. Gray, 11 Ala. 233; Dudley v. Sawyer, 41 N. H. 326; Pease v. Smith, 61 N. Y. 477; Everett v. Coffin, 6 Wend. (N. Y.) 603; s. c., 22 Am. Dec. 551; Mc-Pherson v. Neuffer, 11 Rich. (S. C.) L.

Trover will Lie for Property Sold or Appropriated to his own use by the defendant, without a previous demand therefor by the owner. Dudley v. Sawyer, 41 N. H. 326.

Where there is Evidence of a Conversion by Selling the property in controversy, proof of a demand and refusal is unnecessary, and the rule is the same although in the first instance the property came lawfully to the defendant. Kyle v. Gray, 11 Ala. 233.

An Admission of Conversion. -An admission by defendant, in an action of trover, that property had come into his possession, that he sold it and received received the money for it, is sufficient evidence of conversion to maintain trover, without showing a demand and refusal. Everett v. Coffin, 6 Wend. (N. Y.) 603; s. c., 22 Am. Dec. 551.

5. Hall v. Chapman, 35 Ala. 553. 6. Robinson v. McDonald, 2 Ga. 116.

7. Wnipple v. Gilpatrick, 19 Me. 427.

d. WHEN TAKEN TORTIOUSLY.—(1) Generally:—Where a person comes into possession of property wrongfully or tortiously, as by force or through one who had no title thereto, no demand is necessary before instituting an action in trover by the real owner.

(2) By Duress.—Where property is parted with by duress of imprisonment, or duress by threats, the transaction is void, and

trover lies for the property without previous demand.2

(3) By Trespass.—In trover for property obtained by an act of trespass a demand is not necessary.³ If a distress for non-payment of taxes is sold by the collector, after the expiration of the time limited by the statute for making such sale, the delay renders the collector a trespasser ab initio; and trover will lie against him in favor of the owner of the goods sold, although no demand therefor is made before the commencement of the action.⁴

(4) By Fraud.—Trover lies against a fraudulent purchaser, or his vendee who has notice without a previous demand.⁵ Thus where it

1. Gentry v. Madden, 3 Ark. 127; Paige v. O'Neal, 12 Cal. 483; Gilmore v. Newton, 91 Mass. (9 Allen) 171; Woodbury v. Long, 24 Mass. (8 Pick.) 543; s. c., 18 Am. Dec. 345; Hyde v. Noble, 13 N. H. 494; s. c., 38 Am. Dec. 508; Moses v. Walker, 2 Hilt. (N. Y.) 536; Farrington v. Payne, 15 Johns. (N. Y.) 431; Jones v. Dugan, 1 McC. (S. C.) 428; Davis v. Duncan, 1 McC. (S. C.) 213; Deering v. Austin, 34 Vt. 330.

A Servant who Takes Away his Mas-

A Servant who Takes Away his Master's Goods upon Leaving his Service is thereby guilty of a conversion, and liable in trover or replevin without a previous demand. Pilsbury v. Webb, 33 Barb.

(N. Y.) 213.

2. Foshay v. Ferguson, 5 Hill (N. Y.),

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Duress of Imprisonment.—To constitute duress of imprisonment, it is said there must be a threat of life or limb or mayhem; and that a man cannot avoid his contract on the ground that it was procured through the fear of illegal imprisonment. But Lord Coke says that the fear of imprisonment is enough. 2 Inst. 483; Co. Litt. 253, b. The rule has been so understood since that time. Eddy v. Herrin, 17 Me. 338; Inhabitants of Whitefield v. Longfellow, 13 Me. 146; Foshay v. Ferguson, 5. Hill (N. Y.), 154; Vin. Abr. tit. Duress, B. Pl. 23; Com. Dig. tit. Pl. W. 20; Bacon Abr. tit. Duress, A.

3. Rhodes v. Lowry, 54 Ala. 4; Pierce v. Benjamin, 31 Mass. (14 Pick.) 356; s. c., 25 Am. Dec. 396; Matheny v. Johnson, 9 Mo. 232. Compare Nelson v. Beck, 54 Ala. 329; Forth v. Pursley. 82 Ill. 152. Seizure and Removal of Property.

Without demand before sui., trover may

be maintained for seizure and removal of personalty—as here, ninety bushels of corn—from the owner's premises. Rhodes v. Lowry, 54 Ala. 4. Compare Nelson v. Beck, 54 Ala. 329; Forth v. Pursley, 82 Ill. 152.

Pursley, 82 Ill. 152.
4. Pierce v. Benjamin, 31 Mass. (14 Pick.) 356; s. c., 25 Am. Dec. 396.

5. Luckey v. Roberts, 25 Conn. 486; Ryan v. Brant, 42 Ill. 78; Stevens v. Austin, 42 Mass. (1 Metc.) 557; Thurston v. Blanchard, 39 Mass. (22 Pick.) 18; s.

c., 33 Am. Dec. 700.

Fraudulent Taking.—When the defrauded party elects to treat a fraudulent exchange of chattels as void, and the other party's possession of his property as tortious, a demand is not necessary to enable him to maintain trover; and when the title of the chattel received by him, fraudulently represented to be good, has wholly failed, he may rescind the exchange without transferring to the fraudulent party a good title which he has obtained from a third person. Moody v. Drown, 58 N. H. 45.

Instances—L. brought an action of trover against O. to recover for goods in his possession fraudulently purchased of the plaintiff on credit by W., and by W., sold to O., claiming that W., O., and one T. had conspired to defraud him in the purchase of the goods. *Held*, that if O. had participated in the fraud by which the goods were procured, no demand on him for the goods before bringing the suit was necessary. Luckey v. Roberts, 25 Conn. 486.

P.'s father, owning a stock of goods worth \$4000. agreed to sell the same to P. for \$3000, if P. would procure from P.'s wife and surrender a note of \$1000

appeared that the defendant in trover had obtained possession of the property sued for under a claim of right, by false assertions as to the result of a lawsuit, it was held that there was a conversion which rendered proof of a demand and refusal unnecessary.1

e. In Case of Intermixture of Goods.—Where a party's property becomes mixed with that of another, and he does not take the proper steps to separate it and return it to its true owner, he will

be liable in an action of trover without demand.2

f. By WIDOW.—Where certain articles of property go to a widow on the death of her husband, such property vests at the time of his death, and no demand is necessary in order to sustain an action of trover against the administrator.3

- 3. Need Not be Proven, when.—Where, in an action of trover, failure of demand of payment is not set up in the answer, a demand by the plaintiff and refusal by defendant need not be proved on the trial.4
- 4. Sufficiency.—a. GENERALLY.—A demand of payment or satisfaction generally for goods sold is a sufficient demand.5 the defendant admits that he had the goods of the plaintiff and that they are lost, this is sufficient evidence of a conversion to maintain trover without showing a demand and refusal.6

which she held against the father; she delivered the note to P., but the father on receiving it tore his name therefrom. repudiated the agreement, and required P. to pay \$4000 for the goods. In an action by P.'s wife against P.'s father for the conversion of the note, held, that she was entitled to recover the present value thereof without demand; the circumstances justifying the inference that the defendant obtained the note with the preconceived design of destroying it, without using it for the purpose for which she parted with it. Powell v. Powell, 71 N. Y. 71

1. Bruner v. Dyball, 42 Ill. 34.

2. Sims v. Glazener, 14 Ala. 695; s. c., 48 Am. Dec. 120; Hall v. Page, 4 Ga. 428; s. c., 48 Am. Dec. 235; Hesseltine This beautiful and Me. 237; s. c., 50 Am. Dec. 627; Willard v. Rice, 52 Mass. (11 Metc.) 493; s. c., 45 Am. Dec. 226; Wetherbee v. Green, 22 Mich. 318; s. c., 7 Am. Rep. 653; Stephenson v. Little, 10 Mich. 441; Robinson v. Holt, 39 N. 10 Mich. 441; Rodinson v. Holl, 39 at.
H. 557; s. c., 7 Am. Dec. 233; Seymour
v. Wyckoff, 10 N. Y. 213; Starr v. Winegar, 3 Hun (N. Y.), 491; Chase v. Washburn, 1 Ohio St. 244; Wood v. Fales, 24
Pa. St. 246; s. c., 64 Am. Dec. 655;
Brakeley v. Tuttle, 3 W. Va. 86; Adams
v. Meyers, I Sawy. C. C. 306; Rokeby v.
Elliot I. R. 12 Ch. Div. 277; Buckley v. Elliot, L. R. 13 Ch. Div. 277; Buckley v. Gross, 3 B. & S. 574; s. c., 32 L. J. (Q. B.) 129; 9 Jur. N. S. 986; 11 W. R. 465; 7 L. T. (N. S.) 743.

Intermingling of Sheep.-Where the plaintiff's sheep became mixed with the defendant's, and he afterwards finding it out made no proper attempt to separate and return them, he will be liable in an action of trover without demand and refusal. Cutter v. Fanning, 2 Iowa, 580. See Brackenridge v. Holland, 2 Blackf. (Ind.) 377; s. c., 20 Am. Dec. 123; Hesseltine v. Stockwell, 30 Me. 237; s. c., 50 Am. Dec. 627; Loomis v. Green, 7 Me. (7 Greenl.) 393; Ringgold v. Ringgold, I Harr. & G. (Md.) 11; s. c., 18 Am. Dec. 250; Willard v. Rice, 52 Mass. (11 Metc.) 493; s. c., 49 Am. Dec. 426.
3. The Tennessee Act, of 1842, ch. 44,

which provides that certain articles of property, therein exempted from execution, shall be secured to the widow after the death of her husband, and shall not go to the executor or administrator, applies to all widows, irrespective of the value of the estates of their deceased husbands; the property vests, at the death of the husband, in the widow, and no demand is necessary to sustain an action of trover against the administrator or executor who has appropriated it. Curd v. Curd, 9 Humph. (Tenn.) 171.
4. Battel v. Crawford, 59 Mo. 215.

5. La Place v. Aupoix, 1 Johns. Cas. (N. Y.) 406; Syeds v. Hay, 4 T. R. 260; Godin v. London Assur. Co., 1 Burr. 493; Thompson v. Shirley, 1 Esp. 31. 6. Jamison v. Hendricks, 2 Blackf. (Ind.) 94; s. c., 18 Am. Dec. 131; La

But the demand, in order to be operative and to afford evidence of a conversion, must be specific and definite, so that there may be no doubt in the mind of the party of whom the demand is made as to what property it related.1

b. WITHOUT EXHIBITING TITLE.—One need not exhibit his title to the property where he makes a demand of property for

which he brings his action of trover.2

c. WITHOUT MEANS OF REMOVAL.—To constitute a valid demand by the purchaser of a building standing on land, but not a fixture, it is not necessary that he have at the time the implements with him necessary for its removal.3.

d. UPON WHOM.—(1) Joint Possessor.—Where two persons are in the possession of personal property owned by a third, demand of one of them will be sufficient to constitute a foundation for an action of trover against both; 4 for a demand upon one is equivalent to a demand upon all; but if they are not partners, or in the joint possession of the property, a demand should be made upon After a partnership has been dissolved, a demand must be made upon each of the partners.6

(2) Agent.—A demand of property made upon a servant or an agent of the defendant who is charged with the duty of receiving, keeping, caring for and delivering the property for his principal or

master, is a sufficient demand.7

Place v. Aupoix, 1 Johns. Cas. (N. Y.) 406; 3 Stark. Ev. 1496.

Demand for Goods Mortgaged .- Such demand is not invalidated by an omission to specify the rate per cent, thereby implying six per cent, when the rate actually reserved in the mortgage was seven per cent. Robinson v. Sprague, 125 Mass. 582. See also Bicknell v. Cleverly, 125 Mass. 164; Hills v. Farrington, 88 Mass. (6 Allen) 80; Averill v. Irish, 67 Mass. (I Gray) 254; Harding v. Coburn, 53 Mass. (12 Metc.) 333; s. c., 46 Am. Dec. 680; Rowley v. Rice. 51 Mass. (10 Metc.) 7: Johnson v. Sumner, 42 Mass. (1 Metc.) 172.

1. Abington v. Lipscomb, I O. B. 776.

780.

The Question of Refusal is for the Jury. -If, in an action for the conversion of the plaintiff's machinery in a workshop, by the refusal of the defendant's agent to allow it to be removed upon demand, it does not appear that the defendant or his agent actually used the machinery, or had the actual possession of it otherwise than by being in the rightful possession of the workshop, and it appears that the defendant had instructed his agent to forbid the removal of any of the machinery, but to use no force to prevent it, and that upon a demand, which included some machinery to which the plaintiff had no right, the agent forbade the removal of

any of it, the question should be submitted to the jury whether this was such a clear and absolute refusal to deliver the machinery to which the plaintiff was entitled as to amount to a conversion. Delano v. Curtis, 89 Mass. (7 Allen) 470.

Excessive Demand, -- The fact that the demand is too large will not excuse the defendant from delivering all the property that the plaintiff was entitled to have, for when the demand is too large the defendant is nevertheless bound to deliver up such property as he may have in his hands, covered by the demand belonging to the demandant, unless the demand is so vague as to leave it uncertain as to what property it relates. Gragg v. Hull, 41 Vt. 217, 222. See Delano v. Curtis, 89 Mass. (7 Allen) 470. Compare Abington v. Lipscomb, I Q. B. 776, 780. And the fact that a demand is made for a few articles not owned by the demandant will not vitiate it. Marine Bank v. Fiske, 71 N. Y. 353.

2. Ratcliff v. Vance, 2 Mills (S. C.)

Const. 239.

3. Edmundson v. Bric, 136 Mass. 189. 4. Ball v. Larkin, 3 E. D. Smith (N.

Y.), 555. 5. Ball v. Larkin, 3 E. D. Smith (N.

Y.). 555.
6. Keith v. Sturges, 51 Ill. 142.
7. Cass v. New York & N. H. R. Co., 1 E. D. Smith (N. Y.), 522; Buxton v. e. By Whom.—A demand must be made by the owner personally, or by some one authorized by him to make such demand.

(1) Joint Owner.—Where the title is in two or more joint owners.

a demand by one of them will be sufficient.2

(2) Agent.—A demand may be made by an agent, but it is a general rule that where an agent makes a demand of property of another on behalf of a third person, the authority to such agent must be proved, otherwise the refusal will not be evidence of a conversion; 3 but where on demand made, the defendant does not question the authority of the agent, but places his refusal upon other grounds, the agent is not bound to disclose his authority; 4 and such refusal will be held a waiver of objection of the authority of the agent making the demand.⁵

f. UNDER STATUTE.—A demand made under a statute will be

sufficient, although informal.6

Baughan, 6 C. & P. 674; Schuster v. McKellar, 7 El. & Bl. 704; Jones v. Hart, 2 Salk. 441. Thus a demand before action, for baggage wrongfully detained, is sufficient when made of the agents of the railroad company, who are charged with the whole duty of receiving, keeping, and delivering property; and in such case a demand of the directors is unnecessary. Cass v. New York & N. H. R. Co., 1 E. D. Smith (N. Y.), 522. The same is true of a demand made upon a painter's servant for a carriage left with his master to be painted,—Buxton v. Baughan, 6 C. & P. 674;—of a shipmaster having the custody of the goods transferred on the ship,—Schuster v. McKellar, 7 El. & Bl. 704;—or upon a pawn-broker's clerk for property pawned with his master. Jones v. Hart, 2 Salk. 441.

1. Blankenship v. Berry, 28 Tex. 448; Solomons v. Dawes, 1 Esp. 83.

2. Joint Owners—Demand by One.—But where property demanded was received from A by B, and deposited by him with a third person, to be held on their joint account, they not being joint owners, both should make the demand. May v. Harvey, 16 East, 197; Nathan v.

Buckland, 2 Moore, 153.

Thus where title of several joint owners of property is transferred to one of them, in an action by him for its conversion after a demand it is no defence that the defendant had previously wrongfully taken possession of the property, while it belonged to them all. Serat v. Utica, I. & E. R. Co., 102 N. Y. 681.

Where a horse which had been attached and delivered by the attaching officer to two receiptors had been sold by one of the receiptors, held in an action of trover against the purchaser, that a demand made upon him by the other receiptor

was a sufficient demand. Carr v. Farley, 12 Me. (3 Fairf.) 328.

3. Robertson v. Crane, 27 Miss. 362; s. c., 61 Am. Dec. 520; Blankenship v. Berry, 28 Tex. 448; Solomons v. Dawes, 1 Esp. 83.

4. West v. Tupper, 1 Bail. (S. C.) 193. 5. Robertson v. Crane, 27 Miss. 362;

s. c., 61 Am. Dec. 520.

Sufficient Demand and Refusal.—In trover for a negro slave, the plaintiff proved title, and that his agent went to defendant with an order to deliver the negro to him as his agent; that the agent told the defendant he had purchased the negro; that defendant said he could have her; and that if he, defendant, did not get her, she should never be of service to plaintiff or any one else. Held, that this was a sufficient demand and refusal to sustain trover. Buel v. Pumphrey, 2 Md. 261; s. c., 56 Am. Dec. 714.

6. Bicknell v. Cleverly, 125 Mass 164.

A Demand by an Assignee of a Mortgage of personal property upon an officer who had attached the same as the property of the mortgagor, "I hereby demand of you the sum of two hundred dollars, which is the amount due me on a mortgage" (describing it), held, although informal, to be sufficient, under Massachusetts Gen. Stat. ch. 123, sec. 63, requiring the demand to "state in writing a just and true account of the debt," to support an action for the conversion. Bicknell v. Cleverly, 125 Mass. 164.

Indemnifying Mortgage.—In the case of Bicknell v. Cleverly, supra, the court say, "it has been held that in case of mortgages given to indemnify the mortgagees against future contingent liabilities a creditor of the mortgagee may make a specific attachment of the mortgaged property instead of resorting to the

5. Insufficiency.—A demand may be either oral or in writing: but in either instance it will be insufficient where it is not made by the person entitled to the goods or property, or by a person duly authorized by him; or where it is not made of the proper party, at

the proper time, and in a proper place and manner.1

Where a demand in writing is left at the defendant's house, it will be insufficient to found an action upon, unless the circumstances proved are such as to raise a presumption that he received it before the action was brought; 2 and a written demand sent by mail is insufficient, except where the plaintiff can show that the defendant received it long enough before suit was instituted to enable him to deliver the property, and that he absolutely refused to do so, because the defendant is not bound to reply by mail, neither is he bound to go out of his way to deliver the property, and therefore the failure to do either affords no evidence of a conversion.3

a. WHEN INDEFINITE.—A demand is insufficient when it is so indefinite as not to clearly describe the property demanded, so that the party may know just what property he is to return.4

b. WHEN AUTHORITY NOT SHOWN.—Where the party himself makes a demand he is not usually required to establish or exhibit his title to the property; 5 but where the demand is made by an

trustee process; and that in such a case the mortgagee must make a demand and notice which should be adapted to the character of his mortgage," citing Putnam v. Rowe, 110 Mass. 28; Hanson v. Herrick, 100 Mass. 323; Codman v. Freeman, 57 Mass. (3 Cush.) 306; Haskell v. Gordon, 44 Mass. (3 Metc.) 268.

1. Where Property has been Bailed to

Two or more persons a demand of one of them only is an insufficient demand to found an action of trover upon. White

v. Demary, 2 N. H. 546.

Joint Bailees. - In an action of trover against two joint bailees, a demand and refusal by one is not sufficient to support the action, a conversion by both must be shown. Mitchell v. Williams, 4 Hill (N.

Y.), 13.

Demand Accompanied by Inventory-When Not Sufficient .- A demand of certain articles, though accompanied by an inventory, was made on the defendant at a distance from those articles, and a copy of the inventory promised. Whether it was furnished or not did not appear. Held, that this was not such a demand as to furnish ground for an action in the nature of trover. Breese v. Bange, 2 E. D. Smith (N. Y.), 474.
Form of Demand Insufficient, when—

Evidence that the holder of a mortgage of everything in a certain organ manufactory, including "parts of organs finished and unfinished," and conditioned that the property should not be removed

therefrom without his written consent, exhibited his mortgage to a church committee, stated that it "included their organ, or parts of it, and demanded the property," and that they answered that they "knew nothing about it," and refused to do anything, held, not to prove any definite demand or refusal, or conversion. Ware v. Georgetown Congregational Society, 125 Mass. 584.

And a demand in these words, "I shall

have to take them from you, if I cannot get my money any other way," was held not to be sufficient to support the action, the original taking having been lawful. Monnot v. Ibert, 33 Barb. (N. Y.) 24.

2. White v. Demary, 2 N. H. 546. 3. Pattee v. Gilmore, 18 N. H. 460; s. c., 45 Am. Dec. 385.

4. Abington v. Lipscomb, 1 Q. B. 776, 780; vide supra, 4. Sufficiency.
5. Ratcliff v. Vance, 2 Mills (S. C.)

Const. 239.

Reasonable Doubt as to Title.-However, where a reasonable doubt as to the title exists, the question whether the defendant's refusal to deliver upon that ground is evidence of conversion always depends upon the circumstances surrounding the case, and it is for the jury to say whether, taking these circumstances into consideration, he was justified in his refusal; and if they find he was justified, the demand and refusal will furnish no evidence of conversion. Robinson v. Burleigh, 5 N. H. 225; Carroll v. Mix, agent or servant the defendant may require reasonable proof of his authority to receive the property, and unless reasonable proof is furnished, the demand will be insufficient to support an action or for a commission. If one bona fide refuses to deliver goods in consequence of his not being reasonably satisfied that the person who applies is properly empowered to receive them, the demand will be held to be insufficient to fix his liability.2

c. Upon Member of Dissolved Firm.—A demand upon a partner, after the dissolution of the firm, is not sufficient to charge another member with conversion of goods delivered to the firm.

d. By LETTER.—A demand by letter of property bailed and deliverable on demand is not sufficient of itself to prove a conversion of it: but if the bailee falsely replies that he has never received such property, it is sufficient.4

51 Barb. (N. Y.) 212; Dowd v. Wadsworth, 2 Dev. (N. C.) L. 130; s. c., 18 Am. Dec. 567. See also Spence v. Am. Dec. 507. See also Spence v. Mitchell, 9 Ala. 744; Ingalls v. Bulkley. 15 Ill. 224; Wilson v. Cook, 3 E. D. Smith (N. Y.), 252; Pillot v. Wilkinson, 2 Hurls. & C. 72; Ogle v. Atkinson, 5 Taupt. 759; s. c., I Marsh. 323.

1. Blankenship v. Berry, 28 Tex. 448; Selpmons v. Daves I Fen. 82

Solomons v. Dawes, 1 Esp. 83.

Demand by Agent. - An agent making a demand for the delivery of property belonging to his principal must, as a general rule, prove his authority to make the demand. 2 Greenl. Ev. sec. 644. Where, however, the party upon whom the demand is made raises no objection to the authority of the agent to make the demand, but puts his refusal to deliver upon grounds which cannot, in point of law, be supported, such refusal is a clear waiver of all objections to the authority of the agent to make the demand. Robertson v. Crane, 27 Miss. 362; s. c., 61 Am. Dec. 520.

2. Blankenship v. Berry, 28 Tex. 448. 3. Pattee v. Gilmore, 18 N. H. 460; s.

c., 45 Am. Dec. 385.
Demand of One Partner After Dissolution.-While it is true that a refusal of one partner to deliver goods upon demand, which have been received by the firm, is evidence of a conversion by all the partners,-Stewart v. Levy, 36 Cal. 159; Sturges v. Keith, 57 Ill. 455; s. c., 11 Am. Rep. 28; Jackson v. Todd, 56 Ind. 406; Wolf v. Mills, 56 Ill. 360; Boardman v. Gore, 15 Mass. 331; Manufacturers' and Mechanics' Bank v. Gore, 15 Mass. 75; s. c., 8 Am. Dec. 83; Mitchell v. Williams. 4 Hill (N. Y.), 13, 15; Sherman v. Smith, 42 How. (N. Y.) Pr. 199; Holbrook v. Wight, 24 Wend. (N. Y.) 169; s. c., 35 Am. Dec. 607; Nesbet v. Patton, 4 Rawle (Pa.), 120; s. c., 26

Am. Dec. 122; Hadfield v. Jameson, 2 Munf. (Va.) 65; Willet v. Chambers, Cowp. 814; Stedman v. Gooch, I Esp. 3; Cowp. 814; Stedman v Gooch, I Esp. 3; Biggs v. Lawrence, 3 T. R. 454. See, as to refusal to deliver generally, Dent v. Chiles, 5 Stew. & P. (Ala.) 383; s. c., 26 Am. Dec. 350; Graham v. Warner's Exrs., 3 Dana (Ky.), 146; s. c., 28 Am. Dec. 65; Fletcher v. Fletcher, 7 N. H. 452; s. c., 28 Am. Dec. 359; Packard v. Getman, 6 Cow. (N. Y.) 757; s. c., 16 Am. Dec. 475; Lockwood v. Bull, I Cow. (N. Y.) 322; s. c., 13 Am. Dec. 539; Dowd v. Wadsworth, 2 Dev. (N. C.) L. 130; s. c., 18 Am. Dec. 567; Irish v. Cloyes, 8 Vt. 30; s. c., 30 Am. Dec. 446,—yet a demand made upon one member of a firm, after its dissolution, is not sufficient to after its dissolution, is not sufficient to charge the other members with conversion of property delivered to the firm. Pattee v. Gilmore, 18 N. H. 460; s. c., 45 Am. Dec. 388.

4. Pattee v. Gilmore, 18 N. H. 460; s.

c., 45 Am. Dec. 385.

Demand by Letter.—A demand by letter upon another to restore goods belonging to the writer is not sufficient to constitute a conversion if no notice is taken of it, but if an answer is sent falsely denying the possession of such goods, the demand becomes sufficient to charge the latter with a conversion. Pattee v. Gilmore, 18 N. H. 460; s. c., 45 Am. Dec. 385. The court say: "The demand by letter would of itself be insufficient. would impose no greater duty on the defendants than existed before. The fact that a party has in his possession goods deliverable on demand, implies that there is some one to whom the goods are to be Upon the reception of the delivered. letter the defendant, Gilmore, was not bound to transmit the goods to the plaintiff, and if he had taken no notice of the letter, no liability would have been im-

- e. AT HOME OF HOLDER.—A demand at the house of a person is insufficient, unless under such circumstances as to raise a presumption of actual notice to him before the commencement of the suit.1
- f. By Assignee for Benefit of Creditors.—Where an insolvent debtor has made an assignment for the benefit of his creditors, a demand for the delivery of property belonging to him and covered by the schedule of the assignment must be made by or in the name of such assignee, by his authority, and be accompanied by evidence of such authority.2

6. Want of, As Defence.—The defendant may show outstanding paramount title to the property, or that he has not converted it.

or that it has not been properly demanded.3

7. Non-compliance With,—a. NOT A CONVERSION.—(1) Ipso Facto. -A refusal to deliver goods when demanded is not per se a con-

version, but merely evidence thereof.4

(2) When Defendant Could Not Deliver.—(a) Generally.—A demand and refusal are never necessary as evidence of conversion. unless the other acts of the defendant are not sufficient to prove it: nor are they evidence when it was not in the defendant's power to deliver the property when demanded.5

But he denied having posed on him. any shingles, and that denial dispensed with the necessity of another demand, for after this it would have been useless to make a demand at any place. The demand made was, therefore, under the circumstances, enough to charge him with the conversion.

 White v. Demary, 2 N. H. 546.
 Demand by Assignee.—Thus, A, being insolvent, made a voluntary assignment of all his property to B, the plaintiff, for the benefit of his creditors. brought his action against the defendant's consignees claiming for advances and commissions, to recover damages for converting to their own use the property of A. Held, that no demand unless made in B's name and by evidence of such authority would enable B to maintain his suit in this form. Griffin v. Alsop, 4 Cal.

3. Blakey v. Douglass (Pa.), 5 Cent.

When Refusal Not a Conversion.—Refusal to comply with a proper and formal demand is not ipso facto conversion. It is only a fact from which a wrongful conversion may be inferred, provided the circumstances are such as to warrant that inference. If they are not, the case should be withdrawn from the jury by binding instructions to find for the defendant. The defendant may rebut either of the allegations of fact on which the plain-

tiff's right of action depends. For example, he may show outstanding, paramount title to the property in controversy, or that he has not wrongfully converted it to his own use, or that it has never been properly demanded by the plaintiff, etc. Blakey v. Douglass (Pa.), 5 Cent. Rep. 275.

4. State v. Patten, 49 Me. 383; Munger v. Hess, 28 Barb. (N. Y.) 75; Blakey

v. Douglass (Pa.), 5 Cent. Rep. 274.

Evidence of Conversion. - In trover a demand and refusal are only evidence of conversion; if an actual conversion is proved, a demand need not be proved to sustain the action. State v. Patten, 49 Me. 383.

Refusal to Comply is not ipso facto conversion, but only a fact from which conversion may be inferred if the other circumstances warrant such inference; if they do not, the jury should be instructed to find for defendant. Blakey v. Douglass (Pa.), 5 Cent. Rep. 274.
5. Gilmore v. Newton, 91 Mass. (9

Allen) 171.

Thus where A borrowed B's plough from C, who had possession but no right to lend it, and after using it a few days returned it to C, believing all the time that it belonged to C, held, that A's failure to comply with B's demand made after the return was no evidence of a conversion. Frome v. Dennis, 45 N. J. L. (16 Vr.) 515.

(b) Recause Not in Possession.—A demand and refusal are no evidence of a conversion, unless the thing demanded was at the time in the possession of the defendant or under his control; 1 for if at the time of demand the defendant had neither actual nor constructive possession of the property, no right to it nor control over it, and therefore could not comply, a demand and refusal only will not support an action of trover.² And where there has been no actual conversion of property, a demand and refusal cannot lay a foundation for the action of trover, unless at the time of the refusal the party has the property demanded in his possession so that he can comply with the demand.3

(c) Because Property in Custody of Law.—When goods or property demanded are in the custody of the law, as by attachment or otherwise, a failure to comply with the demand is not a conver-

1. Beckman v. McKav. 14 Cal. 250: v. Becknat v. McKay, 14 Cat. 250, Hill v. Belasco, 17 Ili. App. 194; Davis v. Buffum. 51 Me. 160; Andrews v. Shattuck, 32 Barb. (N. Y.) 396; Fillmore v. Horton, 31 How. (N. Y.) Pr. 424; Barrows v. Keene (R. I.), 4 New Eng. Rep. 271; Morris v. Thomson, 1 Rich. (S. C.) 65; Garvin v. Luttrell, 10 Humph. (Tenn.) 16; Buck v. Ashley, 37 Vt. 475; Yale v. Saunders, 16 Vt. 243.

A Demand and Refusal is no Evidence

of a Conversion, unless the jury are satisfied of the plaintiff's title and the defendant's possession. Beckman v. Mc-

Kay, 14 Cal. 250.

2. Davis v. Buffum, 51 Me. 160; Yale

v. Saunders, 16 Vt. 243.

To Show a Conversion the plaintiff must prove either a refusal to deliver upon a previous demand, when the defendant had the goods in his possession and could have complied with the demand. or a fraudulent conversion of the goods before demand, or that the defendant had parted with the goods so as to evade a. demand. Andrews v. Shattuck, 32 Barb. (N. Y.) 396.

It is only when a party has possession or control of the property in question that a refusal to deliver it on demand constitutes evidence of conversion. Fillmore v. Horton, 31 How. (N. Y.) Pr.

Bailee Not in Control .- A refusal by a bailee to give up property upon demand is not a conversion, nor evidence of a conversion, when it is not within his control, having been stolen from him.

Buck v. Ashley. 37 Vt. 475.

Demand of Husband—When Title in Wife.-Something more than a demand of the husband of personal property, and are fusal by him to deliver it, is necessary to prove a conversion by him where he

has no possession of the property, and has parted with whatever title he had to his wife. Barrows v. Keene (R. I.), 4 New Eng. Rep. 271.

Defendant Not in Possession. - Demand and refusal were held not evidence of the conversion of slaves where the defendant had no interest in or control over them, and put his refusal on the ground that he was not in possession. Morris v. Thomson, I Rich. (S. C.) 65.

When Goods are Attached.—A demand and refusal are not always conclusive proof of a conversion; as when goods are attached in the hands of the de-This is, however, matter of fendant. defence. Garvin v. Luttrell, 10 Humph.

(Tenn.) 16.

3. Kelsey v. Griswold, 6 Barb. (N. Y.)

4. See Garvin v. Luttrell, 10 Humph. (Tenn.) 16.

Seized on Attachment.-A deposited in the hands of B certain promissory notes to be collected. Soon afterwards process of foreign attachment was served upon B as trustee of A. A then demanded the notes of B, who refused to deliver them on the ground that he had been summoned as the trustee of A. In an action of trover, brought by A against B, the refusal of B to deliver the notes was held not to be evidence of a conversion. Fletcher v. Fletcher, 7 N. H. 452; s. c., 28 Am. Dec: 357.

Seizure on Libel.—A vessel and her

cargo were seized and libelled by a collector of customs for a breach of the revenue laws. Upon the petition of the owner, a remittitur was granted by the secretary of the treasury, and an order for the restoration of the property was issued from the district court. secretary afterwards wrote to the district

- (3) When Refusal Qualified.—A qualified refusal to deliver the goods claimed is not per se a conversion, but the question should be left to the jury.¹ And where a refusal to deliver property may be considered only as the result of a reasonable hesitation in a doubtful matter, it is not sufficient evidence to prove a conversion.²
- (4) When Held under Contract.—In trover a demand and refusal are not evidence of conversion if there is an oral agreement that the defendant should retain the possession of the goods as collateral security; although by a previous written agreement the defendant was bound to deliver them on demand.³

(5) When Property Previously Converted.—If the grantor in a bill of sale of personal property, acknowledging receipt of the consideration therein named, retains possession of the property, and

attorney to return the certificate of remittitur that it might be revoked, of which orders the collector was notified. Upon demand upon him for the property, the collector refused to deliver it on account of the proceedings of the secretary. Afterwards the remittitur was revoked, and the owner obtained possession of the property, under an order of court, by giving a bond therefor, and brought trover against the collector. Held, that the property in the hands of the collector was in the custody of the law, and that his refusal to deliver it was not a conversion; and that the plaintiff having admitted by his petition to the court by the giving of the bond that it was so in the custody of the law, was estopped from charging the collector as a wrong-doer. Barnes v. Taylor, 29 Me. 514.

1. Thomson v. Sixpenny, etc., Bank,

5 Bosw. (N. Y.) 293.

Question for the Jury .- If in an action for the conversion of the plaintiff's machinery in a workshop, by the refusal of the defendant's agent to allow it to be removed upon demand, it does not appear that the defendant or his agent ever actually used the machinery or had possession of it, otherwise than by being in the rightful possession of the workshop, and it appears that the defendant had instructed his agent to forbid the removal of any of the machinery, but to use no force to prevent it, and that upon a demand, which included some machinery to which the plaintiff had no right, the agent forbade the removal of any of it, the question should be submitted to the jury whether this was such a clear and absolute refusal to deliver the machinery to which the plaintiff was entitled as to amount to a conversion. Delano v. Curtis, 89 Mass. (7 Allen) 470.

2. Robinson v. Burleigh, 5 N. H. 225.

When the Demand for Property is made by an Agent, and the refusal to deliver is for defect of authority in the agent, or for a refusal to show his authority, it is not evidence of a conversion; otherwise where there is no request to see the authority, and the refusal to deliver the property turns on other and distinct grounds. Watt v. Potter, 2 Mason C. C. 77. See Dent v. Chiles, 5 Stew. & P. (Ala.) 383; s. c., 26 Am. Dec. 350.

Reasonable Hesitaney.—The defendant received goods from B, and had every reason to suppose B was the owner of such goods, though not positively knowing such to be the fact. A third person claimed to be the owner of the goods, and demanded them. The defendant did not set up any claim to the goods, nor dispute the claimant's right, but stated in substance his ignorance of claimant's ownership, that the property was left with him by B, and that he wished the order of his father or B before delivering the property. Held, that such refusal did not amount to a conversion of the goods. Carroll v. Mix, 51 Barb. (N. Y.) 212.

Where the plaintiff demanded of the defendant the goods sued for, and he answered that he had no claim to them himself, but would not give them up until he ascertained to whom they belonged, and the proof showed that the property was in dispute, and that the defendant had reasonable grounds to doubt the title of the plaintiff, held, that such qualified refusal, under the circumstances, did not amount to a conversion; but that, unless the defendant had shown such dispute, and reasonable grounds for doubt, the qualification of his refusal would not avail him. Zachary v. Pace, 9 Ark. 212; s. c., 47 Am. Dec. 741.

3. McIntosh v. Summers, I Cr. C. C.

25. 41.

again sells it, the second sale, and not a refusal to deliver the property to the first purchaser upon a subsequent demand, constitutes a conversion.¹

(6) When by Co-tenant.—As a general rule, trover will not lie in favor of one tenant in common against his co-tenant, because the possession of one is in law the possession of both.²

1. Philbrook v. Eaton, 134 Mass. 398.
2. Balch v. Jones, 61 Cal. 234; Starnes v. Quin, 6 Ga. 87; Hall v. Page, 4 Ga. 428; s. c., 48 Am. Dec. 235; Leonard v. Scarborough, 2 Ga. 73; Tyler v. Taylor, 8 Barb. (N. Y.) 588; Wilson v. Reed, 3 Johns. (N. Y.) 175; St. John v. Standring, 2 Johns. (N. Y.) 468; Farr v. Smith, 9 Wend. (N. Y.) 340; s. c., 24 Am. Dec. 162; Gilbert v. Dickerson, 7 Wend. (N. Y.) 449; s. c., 22 Am. Dec. 592; Harman v. Gartman, Harp. (S. C.) L. 430; s. c., 18 Am. Dec. 656; Welch v. Clark, 12 Vt. 681; s. c., 36 Am. Dec. 368; Barnardiston v. Chapman, Bul. N. P. 33, 35; s. c., cited in 4 East, 121; Fox v. Hanbury, Cowp. 450; Stancliffe v. Hardwick, 2 Cromp. M. & R. I; s. c., 5 Tyr. 551; Fisher v. Wigg, I Salk. 391; Fennings v. Grenville, I Taunt. 241; Holliday v. Gamsell, I T. R. 658. Littleton says (I Inst. 199, b, sec. 323) that "if two be possessed of chattels personal in common, by divers titles, as of a horse, an ox, or a cow, if the one takes the whole so himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done the wrong, to occupy in common, when he can see his time." And Coke, in his commentary on this passage, reiterates it with approbation. I Inst. 200, a. See Gilbert v. Dickerson, 7 Wend. (N. Y.) 449; s. c., 22 Am. Dec. 593.

Trover is not Maintainable by a tenant in common of a chattel against his cotenant, merely upon proof of a demand for the chattel, and a refusal to deliver it; for this is not enough to establish in such a case a conversion. Balch v. Jones, 61

Cal. 234.

As a general rule, it is not denied anywhere that trover will not lie in favor of one tenant in common against his cotenant. The reason is, that the one tenant is as much entitled to the possession as the other. The possession of one is, in law, the possession of both. Hall v. Page, 4 Ga. 428; s. c., 48 Am. Dec. 236; Leonard v. Searborough, 2 Ga. 73; Fox v. Hanbury, Cowp. 450; Stancliffe v. Hardwick, 2 Cromp. M. & R. I; s. c., 5 Tyr. 551; Fisher v. Wigg, I Salk. 391; Fennings v. Grenville, I Taunt. 211; Holliday v. Camsell, I T. R. 658; Co. Lit. 200, a.

Exceptions to the Rule. - An exception to this rule is where there is a destruction or loss of the common property by one of the tenants. Oviait v. Sage, 7 Conn. 95; Leonard v. Scarborough. 2 Ga. 73; Wilson v. Reed. 3 Johns. (N. Y.) 175; Hyde v. Stone, 7 Wend. (N. Y.) 354; s. c., 32 Am. Dec. 582; Barton v. Williams, 5 Barn. & Ald. 395; Farrar v. Beswick, I Mees. & W. 688. Another exception is found in the case of a sale of the whole property by one tenant. Tenants in common having equal rights of possession, and an un-divided property, one has no right to dispose of the property and transfer the possession, to the injury of the other. possession, to the injury of the other. In this regard they are unlike partners. Hinds v. Terry, Walker (Miss.), 80; Waddell v. Cook, 2 Hill (N. Y.), 47; s. c., 37 Am. Dec. 372; Wilson v. Reed, 3 Johns. (N. Y.) 178, 179; White v. Osborn, 21 Wend. (N. Y.) 72; Farr v. Smith, 9 Wend. (N. Y.) 338; s. c., 24 Am. Dec. 162; Hyde v. Stone, 7 Wend. (N. Y.) 354; s. c., 32 Am. Dec. 582; Lucas v. Wassen, 3 Dev. (N. C.) L. 398; s. c., 24 Am. Dec. 266; Cole v. Terry, 2 Dev. & B. (N. C.) L. 252; Barton v. Williams, 5 Barn. & Ald. 395; 2 Kent Com. 350, note. Compare Oviatt v. Sage, 7 Conn. 95; St. John v. Standring, 2 Johns. 95; St. John v. Standring, 2 Johns. (N. Y.) 468; Heath v. Hubbard, 4 East, The weight of authority is in favor of the exception as last stated, and it would seem too, that for the like reason, any user of the joint property, which amounts to a disclaimer of the title of the co-tenant, or which is inconsistent with his right of property, ought to constitute an additional exception. is no question, therefore, but that both the counsel and the court below rightly held the law, upon the general proposition. We think with the court, however, that this is not to be considered a tenancy in common. Hall v. Page, 4 Ga. 428; s. c., 48 Am. Dec. 237. Sale of the Whole Chattel by one tenant

sale of the Whole Chattel by one tenant in common is an injury for which the other may maintain trover against him. Warren v. Aller, I Pinn. (Wis.) 479; s. c., 44 Am. Dec. 406. The court say: "It was a question whether a sale of the whole chattel would entitle one tenant in

common to an action of trover or trespass against another, but it seems to be now well settled by the modern decisions, that in such cases the action of trover or trespass lies in favor of the injured party." Mersereau v. Norton, 15 Johns. (N. Y.) 179; Wilson v. Reed, 3 Johns. (N.Y.) 175; Farr v. Smith, 9 Wend. (N. Y.) 338: 775; Farr v. Shirth, y wend. (N. 1.7530, s. c., 24 Am. Dec. 162; Hyde v. Stone, 7 Wend. (N. Y.) 357; s. c., 22 Am. Dec. 582; Vickery v. Taft, r D. Chip. (Vt.) 242; Barton v. Williams, 5 Barn. & Ald. 395; Fennings v. Grenville, 1 Taunt. 241; Co. Lit. 200, a; Litt. sec. 323. The distinction attempted to be drawn, that for such injury trover lies, and not trespass, is not established or recognized in maintained. Warren v. Aller, I Pinn, (Wis.) 479; s. c., 44 Am. Dec. 408; 2 Kent Com. 250, note (a). The court say in the case of Wilson v. Reed, 3 Johns. (N. Y.) 175, that if one tenant in common of a chattel sells it, an action of trover will lie against him by the other co-tenant. Welch v. Clark, 12 Vt. 681; s. c., 36 Am. Dec. 368, Sale of Wool by Co-tenant.—In the case

Sale of Wool by Co-tenant.—In the case of Tubbs v. Richardson, 6 Vt. 442; s. c., 27 Am. Dec. 570, where the parties were tenants in common of a quantity of wool in the possession of the defendant, and he had sold a part of it and retained the rest, claiming the whole as his own, and refused to deliver any portion of it to the plaintiff on demand, it was held that trover would not lie, even for a moiety of what had been sold. Welch v. Clark, 12 Vt. 681; s. c., 36 Am. Dec. 369.

12 Vt. 681; s. c., 36 Am. Dec. 369.

Conversion of a Whale.—In Fennings v. Grenville, I Taunt. 241, the action was brought for the conversion of a whale, by the defendant, of which the plaintiff claimed to be joint owner. The defendant had cut up the whale and made it into oil. Still it was held that this was not such a destruction of the subject-matter as to sustain the action of trover, because the plaintiff could take and use the commodity in its altered state. Gilbert v. Duckerson, 7 Wend. (N. Y.) 449; s. c. 22 Am. Dec. 594.

Distributees—Conversion.—Distributees are tenants in common of an intestate's personalty, before distribution, and where one takes possession of the whole property, unless it be sold or destroyed by him, trover will not lie against him in favor of a co-tenant. Hyde v. Stone, 9 Cow. (N. Y.) 230; s.c., 18 Am. Dec. 501.

Vermont Doctrine.—Judge Bennett, in Welch v. Clark, 17 Vt. 681; s. c., 36 Am. Dec. 369, said: "I am not aware of any adjudged case in this State, that trover

could be sustained upon a sale of the entire chattel held in common, and perhaps there may be some reason to question the soundness of the doctrine in the State of New York on this subject. If one of two tenants in common take the whole chattel into his possession, the other has no remedy against him who has done the wrong, but to take it himself out of his possession when an opportunity presents. And if one tenant in common sells the whole chattel without the consent of the other tenant, the purchaser acquires a right to the possession of the whole chattel, as tenant in common, the possession of one being the possession of both, but a title to one moiety only. The tenant is not divested of any right by the sale of his co-tenant, but becomes a tenant in common with his purchaser, who suc-ceeds to all the rights of a tenant in common. How, then, is such a sale equivalent to a destruction of the chattel? No doubt the tenant may at his election affirm the sale, and sustain his action against his co tenant for a moiety of the consideration received. But if he brings his action for the tort, this is not an affirmance of the sale, though, probably, a recovery and satisfaction in trover against the co-tenant might have the effect to vest the entire chattel in the purchaser. It is not necessary, however, in this case for the court to decide upon the effect of a sale of a chattel by a co-tenant, and whether, if upon such sale trover will lie, there should be a distinction between trover and trespass."

In Order to Maintain Trover between Co-tenants, it is necessary to show a destruction of the property, or some act tantamount to a destruction, and an action will not lie by one co-tenant for a mere conversion by a defendant claiming under another co-tenant. Perminter v. Kelly, 18 Ala. 716; s.c., 54 Am. Dec. 177; Oviatt v. Sage, 7 Conn. 95; Webb v. Danforth. I Day (Conn.), 301; Hall v. Page, 4 Ga. 428; s. c., 48 Am. Dec. 235; Bell v. Layman, I T. B. Mon. (Ky.) 39; s. c., 15 Am. Dec. 83; Ripley v. Davis, 15 Mich. 82; Dyckman v. Valiente. 42 N. Y. 561; Green v. Edick, 66 Barb. (N. Y.), 567; Benedict v., Howard, 31 Barb. (N. Y.) 572; Tyler v. Taylor, 8 Barb. (N. Y.) 588; Wilson v. Nason, 4 Bosw. (N. Y.) 167; Hyde v. Stone, 9 Cow. (N. Y.) 230; s. c., 18 Am. Dec. 501; Nowlen v. Colt, 6 Hill (N. Y.), 461; s. c., 41 Am. Dec. 756; Small v. Robinson, 9 Hun (N. Y.), 420; Wilson v. Sandring, 2 Johns. (N. Y.) 175; St. John v. Sandring, 2 Johns. (N. Y.) 468; White v. Osborn, 21 Wend. (N. Y.) 72; Hyde

v. Stone, 7 Wend. (N. Y.), 354; s. c., 22 Am. Dec. 582; Powell v. Hill, 64 N. C. 169, 171; Rooks v. Moore, Busb. (N. C.) L. 1; s. c., 57 Am. Dec. 569; Lucas v. Wasson, 3 Dev. (N. C.) L. 398; s. c., 24 Am. Dec. 266; Agnew v. Johnson, 17 Pa. St. 373; s. c., 55 Am. Dec. 565; Gibson v. Vaughn, 2 Bail. (S. C.) 389; s. c., 23 Am. Dec. 143; Harman v. Gartman, Harp. (S. C.) L. 430; s. c., 18 Am. Dec. 656; Rains v. McNairy, 4 Humph. (Tenn.) 356; s. c., 40 Am. Dec. 651; Lowe v. Miller. 3 Gratt. (Va.) 205; s. c., 46 Am. Dec. 188; Sanborn v. Merrill, 15 Vt. 700; s. c., 40 Am. Dec. 70; Warren v. Aller, 1 Pinn. (Wis.) 479; s. c., 44 Am. Dec. 406; Barton v. Williams, 5 B. & Ald. 395; Heath v. Hubbard, 4 East, 110; Fennings v. Grenville, 1 Taunt. 241. Compare, as to a sale, Welch v. Clark, 12 Vt. 681; s. c., 36 Am. Dec. 368.

Trover by a Son succeeding to his Father's Personalty will lie to recover the value thereof, where administration is not granted to any one. Hyde v. Stone, 9 Cow. (N. Y.) 230; s. c., 18 Am. Dec. 501; 7 Wend. (N. Y.) 354; 22 Am. Dec. 582. See also Miles v. Boyden, 20 Mass. (3 Pick.) 213; Genet v. Tallmadge, I Johns. Ch. (N. Y.) 3; Cooper v. Thornton, 3 Brown Ch. 96, 186; Holloway v. Collins, I Eq. C. Abr. 300; Dawley v. Ballfrey, Gib. Eq. Cas. 103; Philips v. Paget, 2 Atk. 80; Dagley v. Tolforry, I P. Wms. 285; I Co. Lit. 84, a.

Co-tenant Selling Entire Property does not vest in the purchaser any more than his own interest. The other co-tenant may so consider it, and take the property when opportunity offers, or he may sue in trover for the conversion, and thereby vest in the purchaser the entire property. Rains v. McNairy, 4 Humph. (Tenn.) 356; s. c., 40 Am. Dec. 651. The court say: It is argued that as the sale by one tenant in common of his co-tenant's share passes the interest of the vendor only, the interest of the other co-tenant still remains in common with the purchaser, and therefore there can be no conversion by the act of sale. Bac. Abr. tit. Trover;

v. Layfield, r Salk. 292; Smith v. Oriell, r East, 318; Litt. sec. 323; And this doctrine was maintained in the case of Mersereau v. Norton, 15 Johns. (N. Y.) 179, where it was held that a sale was not such a destruction of the property as to destroy the tenancy in common.

common.

American Doctrine. — But the more recent American cases hold that as the assumption of authority over and actual sale of the property by a stranger will constitute a conversion, so the assuming

authority to sell, and actually making sale of the interest of another under a claim of title in the vendor, although he be a part owner, may be taken to be a conversion. for which an action of trover will lie. Weld v. Oliver, 38 Mass. (21 Pick.) 559; Melville v. Brown, 15 Mass. 82; White v. Osborn, 21 Wend. (N. Y.) 72; Lucas v. Wasson, 3 Dev. (N. C.) L. 398; s. c., 24 Am. Dec. 266. It is true, such sale does not vest in the purchaser any greater interest than that of the party making the sale; and the co-tenant, who is not consulted, may so consider it, and take the property when opportunity offers, but he may sue in trover for the conversion, and thereby vest in the purchaser the entire (N. Y.) 77; Rains v. McNairy, 4 Humph. (Tenn.) 356; s. c., 40 Am. Dec. 652.

Agent of Joint Owner—Sale of Entire

Property.—An agent of one joint owner. selling the entire chattel, is guilty of conversion, whether he had notice of a cotenant's right or not, and is liable in an action of trover by such co-tenant where neither negligence nor any fault whatever is imputable to the plaintiff, minter v. Kelly, 18 Ala. 716; s. c., 54 Am. Dec. 177. The court say: "It is clear Dec. 177. that one joint tenant, tenant in common, or partner cannot maintain trover against his companion for a thing still in possession; for the possession of one is the possession of both." It is, however, fully settled, that if one tenant in common destroy the thing in common, the other may bring trover. Heath v. Hubbard, 4 East, 110; Fennings v. Grenville, I Taunt. 241. And a late English author observes, that "a sale of the whole of the property by one of them, adversely, and in exclusion of the other, would, it seems, be a conversion of the other's share, for which he might maintain trover. Barton v. Williams, 5 Barn. & Ald. 395; 1 Arch. N. P. 454. This renders the law far more adapted to the rights and the wrongs of the respective parties than it was in the former times. He who sells his co-tenant's share of the property to a stranger, who will hold against him, has violated the relation he bore, and injured his companion as much, perhaps, as if he Why then had destroyed the property. should he not have a legal remedy against the wrongdoer, instead of requiring him to look to the purchaser for his interest in the property, and he to the wrong-doer? To sustain the general proposition, that when one joint owner of a chattel sells the entire chattel it is a conversion for which trover lies."

Execution against Co-tenant-Liability

(7) Where Agent Holding for Principal.—Where the defendant never had any possession of or control over the property claimed by the plaintiff, except as agent of one who was entitled to hold it, his refusal to deliver on demand could not constitute or be evidence of a conversion. Thus, an agent having received the possession of a chattel for his principal is not bound to deliver it to the true owner, and a refusal by him, thus explained, would be no evidence of conversion. But it is incumbent on him to prove his explanation; his mere declaration at the time that he was acting by the orders of somebody else amounts to nothing.2

b. Conversion.—(1) When Refusal Absolute—(a) Generally.— A wrongful refusal to deliver up property on reasonable demand

will support trover.3

of Officer.-An action in trover will lie against an officer who sells the whole property on execution against a creditor. White v. Morton, 22 Vt. 15; s. c., 52 Am. Dec. 75. See also Lothrop v. Arnold, 25 Dec. 75. See also Lothrop v. Arnou, 25 Me. 136; s. c., 43 Am. Dec. 256; Harker v. Dement, 9 Gill (Md.), 7; s. c., 52 Am. Dec. 670; Waddell v. Cook, 2 Hill (N. Y.), 47; s. c., 37 Am. Dec. 372; Rains v. McNairy, 4 Humph. (Tenn.) 356; s. c., 40 Am. Dec. 652.

In Tennessee it is held that one joint owner of property may recover against the sheriff who sold the entire chattel under an execution against the other joint owner. Rains v. McNairy, 4 Humph. (Tenn.) 356; s. c., 40 Am. Dec. 651. The sheriff in that case had Dec. 651. The sheriff in that case had notice. Perminter v. Kelly, 18 Ala. 718; s. c., 54 Am. Dec. 178. However. it has been said that the attaching of a chattel on process against a tenant in common is not such a destruction as to give the other tenant a right of trespass against the attaching officer or creditor. Heald v. Sargeant, 15 Vt. 506; s, c., 40 Am. Dec. 694; Welch v. Clark, 12 Vt. 681; s. c., 36 Am. Dec. 368. The court say: "That the sale by the defendant below was such an assumption of authority over another's property as to amount to a conversion, there can be no doubt. If a party claim the property in the chat-tels as his own, or even assert the right of another over them, it is evidence of a conversion; and where a person's property is sold by one, whether for his own use or the use of another, it is a conversion for it is a tortious act, and the gist of the action. Parker v. Godin. 2 Str. 813; Perkins v. Smith, I Wils. 328."

Conversion by Co-tenant-Partial Restoration .- In trover by a tenant in common of chattels against his co-tenant, where the defendant produces some of the articles, and admits that others have

been lost or destroyed, but does not say by him, it is for the jury to determine whether or not there has been a conversion by the defendant, and the amount of the damages and a direction by the court to find a particular sum is erroneous. Hyde v. Stone, 9 Cow. (N. Y.) 230; s. c., 18 Am. Dec. 501.

Mingling of Wheat - Conversion .-Mingling wheat, belonging to two persons. in a common bin, with the knowledge and assent of both, makes them tenants in common, and if one of them disposes of the whole without the other, he is liable in trover. Nowlen v. Colt, 6

18 hable in trover. Nowien v. Colt, v. Hill (N. Y.), 461; s. c., 41 Am. Dec. 756.

1. Hunt v. Kane, 40 Barb. (N. Y.) 638.

2. Carey v. Bright, 58 Pa. St. 70.

3. Overstreet v. Nunn, 36 Ala. 649; Ray v. Light, 34 Ark. 421; Estes v. Boothe, 20 Ark. 583; Boothe v. Estes, 6 Ark. 758; Boothe v. Estes, 6 Ark. 758; Boothe v. Care, 758. 16 Ark. 104; Clark v. Hale, 34 Conn. 398; Thompson v. Rose, 16 Conn. 71; Yaughan v. Webster, 5 Harr. (Del.) 256; Hare v. Atlanta City Brewing Co., 65 Ga. 348; Hayes v. Houston, 86 Ill. 487; Davis v. Taylor, 41 Ill. 405; Ingalls v. Bulkley. 15 Ill. 224; Pullen v. Bell, 40 Me. 314; Buck v. Rich, 78 Me. 431; Miller v. Grove, 18 Md. 242; Dietus v. Fuss. 8 Md. 148; Henckley v. Baxter, 7 Shass. (13 Allen) 139; Way v. Davidson, 78 Mass. (12 Gray) 465; s. c., 74 Am. Dec. 604; Folsom v. Manchester, 65 Mass. (11 Cush.) 334; Magee v. Scott, 63 Mass. (9 Cush.) 138; Chamberlin v. Shaw, 35 Mass. (18 Pick.) 278; s. c., 29 Am. Dec. 586; Kinder v. Shaw, 2 Mass. 398; Figuet v. Allison, 12 Mich. 328; 390; riquet v. Allison, 12 Mich. 320, O'Donoghue v. Corby, 22 Mo. 394; Stone v. Clough, 41 N. H. 290; Ferguson v. Clifford, 37 N. H. 86; Casper v. Wallace, 50 N. Y. Super. Ct. (18 J. & S.) 147; Lockwood v. Bull, 1 Cow. (N. Y.) 322; s. c., 13 Am. Dec. 539; Judah v. Kemp, 2 Johns. Cas. (N. Y.) 411; Wheeler & W.

In trover a demand and refusal is evidence of a conversion, conclusive if not rebutted or explained. If upon demand the defendant said he would retain the goods demanded, and that he knew a suit would be brought, this is evidence of a conversion.2 And where one party has the property of another in his possession and refuses to surrender it upon demand, a jury may infer a conversion.3 And a general refusal to deliver over a number of

Manuf. Co. v. Heil, 115 Pa. St. 487; West v. Tupper, 1 Bail. (S. C.) 193; Nelson v. King, 25 Tex. 655; Sterns v. Houghton, 38 Vt. 583; Irish v. Cloyes, 8 Vt. 33; s. c., 30 Am. Dec. 446. 1. Dietus v. Fuss. 8 Md. 148; Magee v.

Scott, 63 Mass. (o Cush.) 148; s. c., 55

Am. Dec. 49.

2. Allen v. Ogden, I Wash. C. C. 174. 3. Norton v. Dreyfuss, 106 N. Y. 90. Subsequent Attachment and Sale —A demand and refusal, where the property is in the possession of the defendant, is evidence of a conversion, but capable of being rebutted. A subsequent attachment of it by another party as property of plaintiff, with sale and application of it to his debts, does not overcome such evidence of defendant's conversion, though it would mitigate the damages. Irish v. Cloyes 8 Vt. 33; s. c., 30 Am. Dec. 446.
The Unconditional Refusal of the person

in possession of a chattel belonging to another to deliver it upon the demand of the owner, although it is at a great distance from the place of demand, is such a conversion that trover will lie. Clark v.

Hale, 34 Conn. 398.

Conditional Refusal .- Trover may be maintained after demand and refusal, though defendant had given plaintiff a paper acknowledging the possession of the property, and agreeing to keep it free of expense, "and to deliver to him on demand such . . . as I admit to be" his property, and to keep the balance "until such time as the question of title is settled." Buck v. Rich. 78 Me. 431.

Claim of Right to Retain .- If a defendant in trover did not question the right of the plaintiff to demand the goods in dispute, but refused to deliver them on a right in himself to detain them, the refusal is sufficient evidence of a conversion. West v. Tupper, 1 Bail, (S. C.) 193.

Joint Conversion.—A demand upon and refusal by a person who claimed property, and his vendee, who together had possession, was held to prove a joint con-Chamberlin v. Shaw, 35 Mass. (18 Pick.) 278; s. c., 29 Am. Dec. 586.

Tortious Conversion. - The refusal to deliver up another's chattel on demand is a tortious conversion of the chattel.

Wheeler & W. Manuf. Co. v. Heil. 115 Pa. St. 487.

Conversion of an Account -A refusal to redeliver to the owner a written account which he has presented for payment is a conversion, and the defendant cannot excuse himself by showing that nothing was due. O'Donoghue v. Corby, 22 Mo. 394.

Conversion of Beer Kegs .- Where beer was shipped by railroad to a buyer, who agreed to return the kegs, held, that when he received the bill of lading, paid the freight, and allowed the kegs of beer to stand in the depot, he thereby received possession of them, and a refusal to return them after demand was conversion. Hare v. Atlanta City Brewing Co., 65 Ga. 348.

Conversion of Check.—A drew a check payable to the order of B. B indorsed and delivered the check to C. Certification was refused, and C called on A, who gave C another check, payable to C's order, whereupon C demanded back the original check, which A refused to return. Held, a conversion. Casper v. Wallace. 50 N. Y. Super. Ct. (18 J. & S.) 147.

Conversion of Land Scrip.—Land scrip

is treated in law as chattel, and unlike an ordinary title-deed, has a market value; a bailor thereof is not required to pursue it in the hands of a third person, or to institute suit to establish his right to it or a portion of it, as against its present holder; but may treat the bailee's refusal to redeliver it as a conversion, and sue for its value. Nelson v. King, 25 Tex.

Conversion of Note.-Where a party who has transferred a note by indorsement as collateral security pays the original debt, he may maintain an action of trover against his creditor for the conversion of the note, upon the latter's refusal to deliver it on demand. Overstreet v.

Nunn, 36 Ala. 649.
Conversion of Note by Pledgee.—The pledgee of a promissory note, who has delivered it up to the pledgeor under an agreement that the latter shall return it or another note which he has refused to do on demand, may maintain an action against him for the conversion of the note, although he obtained it without fraud.

Way v. Davidson, 78 Mass. (12 Gray) 465; s. c., 74 Am. Dec. 604.

Conversion of Note after Payment. Trover may be maintained by the maker of a promissory note against the payee, after the same is fully paid, if the payee, having the note in his possession, refuses to deliver it to the maker upon demand. or if after payment the pavee disposes of the note. Stone v. Clough, 41 N. H. 290.

Conversion of Mortgaged Property.-An attachment of mortgaged property, followed by a refusal to give it upon demand made, and exhibition of the mortgage and mortgage debt, is competent and sufficient evidence of conversion, whether at the time of demand the property is actually in the possession of the officer making the attachment or not. Ferguson v.

Clifford, 37 N. H. 86.

Fraudulent Representations in Exchange Conversion of Diamond Ring.—Where a stranger in Chicago was induced to exchange a diamond ring worth nearly \$1200 for \$250 and "a city lot" represented by the vendor to be worth \$1000. but, after the deed was recorded, found that the lot was five by ten feet in dimensions, and located fourteen miles south of Court-house Square, held, that on tendering the \$250 and a reconveyance of the lot, and vainly demanding the diamond, he was entitled to recover in trover Haves v. Houston, 86 Ill. 487. therefor.

Same-Conversion of Horse. - Two parties exchanged horses, the defendant warranting his horse sound, and granting the privilege of returning her after trial if she proved otherwise. She proved unsound, and the plaintiff in a few days returned her, and demanded his own, which the defendant refused. Held, that the plaintiff had a right to rescind the contract, and therefore the refusal of the defendant to restore the plaintiff's horse was a conversion of the property, and made him liable in a suit for the value. Miller v. Grove, 18 Md. 242.

Conversion by Administrator.—Where the plaintiff, a surviving partner, demanded certain notes, which were partnership effects, of the administrator of his deceased partner, who refused to deliver them to him, claiming the right to hold them for the benefit of the deceased's estate, held, that the refusal was an absolute one, accompanied by an assertion of an absolute right, and was evidence of a Stearns v. Houghton, 38 conversion.

Vt. 583.

Conversion by Bailee. - Where the contract of bailment was that, upon a certain contingency, the bailee was to account to the bailor for the property, and the proof

was that upon legal demand the bailee refused to deliver the property, disputed the bailor's right to it, and offered in no way to account for it, the bailor was held to have the right to bring trover after the demand and refusal. Estes v. Boothe 20 Ark. 583.

The plaintiff left property, which he had purchased at an execution sale, with the defendant, for the purpose of allowing the judgment debtor to redeem it, but if he did not choose to do so, the defend. ant was to deliver the property to the plaintiff when demanded, or account for it. when called upon; the debtor not having redeemed, he refused to do either. Held, that trover would lie. Boothe v. Estes, 16 Ark, 104.

Conversion of Grain by Landlord.—It was agreed by defendant and a third party that the latter should take defendant's farm, and raise grain thereon on shares. doing also other farm duties; while the grain was yet growing, the tenant mortgaged it to the plaintiffs, and it was gathered by the latter, but immediately taken possession of by the defendant, who drew it off, threshed and stored it, and refused to deliver any part thereof to the plaintiffs, claiming an exclusive right to it. Held, that this amounted to a conversion of the property by the defendant. Figuet v. Allison, 12 Mich. 328.

Conversion of Watch by Husband and Wife.-In an action of trover against a husband and wife for a watch delivered by the plaintiff to the woman, the defence was that the plaintiff gave her the watch either for her own, or to induce her to commit a crime. The judge ruled that if the jury were not satisfied upon the evidence of either of these defences, and if the plaintiff demanded the watch of the wife and she refused to deliver it, the plaintiff could recover. Held, that the demand and refusal were sufficient prima facie evidence of a conversion, although it did not positively appear that the wife had possession of the watch at the time of such demand and refusal, as there was no legal presumption that the watch was then in the husband's possession or under his control. Folsom v. Manchester, 65 Mass. (11 Cush.) 334.

Refusal of Captain to Deliver Goods .--The refusal of the captain to deliver goods to the assignee of the consignee on tender of freight, without any objection as to the amount, is sufficient evidence of conversion. Judah v. Kemp, 2

Johns. Cas. (N. Y) 411.

Refusal to Deliver Building .- Where the owner of land refuses to deliver a building thereon which is the personal

articles upon the demand of their owner is evidence of a conversion, although the party making the refusal has only a portion of the articles demanded under his control. But one who, having received a wagon innocently from one not the owner, with a view to buying it, having returned it to the one from whom he received it, upon being informed by the owner that it was his, but before demand or suit, is not liable for the conversion thereof, but otherwise if he so returns it after the owner claims it.2 Where a party holds property, and refuses to deliver it, on demand made, because he doubts the authority of the person making such demand, he must place his refusal distinctly upon that ground; otherwise the refusal affords presumptive evidence of a conversion.3

(b) By Purchaser.—A bona fide purchaser of property from one who has no right or authority to sell the same acquires no title as against the true owner or the person entitled to the present possession, and if on proper demand he refuses to deliver the property to such owner or person, he will be liable in trover for the con-

version 4

Thus where a person who had purchased goods of one who had no right to sell, upon demand by the owner said he should not deliver them up at present, having bought them of the vendor, supposing them to be his, and afterwards held the goods for the space of seven days, without offering to return them, held that this was sufficient evidence of a conversion.⁵ And where a guardian without right sold property of deceased ward, and the administrator of the deceased brought trover against the vendee, after demand and refusal, the court held that the demand and refusal were evidence of a conversion from the time the vendee acquired posses-

(c) By Pledgee.—If chattels are pledged without authority by a person to whom they have been intrusted by the owner for a special

Pullen v. Bell, 40 Me. 314; Hinckley v. Baxter, 95 Mass. (13 Allen) 139.

 Ray v. Light, 34 Ark. 421.
 Rembaugh v. Phipps, 75 Mo. 422.
 Ingalls v. Bulkley, 15 Ill. 224.
 See Jorgansen v. Tait, 26 Minn. 327;
 Sargent v. Gile, 8 N. H. 325; Dealy v. Lance, 2 Spears (S. C.), 487; Houston v. Parks of Minn. 276: S. C. 33 Am. Dyche, 1 Meigs (Tenn.), 76; s. c., 33 Am. Dec. 130; Mann v. Arkansas Valley Land & Cattle Co., 24 Fed. Rep. 261.

Thus A delivered a horse to B, agree-ing at the time with him that if B would do a certain piece of work within a limited time he should have the horse, but that the horse should remain the property of A until the work should be completed. B abandoned the work without completing it, and sold the horse to C who upon A's claiming the horse said that A must look to B. look to B. Held, that A's right was

property of another, this constitutes a not divested by the delivery of the horse conversion. Davis v. Taylor, 41 Ill. 405; to B, and that there was evidence of a conversion of the horse on the part of C. Houston v. Dyche, I Meigs (Tenn.), 76;

s. c., 33 Am. Dec. 130.
5. Sargent v. Gile. 8 N. H. 325.
Purchase of Cattle Strayed from the Range.—One who purchases for value and without notice, from a stranger, cattle that have strayed from their range and taken possession of by such stranger. will be liable for conversion if he refuses to deliver them to their owner on demand made by him. Mann v. Arkansas Valley Land & Cattle Co., 24 Fed. Rep. 261. Purchaser of Mortgaged Chattels.—A

mortgaogr of chattels, with intent to defraud the mortgagee, sold them to a

6. Dealy v. Lance, 2 Spears (S. C.), 487.

purpose, the pledgee, after notice of the true ownership, and a demand by the owner, which he refuses, is liable to a subsequent purchaser of the owner's rights in trover after a demand by such purchaser, although he has sold the chattels since the first demand and before the second.1

(2) In Case of Failure to Deliver According to Promise.—Where the mortgagor of a chattel, on demand of the mortgagee, agreed to pay the mortgage or deliver the property on a certain day, and on that day failed to do either, held, that this was sufficient proof of conversion.2 One coming into possession of property by agreement with the owner, and afterwards selling it according to the agreement for the sole use and benefit of the owner, cannot be guilty of conversion of such property. But if the proceeds thereof are in money, and he refuses to pay it over on reasonable demand or according to the terms of the agreement, he will be liable for so much money had and received; or if the proceeds is in other property, upon a like refusal he will be guilty of a conversion of such proceeds, and liable in damages.3

(3) When Sold After Demand.—Selling property after demand and taking the proceeds is a conversion, and renders the party liable in an action of trover.4

- c. MERE NEGLECT NO CONVERSION.—A mere neglect, on the part of the defendant, to deliver upon demand, unless the goods are in his possession, is no conversion. The remedy in that case is by another form of action.⁵ Thus, if a party makes no claim to borrowed property in his possession, and no objection to the owner's taking it, but only refuses to carry it to the latter's house, claiming that he is under no obligation to do so, although it is his duty to return it, his refusal to do so is no conversion. And the omission or neglect to perform a promise made to the plaintiff, to procure promissory notes from those who rightfully held them, and deliver them to the plaintiff, cannot constitute a conversion, if the defendant never had the notes in his possession or control, and was never able in his individual capacity to obtain possession or control over them.7
- d. SILENCE EQUIVALENT TO A REFUSAL.—Where a plaintiff, before bringing trover for a machine, went to the defendant's place of business, paid the amount due, and asked where the machine

1. Carpenter v. Hale, 74 Mass. (8 Gray) 157.

 Mattingly v. Paul, 88 Ind. 95.
 Chase v. Blaisdell, 4 Minn. 90.
 Burnham v. Marshall, 56 Vt. 365.
 Whitney v. Slauson, 30 Barb. (N. Y.) 276; Bowman v. Eaton, 24 Barb. (N. Y.) 528.

Driving Away Cattle-Delay in Restoring .- A cow going at large in a highway, without a keeper, joined a drove of cattle without the knowledge of the driver, and was driven to a distant place, and there pastured with the other cattle. owner of the cow called on the driver after his return, made inquiries, and demanded the cow. On the return of the drove a few months afterwards, the driver delivered the cow to the owner, who received her. Held, in an action of trover against the driver, that his omission to deliver the cow on demand was not evidence of conversion. Wellington v. Wentworth, 49 Mass. (8 Metc.) 548.

Farrar v. Rollins, 37 Vt. 295.
 Hunt v. Kane, 40 Barb. (N. Y.) 638.

was, to which defendant replied, "In our warehouse:" and the plaintiff then made a formal demand for it, and defendant made no

reply, held, that his silence was equivalent to a refusal.1

- 8. One Excuse Waives Others.—Where a person of whom a demand is made refuses to deliver possession, and gives his reason or excuse for such refusal, by giving a special excuse he waives all others.² Thus, where he refuses to deliver the property demanded, alleging as an excuse that it has been taken from his possession by another person, he cannot afterwards object to the authority of the party who made the demand; 3 or where he has absolutely refused to deliver any property to the demandant, he cannot afterwards object that the demand was for too much.4
- 9 Effect of an Offer to Return Subsequent to Demand.—Since demand and refusal are evidence of a conversion, and nothing more. therefore, if the defendant refuses to deliver goods on demand, and afterwards, before the commencement of an action therefor, signifies to the plaintiff his willingness that he may take them away, this does not constitute a conversion. But one who after demand withholds the goods of another cannot divest him of his rights of action for the conversion by a subsequent offer to return them.6
- 10. How Far a Waiver of Previous Conversion. —A demand on the part of the owner for the return of his property, or any other effort

1. Richards v. Pitts Agricultural

Works, 37 Hun (N. Y.), 1.

2. The fact that on demand for a specific chattel one refused to surrender it, and did not deny being in possession thereof, may be regarded as an admission by him that he was in possession thereof, if the plaintiff was entitled to possession.

Kimball v. Post, 44 Wis. 471.

3. Where one receives a chattel from another under a stipulation in writing that he will return it "whenever called for, in good repair and free from expense," he must deliver it on demand, or excuse the non-delivery. If, when demand is made by a third person, in whose hands the writing was placed for that purpose, the bailee does not call on him to produce his authority, but places his refusal upon the ground that the chattel had been removed from his possession by some other person, he cannot object, in his defence to an action of trover, that the agent did not show an authority when the chattel was demanded. Spence v. Mitchell, 9 Ala. 744.

Absolute Refusal by Officer—Waiver,

when .- But if upon such demand being made there is an unqualified refusal by the officer to deliver the goods, without requiring any evidence of the vendor's title, or expressing any doubts concerning it, the jury may presume a waiver of any information on the subject. Thompson v. Rose, 16 Conn. 71; s. c., 41 Am. Dec. 121.

4. Excessive Demand-Waiver.-Where the owner of property, which came lawfully to defendant's possession, demands a delivery of more than he is entitled to. the defendant, if he refuses absolutely to deliver any, cannot afterward object that the demand was for too much. King v. (N. Y.) Fitch, 2 Abb. App. Dec.

5. Wells v. Kelsey, 15 Abb. (N. Y.) Pr. 53; Powers v. Bassford, 19 How. (N. Y.) Pr. 309.

A Conversion Based upon an Alleged Refusal to Deliver Goods on Demand held waived by a subsequent offer of defendant to deliver unconditionally, on terms fixed by plaintiff; and also by plaintiff taking away part of the property in two instances with defendant's consent, when he was unable to pay the amount of what he admitted was a lawful charge upon it; and further, by an agreement that the residue was to be given up and said amount paid, the performance of which was prevented by plaintiff refusing to give a receipt in full on account of the property. Lander v. Bechtel, 55 Wis.

6. So held as to a lot of glass-ware moulds, which after demand and refusal had become rusted and worthless. Whit-

aker v. Houghton, 86 Pa. St. 48.

made by him for its recovery, with which the wrong-doer refused to comply, is not of itself a waiver of a previous conversion.

- V. IN DEVISE AND LEGACY.—1. Necessary, when.—No action lies on a bond by an executor for the faithful execution of his trust for the benefit of a legatee, to whom a personal legacy is bequeathed. and payable at a day certain, until after a demand of the legacy by the legatee. Where property is charged by a testator with a legacy "to be paid" by the devisee "in good property," there must be a demand of the amount "to be paid in good property," according to the tenor of the will, before an action will lie there-
- 2. Unnecessary, when.—No previous demand is necessary to maintain an action by a devisee whose land has been taken by a creditor of the deceased, on the bond of the executor, who was also residuary legatee, and gave bonds as such to pay all debts.4

VI IN DOWER -- 1. Necessary -- a. GENERALLY -- An action of dower cannot be maintained before demand has been made to as-

sign the dower claimed.5

b. WHERE HUSBAND DID NOT DIE SEIZED.—The widow is entitled to dower in an estate of which her husband did not die seized only from the time of demand, or, if no demand is made, from the time of filing the bill.6

c. By DIVORCED WIFE.—A demand is necessary to enable a divorced wife to recover dower from the estate of her husband.7

1. Winterbottom v. Morehouse, 70 Mass. (4 Gray) 332; Cobb v. Wallace, 5 Coldw. (Tenn.) 539; Manwell v. Briggs, 17 Vt. 176.

2. Conant v. Stratton, 107 Mass. 474, 483; Newcomb v. Williams, 50 Mass. (9 Metc.) 525. 536; Jones v. Richardson, 46 Mass. (5 Metc.) 247; Prescott v. Parker, 14 Mass. 429; Paine v. Gill, 13 Mass. 365.

In Prescott v. Parker, supra, the court say: " From analogy to other cases where a demand is required, although it is not in this case expressly made necessary by the statute, yet we think the intention of the legislature may be presumed, that the executor should not be liable to an action on the bond until he was notified by a demand that the legatee intended to claim the legacy. Until such a demand. the executor cannot be reasonably said to have been guilty of a breach of his trust, or even of a neglect of duty. The legacy being made payable at a fixed time, makes no difference as to the question, Whether, in such a case, a previous demand would be held necessary to support the action for the legacy given by our statute, has not been determined; nor is it necessary to decide that question in the present case. It seems to us, however, on general principles, that it would be considered an essential point in the case supposed."

The same court say, in the subsequent case of Miles v. Boyden, 20 Mass. (3 Pick.) 218, that "a demand by one having authority to receive and to discharge the legacy after it became pavable might have been insisted upon by the defendant. In the case of Prescott v. Parker, 14 Mass. 431, it was held that no action on a bond given for the faithful performance of the trust of executor would lie in consequence of his not having paid a legacy payable at a day certain, which had passed, but which legacy had not been demanded; the executor in such case not being in any fault. And the court intimated an opinion that the same rule would apply if the legatee should sue for his legacy according to the provision of the statute. And we are now of that opinion. The executor is not obliged to seek the legatee, but may properly wait until the money is demanded."

Plummer v. Roads, 4 Iowa, 587.
 Paine v. Gill, 13 Mass. 365.

5. Ford v Erskine, 45 Me. 484; Parker, v. Murphy, 12 Mass. 485; Jackson v. Churchill. 7 Cow. (N. Y.) 287; s. c., 17 Am. Dec. 514; Ellicott v. Mosier, 7 N. Y. 201.
6. Chiswell v. Morris, 14 N. J. Eq. (1

McCart.) 101.

7. Merrill v. Shattuck, 55 Me. 370.

d. To Entitle to Damages.—At common law the claim for dower, and the claim for damages for the detention of dower, were several and distinct causes of action, and there was no right to damages for a detention of dower until after a demand; and damages could be recovered in an action other than the writ for dower from the time of demand, whenever that may have been.¹

2. Unnecessary.—a. UNDER STATUTE.—By statute in some States, the heir of a husband who dies seized of lands is obliged to assign to the widow her dower without demand, and the widow can recover damages for the neglect to assign without demand.² In others, notice to the administrator of proceedings in the probate court³ for assignment of the widow's dower is not necessary; ⁴ and in others a demand by an infant is unnecessary.⁵

b. To Relieve from Expenses Incurred.—It would seem that unless especially required by statute a previous demand need not be made to relieve from the expenses incurred in proceedings

to secure dower.6

3. How Made.—A demand of dower may be made in writing or by parol, and in either case will be equally effective. It is not necessary that it should be demanded on the land.

Effect of an Absolute Divorce.—As a rule, the effect of a divorce from the bond of matrimony upon property rights is to put an end to all rights depending upon the marriage, and not actually vested, and of course extinguishes the wife's right of dower. Billan v. Hercklebrath, 23 Ind. 71; Whitsell v. Mills, 6 Ind. 220; Stilphen v. Houdlette, 60 Me. 447; Barbour v. Barbour, 46 Me. 9; Given v. Mart, 27 Me. 212; Rice v. Lumley, 10 Ohio St. 596; Miltimore v. Miltimore, 40 Pa. St. 157; Burdick v. Briggs, 11 Wis. 126. Compare Wait v. Wait, 4 N. Y. 95; Forrest v. Forrest, 6 Duer (N. Y.). 102, 153; Mansfield v. McIntyre, 10 Ohio, 27.

Dower after Divorce—Statutory Provisions.—But in many States there are statutory provisions to the effect that, where the wife is the innocent party, she shall be entitled, immediately on the divorce, to dower in the lands of the husband, in the same manner as though he were dead. See Merrill v. Shattuck, 55 Me. 370; Smith v. Smith. 13 Mass. 231. And her right extends not only to lands whereof the husband was seized at the time of the dissolution of the marriage, but also to those aliened during the coverture. Harding v. Alden, 9 Me. (9 Greenl.) 140; s. c., 23 Am. Dec. 549; Davol v. Howland, 14 Mass. 210. See Cunningham v. Cunningham, 2 Ind. 233.

1. See Whitaker v. Greer, 129 Mass.

Under Massachusetts Gen. Stat. ch. 135, damages cannot be recovered for the detention of dower for a period prior to the demand upon which the action is founded. Whitaker v. Greer, 129 Mass. 417.

2. Hopper v. Hopper, 22 N. J. L. (2 Zab.) 715.

3. See Mich. Rev. Stat. 1838, 262, ch. 2.
4. Campbell, Appellant, 2 Doug.

(Mich.) 141.
5. In Indiana, by the act of January 28, 1847, a demand of dower of infants is unnecessary. McCormick v. Taylor, 2 Ind. 336.

At Common Law.—An infant can assign dower, but if he so assign he will be protected against the consequences of excessive assignment, and may have his writ of admeasurement of dower. McCormick v. Taylor, 2 Ind. 336.

An Infant cannot defeat an assignment of dower by entry. McCormick v. Tay-

lor, 2 Ind. 336.

6. In New York.—Where, pending a suit to recover dower, the land is sold under a paramount mortgage, defendant may properly be required to pay to plaintiff one third of the rents received by him before such sale. And he may not charge against this amount of expenses incurred by him before plaintiff demanded her dower. Nor may he charge commissions for receiving such rents. Whitthaus v. Schack, 38 Hun (N. Y.), 560.

7. See Lathrop v. Foster, 51 Me. 367; Luce v. Stubbs, 35 Me. 92; Baker v. Baker, 4 Me. (4 Greenl.) 67; Page v. Page, 60 Mass. (6 Cush.) 196; Jones v. Brewer, 18 Mass. (1 Pick.) 314; Conant v. Little, 18 Mass. (1 Pick.) 189; Pinkham v. Gear,

3 N. H. 163.

8. Baker v. Baker, 4 Me. (4 Greenl.)

- a. By Whom.—A demand for dower may be made by the widow herself, or by an attorney in fact or other person duly authorized.¹
- (I) Authority.—(a) How Conferred and Proved.—Authority to demand dower may be conferred by parol; 2 and may be proved as an act in pais by admissions, or by positive and direct testimony, or be inferred from facts and circumstances proved.3 If the widow claims the benefit of such demand by bringing her action upon it, that is competent proof of the attorney's authority.4

(b) What Includes.—An authority to demand dower implies also

the power to assent to or receive the assignment of it.5

b. UPON WHOM.—(I) Owner.—A demand of dower should be made upon the owner or devisee of the land in which a dower interest is claimed, but need not be made on the land.

- (2) Tenant.—Demand must be made of the tenant of the freehold if within the State. However, it would seem that a demand of dower is well made on the tenant's grantor, if he is tenant of the freehold at the time.
- (3) Guardian.—The guardian of a minor heir may assign dower, and a demand made on a guardian and upon the heir is sufficient.⁹
- (4) One Devisee.—Where a testator has subdivided a tract, and devised the three parts separately to three devisees, his widow may demand her dower in one part from the devisee thereof, without making the other devisees parties. 10
- (5) By Statute.—When the statute requires the widow to make a demand of dower of the person who is seized of the freehold, before commencing her action therefor, such a demand is a per-

67; Jones v. Brewer, 18, Mass. (1 Pick. 314; Conant v. Little, 18 Mass. (1 Pick.) 189; Pinkham v. Gear, 3 N. H. 163.

1. See Lathrop v. Foster, 51 Me. 367; Luce v. Stubbs, 35 Me. 92; Page v. Page, 60 Mass. (6 Cush.) 196; Stevens v. Reed,

37 N. H. 49.

Power of Attorney to Demand Dower-Insufficient, when-A demand of dower made by an attorney in fact, in virtue of a power authorizing him for the constituent, and in her name and behalf, to demand her just dower to be assigned to her "in any and all of the before-mentioned premises, or any other," no premises whatever being mentioned in the instrument, is sufficient; although such authority is subsequently ratified by the constituent, by a second power of attorney, in which she recites the former, and authorizes the same attorney to commute for and settle all her claims of dower in the premises, no premises being otherwise mentioned in such power of attorney than by reference to the former power. Sloan v. Whitman, 59 Mass. (5 Cush.) 532.

- 2. Lathrop v. Foster, 51 Me. 367; Baker v. Baker, 4 Me. (4 Greenl.) 67; Jones v. Brewer, 18 Mass. (1 Pick.) 314; Conant v. Little, 18 Mass. (1 Pick.) 189; Pinkham v. Gear, 3 N. H. 163.
- - 4. Stevens v. Reed, 37 N. H. 49. 5. Baker v. Baker, 4 Me. (4 Greenl.)
 - 6. See Luce v. Stubbs, 35 Me. 92.
- In Maine.—When a foreign corporation is seized of real estate situated in the State, and has a tenant thereon, the demand of dower may be made upon the tenant under Maine Rev. Stat. ch. 103, sec. 17. Stevens v. Rollingsford Savings Bank, 70 Me. 180.

7. Luce v. Stubbs, 35 Me. 92. See Stevens v. Rollingsford Savings Bank,

70 Me. 180.

8. Barker v. Blake, 36 Me. 433.
9. Robinson v. Miller, 1 B. Mon. (Ky.)
88; Young v. Tarbell, 37 Me. 509; Jones
v. Brewer, 18 Mass. (1 Pick.) 314.

10. Shelton v. Shelton, 20 S. C. 560.

sonal one, and where there is more than one person seized of the freehold, a personal demand must be made on each of them.1

4 Sufficiency.—a. As to Manner, Place, and Form.—A demand of a dower interest must not only be made upon the proper persons, but must be made in the proper manner, at an appropriate place, and in due form. When the statute requires2 the demand to be made of the person who is seized of the freehold, it must be made in person of such person; 3 but in the absence of such a statute it would seem that a demand made by an agent.4 or attorney,5 duly authorized, will be sufficient.

Where a dower interest is claimed in land that is held by two or more persons in severalty, a demand made of them iointly, and embracing the whole of the land, will not be sufficient to support an action for dower; 6 the demand should be

1. Burbank v. Dav. 53 Mass. (12 Metc.)

Massachusetts Doctrine -- A widow wrote and signed a demand on three tenants of the freehold, to set out her dower in her husband's estate, and a deputy-sheriff gave an attested copy of the demand into the hands of one of the tenants, an I left an attested copy thereof at the dwelling house of each of the other tenants; and the widow more than one month afterwards brought an action of dower against the tenants. Held, that the action could not be maintained for want of a legal demand. The court sav: "The only question raised by the report of this case is, whether the demand of dower, made on the tenants, is conformable to the Rev. Stat. c. 102, sec. 2; and we are of opinion it is not. The provision of that section is, that 'she shall demand her dower of the person who is seized of the freehold at the time of making the demand, and shall not commence her action therefor before the expiration of one month, nor after the expiration of one year after such demand." requires a personal demand of the party who is seized of the freehold; and it follows conclusively, that if more than one person is thus seized, a personal demand must be made on each. At least, such must be the construction, unless the tenant of the freehold should not be within the commonwealth, so that personal service could not be made. 'Whether, in such a case, a notice to the sub-tenant of the tenant of the freehold would be sufficient, or whether any or what other notice would be required, are questions not raised in the present case." Burbank v. Day, 53 Mass. (12 Metc.) 557.
2. In Massachusetts, see Rev. Stat.

ch. 102, sec. 2.

3. See Burbank v. Day, 53 Mass. (12

Metc.) 557; also Atwood v. Atwood, 39

Mass. (22 Pick.) 283.

4 Demand by Agent .- A demand of dower in writing, signed by the demandant, and unobjectionable in form and substance, was left by an agent at the dwelling-house of the tenant in due sea-The writing was then read by the wife of the tenant, and a witness then at work for him in his house, but the defendant not being there at the time, the notice was laid on the table, and the tenant told a witness that "they had demanded her dower." Held, that on this evidence a jury would be authorized to infer that a sufficient demand had been made. Luce v. Stubbs, 35 Me. 92.

5. Demand by Widow's Attorney.-Thus a proposition by a widows attorney to one of the heirs to have her dower assigned without the delay and expense of a suit for that purpose, held to be a "demand" within the meaning of the Illinois Dower Act, sec. 26; and a reply of such heir thereto, that they could never agree, held to be a "refusal by heirs." Strawn v. Strawn, 50 Ill. 256.

6. Pond v. Johnson, 63 Mass. (9 Gray)

Demand where Property Held in Severalty.—In Pond v. Johnson, supra, the court say: "The demand of dower in the present case was insufficient, it being a demand upon two persons who owned in severalty the land described, and the demand embracing the entire tract thus owned by the two persons. If such demand thus made on two persons, having distinct interest in distinct parcels, was a good demand, it would be equally so if it had included ten, or even a hundred, adjacent owners of distinct parcels. In such cases the actions must be distinct, and the demands should also be several,

requiring of each to assign dower to the

made of each for dower in that part of the real property which he holds.1

To constitute a demand by a divorced wife for dower in the estate of her husband, it is not sufficient to show negotiations or discussions between the parties on the subject of dower, or propositions to select certain men to appraise or set out dower in lieu of other proceedings, or propositions for a reference and compromise made and considered.²

- b. DESCRIPTION OF PREMISES.—A demand of dower will be sufficient if it designates the premises in which dower is claimed with reasonable certainty.³ But the demand should contain such a description of the estate as will give notice of what land dower is demanded; and this may be in terms or by reference to a deed under which the tenant claims.⁴
- c. EFFECT OF CLAIM IN EXCESS OF TITLE.—A demand of dower is good, although made for more land than the demand is entitled to and more than is described in the writ in an action of dower.⁵
- d. Effect of Limiting Time.—A demand of dower will not be vitiated by its requiring the dower to be set off in a specific number of days, where the statute does not require any time to be specified in the demand.⁶
- 5. Excessive Allowance After, Effect.—Where a widow has demanded dower, and the commissioners 7 assess a sum in lieu of

widow in land of which he was a tenant of the freehold. Fosdick v. Gooding, I Me. (I Greenl.) 39; Stearns on Real

Actions, 305.

- 1. Demand of Tenants—Service by Sheriff.—A widow wrote and signed a demand on three tenants of the freehold to set out her dower in her husband's estate, and a deputy-sheriff gave an attested copy of the demand into the hands of one of the tenants, and left an attested copy thereof at the dwelling house of each of the other tenants; and the widow more than one month afterwards brought an action of dower against the tenants. Held. that the action could not be maintained for want of a legal demand. Atwood v. Atwood, 39 Mass. (22 Pick.) 283; Burbank v. Day. 53 Mass. (12 Metc.) 557.

 2. Merrill v. Shattuck. 55 Me. 370.
- 3. McCormick v. Taylor. 2 Ind. 336; Atwood v. Atwood. 39 Mass. (22 Pick.) 283; Davis v. Walker, 42 N. H. 482; Haynes v. Powers, 22 N. H. (4 Fost.)

Demand of Tenant—Description—Sufficiency of.—In the demand of dower, the description will be sufficient if it give notice to the tenant to what land the demand refers. Atwood v. Atwood, 39 Mass. (22 Pick.) 283.

This a demand "of all lands of which my late husband was seized at any time during my coverture with him, and of which you are now seized of the freehold, and particularly of the land conveyed to J. T. by my said husband, by deed dated October 19, 1879," was considered too vague and indefinite. Mc-Cormick v. Taylor, 2 Ind. 336.

4. McCormick v. Taylor, 2 Ind. 336.

Description by Reference to a Deed.—
But reference to a deed executed forty years before, to a third person, and not recorded, is not notice to the tenant of what was conveyed, and such description of the premises is insufficient. McCormick v. Taylor, 2 Ind. 336.

5. Williams v. Williams, 78 Me. 82.

Excessive Demand.—The demandant in dower is entitled to recover according to her title, though in her demand on the tenant to have dower assigned she claimed dower in the whole premises, when entitled in dower in moiety alone. Hamblin ν . Bank of Cumberland, 19 Me. 66.

New Hampshire Doctrine.—A demand of dower under New Hampshire Rev. Stat. ch. 205, sec 2, is not vitiated by the fact that the demandant is entitled to dower in part only of the land described in it, or that of a part of it the defendant is not seized. Fulton v. Fulton, 19 N. H. 168.

6. Stevens v. Reed, 37 N. H. 49.
7. As under the South Carolina statute.

dower exceeding that allowed by statute, the court will not alter the return, but recommit it to the commissioners; however, the demandant may remit and release the excess, and upon her doing so the court will confirm the return.1

6. Ineffectual, when.—A demand of dower in lands, of which the husband was seized under a contract of conveyance on the performance of certain specified conditions, will be ineffectual.2

VII INTEREST.—In many instances interest cannot be recovered until after a demand for payment has been made. But it is not necessary to constitute a good demand that the interest should be computed and added to the principal sum. And where a plaintiff in making a demand included interest, but claimed a less sum than that which was due him by virtue of the mortgage under which he claimed, it was held that the demand was not thereby invalidated.4

1. Upon Contracts and Accounts,—a. DEMAND NECESSARY.— (1) When Account Unliquidated.—It is a well-settled principle that a party is not entitled to interest on an unliquidated claim until after demand, in the absence of an agreement, express or implied, to allow it.5

1. Douglass v. McDill, I Spears (S. C.).

2. A and B owned land in common. A gave B a bond for the conveyance of the undivided half, on a condition to be performed in ten years, and put B in possession of it. A's wife was divorced from him. Held, that she could not maintain an action against B before the ten years expired to recover dower in said land, even though she had previously made a demand upon him for dower. Cook v. Walker, 70 Me. 232.

3. Robinson v. Sprague, 125 Mass. 582; Jones v. Richardson, 51 Mass. (10

Metc.) 481.

4. Robinson v. Sprague, 125 Mass. 582.

5. Taft v. Stoddard, 142 Mass. 101. See Crosby v. Mason, 32 Conn. 482; Jassoy v. Horn, 64 Ill. 379; Casey v. Carver, 42 Ill. 225; Flake v. Carson, 33 Ill. 518; Young v. Dickey, 63 Ind. 31; Williams v. Hersey, 17 Kan. 18; Amee v. Wilson, 22 Me. 116; Stimpson v. v. Wilson, 22 Me. 116; Stimpson v. Green, 95 Mass. (13 Allen) 326; Palmer v. Stockwell, 75 Mass. (9 Gray) 237; Houston v. Crutcher. 31 Miss. 51; Livermore v. Rand, 26 N. H. (6 Fost.) 85; Esterly v. Cole, 3 N. Y. 502; Wood v. Belden, 59 Barb. (N. Y.) 549; Liotard v. Graves. 3 Cai. (N. Y.) 226; Tucker v. Ives. 6 Cow. (N. Y.) 193; Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 587; Van Beuren v. Van Gaasbeck, 4 587; Van Beuren v. Van Gaasbeck, 4 Cow. (N. Y.) 496; Kane v. Smith, 12 Johns (N. Y.) 156; McClelland v. West,

70 Pa. St. 183; McClintock's Appeal, 29 Pa. St. 360; Davis v. Smith, 48 Vt. 53; Langdon v. Castleton, 30 Vt. 285; Brainerds v. Champlain Trans. Co., 29 Vt. 154; School District No. 1 v. Dreutzer, 51 Wis. 153; Gilman v. Vaughan, 44 Wis.

Thus where the plaintiff deposited with the defendant certain sums of money for an indefinite quantity of bricks and gravel to be delivered by him, and, when the defendant ceased the delivery before accounting for the whole sum received, the plaintiff brought an action against him for money had and received, held, that the plaintiff could recover interest on the balance only from the time of the last delivery, without a demand. Sco-

field v. Kinsler, 2 Strobh. (S. C.) L. 481.

Open Mutual Cash Account.—Interest is allowable on an open mutual cash account. Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 587; Dilworth v. Sinderling, I Binn. (Pa.) 488; s. c., z. Am. Dec. 469; Craven v. Tickell, I Ves. Jr. 60.

Interest on Balance of Account.—In-

terest runs on the balance of an account from the time it is liquidated. Daniels v. Osborn, 75 Ill. 615; Walden v. Sherburne, 15 Johns. (N.Y.) 409; Williams v. Finney, 16 Vt. 297; Cooper v. Coates. 88 U. S. (21 Wall.) 105; bk. 22, L. Ed. 481. Where parties are engaged in continuous dealings, the presentation of bills at various times, stating parts of accounts, does not raise a presumption of liquidation under which interest can thereafter be charged

(2) For Service Performed.—On money due for labor, interest may be recovered after a demand of payment made at the expiration of a reasonable time, but not otherwise.

(3) By Contract.—Where a contract requires the payment of interest "after demand," interest is not allowable before demand."

(4) When Money Paid.—(a) As Usury.—Interest on money paid

- as usury can be recovered only from the time of demanding repayment or the institution of a suit.3
- (b) By Mistake.—Where money is paid by mistake, interest can only be allowed from a demand and refusal.⁴ Thus where an ad ministrator pays a debt of his estate in full, believing the estate solvent after decree of insolvency, he can recover interest on the amount overpaid only after demand.5

(5) Where Property Loaned.—Where personal property, lent indefinitely without hire, is sold on execution against the borrower. he will be charged with interest on the value only from the time of

demand by the lender.6

upon the balance shown to be due. Raymond v. Williams, 40 Iowa, 117.

Consignors and Factors are entitled to in-

terest on account for advances and purchases. Porter v. Patterson, 15 Pa. St. 229; Walters v. McGirt, 8 Rich. (S. C.)

Agreement to Pay Interest Presumed from Course of Dealing between the parties, or from the uniform practice of the creditor, known to the customer at the time of dealing, to charge interest, or from a general usage in any branch of trade known to the parties. Ayers v. Metcalf, 39 Ill. 307; Rayburn v. Day, 27 Ill. 46; Veiths v. Hagge, 8 Iowa 163; Fisher v. Sargent, 64 Mass. (10 Cush.) 250; Esterly v. Cole, 3 N. Y. 502; McAllister v. Reab, 4 Wend. (N. Y.) 483; Adams v. Palmer, 30 Pa. St. 346; Adriance v. Brooks, 13 Tex. 279.

1. Ford v. Tirrell 75 Mass (2 Grave) known to the customer at the time of

1. Ford v. Tirrell, 75 Mass. (9 Gray) 401; s. c., 69 Am. Dec. 297; Doyle v. St. James' Church, 7 Wend. (N. Y.) 178; Gammel v. Skinner, 2 Gall. C. C. 45.

In Suits for Wages, interest is allowed from the time of demand, and if no demand is proved, from the commencement of the suit. Gammel v. Skinner, 2 Gall,

C. C. 45.

Interest is not allowable on an unliquidated account for work, labor, and services, especially where the account was not rendered before suit, and where a greater sum was claimed than was allowsed after a hearing by referees. Doyle v. St. James's Church, 7 Wend. (N. Y.) 178.

2. Maxcy v. Knight, 18 Ala. 300;

Butler v. Austin, 64 Cal. 3; Cruikshank, v. Comyns, 24 Ill. 602; Gore v. Buck, 1 T. B. Mon. (Ky.) 209; Pierce v. Char-

ter Oak Life Ins. Co., 138 Mass. 151; Ordway v. Colcord, 96 Mass. (14 Allen) 59; Evans v. Beckwith, 37 Vt. 285; Gleason v. Briggs, 28 Vt. 135.

A Debt Pavable on Demand will not bear interest until a demand is made or a writ served. Maxcy v. Knight, 18 Ala. 300; Gore v. Buck, 1 T. B. Mon. (Ky.) 200; Ordway v. Colcord, of Mass. (14 Allen) 59: Gleason v. Briggs, 28 Vt. 135.

On Certificate of Deposit. - A certificate of deposit promised "to pay the money with interest, if ten days notice was given." Held, that the interest was due only from ten days after notice. Cruikshank v. Comyns, 24 Ill. 602.

On Life Insurance Policy.- In an action on a policy of life insurance payable on a day named therein, interest is recoverable only from the date of the suit, unless a demand is alleged. Pierce v. Charter Oak Life Ins. Co., 138 Mass. 151.

In Sale of Property on Attachment.—By an arrangement of the parties interested, certain goods which had been attached were sold and delivered to the purchaser, who receipted to the officer for them, it being agreed that he should not be required to pay the price until the question of ownership was decided. Held, that he was not liable for interest on the price before payment became due and was demanded. Evans v. Beckwith, 37 Vt. 285.

3. Sharp v. Pike, 5 B. Mon. (Ky.) 155.

4. Simons v. Walter, 1 McC. (S. C.) 97.

5. Walker v. Bradley, 20 Mass. (3

Pick.) 261.

6. Rayner v. Bryson, 29 Md. 473; Newman v. Wilbourne, 1 Hill (S. C.) Eq.

Pledge of Stock.-Upon a bill by a

(6) Of Agent.—A principal is entitled to interest on money collected by his agent only from demand and default of the interest.¹

(7) By Statute.—In some of the States the question from what

time interest will be allowed is regulated by statute.2

b. Demand Unnecessary.—(1) Generally.—Interest is to be allowed where the law, by implication, makes it the duty of the party to pay over the money to the owner without any previous demand on his part; so where there has been a default of paying according to agreement, express or implied; to pay on a day certain, or after demand, or after a reasonable time.³

(2) When Money Paid by Surety.—In an action for money paid by a surety, interest is recoverable from the time of payment, with-

out proof of a demand of repayment.4

(3) When Delay Vexatious.—Where the delay in payment of a claim is vexatious, interest will be allowed without a previous demand.⁵

(4) By Consent.—Where there have been running accounts between parties, and one party has been in the habit of transmitting his accounts regularly to the other, striking a balance and charging or giving credit for interest, as the balance might be, and no objections have been made, and where this mode of stating accounts is shown to be the custom of trade, such manner of charging interest is legal, and will be supported.⁶

(5) In Case of Conversion.—In cases of conversion interest should be allowed from the date of the conversion without a demand.

pledgeor to redeem certain stock where there was no bad faith or intentional misconduct on the part of the pledgee, held, that the complainant was only entitled to interest from the time the bill was filed, he having made no previous offer to redeem, and no demand. Rayner v. Bryson, 29 Md. 472.

1. Neal v. Freeman, 85 N. C. 441.

2. In Indiana.—The statutes of Indiana give interest for money had and received where the money is retained without the owner's knowledge, or where it is retained after it has been demanded. But interest is not recoverable in other cases on account for money had and received. Hawkins v. Johnson, 4 Blackf. (Ind.) 21.

In Missouri interest on account is not allowable until after demand of payment has been made. Southgate v. Atlantic & Pac. R. Co., 61 Mo. 89; s. c., 3 Cent. L.

J. 140.

Interest on debts due is regulated by statute. Rev. Stat. sec. 2723. On written contracts, if no rate is fixed, six per cent is demanded after the debt matures; and the same rate on all accounts, only after due and demand made. Compton v. Johnson, 19 Mo. App. 88.

- pledgeor to redeem certain stock where difference v. Blanchard, 88 Mass. (6) there was no bad faith or intentional misconduct on the part of the pledgee, $held_v$. (9 Pick.) 368, 388; 2 Sedg. 168, 170, 176, that the complainant was only entitled to note.
 - 4. Knight v. Mantz, Ga. Dec. 22; Winder v. Diffenderffer, 2 Bland, Ch. (Md.) 166; Ilsley v. Jewett, 43 Mass. (2 Metc.) 168.
 - 5. A Delay for Ten Years of payment of an account evidenced by the entries in a depositor's bank-book, *held* to be vexatious and unreasonable, and interest allowed on the account. Jassoy v. Horn, 64 Ill. 379.

6. Barclay v. Kennedy, 3 Wash. C. C. 35v. See Ayers v. Metcalf, 39 Ill. 307; Rayburn v. Day, 27 Ill. 46; Veiths v. Hagge, 8 Iowa, 163; Fisher v. Sargent, 64 Mass. (10 Cush.) 250; Esterly v. Cole, 3 N. Y. 502; McAllister v. Reab, 4 Wend. (N. Y.) 483; Adams v. Palmer, 30 Pa. St. 346; Adriance v. Brooks, 13 Tex 279.

7. Against Bank—Wrongful Conversion by Agent.—Interest should be given from the date of the conversion, by a bank being conusant of the facts, of money of a principal, wrongfully deposited and drawn against by his agent, when the bank is conusant of the facts at the time

- c. PAYABLE FROM TIME OF DEMAND .- (1) Upon Goods Sold and Delivered.—In assumpsit for goods sold and delivered, interest should be allowed by way of damages for the detention of the debt. upon the amount found due, from the time of a demand of payment, if one be proved, or if there be no demand, from the commencement of the suit.1
- (2) In Contribution Cases.—In those cases where a contribution is decreed where the parties are jointly liable, interest will be allowed on the sum decreed from the time when the contribution was demanded and refused.2
- (3) On Freight.—Interest may be allowed on freight after a demand.3

(4) In Case of Wrongful Refusal to Pay.— In all cases where there is a wrongful refusal to pay, interest will be allowed from the

time the demand of payment is made.4

d. SUFFICIENCY OF JUDICIAL DEMAND.—(1) Generally.—In an action to recover for work done and materials furnished, no time having been agreed upon for payment, interest can be recovered at least from time of beginning suit, that being a sufficient demand.5

The institution of a suit, afterwards dismissed by order of the

of payment of such wrongful drawing by the agent, and not merely from the date of a demand upon the bank by the principal. Commercial & A. Bank v. Jones, 18 Tex. 811.

1. McIlvaine v. Wilkins, 12 N. H.

When Allowed Upon Accounts—Illinois Statute.- Interest is recoverable (under the statute of Illinois) upon a sum due for various goods sold at one time where an account has been rendered, no objection to which is shown, and payment demanded. Cooper v. Coates, 88 U.S. (21 Wall.) 105; bk. 22, L. Ed. 481.
2. Campbell v. Mesier. 6 Johns. Ch.

(N. Y.) 21. See In re Rensselaer & S. R. Co., 4 Paige Ch. (N. Y.) 553; and Sherred v. Cisco, 4 Sandf. (N. Y.) 485; and also Leigh v. Dickeson, 50 L. T. R. N. S. 124; S. C., 12 Q. B. Div. 194. 3. Schureman ν. Withers, Anth. (N.

Y.) 166.

4. Interest on Stolen Certificate .-- Where plaintiff had stolen from him a certificate of deposit, defendant bank compelled plaintiff-who had ordered payment stopped-to bring suit and obtain judgment before it would pay the amount, indorsements having been placed on the certificate after it had been stolen. Held, that plaintiff was entitled to interest on the value of the certificate from the time of demand made. Sleppy v. Bank of Commerce, 8 Sawy C. C. 17; s. c., 17 Fed. Rep. 712.

5. Hall v. Farmers & Citizens' Savings Bank, 55 Iowa, 612; Conway v. Ermin, I La. An. 391; Guild ν. Guild, 43 Mass. (2 Metc.) 229; Berner ν. Bagnell, 20 Mo. App. 543; Case ν. Osborn, 6c How. (N. Y.) Pr. 187; Allen ν. Lyman, 7 Vt. 20.

Ad Damnum Clause a Sufficient Demand. -In debt on a judgment, the ad damnum clause in the writ is a sufficient demand of interest on the judgment. Allen v. Lyman, 27 Vt. 20.

Where the ad damnum in the plaintiff's writ is not large enough to include in his judgment the interest that accrues on his demand during the pendency of a petition to vacate his attachment, though it is large enough to include the interest that had accrued when judgment would have been rendered if the petition had not been interposed, the subsequent attaching creditor, who files such petition, and fails to support it, is not liable to pay the plaintiff, as damages, such accruing interest, if the defendant, after the petition was filed, delayed the judgment by his appearance and pleading. Guild, 43 Mass. (2 Metc.) 220.

In an Action for Work and Labor Performed, the institution of the suit is sufficient evidence of demand for payment, and under an instruction to the jury to find from time of demand, the presumption is that they allowed interest only from the bringing of the suit. Berner v.

Bagnell, 20 Mo. App. 543.

court, is a demand in writing, putting the defendant in default, and entitling the plaintiff to recover, in a subsequent action, interest from the first judicial demand. And in suit on a claim due on demand, where no date of demand is alleged, interest can only be recovered from the date of the commencement of the action.2

(2) As to Amount.—In debt on a judgment bearing interest, if the plaintiff demands only the principal and the interest accrued at the commencement of the action, he cannot have judgment for

interest accruing since.3

e. PAYABLE FROM THE TIME SUIT IS BROUGHT,—(1) When,— Where the plaintiff claims a certain amount and interest, he is entitled to interest from the time of the commencement of the action.4 And where money is payable on demand, and there is no contract or usage requiring it, and the defendant is not a wrongdoer in acquiring or detaining it, interest is to be computed from the service of the writ only.5

(2) When Not.—When the judgment liquidates damages, interest should be allowed from the date of the judgment, and not from

the date of the judicial demand.6

- f. UNAVAILING, WHEN.—Where a debtor is prevented by law from the payment of the debt, he is not chargeable with interest even after demand.7 And the holder of a county warrant cannot recover interest after demand and non-payment for want of funds.8
- 2. Upon Claims Against Decedent's Estates.—a. LEGACIES—When allowed upon.—A legacy charged upon land yielding profits carries

1. Conway v. Erwin, I La. An.

2. Hall v. Farmers & Citizens' Savings Bank, 55 Iowa, 612.

3. Caldwell v. Richards, 2 Bibb (Kv.).

4 Anderson v. Kerr. 10 Iowa, 233, 236; Lyon v Byington, 10 Iowa, 124; Stadler v. Parmlee, 10 Iowa, 23; Ferry v. Page, La. An. 424; Rawson v. Grow, 4 E. D. Smith (N. Y.), 18.

Legal Interest is Due from Judicial Demand on a claim for the price of a steamer. Yeatman v. Broadwell, I La. An. 424.

Without proof of the time when payment was demanded, interest can be allowed from the time of suit brought. Rawson v. Grow, 4 E. D. Smith (N. Y.),

5. Hunt v. Nevers, 32 Mass. (15 Pick.) 500; s. c., 26 Am. Dec. 616 See Brewer Tyringham, 29 Mass. (12 Pick.) 547; Haven v. Foster, 26 Mass. (9 Pick.) 112; s. c., 19 Am. Dec. 353; Dawes v. Winship, 22 Mass. (5 Pick.) 97, note; Parker v. Thompson, 20 Mass. (3 Pick.) 429.

From Service of Summons.—A plaintiff is entitled to receive interest on the amount of the verdict from the day of judicial demand. Murison v. Butler. 18 La. An. 206.

Where in an action for goods sold, etc. there appeared no stipulation as to time of payment or interest, interest was allowed from service of the writ, no previous demand having been shown. Houghton v. Hagar, Brayt. (Vt.) 133.

6. Robertson v. Green, 18 La. An. 28; Wright v. Abbott, 6 La. An. 569. In an Action of Trespass.—Interest can be allowed only from the date of the judgment liquidating the damages in an action of trespass, and not from the date of the judicial demand. Robertson v. Green, 18 La. An. 28.

Under Maine Revised Statutes, ch. 113, sec. 47.-In an action by a creditor for aiding his debtor to transfer and conceal his property, the jury are not authorized to give the plaintiff interest from the date of his writ. Skowhegan Bank v. Cutler,

52 Me. 509.
7. Chase v. Manhardt, I Bland Ch. (Md.) 333; Branthwait v. Halsey, 9 N. J. L. (4 Halst.) 3; Stevens v. Barringer, 13 Wend. (N. Y.) 639; Jackson v. Lloyd, 44 Pa. St. 82; Irwin v. Pittsburg, etc., R. Co., 43 Pa. St. 488.

8. Allison v. Juniata Co., 50 Pa. St. 351

interest from the time it becomes payable, even though no demand is made at that time. But the rule requiring demand before a legacy can bear interest has no application where the executor is legatee.2

b. DEBTS.—A legal claim against the estate of one deceased bears interest from the time of its presentation to the adminis-

- 3. Upon Trust.—a. NECESSARY, WHEN.—A mere trustee of money is not liable for interest, unless he neglects to pay it over
- b. UNNECESSARY, WHEN.—A trustee or bailee who disclaims that relation is chargeable with interest without a demand.⁵ trustees of every description neglecting to apprise those interested in the fund of the amount due to them, and to offer payment in a reasonable time, are chargeable with interest, and a demand by legatees, heirs, or creditors is not necessary.6

1. Keech v. Speakman, I Pa. L. I. See Ventress v. Brown, 34 La. An. 448.

A Special Legatee is entitled to the interest without proof of his having demanded payment when the executor asked for and obtained an order of court to sell property of the estate for the purpose of paying such legacy. Ventress v. Brown, 34 La. An. 448.
2. Ames's Succession, 33 La. An.

1317.

3. Pico v. Stevens, 18 Cal. 376.

In Massachusetts it is held that commissioners appointed by the judge of probate to receive and examine the claims of creditors of the estates of persons deceased, represented insolvent, should cast interest on all claims allowed by them from the death of the insolvent debtor to the time of making their report, whether they expressly bear interest or not. Dodge v. Breed, 13 Mass.

4. Knight v. Reese, 2 U. S. (2 Dall.)

182; bk. 1, L. Ed. 340.
5. Dickinson v. Owen, 11 Cal. 71.
6. Glenn v. Cockey, 16 Md. 446; Gray v. Thompson, I Johns. (N. Y.) 82; Estate

of Merrick, I Ashm. (Pa.) 305.

Liability of Trustee for Interest .- Williams, in his Treatise on Executors, says: "There are two grounds on which an executor or administrator may be charged with interest: 1. That he has been guilty of negligence in omitting to lay out the money for the benefit of the estate; 2. That he himself had made use of the money, or has committed some other misfeasance to his own profit and advantage." See 3 Williams on Executors, 1844 et seq.

In Gray v. Thompson, I Johns. Ch.

(N. Y.) 82, an assignee of property in trust for the benefit of creditors having received the proceeds, and neglected for many years to distribute the fund among the creditors, pursuant to his trust, was decreed to pay the amount with interest from the time he received the money, and was charged with costs. The ground of the rule is the negligence of the trustee, and the presumption in the absence of proof to the contrary that he appropriated the fund to his own use. The same rule has been adopted in several later Cases. Rundle v. Allison, 34 N. Y. 184; Hasler v. Hasler, I Bradf. (N. Y.) 248; Stephens v. Van Buren, I Paige Ch. (N.

The General Rule now established is, that administrators or executors are not chargeable with interest, except where they have received interest, or used the money, or retained it unreasonably after they ought to pay it out to claimants, or to account to the court. Williams v. American Bank, 45 Mass. (4 Metc.) 317; Boynton v. Dyer, 35 Mass. (18 Pick.) 2; Wyman v. Hubbard, 13 Mass. 232; Tur-nev v. Williams, 7 Yerg. (Tenn.) 173. All Trustees are Chargeable with In-

terest if they have Used the Money, or have been negligent in paying it over, in loaning it or investing it, so as to make it productive. Ringgold v. Ringgold, I it productive. Ringgold v. Ringgold, I Harr. & G. (Md.) II., 79; s. c., 18 Am. Dec. 250; Boynton v. Dyer, 35 Mass. (18 Pick.) 6; King v. Talbot, 40 N. Y. 95; Rundle v. Allison, 34 N. Y. 184; Gil-let v. Van Rensselaer, 15 N. Y. 397; Duffy v. Duncan, 32 Barb. (N. Y.) 593; White v. Parker, 8 Barb. (N. Y.) 48; Hasler v. Hasler, I Bradf. (N. Y.) 248; Brown v. Rickets, 4 Johns. Ch. (N. Y.) 305; s. c., 8 Am. Dec. 567; Dunscomb

4. Upon Taxes Illegally Exacted.—a. DEMAND NECESSARY, WHEN. In a suit to recover back the amount of taxes paid without protest on an illegal assessment, the plaintiff is entitled to interest thereon from the time of demanding repayment, or from the date of the writ where no previous demand is made; but where such taxes are paid under protest, the plaintiff is entitled to interest thereon from the time of payment.

v. Dunscomb, I Johns. Ch. (N. Y.) 508; v. Duiscomo. 1 Johns. Ch. (N. 1.) 508; s. c., 7 Am. Dec. 504; Piatt v. Oliver, 2 McL. C. C. 313; *In re* Thorp, Dav. (2 Ware) C. C. 293.

However, it would seem that a trustee is not liable for interest where the money has been kept in bank or otherwise ready to be paid over when called for. See Hasler v. Hasler, I Bradf. (N. Y.) 252. When Chargeable with Compound In-

terest .- If in the management of a trust fund the trustee exceed his powers or make unproductive investments. is chargeable with simple interest, but in those cases where he applies the trust funds to his own use, or mingles them with his own funds, involving them in a risk of trade without accounting for the profits, he is liable for compound interest. Johnson's Admr. v. Hedrick, 33 Ind. 129; s. c.. 5 Am. Dec. 191; Ray v. Doughty, 4 Blackf. (Ind.) 115; Paige's Ex'rs v. Holman, 82 Ky. 373; s. c.. 19 Rep. 591; Ringgold v. Ringgold, I Harr. & G. (Md.) 11, 79; s. c., 18 Am. Dec. 250; Stearns v. Brown, 18 Mass. (1 Pick.) 530; Shuttleworth v. Winter, 55 N. Y. 624; Brown v. Rickets, 4 Johns. Ch. (N. v. Stewart, I Johns. Ch. (N. Y.) 624; s. c., 7 Am. Dec. 507; Manning v. Manning, I Johns. Ch. (N. Y.) 527; McNair v. Ragland, 1 Dev. (N. C.) Eq. 517; Fox v. Wilcox, 1 Binn. (Pa.) 194; s. c., 2 Am. Dec. 433; Darrel v. Eden, 3 Desaus. (S. Dec. 433; Barrel v. Eden, 3 Desaus. (S. C.) 241; s. c., 4 Am. Dec. 613; Sparhawk v. Buell, 9 Vt. 42. See Boynton v. Dyer. 35 Mass. (18 Pick) 6. 8; Gillet v. Van Rensselaer, 15 N. Y. 400; Lansing v. Lansing, 45 Barb. (N. Y.) 191; s. c., 1 Abb. (N. Y.) Pr. N. S. 286; 31 How. (N. Y.) Pr. 64. Seaman v. Durves 10. c. 1 Abb. (N. Y.) Pr. N. S. 286: 31 How. (N. Y.) Pr. 64; Seaman v. Duryea, 10 Barb. (N. Y.) 534; White v. Parker, 8 Barb. (N. Y.) 48, 53; Garniss v. Gardiner, 1 Edw. Ch. (N. Y.) 130; Gilman v. Gilman, 2 Lans. (N. Y.) 1; Utica Ins. Co. v. Lynch, 11 Paige Ch. (N. Y.) 523; Taylor v. Benham, 46 U. S. (5 How.) 274; bk. 12. L. Ed. 149; Piatt v. Oliver, 2 McL. C. C. 313; Doggett v. Emerson, 1 Woodb & M. C. C. 205; In re Throp, I Woodb & M. C. C. 205; In re Throp,

Dav. (2 Ware) C. C. 293. It is said in Lansing v. Lansing, 45 Barb. (N. Y.) 191; s. c., 1 Abb. (N. Y.)

Pr. N. S. 288; 31 How. (N. Y.) Pr. 64, and Garniss v. Gardiner, 1 Edw. Ch. (N. Y.) 130, that "it is only in cases of gross delinquency that trustees will be charged with compound interest." In the last mentioned case the court say: "In De Peyster v. Clarkson, 2 Wend. (N. Y.) 77. it was contended arguendo that Schieffelin v. Stewart, I Johns. Ch. (N. Y.) 624; s. c., 7 Am. Dec. 507, and the English cases there cited, were not supported by authority. The court of errors, however, express no opinion upon the point.as the cause was decided on another ground. The case of Schieffelin v. Stewart has not been overruled; and as far as my observation extends, it stands as an authority to be followed in similar cases.'

Liability of Guardian for Interest -A guardian who has acted in good faith, but who is chargeable with some degree of negligence, and mixing the trust funds with his own, will be chargeable with simple interest, and not compound in-Hasler v. Hasler, I Bradf. (N. Y.) 628; Hasler v. Hasler, I Bradf. (N. Y.) 252; Harrington v. Libby, 6 Daly (N. Y.), 259; Clarkson v. De Peyster, Hopk. Ch. (N. Y.) 424; Dunscomb v. Dunscomb, I Johns.Ch. (N. Y.) 508; s.c., 7 Am. Dec. 504.

Time from which Interest will be Charged.—The time from which interest is to be charged in case of negligence varies according to circumstances. Six months from the time the money was received is a reasonable period in most cases from which to charge interest against the trustee. See Bennett v. Hanifin, 87 Ill. 37; In re Steele, 65 Ill. 322; Gilbert v. Guptill, 34 Ill. 112; Bond v. Lockwood, 33 Ill. 219; Karr v. Karr, 6 Dana (Ky.), 3; Ringgold v. Ringgold, I Harr. & G. (Md.) 11, 79; s. c., 18 Am. Dec. 250; Crosby v. Merriam, 31 Minn. 342; Rundle v. Allison, 34 N. Y. 184; White v. Parker, 8 Barb. (N. Y.) 48; Dunscomb v. Dunscomb, I Johns. Ch. (N. Y.) 508; s. c., 7 Am. Dec. 504; Stephens v. Van Buren, 1 Paige Ch. (N. Y.) 479: Hooper v. Royster, 1 Munf. (Va.) 133. 1 Boston & Sandwich Glass Co. v.

Boston, 45 Mass. (4 Metc.) 181.

5. Upon Notes.—a. DEMAND, WHEN NECESSARY.—A note payable on demand can carry interest only from the date of demand 1 But a note payable on demand, "with interest . . . till paid" bears interest from the date of its execution.2

b. WHEN UNNECESSARY.—In actions on obligations and promissory notes containing no stipulation as to interest, it need not be demanded in the declaration, nor its payment negatived in the

assignment of breaches.3

6. Upon Bonds.—a. DEMAND NECESSARY, WHEN.—When allowed from demand, a penal obligation to pay a sum of money on demand carries interest only from the time of a demand, or from the date of the writ.⁴ And in an action on a bond with a penalty. if there has not been a previous demand of the penalty, or an acknowledgment that the whole is due, interest is recoverable only from the commencement of the suit.5

VIII. BILLS AND NOTES.—1. Necessary.—a. TO CHARGE DRAWER. —(I) Of Bill.—(a) Generally.—The holder of a bill cannot resort to the drawer until he has demanded payment of the drawee, or used due diligence to demand it, and notified the former of the

latter's refusal to pay.6

1. Patrick v. Clay, 4 Bibb (Ky.). 246; Bartlett v. Marshall, 2 Bibb (Ky.), 467; Dillon v. Dudley, 1 A. K. Marsh. (Ky.) 66; Bishop v. Sniffen, 1 Daly (N. Y.), 155; Schmidt v. Limehouse, 2 Bail. (S. C.) 276; Cannon v. Beggs, I McC. (S. C.) 370; S. c., 10 Am. Dec. 677.
2. Pitzer v. Barret, 34 Mo. 84; Pate v. Gray, 1 Hempst. C. C. 155.
3. Chinn v. Hamilton, 1 Hempst. .C

C. 438.
In Arkansas, a promissory note, payable on demand, draws interest from date without a demand. Pullen v. Chase, 4

Ark. 210.

In Ohio .- The instrument was "due A. K. or order, ninety-two dollars on demand, value received," and interest was allowed from the date under Ohio Statute 1824, there never having been any demand. Darling v. Wooster, o Ohio St.

517. 4. Vaughan v. Goode, Minor (Ala.),

A Promise Under Seal, to pay a sum of money on demand, will carry interest only from the time of demand. Scudder v. Morris, 3 N. J. L. (2 Pen.) 419; s. c., 4 Am. Dec. 382.

5. Bank of United States v. Magill, 1

Paine C. C. 661.

Bond of Cashier. - In an action of debt on the official bond of the cashier of a bank, for overdrafts made by him as a private depositor, held, that the bank was entitled to interest only from the time he went out of office, or from a demand, if one had been made earlier, and not from the date of each overdraft. Union Bank v. Sollee, 2 Strobh. (S. C.) 390.

Sollee. 2 Strobh. (S. C.) 390.
6. Pitts v. Jones, 9 Fla. 519; Holbrook v. Allen, 4 Fla. 87; Lawrence v. Ralston, 3 Bibb (Ky.), 102; Murry v. Clayborn, 2 Bibb (N. Y.), 300; Smith v. Jones, 2 Bush (Ky.), 103; Smith v. Roach, 7 B. Mon. (Ky.) 17; Strader v. Batchelor, 8 B. Mon. (Ky.) 168; Taylor v. Bank of Illinois, 7 T. B. Mon. (Ky.) 579; Read v. Bank of Kentucky, 1 T. B. Mon. (Ky.) 91; s. c., 16 Am. Dec. 86; Scott v. McCulloch, 16 La. An. 242; Grieff v. Kirk, Culloch, 16 La. An. 242; Grieff v. Kirk, 15 La. An. 320; Bank of Louisiana v. Morgan, 13 La. An. 598; Curry v. Herlong, 11 La. An. 634; Orear v. McDonald, 9 Gill (Md.). 350; s. c., 53 Am. Dec. 703; Baring v. Clark, 36 Mass. (19 Pick.) 226; Richie v. McCoy. 21 Miss. (13 Smed. & M.) 541; Offit v. Vick, 1 Miss. (Walk.) 99; M., 541; Oml v. Vick, I Miss. (Walk.) 99; Moore v. Waitt, 13 N. H. 415; Bank of Vergennes v. Cameron, 7 Barb. (N. Y.) 143; Munroe v. Easton, 2 Johns. (N. Y.) Cas. 75; Jones v. Savage, 6 Wend. (N. Y.) 658; Schofield v. Bayard, 3 Wend. (N. Y.) 491; Case v. Morris, 31 Pa. St. 100; Brown v. Teague, 7 Jones (N. C.)
L. 573; Payne v. Winn, 2 Bay (S. C.),
376; Treadway v. Nicks, 3 McC. (S. C.)
195; Duncan v. Course, I Mills (S. C.), 100; Cole v. Wintercost, 12 Tex. 118; Union Bank v. Hyde, 19 U. S. (6 Wheat.) 572; bk. 5. L. Ed. 333; Mitchell v. Degrand, I Mason.C. C. 176.

The Drawer of Bill of Exchange is Entitled to Notice on failure of the acceptor

(b) When No Funds in Hands of Drawee, when.—Want of funds in the hands of the drawee is no excuse for not presenting a bill, if the drawer has reasonable expectations to believe that it will be accepted and paid. And although the drawer has no funds in the acceptor's hands, yet if upon taking up the bill he would be entitled to sue the drawee, or any other party on the bill, then he is entitled to strict notice. Should the holder, to excuse want of

to pay, except where he has had no funds in the hands of the acceptor from the time of making the bill till it became due. Richie v. McCoy, 21 Miss. (13 Smed. &

M.) 541.

Failure to Notify.—If, on protest for non-acceptance of a bill payable at so many days after sight, the drawee accepts the next day, and fails before the day of payment, the drawer is not liable if he had no notice of the non-acceptance. Mitchell v. Degrand, I Mason C. C. 176. See Schofield v. Bayard, 3 Wend. (N. Y.)

If an Agent Draws a Bill of Exchange on his Principal for the purchase-money of certain goods that he has bought for him, he is entitled to notice of the dishonor of the bill, although the payee has no knowledge of the agency. Pitts v.

Jones, 9 Fla. 519.

In Kentucky, by statute, damages cannot be recovered when an inland bill is dishonored, unless it is protested, or written notice is given of its dishonor. Lawrence v. Ralston, 3 Bibb (Ky.), 102; Murry v. Clayborn, 2 Bibb (Ky.), 300; Strader v. Batchelor, 8 B. Mon. (Ky.) 168; Taylor v. Bank of Illinois, 7 T. B.

Mon. (Ky.) 579.

To Fix the Liability of the Drawer of a Bill it is necessary to prove presentation for payment, refusal to pay, and notice to the drawer, or that the drawer has had no funds or effects in the hands of the drawee at the time the draft was payable; or that he had promised subsequently to Cole v. Wintercost, 12 pay the debt.

Tex. 118.

The rule is the same although the drawer is indebted to the acceptor for whose use the bill is drawn to the amount of the bill, it not appearing that the bill was drawn in payment. Sherrod o. Rhodes, 5 Ala. 683. Compare Evans v. Norris, 1 Ala. 511; Reid v. Morrison, 2 Watts & S. (Pa.) 401.

Plaintiff, the owner of a draft, transferred it to S. in payment of a debt; S. placed it in the hands of the defendants, with the directions to collect and distribute the proceeds in payment of claims against him. The agent of defendants presented the drafts to the acceptor, who did not pay it, and no notice being given to the drawer, who was solvent, he was released. Held, that S. having accepted the draft as payment of the debt due him, was bound to use ordinary diligence in presenting it for payment, and notifying the drawer if payment was refused; that upon a neglect to do so the debt was discharged and plaintiff had no interest in the draft: that defendants were the agents of S, in the transaction, and were responsible to him and not to plaintiff for the damage caused by the neglect to give notice of the non-payment of the draft. Huston v. Weber, 3 T. & C. 147; s. .., I Hun (N. Y.), 120.

Presentment -The drawer of a bill of exchange is not liable where there has been no presentment made to the acceptor, although he has received notice, when the bill was drawn, that it would be discounted or left for collection at a certain bank in the vicinity; and although it appears to be the usage of that and some other banks not to make presentment when the bill becomes due, but to give notice to the acceptor and drawer. Moore

v. Waitt, 13 N. H. 415. See Schofield v. Bayard, 3 Wend. (N. Y.) 491.

A bill for \$3000, previous authority being given, was drawn on C. and K. They were advised of the draft, and also of an intended shipment, and promised to honor the draft. The shipment was received and disposed of for upwards of \$7000. Other shipments were afterwards made, and other drafts drawn and accepted. When this draft matured there were large consignments in the hands of the drawees, which ultimately produced enough to pay all subsequent drafts, and leave a balance for this bill. *Held*, that the drawers were entitled to demand and notice, that the drawers were discharged, and the bill could not be given in evidence on the money accounts. Orear v.

McDonald, 9 Gill (Md.), 350.

1. Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696: bk. 28, L. Ed. 866.
2. Curry v. Herlong, 11 La. An. 634
When Funds Attached.—The drawer is

entitled to notice of non-acceptance. though his effects in the drawee's hands are attached by the trustee process after legal diligence, prove the drawer had no funds in the hands of the drawee, the drawer may then show that notwithstanding the want of funds, his bill was drawn in good faith, and that he was entitled to strict notice. For in cases of a fluctuating balance between the drawee and the drawer of a bill of exchange, or where a drawer draws in the belief that he has funds, or in the reasonable expectation that he shall have funds, to meet it, he is entitled to notice of its non-payment, but otherwise he is not.²

(c) When Drawee Insolvent.—The insolvency of the acceptors is

not a sufficient excuse for not making the demand.3

the bill is drawn, and before it is presented to the drawee for acceptance. Stanton v. Blossom, 14 Mass. 116; s. c., 7 Am. Dec. 198.

1. Cole v. Wintercost, 12 Tex. 118.

2. Matter of Brown, 2 Story C. C. 502.
3. Hunt v. Wadleigh, 26 Me. 271; s. c., 45 Am. Dec. 108; Gower v. Moore, 25 Me. 16; s. c., 43 Am. Dec. 247; Sandford v. Dillaway, 10 Mass. 52; s. c., 6 Am. Dec. 99; Crossen v. Hutchinson, 9 Mass. 205; s. c., 6 Am. Dec. 55; Bond v. Farnham, 5 Mass. 170; s. c., 4 Am. Dec. 47; Pon's Exrs. v. Kelly, 2 Hayw. (N. C.) 45; s. c., 2 Am. Dec. 617; Sullivan v. Mitchell, 1 Law Rep. (N. C.) 482; s. c., 6 Am. Dec. 569; Page v. Loud, Harp. (S. C.) L. 269; s. c., 18 Am. Dec. 650; Nash v. Harrington, 2 Aik. (Vt.) 9; s. c., 16 Am. Dec. 672; Brown v. Ferguson, 4 Leigh (Va.) 37; s. c., 24 Am. Dec. 707; Smith v. Becket, 13 East, 187. Compare Fleming v. McClure, 1 Brev. (S. C.) 428; s. c., 2 Am. Dec. 671.

Insolvency of Maker or Drawer.—As to the insolvency of the maker, it is not stated that he was insolvent, but that he was imprisoned, and was reputed to be insolvent, and to have no attachable property. But if it were alleged in positive terms, it is unimportant; for it is well settled by the authorities that notice must be given back to charge the indorser, notwithstanding the insolvency of the maker. Though the maker be poor, yet something may be found by the indorser. Nash v. Harrington, 2 Aik. (Vt.) 9; s. c., 16 Am. Dec. 674.

The holder cannot assume the right to decide that his performance of the condition will be of no service to the indorser, and thus put that matter in issue to relieve himself from the performance of the condition imposed upon him by law. Gower v. Moore, 25 Me. 16; s. c., 43 Am. Dec. 248; Clegg v. Cotton, 3 Bos. & Pul. 230; Nicholson v. Gouthit, 2 H. Bl. 610; Prideaux v. Collier, 2 Stark. 57.

English Doctrine.—In England it has been held that a known bankruptcy is not equivalent to a demand or notice. Nicholson v. Gouthit, 2 H. Bl. 609. It is the general understanding of the parties, when negotiable paper is indorsed, that the legal consequences shall attach, and that an indorser is entitled to all the privileges of that character. The necessity of a demand, notwithstanding the bankruptcy of the maker or acceptor, in order to charge the indorser or drawer, is founded solely on the custom of merchants, it is said, and that the courts cannot change the custom. Warrington v. Furbor, 8 East, 242.

South Carolina Doctrine, - It is said in Kiddell v. Ford, 3 Brev. (S. C.) 178; s. c., 6 Am. Dec. 569: "In this State, however, the rule has been relaxed, and it has been determined that a known bankruptcy shall be equivalent to a demand The case of Clark v. Adminand notice. istratrix of Minton, which was decided in the constitutional court of appeals at Columbia, in April, 1807, 2 Brevard, 185, established that distinction. The case was tried before myself in the court of common pleas for Kershaw district; the action was against the indorser's administratrix upon a note made by Douglass, payable the first of April, 1802, bearing date September, 1800. It did not appear when it was indorsed, in fact, otherwise than by the indorsement itself, which was dated September, 1800; the declaration was in the usual form. It appeared in evidence that Douglass, the maker, became insolvent, and was declared a bankrupt the ninth of November, 1801; that he left the State in a vessel bound for Liverpool in February, 1802, and that he landed in Jamaica, where he afterwards remained; also, that he was reputed and generally believed to be insolvent from the time of going from the State. No evidence was given of demand, or due diligence to get payment from the maker, nor any notice to the indorser of the indorsee's intention of resorting to him; a

(d) In Case of Accommodation Acceptance, when.—Where a bill is accepted for the drawer's accommodation, if he has funds in the executor's hands at maturity, though in sufficient to pay the whole amount, he is entitled to notice.1

motion for a nonsuit was overruled, and the plaintiff had a verdict. I held that, under the circumstances of the case, it was not incumbent on the plaintiff to prove any demand of, or diligence to obtin, payment. It was not pretended that the evidence to excuse the want of notice could be rebutted. After hearing arguments for a new trial, the whole court, Grimke, Waties, Bay, Trezevant, and Wilds, JJ., confirmed the law as laid down by the district court; and Judge Waties, in delivering the resolution of the court, said that the strict rule of the English law had been often departed from, and particularly in the case of Kiddell v. Perroneau, which had been decided in Charleston many years before; he further declared that a known bankruptcy or insolvency was equivalent to demand and notice, and that no good reason could be assigned to the contrary. I am not disposed, however, at present to carry the doctrine further than was done in the case of Clark v. Minton's Administratrix. There was no proof of bank-ruptcy in this case, nor of an absolute declared insolvency, under the insolvent debtor's or prison-bounds acts."

Waiver of Demand and Notice. - Where the maker of a promissory note assigns all his property to the indorser to secure him against his indorsements, the indorser will be considered as waiving demand and notice. Bond v. Farnham, 5 Mass. 170; s. c., 4 Am. Dec. 47. In Seacord v. Miller, 13 N. Y. 58, the court say: "The mere precaution of an indorser of taking security from his principal has never been adjudged to operate as a dispensation of a regular demand and notice. There must be something more—such as the taking into posses-sion the funds or property of the principal sufficient for the purpose of meeting the payment of the note, or he must have an assignment of all the property, real and personal, of the makers for that purpose." In Duvall v. Farmers' Bank, 9 Gill & J. (Md.) 47, the court say: "The position that a transfer of all the drawer's property to the indorser to indemnify him against loss for his liability exempts the holder from the necessity of making a demand, might perhaps, if it were a new question, admit of some discussion, unless shown to be amply sufficient to meet the notes. But then there are respectable

authorities which sanction the doctrine: Norton v. Lewis, 2 Conn. 478: Bond v. Farnham, 5 Mass. 170; s. c., 4 Am. Dec. 47; Barton v. Baker, I Serg. & R. (Pa.) 334, 3 Kent Com. 113. And it is important that the law in relation to commercial paper should be uniform in the States of the Union. We therefore adopt the judgments of the supreme courts of Massachusetts, Connecticut, and Penn-sylvania." See Prentiss v. Danielson, 5 Conn. 175; Lewis v. Kramer, 3 Md. 265; Andrews v. Boyd, 44 Mass. (3 Metc.) 434; Mechanics' Bank v. Griswold, 7 Wend. (N. Y.) 169; Spencer v. Harvey, 17 Wend. (N. Y.) 491; Barton v. Baker, I Serg. & R. (Pa.) 334; s. c., 7 Am. Dec. 620; Kramer v. Sandford, 4 Watts & S. v. Palmer, 5 Ired. (N. C.) 626; Bank of S. Car. v. Myers, I Bail. (S. C.) 412.

But in the case of Watkins v. Crouch,

5 Leigh (Va.), 522, it is held that where the property assigned is insufficient to meet the indorser's liability, he must then have the benefit of demand and notice. See also Bigelow's Lead. Cas. on Bills, 467.

Demand of Payment-When Excused.-In an action by an indorsee against an indorser of a promissory note, the plaintiff is not bound to prove a demand on the promisor where it appears that the latter had absconded before the maturity of the note. Putnam v. Sullivan, 4 Mass. 45; s. c., 3 Am. Dec. 206. The court say: "The condition on which an indorser of a note is holden is, that the indorsee shall present the note to the promisor when due, and demand payment of it, if it can be done by using due diligence. Now it appears that when the note in this case was due it could not be presented to the promisor for payment, and that there was no neglect in We are all, therefore, the indorsers. satisfied that the indorsers are holden on their indorsement in this case, notwithstanding there was no demand on the promisor." See also Pierce v. Cate, 66 Mass. (12 Cush.) 192; s. c., 59 Am. Dec. 176; Tasker v. Bartlett, 59 Mass. (5 Cush.) 363; Foster v. Julien, 24 N. Y. 37; s. c., 80 Am. Dec. 328; Rhett v. Poe, 43 U. S. (2 How.) 482; bk. 11, L. Ed.

338, 347. 1. Lacoste v. Harper, 3 La. An. 385; s. c., 48 Am. Dec. 449.

(e) Acceptance Supra Protest.—Where bill is dishonored by drawees, and accepted by a third person supra protest for honor of the drawers, in action against the latter it must appear that there was demand of payment and notice of non-payment given.1

(2) Of Check.—If payment of a check is not regularly demanded. and the bank fails after the time it should have been demanded the loss falls on the holder. If the check is presented and not paid, notice of dishonor must be given the drawer in order to charge him; 2 for an action does not lie on bank check against the drawer until after notice of presentment and non-payment.3

An Accommodation Drawer of a Bill of Exchange is entitled to notice of its dishonor, although he had no funds in the hands of the drawee. Sherrod v. Rhodes, 5 Ala. 683.

1. See Martin v. Ingersoll, 25 Mass. (8 Pick.) 1; Grosvenor v. Stone, 25 Mass. (8 Pick.) 79; Schofield v. Bayard, 3 Wend. (N. Y.) 488; Konig v. Bayard, 26 U. S. (1 Pet.) 262; bk. 7, L. Ed. 137.

The court say in Schofield v. Bayard, supra: "Where a bill is accepted supra protest, the holder must demand payment, and if refused, notice must be given. Such an acceptance is a conditional engagement; and to render such acceptor absolutely liable, the bill must be duly presented for payment to the drawee, and protested in case of refusal. Hoare v. Cazenove, 16 East, 391; Chit. on Bills,

Where and of Whom Demand is to be. Made. -- In Schofield v. Bayard, supra, it is said that Chitty on Bills, 242, and Hoare v. Cazenove, 16 East, 391, say that the payment must be demanded of the drawees, but that if the bill is payable at a particular place, payment must be demanded at that place.

2. Farwell v. Curtis, 7 Biss. C. C. 160. To nearly same effect, Deener v. Brown, I McAr. C. C. 350.

3. Harker v. Anderson, 21 Wend. (N.

Y) 372.

Check Payable After Sight.—The drawer of a bank check payable ten days after sight is conditionally liable, and is entitled to notice of dishonor. Bradley v. Hamilton, 5 Harr. (Del.)

A Check Addressed to the Cashier of a Bank, and thus expressed: "Pay to U. S., or bearer, fifty dollars, value received," must be presented to the bank for payment in order to charge the drawer; and proof that it was intended by the parties as evidence of money lent, and was not intended to be presented to the bank for payment, is inadmissible to support an action against the drawer on

the check. Kelley v. Brown, 71 Mass.

(5 Gray) 108.

Diligence Required-Presentment within Reasonable Time, - It is a well-established 'rule that checks must be presented within a reasonable time, but the day following the day on which it is drawn is in good season. Harker v. Anderson, 21 Wend. season. Tarket v. Anderson, 21 Wend. (N. Y.) 372. See Daniels v. Kyle, I Ga. 304; First National Bank v. Fourth National Bank of New York, 77 N. Y. 320; s. c., 33 Am. Rep. 618; 24 Hun (N. Y.), 241; Murray v. Judah, 6 Cow. (N. Y.) 484; Harbeck v. Craft, 4 Duer (N. Y.), 129; Little v. Phenix Bank, 2 Hill (N. Y.), 425; Hazelton v. Colburn, I Robt. (N. Y.) 345; s. c., 2 Abb. (N. Y.) Pr. N. S. 199; Kobbi v. Underhill, 3 Sandf. Ch. (N. Y.) 277; Merchants Bank v. Spicer, 6 Wend. (N. Y.) 443. Aymar v. Beers, 7 Cow. (N. Y.) 705; s. c., 17 Am. Dec. 538; Wethey v. Andrews, 3 Hill (N. Y.). 582; Gowan v. Jackson, 20 Johns. (N. Y.) 176; Robinson v. Ames. 20 Johns. (N. Y.) 146; s. c., 11 Am. Dec. 259; Brower v. Jones. 3 Johns. (N. Y.) 192. See also Allen v. Avery, 47 Me. 287; Flint v. Rogers, 15 Me. 67; White v. Stoddard, 77 Mass. (II Gray) (N. Y.) 372. See Daniels v. Kyle, I Ga. White v. Stoddard, 77 Mass. (II Gray) 258; Shepherd v. Chamberlain, 74 Mass. (8 Gray) 225; s. c., 69 Am. Dec. 248; Salt Springs Nat. Bank v. Burton, 58 N. Sait Springs Nat. Bank v. Burton, 50 N. Y. 430; s. c., 17 Am. Rep. 265; Benton v. Martin, 31 N. Y. 382; Bank of Syracuse v. Hollister, 17 N. Y. 46; s. c., 72 Am. Dec. 416; Kelty v. Second Nat. Bank, 52 Barb. (N. Y.) 328; Brady v. Little M. R. Co., 34 Barb. (N. Y.) 249; Sice v. Cunningham, I Cow. (N. Y.) 397; Vantrot v. McCulloch, 2 Hilt. (N. Y.) Vantrot v. McCulloch, 2 Hilt. (N. vantrot v. mcCulloch, 2 Hill. (N. Y.)
272; Conroy v. Warren, 3 Johns. Cas.
(N. Y.) 259, note; s. c.. 2 Am. Dec. 156;
Schofield v. Bayard, 3 Wend. (N. Y.) 488;
Van Hoesen v. Van Alstyne, 3 Wend.
(N. Y.) 75; Wallace v. Agry, 4 Mason C.
C. 336; s. c., 5 Mason C. C. 118; Mitchell
v. Degrand, 1 Mason C. C. 176; Henry v. Lee, 2 Chitt. 124; Hilton v. Shepard. 6 East, 16; Garnett v. Woodcock, 1 Stark.

. . .

Where, owing to a failure on the part of the payees to make presentment in a reasonable time, the check is not paid, the drawees

having in the mean time failed, the drawer is not liable.1

h. To Charge Indorser.—(1) Of Note.—(a) Generally.—In order to charge the indorser of a promissory note, a demand of navment must be made upon the maker; and notice thereof, and of the non-payment of the note, and that the holder relies upon the indorser for payment, must be seasonably given him, or a waiver of demand and notice, or sufficient grounds of excuse, must be shown; even where the indorsement is made after the

475; Dan. Neg. Inst. secs. 454, 466, 478, 1125; 1 Pars. on Notes and Bills. 267;

Story on Bills, sec. 228.

Demand and Notice to which Drawer Entitled -The drawer of a check is always entitled to such a presentment and demand and notice of non-payment as will protect him from loss. Stevens v. Park, 73 Ill. 387; Howes v. Austin, 35 Ill. 396; Gregg v. George, 16 Kan. 546; Morrison v. McCartney, 30 Mo. 183; Murray v. Judah, 6 Cow. (N. Y.) 490; Little v. Phenix Bank, 2 Hill (N. Y.), 425; Scott v. Meeker, 20 Hun (N. Y.), 163; Conroy v. Warren, 3 Johns. Cas. (N. Y.) 259, note; s. c., 2 Am. Dec. 156; Stewart v. Smith, 17 Ohio St. 82; Purcell v. Allemong, 22 Gratt. (Va.) 743; Cox v. Boone, 8 W. Va. 500; s. c.. 23 Am. Rep. 627; Cork v. Bacon, 45 Wis. 192. Greater diligence is required in the mand and notice of non-payment as will

Greater diligence is required in the presentment of checks than of bills of exchange; where, however, there are no peculiar circumstances, laches cannot be imputed if the presentment be made on the day next after the one on which the check is given. Gough v. Staats, 13 Wend. (N. Y.) 550.

1. East River Bank v. Gedney, 4 E.

D. Smith (N. Y.), 582.

Notice-Reasonable Time. - A bank received a check, and on the next day sent it to another bank, which had given notice that it would redeem checks upon the drawees, by whom on the following day it was returned, with notice that there were none of the drawee's funds in their hands. Subsequently the payees made presentment to the drawees, who meanwhile had failed, and afterwards notice of non-payment was given to the drawer. Held, that by these circumstances the drawer was discharged. East River Bank v. Gedney, 4 E. D. Smith (N. Y.), 582.

2. Branch Bank v. Gaffney, 9 Ala. 153; Crenshaw v. McKiernan, Minor (Ala.), 295: Peters v. Hobbs, 25 Ark. 67; Vance v. Collins, 6 Cal. 435; Green v. Louthain, 49 Ind. 139; State Bank of Indiana v. Hayes, 3 Ind. 400; Abott v. Borge, 20

La. An. 372; Crane v. Benit, 20 La. An. 228; Penn v. Watts, 11 La. An. 205;. Hussey v. Freeman, 10 Mass. 84, 86;. Copp v. McDugall, 9 Mass. 1, 5; Henry v. Jones, 8 Mass. 453, 455; May v. Coffin, 4 Mass. 341; Putnam v. Sullivan, 4 Mass. 45, 53; s. c., 3 Am. Dec. 206; Unions Bank v. Willis, 49 Mass. (8 Metc.) 504; s. c., 41 Am. Dec. 541; Lawrence v. Langley, 14 N. H. 70; Shutts v. Fingar, 100 N. Y. 539; Berry v. Robinson, 9 Johns. (N. Y.) 121; s. c., 6 Am. Dec. 267; House v. Vinton Co. Nat. Bank, 43 Ohio St. 346; Frazier v. Johnston, Wright. (Ohio), 131; Kilpatrick v. Heaton, 3 Brev. (S. C.) 92; Bank of S. Car. v. Croft, 3 McC. (S. C.) 522; Galpin v. Hard, 3 McC. (S. C.) 394; s. c., 15 Am. Dec. 640; Butler v. Denham, 2 McC. (S. C.) 350; Lazarus v. Aubin, 2 McC. (S. C.) 339; Kiddell v. Ford, 2 Treadw. (S. C.) 678; Baker v. Hall, Mart. & Y. (Tenn.) 183; Stothart v. Lewis, 1 Overt. (Tenn.) 255; Nash v. Harrington, 1 Aik. (Vt.) 39; May v. Boisseau & Lieiph (Va.) 164: Evans v. La. An. 372; Crane v. Benit, 20 La. An. v. Boisseau, 8 Leigh, (Va.), 164; Evans v. Gee, 36 U. S. (11 Pet.) 80; bk. 9, L. Ed. 639; Magruder v. Union Bank of Georgetown, 28 U. S. (3 Pet.) 87; bk. 7 L. Ed. 612; Williams v. Bank of United States, 27 U. S. (2 Pet.) 96; bk. 7, L. Ed. 360; Lenox v. Prout, 16 U. S. (3 Wheat.) 520; bk. 4,L. Ed. 449; Bank of North America. v. Wycoff, 4 U. S. (4 Dall.) 151; bk. 1, L. Ed. 778; Bank of North America v. Pettit, 4 U. S. (4 Dall.) 127; bk. 1, L. Ed. 770; Allen v. King, 4 McL. C. C. 128; Burrows v. Hannegan, 1McL. C. C. 309.

Necessity of Demand — Payment must be demanded from the maker of a note. 639; Magruder v. Union Bank of George-

be demanded from the maker of a note, and notice of non-payment forwarded to the indorser within due time, in order torender him liable,-Magruder v. Union Bank of Georgetown, 28 U.S. (3 Pet.) 87; bk. 7, L. Ed. 612, - because the demand stipulated for is an essential part of the indorser's contract. Shutts v. Fingar, 100 N. Y. 539.

Obligation Extends to Residents Within State. The obligation to make presen. .. ment and demand of payment of the maker of a note extends to the case of a resident within a State (if known to the holder) as well as to a resident of a city.

Staylor v. Ball, 24 Md. 183.

Demand to be Made Within Reasonable Time.—An indorser's liability upon a negotiable note depends upon notice of dishonor within a reasonable time. Lenox v. Prout, 16 U. S. (3 Wheat.) 520; bk. 4, L. Ed. 449; Bank of North America v. Wycoff, 4 U. S. (4 Dall.) 151; bk. 1 L. Ed. 778; Bank of North America v. Pettit, 4 U. S. (4 Dall.) 127; bk. I, L. Ed. 770.

To enable the holder of a bill of exchange or promissory note to charge the indorser, it is incumbent on him to prove that timely notice of the dishonor of the bill or of the non-payment of the note was given to the indorser; or, if this could not be done, he must excuse the omission by showing that due diligence had been used to give such notice. Williams v. Bank of United States, 27 U. S. (2 Pet.) 96; bk. 7. L. Ed. 360.

Forged Indorsement.-If bona fide holders of a bill, upon which the indorsement of the pavee is forged, transfer it, they are entitled to notice of its dishonor, to hold them. The holder must use reasonable diligence to entitle him to recover.

Collier v. Budd, 7 Mo. 485.

The Removal of the Maker from his Residence at the time of making the note, if he continues within the same jurisdiction, does not of itself excuse demand; but the holder is bound to make reasonable inquiries, and to make demand at the new residence, if by such inquiries it can be ascertained. McGruder v. Bank of Washington. 22 U. S. (9 Wheat.) 598; bk. 6, L. Ed. 170.

Causes Excusing Presentment and Demand-Removal of.-Where the causes which excuse presentment and demand for payment of a note cease to exist, the holder's duty to make presentment again arises, and by his failure to do so, and on non-payment to give notice, the indorser is discharged. Peters v. Hobbs, 25 Ark.

Notice to the Indorser where Demand cannot be made upon the Drawer .- Although a demand cannot be made on the drawer, yet notice must be given to the indorser, within the same time as if the demand had been made. Price v. Young,

I McC. (S. C.) 339.

Demand when Indorser Administrator of Drawer.-The indorser is not liable without notice from the holder; and his becoming the administrator of the drawer, who died before the note was due, does not relieve the holder from the necessity

Magruder v. Union Bank of of notice. Georgetown. 28 U. S. (3 Pet.) 87; bk. 7. L. Ed. 612.

Failure to Make Demand-Effect in In. solvency. - Unless the liability of the indorser be fixed by demand and notice of non-payment, the indorsed note cannot be proved as a claim against the estate in insolvency. House v. Vinton Co. Nat.

Bank. 43 Ohio St. 346.

Discharge by Failure to Demand-Setting up as a Defence.-But where, by neglect of a holder, an indorser is discharged for want of notice, and the holder afterwards indorses the note to a bank which sues such discharge indorser on it. although the bank would not, in the first instance, be bound to prove demand and notice, the defendant would be allowed to set up such discharge in defence. Merchants Bank v. Central Bank, I Ga. 418; c., 44 Am. Dec. 665.

The Liability of the Indorser of a Bill of Exchange attaches when the drawee refuses to accept, or, having accepted, fails to pay; and an indorser before the bill has been presented for acceptance is not distinguishable from the drawer, in regard to such liability. Evans v. Gee, 36 Ŭ. S. (11 Pet.) 80; bk. 9, L. Ed. 639.

An Indorser who signed his name under the words "holden on the within note, is entitled to notice of demand and non-Vance v. Collins, 6 Cal. 435. payment.

The Holder of a Draft who has Received it from the Indorser under an Agreement to apply the Proceeds in Discharge of a Debt due him from the indorser, if he neglects to give proper notice of its dishonor, makes the draft his own, and has no remedy against the indorser, as such, or for the debt for which it was given.

Allen v. King, 4 McL. C. C. 128
Indorser in. Blank.—Effect of Filling
Blank on Demand.—A, for the accommodation of B, agreed to become "security" on his note. When the note was made, A wrote his name on the back. At the maturity of the note the holder wrote above A's name, "for value received, I undertake to pay the money within mentioned." Held, that A was not bound by these words, but could only be held as an indorser in blank, and was entitled to demand and notice. Clouston v. Barbiere, 4 Sneed (Tenn), 336.

Presumption as to Holder.-It is a rule of law, that the holder of a bill is presumed to know the burdens imposed on him when he takes it, to make the drawer or indorser liable. Where the court below charged the jury that they might infer, from a subsequent promise to pay, or from an unqualified acknowledgment of maturity of the instrument, and the maker is known to be in-

the debt, that the drawer had notice. Held, that such charge was error. Ford v. Dallam, 3 Coldw. (Tenn.) 67.

nemand on Promissory Note .- As between indorsee and indorser, a promissory note is a bill of exchange, as to demand and notice. Crenshaw v. McKiernan. Minor (Ala.), 295. Demand of payment should not be made of the indorser before the note has been presented to the maker. Jackson v. Richards, 2 Cai. (N. Y.) 343.

Note Payable on Demand.-Indorser cannot be held on a note payable on demand with interest, unless the holder can show a demand made of the maker, upon a subsisting obligation against all parties thereto, and can deliver to the indorser, upon payment by him, the note unimpaired. Shutts v. Fingar, 100 N. Y.

Note Payable to Bearer.—A demand on the maker of a note pavable to bearer is necessary to bind indorser. Bank of S. Car. v. Croft, 3 McC. (S. C.) 522; Galpin v. Hard, 3 McC. (S. C.) 394; s. c., of 15 Am. Dec. 640.

Under the Laws of Indiana, a negotiable note, payable at a bank in that State, need not be protested for non-payment in order to hold the indorser. Notice of a demand and non-payment is sufficient. Green v. Louthain, 49 Ind. 139. A bill of exchange drawn in Indiana, payable in another State, is a foreign one, and a protest is necessary to charge the indor-

In Ohio, the act of 1820 does not dispense with notice to an indorser of a negotiable note. Frazier v. Johnston,

Wright (Ohio), 131.

1. See Hightower v. Ivy, 2 Port. (Ala.) 308; Stocking v. Conway, 1 Port. (Ala.) 260; Jones v. Robinson, 11 Ark. 504; s. c., 54 Am. Dec. 212; Beebe v. Brooks, 12 Cal. 308; Guild v. Goldsmith, 9 Fla. 212; Jones v. Middleton, 29 Iowa, 188; Roquest v. Pickett, 20 La. An. 546; Cammack v. Gordon, 20 La. An. 213; McCall v. Witkouski, 16 La. An. 179; Hunt v. Wadleigh, 26 Me. 271; s. c., 45 Am. Dec. 108; Greely v. Hunt, 21 Me. 455; Farnum v. Fowle, 12 Mass. 89; s. c., 7 Am. Dec. 35; Sandford v. Dillaway, 10 Mass. 52; s. c., 6 Am. Dec. 99; Crossen v. Hutchinson, 9 Mass. 205; s. c., 6 Am. Dec. 55; Colt v. Barnard, 35 Mass. (18 Pick.) 260; s. c., 29 Am. Dec. 584; Granite Bank v. Ayers, 33 Mass. (16 Pick.) 392; s.c., 28 Am. Dec. 253; Hart v. Eastman, 7 Minn. 74; Armstrong v. Armstrong, 36 Mo. 225; Oliver v. Munday, 3 N. J. L. (2 Pen.) 982; St. John v. Roberts, 6 Bosw. (N. Y.) 593; Tyler v. Young, 30 Pa. St. 143; McKinney v. Crawford, 8 Serg. & R. (Pa.) 351; Barton v. Baker, 1 Serg. & R. (Pa.) 334; s. c., 7 Am. Dec. 620; Allwood v. Haseldon, 2 Bail. (S. C.) 457; Jervey v. Wilbur, 1 Bail. (S. C.) 453; Kiddell v. Ford, 3 Brev. (S. C.) 178; 453; Kiddell v. Ford, 3 Brev. (S. C.) 178; s. c., 6 Am. Dec. 569; Page v. Loud, Harp. (S. C.) L. 269; s. c., 18 Am. Dec. 650; Kiddell v. Ford, 2 Treadw. (S. C.) Const. 678; Course v. Shackleford, 2 Nott & McC. (S. C.) 283; Gray v. Bell, 2 Rich. (S. C.) 67; s. c., 44 Am. Dec. 277; Union Bank v. Ezell, 10 Humph. (Tenn.) 385; Kirkpatrick v. McCullough, 3 Humph. (Tenn.) 171; s. c., 39 Am. Dec. 158; Nash v. Harrington, 2 Aik. (Vt.) 9; s. c., 16 Am. Dec. 672.

Indorsement After Due .- In an action against the indorser of a note indorsed after due, reasonable notice and demand must be proved,-Jones v. Middleton, 20 Iowa, 188, -for the indorsement of a note after maturity is in effect the drawing of a new bill, payable on demand; and to hold the indorser, demand and notice of non-payment are essential. Swartz v.

Redfield, 13 Kan. 550.

If a promissory note, payable on demand, is indorsed eight months after date, notice must be given to the indorser of non-payment by the maker, in order to charge him. McKinney v. Crawford,

8 Serg. & R. (Pa.) 351.

A Bill of Exchange may be Transferred when Overdue, and an action lies at the instance of the indorsee against the in-The indorsee must show that he dorser. presented it for payment in a reasonable time after indorsement. What is reasonable time is a question of fact, to be determined on the circumstances of each case by the jury. Union Bank v. Ezell, 10 Humph. (Tenn.) 385.

The transfer by indorsement of dis-

honored paper is in the nature of a sight or demand draft on the original maker. Davis v. Francisco, 11 Mo. 575. Demand and notice of non-payment are necessary, as in other cases of negotiable paper. See Hunt v. Wadleigh, 26 Me. 271; s. c., 45 Am. Dec. 108; Greely v. Hunt, 21

Йе. 455.

Thus A, being the payee in an accepted bill of exchange, indorsed the same, and on the failure of the acceptors to pay at maturity, received the bill from the bank where it was deposited for collection, and again transferred it to B. In an action by

(b) When Maker and Indorser are Partners.—Where a promissory note is made by one partnership and indorsed by another, the acting partner in both being the same person, this does not excuse the want of due presentment and notice. And where a member of the firm made a promissory note payable to the order of the firm and it was indorsed by the firm, it was held that the relation of the firm to the note was that of indorser, and could not be varied by parol, and that a demand upon the maker was neces-

sary to charge the firm.2

(c) At Particular Place, when.—The provision to pay at a particular place included in a promissory note relates only to the mode in which the contract shall be executed, as far as the maker is concerned; but with regard to the indorser it constitutes a condition precedent, on which his liability depends.3 The demand must be made at his place of abode or place of business. That it should be strictly personal, is not required; it is enough if it is at his place of abode, or, generally, at the place where he ought to be found.4 But where nothing in a note shows, either where it was made or where to be paid, and evidence indicates that the maker's residence in the State is known to the holder, a failure to make a presentment to the maker either personally or at his domicile will discharge the indorser.5

(d) When Maker in Foreign Country.—Where a note is made in this country payable generally, and the maker afterwards, before its maturity, removes to a foreign country, this does not dispense with the necessity of a demand upon him at his residence in such foreign country, if known, in order to hold an indorser. And

B to recover the amount of the bill from A, held, that the reissue of the bill by A was equivalent to the issue of a new bill, and that a new demand of payment on the acceptors, within a reasonable time, was necessary, in order to hold A

Me. 271; s. c., 45 Am. Dec. 108.

Insolvency of Maker will not excuse demand and notice. Story on Prom. Notes, sec. 286. See Morgner v. Bigelow

(Mo. App.), 4 Cent. L. J. 238. 1. Dwight v. Scovil, 2 Conn. 654.

Indorser a Copartner .- The fact that the maker and indorser of a promissory note were copartners, and that the note was given for a partnership purchase, will not dispense with the necessity of giving due notice of non-payment by the maker, in an action against the indorser alone, as such. Foland v. Boyd, 23 Pa. St. 476.
 2. Coon v. Pruden, 25 Minn. 105.
 3. Ferner v. Williams, 37 Barb. (N.

Y.) q.

Notes Payable in Bank .- In order to charge the indorser of such a note, a demand of the bank specified must be made. The indorser of a promissory note is not

the original and real debtor, but only surety. His undertaking is not general, like that of the maker, but conditionalthat if payment is not received, upon due diligence having been used against the maker, then he shall become liable to pay. And when a place of payment is designated in the body of the note, the indorser has a right to presume that the maker has provided funds at such place to pay the note, and has a right to require of the holder to apply for paytment at that place. Bank of United Stabes v. Smith, 24 U. S. (11 Wheat.) 171; k. 6, L. Ed. 443; aff'g s. c., 2 Cr. C. C. 319.

4. McGruder v. Bank of Washington,

22 U. S. (9 Wheat.) 598; bk. 6, L. Ed.

A Note not Payable at any Particular Place upon its face, must be demanded when due of the maker, or at his usual place of business, to charge the indorser. Burrows v. Hannegan, 1 McL. C. C. 309.

5. Penn v. Watts, 11 La. An. 205. 6. Gilmore v. Spies, I Barb. (N. Y.)

Neighboring State a Foreign Country.-As to the necessity of a demand on the where a note, specifying no place of payment, was made and indorsed in New York, but the maker and indorser resided in a foreign country, and continued to reside there when the note fell due: their place of residence being known to the payee and holder both when the note was given and when it matured, the presentment of the note to the maker, demand of payment from him, and notice to the indorser, were necessary in order to charge the latter.1

(e) If Indorser Secured, when.—A transfer by the maker to the indorser of a note of a part of the property owned by the maker at the time of the transfer, does not dispense with the necessity of demand and notice as against the indorser, although the transfer covers all the property owned by the maker at the

time the note matures.2

(f) In Case of Maker's Death.—When the maker of a promissory note dies before it becomes payable, the indorsee should make inquiry for his personal representative, if there is one, and present the note to him for payment on its maturity.³ Thus, where the maker of a note died before it came due, and the indorser became administrator of his estate, and notice of non-payment was not given to the indorser, he was held to be discharged.4

(g) In Case Maker Insolvent.—Insolvency of the maker of a note is no excuse for not demanding payment.5 And knowledge that the estate of the deceased is insolvent, and that the note will

maker, by the holder of an indorsed note, a neighboring State is regarded as a foreign country. Gillespie v. Hannahan, 4 McC. (S. C.) 503. 1. Spies v. Gilmore, 1 N. Y. 321.

2. Brandt v. Mickle, 28 Md. 436. See also Moses v. Ela, 43 N. H. 557; Wood-man v. Eastman, 10 N. H. 359; Ray v. Smith, 84 U. S. (17 Wall.) 411; bk. 21, L. Ed. 166. Compare Shipman v. Cook, 16 N. J. Eq. (1 C. E. Gr.) 251.

The rule that notice of demand and non-payment of a note need not be given to an indorser who has received funds from the maker for the purpose of paying the note whenever presented, does not apply when the indorser receives the funds from the profits of a business in which he is a partner of the maker, and is simply authorized, but not under obligation, to apply the funds to the payments of notes at their maturity, but may have parted with them after the date of maturity. In such a case it is error to take from the jury the question of sufficiency of demand and notice. The most that in such case can properly be asked by the holder is, that the jury should be instructed to find whether the defendant became the principal debtor by arrangement between him and the maker, with instruction that if they did, the plaintiff was entitled to recover, and that if they did not the indorser could not be held liable without proof of demand and notice. Ray v. Smith, 84 U. S. (17 Wall.) 411; bk. 21, L. Ed. 666.

Holder of an Indemnifying Mortgage.-An indorser of a note who received a mortgage of the maker for its security is notwithstanding entitled to require proof of demand and notice. Moses v. Ela, 43 N. H. 557; Woodman v. Eastman, 10 N. H. 359. Compare Shipman v. Cook, 16 N. J. Ch. (I C. E. Gr.) 251.

3. Gower v. Moore, 25 Me. 16; s. c.,

43 Am. Dec. 247.

The Death of the Maker of a Note does not release the holder from the necessity of using due diligence to bind an indorser. Groth v. Gyger, 31 Pa. St. 271; dorser. Groft v. Gyger, 31 Pa. St. 271;
S. c., 72 Am. Dec. 745; Juniata Bank v.
Hale, 16 Serg. & R. (Pa.) 157; s. c., 16
Am. Dec. 568; Johnson v. Harth, I Bail.
(S. C.) 183; Price v. Young, I Nott &
McC. (S. C.) 438. Compare Davis v.
Francisco, II Mo. 572; s. c., 49 Am. Dec. 98.

4. Morganer v. Union Bank of Georgetown, 28 U. S. (3 Pet.) 87; bk. 7, L. Ed.

5. Morgner v. Bigelow (Mo. App.), 4 Cent. L. J. 238; Assignees of Myers v. Coleman, Anth. (N. Y.) 150.

not be paid on presentment, will not excuse a failure to demand

payment, and to giving due notice of dishonor.1

(h) When Paid for Honor.—There is the same necessity for notice of non-acceptance, etc., when a bill is paid for the honor of one of the parties, as in other cases; 2 and he who accepts or pays. supra protest must give the same notice in order to charge a party which is necessary to be given by other holders.3

(i) When Government Payee. - Wherever the government of the United States, through its lawfully authorized agents, becomes the holder of a bill of exchange, it is bound to use the same diligence in order to charge the indorsers as in a transaction between private individuals.4 But a bill of exchange in form, drawn by one government on another, is not and cannot be governed by the law merchant, and for that reason is not subject to demand, protest, and consequential damages, the same as bills of exchange passing between individuals.5

(2) Of Check.—A demand for the payment of a check must be made with reasonable diligence, according to the ordinary course

1. Gower v. Moore, 25 Me. 16; s. c., 43 Am. Dec. 246.

2. Lenox v. Leverett, 10 Mass. 1; s.

c., 6 Am. Dec. 97.

3. Grosvenor v. Stone, 25 Mass. (8 Pick.) 79; Martin v. Ingersoll, 25 Mass. (8 Pick.) 1; Konig v. Bayard, 26 U. S. (1 Pet.) 262; bk. 7, L. Ed. 137. See Schofield v. Bayard, 3 Wend. (N. Y.) 488.

4. United States v. Barker, 25 U. S. (12 Wheat.) 559; bk. 6, L. Ed. 728. See Cooke v. United States, 91 U. S. (1 Otto) 389, 399; bk. 23, L. Ed. 237; United States v. State National Bank of Boston, 96 U. S. (6 Otto) 30; bk. 24, L. Ed. 647; United States v. Bank of United States, 46 U. S. (5 How.) 382, 405; bk. 12, L. Ed. 210.

In United States v. Bank of Metropolis, 40 U.S. (15 Pet.) 392; bk. 10, L. Ed. 779, the court say: "When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights and incur all the responsibility of individuals who are parties to such instruments. We know of no difference except that the United States cannot be sued." United States v. Bank of United States, 46 U. S. (5 How.) 382; bk. 12, L. Ed. 210.

The United States Must Use Due Diligence to charge the indorsers of a bill of exchange, and they are liable to damages if they allow one which they have accepted to go to protest. United States v. State National Bank of Boston, 96 U. S. (6 Otto) 30; bk. 24, L. Ed. 647; Bank of U. S. v. United States, 43 U. S. (2 How.) 711; bk. 11, L. Ed. 439; United States v. Bank of Metropolis, 40 U. S. (15 Pet.) 377; bk. 10, L. Ed. 779; United States v. Barker, 25 U. S. (12 Wheat.) 560; bk. 6, L. Ed. 728.

Laches of Government-Negligence of Officer .- Laches is not imputable io the government in its character as sovereign by those subject to its dominion. Gibbons v. United States, 75 U. S. (8 Wall.) 269; bk. 19, L. Ed. 453; United States v. Kirkpatrick, 22 U. S. (9 Wheat.) 720, 735; bk. 6, L. Ed. 199. Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and if it fails in this, its claim upon the parties is lost. United States v. Barker, 25 U.S. (12 Wheat.) 559; bk. 6, L. Ed. 728. See also Looney v. Hughes, 26 N.Y. 522; Johnson v. Learn, 30 Barb. (N. Y.) .618; Hayden v. Agent of Auburn State Prison, I Sandf. Ch. (N. Y.) 196. Generally in respect to all the commercial business of the government in that behalf, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect. Cooke v. United States, 91 U. S. (1 Otto) 389, 399; bk. 23, L. Ed,

5. United States v. Bank of United States, 46 U. S. (5 How.) 382; bk. 12, L.

Ed. 199.

of business; and what shall be deemed such diligence depends upon the circumstances of each particular case.1

Where a check is made payable ninety days after date, notice of non-payment must be given to an indorser thereof without an al-

lowance of the days of grace.2

c. To CHARGE JOINT INDORSER.—If one of two or more joint indorsers pays the note he cannot recover contribution from the

other indorser unless the latter was charged by notice.3

d. To CHARGE ACCOMMODATION INDORSER.—The indorser is always entitled to a notice, whether he becomes such for value, or lends his name for the accommodation of another party; 4 and the indorser of a bill of exchange, for the accommodation of the drawer, payable in six months from date, is liable as indorser upon non-payment and notice, although the bill is not presented for acceptance and protested for non-acceptance, and notice thereof given to the indorser, until five months after its date.5

e. To CHARGE GUARANTOR, WHEN.—The guarantor of a negotiable note or other negotiable instrument is entitled to the proper demand of payment and due notice of refusal; 6 but an action on the instrument is a sufficient demand.7 and where known

to such indorser will be a sufficient notice.8

The assignment of a non-negotiable note renders the payee

1. Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 304; s. c., 27 Am. Dec. 192, aff'g 13 Wend. (N. Y.) 133.

What is Reasonable Time.—Present-

ment on the day succeeding the day on which the check is drawn will usually be regarded as due diligence. Daniels v. Kyle, I Ga. 304; First National Bank of Kyle, I Ga. 304; First National Bank of Meadville v. Fourth National Bank of New York, 77 N. Y. 320; s. c., 33 Am. Rep. 618; 24 Hun (N. Y.), 241; Murray v. Judah, 6 Cow. (N. Y.) 484; Harbeck v. Craft, 4 Duer (N. Y.), 129; Little v. Phenix Bank, 2 Hill (N. Y.), 425; Hazelon v. Colburn, I Robt. (N. Y.) 345; s. c., 2 Abb. (N. Y.) Pr. N. S. 199; Kobbi v. Underhill, 3 Sandf. Ch. (N. Y.) 277; Merchants' Bank v. Spicer, 6 Wend. (N. Y.) 443.

The Georgia Act of 1826, requiring demand and notice on bankable paper in order to hold the indorser, is applicable to notes payable at a bank agency. Westminster Bank v. Wheaton, 4 R. I.

2. Gantt v. Jones, 1 Cr. C. C. 210.

3. Braux v. Le Blanc, 10 La. An. 97; Rea v. Dorrance, 18 Me. 137.

Purchase at Succession Sale-Accommodation Indorser.—The accommodation indorser of a note, made by a purchaser at a succession sale, is entitled to the same notice as any other indorser, although he has signed the proces verbal of adjudication as surety of the purchaser. Braux v. Le Blanc, 10 La. An. 97.

4. Oxford Bank v. Davis, 58 Mass. (4

Cush.) 188.

5. Unless a demand be made upon the maker of a note a reasonable time after it falls due, and notice given in case of non-payment to the guarantor, the latter is discharged to the extent that he may be damaged by the delay. Newton Wagon Co. v. Diers, 10 Neb. 284.

A note being indorsed before it was due by the payee in the following words: "I guaranty the payment of the within to A., for value received," and being subsequently indorsed by A., held, that a demand on the maker and notice to the indorser were indispensable requisites to a recovery. Barrett v. May, 2 Bail. (S. C.) 1.

6. Vide infra, VIII, 3, b. (3), (e).

7. Benton v. Gibson, I Hill (S. C.), 56. Guarantor of a Past-due Note. - In case of a negotiable note transferred after due, and guaranteed by the indorser, demand on the maker and notice to the indorser must be proved before an action can be maintained against him. An action on the note is a demand, and, if known to the indorser, would be sufficient notice. Benton v. Gibson, I Hill (S. C.), 56.

8. Sutton v. Owen, 65 N. C. 123.

liable as guarantor only; and in that capacity he is entitled to notice of default of the maker.1

f. To CHARGE ASSIGNOR.—Demand on the maker, and notice of non-payment or protest, is necessary to fix the liability of an assignor of a note.²

g. WHEN PAYABLE AT BANK AGENCY.—Demand and notice are necessary on bank paper, although payable at an agency.³

h. To Make Paper Due, when.—Negotiable paper payable on demand is not due without demand until after the lapse of a reasonable time within which to make demand; and what the length of that reasonable time is, varies according to the circumstances of the case.4

Illinois Doctrine.—According to the Illinois doctrine, the assignee of a note may recover against his assignor without notice of non-payment. Wilder v. De-

1. Ruddell v. Walker, 7 Ark. 457.

notice of non-payment. Wilder v. De-Wolf, 24 Ill. 190. But under the statute of Illinois an assignor of a note is not liable unless due diligence by suit against the maker has been used. Thompson v. Armstrong, I Ill. (Breese) 23; Mason v. Wash, I Ill. (Breese) 16; s. c., 12 Am. Dec. 138.

2. Beckwith v. Carleton, 14 Ga. 691. See Bank of United States v. Smith, 24 U. S. (11 Wheat.) 171; bk. 6, L. Ed. 443; aff'g s. c., 2 Cr. C. C. 319.

3. Butler v. Marine, etc., Ins. Bank,

18 Ga. 517. 4. Morgan v. United States, 113 U. S. 476; bk. 28, L. Ed. 1044.

Note Payable on Demand.—A note payable on demand with interest is due forthwith, and no demand is necessary before bringing a suit on it against the maker. Wheeler v. Warner, 47 N. Y. 519; s. c., 7 Am. Rep. 478; Herrick v. Wolverton, 41 N. Y. 581; s. c., 1 Am. Rep. 461; Hirst v. Brooks, 50 Barb. (N. Y.) 334.

Such a note is a continuing security, and an indorser remains liable until an actual demand, and the holder is not chargeable with neglect for omitting to make such a demand within any particular time. Pardee v. Fish, 60 N. Y. 265; s. c., 19 Am. Rep. 176; Merritt v. Todd, 23 N. Y. 28; s. c., 80 Am. Dec. 243; Barough v. White, 4 Barn. & Cres. 325; Brooks v. Mitchell, 9 Mees. & W. 15.

A note payable on demand must be presented within a reasonable time from its execution in order to hold the indorser. Salmon v. Grosvenor, 66 Barb. (N. Y.) 160; Furman v. Haskin, 2 Cai. (N. Y.) 369; Sice v. Cunningham, 1 Cow. (N.Y.) 397; I Dan. Neg. Inst. sec. 610; Edw. on B. & N. 156, 390. What is a reasonable time is to be determined from the

circumstances of the case and the general conduct of business men; and whether such time has elapsed as should warrant a presumption of payment or refusal seems to be the test. Dennen v. Haskell, 45 Me. 431; Parker v. Tuttle, 44 Me. 459; Seaver v. Lincoln, 38 Mass. (21 Pick.) 267; Stevens v. Bruce, 38 Mass. (21 Pick.) 193; Field v. Nickerson, 13 Mass. 131; Ayer v. Hutchins, 4 Mass. 370; s. c., 3 Am. Dec. 232; Carll v. Brown, 2 Mich. 401; Odiorne v. Howard, 10 N. H. 343; Weeks v. Pryor, 27 Barb. (N. Y.) 705; s. c., 17 Am. Dec. 538; Sice v. Cunningham, 1 Cow. (N. Y.) 397; Gowan v. Jackson, 20 Johns. (N. Y.) 176; Robinson v. Ames, 20 Johns. (N. Y.) 176; Robinson v. Ames, 20 Johns. (N. Y.) 146; s. c., 11 Am. Dec. 259; Loomis v. Pulver, 9 Johns. (N. Y.) 244; Losee v. Dunkin, 7 Johns. (N. Y.) 70; s. c., 5 Am. Dec. 245; Camp v. Scott, 14 Vt. 387; Wallace v. Agry, 4 Mason C. C. 241; Mellish v. Rawdon, 9 Bing. 416; Muilman v. D'Eguino, 2 H. Bl. 565; Mullick v. Radakissen, 9 Moore P. C. 46; s. c., 28 Eng. L. & Eq. 86. But see Barough v. White, 4 Barn. & Cres. 325; Brooks v. Mitchell, 9 Mees. & W. 15. Chief-Justice Shaw says that "in Eng-

Chief-Justice Shaw says that "in England, a promissory note payable on demand is not overdue or deemed dishonored by lapse of time, nor till an actual demand made. Such a species of security is probably rare in England, and is regarded as a continuing security until the holder shall see fit to render it due by a demand. Here it has long been in use, and the rules applicable to it have been firmly fixed. Sylvester v. Crapo, 32 Mass. (15 Pick.) 92.

Mass. (15 Pick.) 92.

Where no Time of Payment is Mentioned in a Note it is payable at once.

Keyes v. Fenstermaker, 24 Cal. 329; Bacon v. Page, 1 Conn. 404; Freeman v.

Ross, 15 Ga. 252; Porter v. Porter. 51

Me. 376; Kendall v. Galvin, 15 Me. 131;

s. c., 32 Am. Dec. 141; Cornell v. Moulton,

i WHEN NOTE PAYABLE IN SPECIFIC ARTICLES. - Where a note is payable in specific articles, without a time or place of payment designated, it is payable on demand, and an actual demand

is necessary before suit brought.1

i To Charge Maker of Note, when. - The maker of a promissory note, made payable on demand at a particular place. is not bound to pay it unless it is presented at the place where it is expressed to be payable. And there is no ground for a distinction upon this point between notes made by a natural person and those made by a corporation, or between notes held by natural persons or corporations.3

k. OF ADMINISTRATOR.—The fact that the administrator is not bound to pay the note until duly allowed against the estate does

3 Den. (N. Y.) 12; Bartholomew v. Seaman, 25 Hun (N. Y.), 619; s. c., 13 Week. man, 25 Hun (N. Y.), 619; s. c., 13 Week. Dig. 320; Herrick v. Bennett, 8 Johns. (N. Y.) 374; Thompson v. Ketcham, 8 Johns. (N. Y.) 190; s. c., 5 Am. Dec. 332; Gaylord v. Van Loan, 15 Wend. (N. Y.) 308; Jones v. Brown, 11 Ohio St. 601; Thurston v. Ludwig, 6 Ohio St. 1; s. c., 97 Am. Dec. 328; Dodd v. Denny, 6 Oreg. 157; Bowman v. McChesney, 22 Gratt. (Va.) 609; Stover v. Hamilton, 21 Gratt. (Va.) 273; Whitlock v. Underwood, 2 Barn. & Cres. 157; Abbott v. Douglass. 2 Barn. & Cres. 157; Abbott v. Douglass, IC. B. 491. At least on demand. Holmes v. West, 17 Cal. 623; Porter v. Porter, 51 Me. 376; Salinas v. Wright, 11 Tex. 572

1. Lobdell v. Hopkins, 5 Cow. (N. Y.) 516; Counsel v. Vulture Min. Co., etc., ben. (N. Y.) 145; Vance v. Churchill, 2 Den. (N. Y.) 145; Vance v. Bloomer, 20 Wend. (N. Y.) 196; Cook v. Ferral, 13 Wend. (N. Y.) 285; Durkee v. Marshall, 7 Wend. (N. Y.) 312. See, infra, VIII. 2, h.

Where a contract is madefor the delivery of property, and the debtor has a known place of residence within the State, a demand of the property must be made there. Chambers v. Winn, Sneed's Ky. Dec. (2d Ed.) 166; Dandridge v. Harris, I Wash. (Va.) 326, 328; s. c., I Am. Dec.

On contracts for the delivery of property, where no place is expressed, the usual residence of the obligor is the place of performance; and where no place is named, and the property is to be deliverered on request, a special request at the obligor's residence must be averred. Wilmouth v. Patton, 2 Bibb (Ky.), 280. Where one contracts to deliver specific articles on demand, he should be always ready at his dwelling-house or place of business. If he be absent, a demand of his wife has been held sufficient. Mason v. Briggs, 16 Mass. 453.

On a Note Pavable in Lumber at the cash price, no time or place being mentioned, demand is necessary before suit. Rice v. Churchill. 2 Den. (N. Y.) 145.

Instances.—In a suit brought upon an instrument: "For value received, I promise to pay A five hundred dollars in castings, at B and C's foundry in Augusta, said A's present account to go in part payment; the castings to be taken at six cents per pound," held, that no time being fixed by the contract for the delivery of the property, there must be a demand and refusal proven. Hotchkiss v. Newton, 10 Ga. 560.

K., in a settlement with F., gave to the latter for a balance due to him on the settlement a draft or order on H. for a certain number of pounds of cotton at a stipulated price per pound. On the trial of an action against K., founded on the cotton order, there was no evidence showing that the order had been dishon-ored. The defendant requested the court to charge the jury that "the plaintiff cannot recover upon the draft unless he proves that he, or some one for him, presented the draft to the drawee for payment within a reasanable time, and that the drawee refused to pay the same." Held, that the court erred in refusing to give the instruction. Fromme v. Kaylor, 30 Tex. 754.

2. Bank of the State v. Bank of Cape

Fear, 13 Ired. (N. C.) L. 75.

Nor can such note be used as a set-off or offered as a payment to the maker, unless so presented. Bank of State v. Bank of Cape Fear, 13 Ired. (N. C.)

L. 75.
3. The Bank of Alexandria is bound over notice of to demand payment and give notice of non-payment before it can sue the maker, notwithstanding any provisions in its charter. Bank of Alexandria v. Young, 2 Cr. C. C. 52,

not relieve the holder from the obligation to make presentment

1. EFFECT OF FAILURE TO MAKE.—Damages to the drawer of a bill or indorser of a note will be presumed from the holder's fail. ure to make presentment or demand, but such drawer or indorser is not liable when it is clearly shown that no injury was sustained by the holder's failure so to do.² And where the holder thereby loses his remedy against the drawer and indorser, he is entitled to one against the bank through whose negligence the bill was lost.³
2. Not Necessary.—a. TO CHARGE MAKER OR JOINT MAKER.—

A presentment and demand at the time and place of payment of a note payable at a future day is not a condition precedent to a

right of recovery upon it against the maker.4

1. Frayzer v. Dameron, 6 Mo. App.

The Notary's Ignorance of the Death of the Maker is no excuse for his failure to make demand upon the administrator; and such failure releases the indorser.

Frayzer v. Dameron, 6 Mo. App. 153.
2. Hill v. Martin, 12 Mart. (La.) 177;
s. c., 13 Am. Dec. 372; May v. Coffin, 4
Mass. 341; Clegg v. Cotton, 3 Bos. &
Pul. 239; Carter v. Flower, 16 Mees. & W. 743; Bickerdicke v. Bollman, I T. R. 405; 743; Bickerdicke v. Bollman, I.T. R. 405; Ex parte Heath, 2 Ves. & B. 240; Edw. on Bills, 636; Story on Bills, sec. 306; 2 Dan. Neg. Inst. 1170. Compare Smith v. Miller, 52 N. Y. 545; Clift v. Rodger, 25 Hun (N. Y.), 39; Commercial Bank of Albany v. Hughes, 17 Wend. (N. Y.) 94; Mechanics' Bank v. Griswold, 7 Wend. (N. Y.) 165; Cory v. Scott, 3 Barn. & Ald. 619; Edw. on Bills, 446; Story on Bills, sec. 280 Bills, sec. 280.

Exception to the Rule. - Where a bill is drawn without funds, the drawer is not entitled to demand and notice. Hoyt v. Seeley, 18 Conn. 353; Norris v. Despard, Seeley, 18 Conn. 353; Norris v. Despard, 38 Md. 491; Cushing v. Gore, 15 Mass. 69; Brush v. Barrett. 82 N. Y. 401; s. c., 37 Am. Rep. 569; Hoffman v. Smith, 1 Cai. (N. Y.) 157; Murray v. Judah, 6 Cow. (N. Y.) 484; Coyle v. Smith, 1 E. D. Smith (N. Y.), 400; Van Wart v. Smith, 1 Wend. (N. Y.) 219; Kinyon v. Stanton, 44 Wis. 479; s. c., 28 Am. Rep. 6or.

3. Chicopee Bank v. Seventh Nat. Bank of Philadelphia, 75 U. S. (8 Wall.)

641; bk. 19, L. Ed. 422.

4. See Bond v. Storrs, 13 Conn. 412; Massey v. Turner, 2 Houst. (Del.) 79; Games v. Manning, 2 G. Greene (Iowa), 251; Bank of Louisiana v. Lawless, 3 La. An. 129; Bradford v. Cooper, 1 La. An. 325; Field v. Nickerson, 13 Mass. 131, 137; Goodloe v. Godley, 21 Miss. (13 Smed. & M.) 233; s. c., 51 Am. Dec. 159;

Brigham v. Smith, 16 N. H. 274; Douglass v. Rathbone, 5 Hill (N. Y.), 143; Nelson v. Bostwick, 5 Hill (N. Y.), 37; s. c., 40 Am. Dec. 310; Troy City Bank v. Grant, Hill & Den. (N. Y.) 119; Here. rick v. Bennett, 8 Johns. (N. Y.) 374; Thompson v. Ketcham, 8 Johns. (N. Y.) 189; s. c., 5 Am. Dec. 332; Haxtun v. Bishop, 3 Wend. (N. Y.) 13; State Bank v. Napier, 6 Humph. (Tenn.) 270; s. c., N. Napier, o Humph. (1enn.) 270; S. C., 44 Am. Dec. 308; Cammer v. Harrison, 2 McC. (S. C.) 246; Pearson v. Bank of Metropolis, 2 6 U. S. (1 Pet.) 89; bk. 7, L. Ed. 65; State Bank v. Fox, 3 Blatchf. C. C. 431; Bank of Washington v. Way, 2 Cr. C. C. 249; Silver v. Henderson, 3 McL. C. C. 165.

As a general rule, no demand of payment of a promissory note is necessary in order to sustain an action against the maker. His undertaking is unconditional, Pearson v. Bank of Metropolis, 26 U. S.

(1 Pet.) 89; bk. 7, L. Ed. 65.
D. owing T. made a negotiable note payable to M., which T. indorsed in blank, delivered to M., and received from M. its amount for his own benefit. Held, that T. was liable to M. as an original promissor and joint maker, without proof of presentment to D. Massey v. Turner,

2 Houst. (Del.) 79.

A Note on Demand becomes due, and an action lies against the maker immediately and without any demand. Field v. Nickerson, 13 Mass. 131, 137; Herrick v. Bennett, 8 Johns. (N. Y.) 374; Thompson v. Ketcham, 8 Johns. (N. Y.) 189; s. c., Vand. (N. Y.) 13; Haxtun v. Bishop, 3 Wand. (N. Y.) 13; Cammer v. Harrison, 2 McC. (S. C.) 246; State Bank v. Fox, 3 Blatchf. C. C. 431. Same—"Two Years after Date."—No

special demand is necessary upon a note payable "two years after date, on de-mand," before bringing an action against the maker, Nelson v. Bostwick, 5 Hill

b. To CHARGE SURETY.—A demand is usually necessary to charge a surety, but a security who signs a note with the maker is not discharged by a failure to protest and give notice;2 and where a party signs as surety of a joint and several promissory note, he is not entitled to notice of demand and non-payment, although the payee knew that fact.3

a. To DISCHARGE ASSIGNOR, WHEN.—When the maker is solvent a demand of payment at maturity is necessary to charge the assignor and indorser; but where the maker is insolvent neither demand nor suit is necessary to hold the assignor, whether the note was assigned

before or after maturity.4

d. To CHARGE GUARANTOR.—A guarantor of a note is not discharged by a failure to make demand and to give him notice of non-payment, unless it appears that he was prejudiced thereby. In an action by the holder, who was also holder at the time of the guaranty, against the guarantor of an existing promissory note, no notice to the guarantor of demand on the maker, and of his inability to pay, need be proved.6

e. To CHARGE INDORSER.—(1) By Statute.—The matter of demand to charge indorsers is regulated in many States by statute.7

(N. Y.). 37; s. c., 40 Am. Dec. 310; State Bank of Ohio v. Fox, 3 Blatchf. C. C. 431. Where a Note is made Payable at a Particular Time and Place, demand at that time and place is not necessary to hold the maker. Games v. Manning, 2 G. Greene (Iowa), 251; Bank of La. v. Lawless, 3 La. An. 129; Bradford v. Cooper, 1 La. An. 325; Goodloe v. Godley, 21 Miss. (13 Smed. & M.) 233; s. c., 51 Am. Dec. 159; Brigham v. Smith, 16 N. H. 274; Troy City Bank v. Grant, Hill & Den. (N. Y.) 119; State Bank v. Napier, 6 Humph. (Tenn.) 270; s. c., 44 Am. Dec. 308; Deel v. Berry. 21 Tex. 463; s. c., 73 Am. Dec. 236; Silver v. Hendeson, 3 McL. C. C. 165.

If a Note is Discounted by Plaintiff for

the Joint Benefit of Maker and Indorser, or if they are jointly interested in the object for which the money is raised, it is not necessary to demand payment of the maker, or give notice to the defendant of the non-payment, in order to charge an indorser, notwithstanding the parties were interested in unequal proportions, and the defendant had indorsed as surety for the other parties to the extent that the whole note exceeded his own interest therein. Bank of Washington v. Way, 2 Cr. C. C. 249.

1. See tit. BILLS AND NOTES, 2 Am. &

Eng. Encycl. of L. 313.

2. Buckner v. Liebig, 38 Mo. 188;
Baker v. Robinson, 63 N. C. 191.

3. Hartman v. Burlingame, 9 Cal. 557.
When a Party is Surety.—Where it is proved that, by a verbal agreement be-

tween the pavee and indorser of a promissory note, the indorser was to be held responsible only in case payment could not be obtained from the maker, the indorser must be regarded as a surety, and not entitled to the strict notice necessary to charge a mere indorser. Wall v. Bry, I La. An. 311.

A Neglect of the Holder to Sue After

Request does not discharge the surety, certainly unless the principal was solvent at the time of the request, and became insolvent afterwards, before the institution of the suit. Hartman v. Burlingame,

9 Cal. 557.

Hawkinson v. Olson, 48 Ill. 277.
 Weller v. Hawes, 19 Iowa, 443.

What Amounts to a Guaranty.—An indorsement by payee of a note "for value received I sell, assign, and guaranty the payment of within note to A. or bearer, is an original guaranty, and demand of maker is unnecessary. Allen v. Right-mere, 20 Johns. (N. Y.) 365; s. c., II Am. Dec. 288.

Writing upon a note "For value received, we guarantee the within note un-til paid," is an absolute and unqualified contract by each signer of the guaranty to pay if the maker does not. Upon maturity, it is the duty of the guarantors to go to the holder and pay the note, and this without demand or notice. City Savings Bank v. Hopson, 53 Conn. 453.

6. Parkman v. Brewster, 81 Mass. (15

7. In Georgia. - Notice of non-payment is not necessary to charge parties seconFor a general statement of the principles governing this subject see the title "BILLS AND NOTES" in this series.

- (2) When Maker not Liable to Bona Fide Indorser.—An indorser of a negotiable promissory note is liable to his indorsee, without demand of payment from the maker and notice of non-payment in cases where the maker is not liable to a bona fide indorsee before maturity, and for value.² And one who indorses a negotiable note after maturity, and after the death of the maker, knowing of his death, is liable without demand, protest, or notice to a holder who presents the note for allowance against the maker's estate, when it is allowed, but not paid on account of the insolvency of the estate.3
- (3) After General Assignment of Maker.—Where the maker of a note before maturity makes a general assignment for the benefit of his creditors, no demand or notice of non-payment is necessary to hold an indorser.4
- (4) When No Funds at Bank where Payable.—No formal demand upon a note payable at a bank is necessary, if there are no funds there to pay it. Thus where a note was discounted and held by the bank where it was made payable, and when it became due the maker had no funds at the bank for its payment, it was held that no formal demand of the maker was necessary, under the circumstances, for the purpose of charging the indorsers; and a notice dated and mailed the next day after the note became due, stating

darily liable on bills of exchange, under the laws of Georgia. Holmes v. Pratt, 34 Ga. 558. Thus in a suit by the Central Bank of Georgia against an indorser, neither demand, notice, nor protest need be proved, under its character. Central Bank v. Whitfield, r Ga. 593; Merchants' Bank v. Central Bank, I Ga. 418; s. c.,

44 Am. Dec. 665: Under the Statute of Illinois, it is unnecessary to give notice of non-payment necessary to give notice of non-payment of a note to an indorser, in order to hold him. (Gale's Stat. 526.) State Bank v. Hawley, 2 Ill. (I Scam.) 580; Fear v. Dunlap, I G. Greene (Iowa), 331.

In Pennsylvania.—The act incorporating the Philadelphia Bank, which places notes discounted by that bank on the facting of foreign bills of exphance does

footing of foreign bills of exchange, does not render a protest and notice thereof necessary to charge an indorser. Rahm v. Philadelphia Bank, I Rawle (Pa.),

The Texas Statute (Hart. Dig. 2528), dispensing with protest and notice for the purpose of rendering liable indorsers, etc., also does away with the necessity of a demand. Sydnor v. Gascoigne, II Tex.

- 1. 2 Am. & Eng. Encycl. of L. 313.
 2. Perkins v. White, 36 Ohio St. 530;
 s. c., 12 Cent. L. J. 263.
 5. Picklar v. Harlan, 75 Mo. 678.

- 4. Coddington v. Davis, 3 Den. (N. Y.) 16, aff'g 1 N. Y. 186. In this case the court hold that "where the maker of a promissory note which was held by an indorsee made an assignment for the benefit of his creditors, preferring the indorser as a creditor to the amount of the note and the holder of a separate debt due him on account; and the holder, in conjunction with other creditors of the maker, executed an instrument referring to the assignment, and agreeing in consideration thereof to discharge the maker from all claims and demands existing in their favor respectively against him, over and above what they might realize under the assignment, on his agreeing to pay the balance of their debts, after the expiration of seven years, -held, that the claim of the holder upon the note was not discharged or suspended, the agreement as regarded him being only applicable to
- regarded him being only applicable to his other demand against the maker."

 5. Gillett v. Averill, 5 Den. (N. Y.) 85. See also People's Bank v. Brooke, 31 Md. 7; Folger v. Chase, 35 Mass. (18 Pick.) 63; Gilbert v. Dennis, 44 Mass. (3 Metc.) 495; s. c., 38 Am. Dec. 329; Merchants' Bank v. Elderkin, 25 N. Y. 178; Nichols v. Goldsmith, 7 Wend. (N. Y.) 160; Chicopee Bank v. Philadelphia Bank, 75 U. S. (8 Wall.) 641; bk. 19, L. Ed. 422; Dan. Neg. Inst. sec. 656.

that the note was "this evening protested for non-payment, the: same having been duly presented and payment demanded, which was refused," was mailed in time, and was in form good notice

of demand and refusal, upon the day preceding.1

(5) When Maker in Another State.—Where the maker of the note has removed into another State or another jurisdiction subsequent to the making of the note, a personal demand upon him is not necessary to charge the indorser, but it is sufficient topresent the note at the former place of residence of the maker.2

(6) When Note Non-negotiable.—No demand of the maker and notice of non-payment is necessary to entitle the party to recover

of the indorser of a non-negotiable note.3

(7) When Indorser Paid.—An indorser of a note, who has received payment previously to the indorsement, is not entitled tonotice of non-payment.4 And where, before maturity of a bill, a second indorser receives indemnity from the first indorser, which is sufficient to cover his liability, demand and notice are not necessary to charge him.5

(8) Generally.—Where the same causes which prevent the presentation of a note for payment apply with equal force to prevent giving notice of non-payment to the indorser, the hindering cause extending alike to both, the holder is excused from the performance of

either.6

Where a part payment is made by the maker of a note at its maturity, and the holder agrees to wait a week for the residue, notice of non-payment at the end of the week need not be given to the indorsers to fix their liability.7 And notice of protest is not required to render a firm liable on an indorsement, where all the members of the firm are members of the house which drew the bill.8

1. First National Bank of Groton v. Crittenden, 2 T. & C. (N. Y.) 118.

2. McGruder v. Bank of Washington, 22 U. S. (9 Wheat.) 598; bk. 6, L. Ed. 170. See also Halliday v. Martinet, 20 Johns. (N. Y.) 172; s. c., 11 Am. Dec. 262; Dickens v. Beal, 35 U. S. (10 Pet.) 580; bk. 9, L. Ed. 541; Williams v. Bank of U. S. 27 U. S. 27 U. S. 27 U. S. 27 U. S. 28 U. S. 28 U. S. 28 U. S. 29 U. S. 20 U. S. 2 S., 27 U. S. (2 Pet.) 102, 105, 129; bk. 7, L. Ed. 360; Bank of Columbia v. Lawrence, 2 Cr. C. C. 512; Bank of Washton v. Reynolds, 2 Cr. C. C. 289; Exparte Heidelback, 2 Low. C. C. 533; Inve Glyn, 15 Bank. Reg. 503; Hartley v. Case, 6 D. & R. 505.

3. Richards v. Warring, 4 Abb. (N. Y.) App. Dec. 47; Stone v. Seymour, 15 Wend. (N. Y.) 19; Seymour v. Van Slyck, & Wend. (N. Y.) 403. See Huse v. Hamolin, 29 Iowa, 501; also Ellis v. Brown, 6 Barb. (N. Y.) 297; Oakley v. Boorman, 21 Wend. (N. Y.) 590.

Indorsers of a Negotiable Instrument are liable to the holders without demand S., 27 U. S. (2 Pet.) 102, 105, 129; bk. 7,

are liable to the holders without demand upon the maker and notice of non-payment. Huse v. Hamblin, 29 Iowa, 501.

- 4. Bissell v. Bozman, 2 Dev. (N. C.
- Eq. 169.
 5. Walker v. Walker, 7 Ark. 542.
 6. Peters v. Hobbs, 25 Ark. 67.

7. Glasgow v. Pratte, 8 Mo. 336; s. c. 40 Am. Dec. 142.

8. Bank of Rochester v. Monteath, I Den. (N. Y.) 402; s. c., 43 Am. Dec. 681; West Branch Bank v. Fulmer, 3 Pa.

St. 399; s. c., 45 Am. Dec. 651.

Pennsylvania Doctrine.—In the case of

West Branch Bank v. Fulmer, supra, the court say: "But it is argued that though Cochran & Perry were liable as makers, notice to them as indorsers was requisite to make them liable as such, and consequently to let Fulmer in as a partnership creditor on the effects of their par-ticular firm. If, however, the use of notice is to give a drawer or indorser a. seasonable opportunity to arrange his affairs with the acceptor or maker, it must be as available in its consequenceswhen 'it is given to him in the one-character as when it is given to him in the other; and Fulmer might conse-

f. To All the Successive Indorsers.—It is not necessary for the holder of a promissory note to give notice of non-payment to a prior indorser in order to hold a subsequent indorser who has due notice.1

The holder of a note is required to charge with notice only the indorser to whom he desires to look for payment, and it belongs to each indorser to see for himself that the prior indorsers are duly noti. fied if he would have his remedy over against them.2 For the purpose of receiving and transmitting notice, those who hold negotiable paper at the time of the protest, and those who indorse as mere agents to collect, are regarded as real parties to the paper; the former as holders in fact, and the later as actual indorsers for value.3

g. When Note Payable at a Particular Place.—(1) At Such Place.—As against the maker of a note or acceptor of a bill payable at a specified place, it is not necessary for the holder to make a demand at such place, as a condition precedent to bringing action; and therefore it is not necessary to aver such a demand in the declaration, or prove it at the trial. If the maker or acceptor was at the place or time designated, and was ready and offered to pay the money, he may plead such fact, as he would plead a tender in bar of damages and costs, by bringing the money into court.4 If,

quently have sued the one firm or the other, each having knowledge of the fact of dishonor, or both, at his election. The principle of Porthouse v. Parkee, I Camp. 82, is, that knowledge is notice, and the effect of it is that the knowledge of the one firm was the knowledge of the other. It would be absurd in an in-dorser to complain that he had not been served with formal notice of what was known to him, or that he was prejudiced for want of it. As, then, it was as much the business of Cochran & Perry as it was the business of the other members of the firm of Beers, Cochran & Co. to provide for the payment of their joint note at maturity, and as they all knew that provision had not been made for it. proof of notice to Cochran & Perry would have been superfluous in an action against them as indorsers. How, then, could Fulmer have been prejudiced by the bank's supposed omission? Its duty, like the duty of any other agent, was to do all that was necessary for the preservation of the interests committed to its charge; and to keep its principal advised of the state of them, as was done by giving Fulmer notice that his indorsement of Cochran's note had not been discharged by the proceeds of the note deposited to meet it. Against the bank, therefore, either as a collector or a pawnee, Fulmer's administrators had no ground of reclamation, and consequently no defence to its action on his indorsements."

1. Walker v. Walker, 7 Ark. 542; Baker v. Morris, 25 Barb. (N. Y.) 138; Struthers v. Blake, 30 Pa. St. 139; Valk v. Bank of the State, 1 McMull. Esq. (S. C.) 414; Mathews v. Fogg, 1 Rich. (S. C.) 369; s.

Mathews v. Fogg, 1 Rich. (S. C.) 369; s. c., 44 Am. Dec. 256.

2. Spencer v. Ballou, 18 N. Y. 327.

3. Linn v. Horton, 17 Wis 151.

4. See Bowie v. Duvall, 1 Gill & J. (Md.) 175; Ruggles v. Patten, 8 Mass. 480; Weed v. Van Houten, 9 N. J. L. (4 Halst.) 189; s. c., 17 Am. Dec. 468; Caldwell v. Cassidy, 8 Cow. (N. Y.) 271. Wolcott v. Van Santvoord, 17 Johns. (N. Y.) 248; s. c., 8 Am. Dec. 396; Foden v. Sharp, 4 Johns. (N. Y.) 183; Mulherrin v. Hannum, 2 Yerg. (Tenn.) 81; McNairy v. Bell, 1 Yerg. (Tenn.) 502; s. c., 26 Am. Dec. 454; Watkins v. Crouch, 5 Leigh (Va.), 522; Brabston v. Gibson, 50 U. S. (9 How.) 263; bk. 13, L. Ed. 131; Wallace v. McConnell, 38 U. S. (13 Pet.) 136; bk. 10, L. Ed. 95; United States Bank v. Smith, 24 U. S.(11 Wheat.) 171; bk. 6, L. Ed. 443; Kendall v. Badger, McAll. C. C. 165; Rowe v. Young, 2 Brod. & B. 165, 180; Nicholls v. Bowes, 2 Campb. 498; Wild v. Rennards, 1 Campb. 425; note; Sanderson v. Bowes, 14 East, 500; Bayl. Bills, 200, note.

Negotiable at a Particular Bank.—A note made "negotiable at the bank of Washington," is not a note payable at that bank; and to demand payment there is not necessary in order to charge the however, the bank at which such a note is made pavable is itself, at the maturity of the note, the holder of it, all that is necessary, even against the indorser, is for the bank to examine the account of the maker with them in order to ascertain whether he has any funds in their hands.1

(2) Elsewhere.—Where a note is made payable at a bank, it is not necessary to make a personal demand upon the maker or acceptor elsewhere. It is his duty to be a tthe bank within reasonable hours

to pay the same.2

h. When Note is Payable in Specific Articles, when.— Where a note is payable in specific articles at a specified time, or in a specified manner and at a designated place, no demand is necessary.3

i. WHEN PAYABLE ON DEMAND.—Where a bank note is pavable on demand generally, and not at a particular place, demand

of payment before suit is not necessarv.4

C. C. 698.
1. Pierce v. Butler, 14 Mass. 303; Woodbridge v. Brigham, 12 Mass. 403; s. c., 7 Am. Dec. 85; Berkshire Bank v.

s. c., 7 Am. Dec. 85; Berkshire Bank v. Jones, 6 Mass. 524; s. c., 4 Am. Dec. 175; Saunderson v. Judge, 2 H. Bl. 509. See also Whitwell v. Johnson, 17 Mass. 449; s. c., 9 Am. Dec. 165.

2. Hildeburn v. Turner, 46 U. S. (5 How.) 69; bk. 10, L. Ed. 54; Covington v. Comstock, 39 U. S. (14 Pet.) 43; bk. 10, L. Ed. 346; Bank of United States v. Carneal, 27 U. S. (2 Pet.) 543; bk. 7, L. Ed. 513; Fullerton v. Bank of United States, 26 U. S. (1 Pet.) 604; bk. 7, L. Ed. 80; Bank of United States, v. Smith 24 States, 20 U. S. (1 Pet.) 604; bk. 7, L. Ed. 280; Bank of United States v. Smith, 24 U. S. (11 Wheat.) 171; bk. 6, L. Ed. 443; aff'g s. c., 2 Cr. C. C. 319; Brown v. Nyyes, 2 Woodb. & M. C. C. 75, 85.

Thus no demand before suit is necessary, against the maker of a note payable "at either of the banks in Boston." Brown v. Noyes, 2 Woodb. & M. C. C.

If a Note be Payable at a Bank, it is a sufficient demand of payment of the maker if the holder on the last day of grace demands payment at the bank. The note is dishonored if the maker has no funds there to pay it. Bank of United States v. Oneale, 2 Cr. C. C. 466.

3. As to when demand is necessary,

see supra, VIII. 1, i.

k

Where an instrument was in the following form, to wit: "Thirty days after date we promise to pay to the order of J.

ndorsee. "Negotiable" does not mean above named. etc." It was held that to 'payable." Beeding v. Thornton, 3 Cr. support an action on such instrument a demand need not be proved. Baughan

1. Pierce v. Butler, 14 Mass. 303; v. Graham, 2 Miss. (1 How.) 220.

4. Haxtun v. Bishop, 3 Wend. (N.Y.)

New York Doctrine—History of the Adjudication.—In Haxtun v. Bishop, supra, C. J. Savage says: "Whether a bank note payable on demand without specifying any place of payment, may be prosecuted without a demand at the banking-house from which it is issued, seems not to have received a judicial decision in this court. In the case of Bank of Utica v. Magher, 18 Johns. (N. Y.) 341, it was held that no action lay upon the bills issued by the branch at Canandaigua, unless first demanded there. The act authorizing the establishment of an office, discount and deposit, at Canandaigua directed that no note should be issued at such office unless countersigned by the cashier; and when so countersigned, they should be considered payable on demand at the office of the said branch. Spencer, Ch. J., in giving the opinion of the court, says: 'Considering the object and provisions of the act, we have no hesitation in saying that payment of such bills must first be demanded at the branch.' was in accordance with the object of the legislature, which was, that a part of the funds of the Bank of Utica should be transferred to Canandaigua for the purpose of banking operations there. It was highly proper, therefore, that there should be a demand upon the branch H. G. \$1200,00 in the following manner, which had possession of those funds be-by shipping cotton, etc., the above to be fore the parent bank should be subjected valid in every respect, in case B. and M. to a suit. In Bank of Niagara v. Mcdo not pay over to said G. the amount Cracken, 18 Johns. (N. Y.) 493, Wood-

i. IN CASE OF ORDER ON PUBLIC OFFICER.—An order on the county treasurer, authorized by statute, though it contains the words "or bearer" after the payee's name, is not subject to the

mercantile rule requiring presentment and notice of dishonor.

k. By Government Officer.—Where an officer of the government receives a note as collateral security for payment of debt due the State, the debtor cannot avail himself of the officer's neglect or omission to perform the duties which the law in ordinary cases imposes upon a party thus receiving a note.2

worth, J., expresses an opinion that bank bills, payable on demand and not at any particular place, would sustain an action without a demand at bank. In the case of Bank of Jefferson Co. v. Chapman, 19 Johns. (N. Y.) 322, the opinion of Mr. Justice Woodworth was said not to be the opinion of the court, and that the question whether a demand was necessary in such a case was open; but it did not become necessary to decide in that case. In the former of these cases a set-off was allowed on the ground that the defendant held \$419 of the bills of the Niagara bank after his note became due to the bank, and before any suit was commenced, though they were not demanded at the bank until after the defendant's note had been assigned. The court, however, did not think the assignment varied the rights of the defendant, because the assignment was after the defendant's note had become due, and the assignee took it subject to all the equity existing at the time between the original parties. Perhaps since the case of Wheeler v. Raymond, 8 Cow. (N. Y.) 311, even that set-off would not now be allowed, although a payment upon the note, or an appropriation of a counter demand after due and before assignment, undoubtedly would. These cases, therefore, do not decide the quesstoon. In the case of Caldwell v. Cassidy, 8 Cow. (N. Y.) 272, 273, I remarked that in case of a note payable on demand at a certain place—a bank note, for instance -I thought a demand would be necessary, and referred to Bowes v. Howe, 5 Taunt. 30, and Howe v. Bowes, 16 East, 112; and such I still think is the law in England at the present day, as appears from the cases cited in regard to all promissory notes, when the place of payment forms a part of the note itself. In this court, however, we hold that on such a note a demand at the place of payment is not necessary; but if the maker was at the place of payment with funds to pay the note,

it and bringing the money into court."

Haxtun v. Bishop, 3 Wend. (N. Y.) 19.

1. Lyell v. Supervisors of Lapeer Co.,

6 McL. C. C. 446.

2. Looney v. Hughes, 30 Barb. (N. Y.) 613; Hayden v. Agent, etc., I Sandf. Ch. (N. Y.) 198; Albany Dutch Church v. Vedder, 14 Wend. (N. Y.) 165-171; Seymour v. Van Slyck, 8 Wend. (N. Y.) 403; mour v. Van Slyck, 8 Wend. (N. Y.) 403; affirmed Stone v. Seymour, 15 Wend. (N. Y.) 19; People v. Russell, 4 Wend. (N. Y.) 570: Dox v. Postmaster-General of the U. S., 26 U. S. (1 Pet.) 318, 325; bk. 7, L. Ed. 160, 163; United States v. Nicholl, 25 U. S. (12 Wheat.) 505; bk. 6, L. Ed. 706; United States v. Vanzandt, 24 U. S. (11 Wheat.) 184; bk. 6, L. Ed. 448; United States v. Kirkpatrick, 22 U. S. (9 Wheat.) 720; bk. 6, L. Ed. 199; Locke v. United States, 3 Mason C. C. 446.

Assurance by Officer, -And even should the officer expressly assume responsibility in relation to such note as to prosecute it to judgment, it seems that the State would not be responsible for any laches that might occur. Seymour v. Van Slyck, 8 Wend. (N. Y.) 403.

Laches of Public Officer.—It furnishes

no defence to the sureties of a collector that, if the warrant against their principal had been issued within the time prescribed by law, the amount due might have been collected of him. The provision is for the benefit of the public, and forms no part of the contract of the sureties. Looney v. Hughes, 26 N. Y. 514.

The court say, in Looney v. Hughes, supra, that "in no case is a surety discharged by mere laches of the creditor, unless after a request to prosecute the principal. In the case of the People v. Jansen, 7 Johns. (N. Y.) 332, the neglect of the supervisors to prosecute defaulting loan officers for a long period, and their indulgence and delay in the prosecution when it had been commenced, were admitted as a defence; and the provisions that fact is a good defence against inter-est and costs, provided the defendant sion and prosecution in such cases seem avails himself of the defence by pleading to have been regarded as equivalent to a

L IN CASE OF BILLS OF EXCHANGE.—(1) To Charge Drawer. _(a) By Statute.—By statute in some States it has been provided regarding certain classes of commercial paper that demand and

notice shall not be necessary to charge the parties thereto.1

(b) When accepted by an Accommodation Indorser.—Where a bill is accepted for the sole accommodation of the drawer, the latter is the primary debtor, and is not discharged either by omission to demand acceptance or payment from the drawee, or to give him. the drawer, notice of its dishonor when acceptance or payment is refused.2

(c) WHEN DRAWEE INSOLVENT.—If the drawee in a bill of exchange is insolvent at its date, neither suit against him nor protest

of the bill is necessary to fix the liability of the drawer.3

(d) WHEN DRAWEE DIRECTED NOT TO PAY.—Where a bill is drawn on a person in favor of a third party, and before it is presented for acceptance or payment the drawer directs the drawee not to pay it, the holder may maintain suit thereon without presenting the order to drawee.4

(e) Where the Drawee has No Funds of the Drawer.— Where the drawee has no funds or effects of the drawer in his hands, the latter has no right to expect payment, and demand and notice, as against him, is unnecessary; because the reason for the demand and notice has failed. Yet in those cases where the

request by the sureties. But the doctrine of the case has been overruled by repeated decisions in our own courts, and a contrary rule laid down in the courts of a contary rule laid down in the courts of the United States. Locke v. United States, 3 Mass. 446; Albany Dutch Church v. Vedder, 14 Wend. (N. Y.) 165, 171; Seymour v. Van Slyck, 8 Wend. (N. Y.) 403; People v. Russell, 4 Wend. (N. Y.) 570; Dox v. Postmaster General of the U.S. of U.S. (1 Pet.) 218, 225; bly 1.) 570; Dox v. Postmaster General of the U. S., 26 U. S. (1 Pet.) 318, 325; bk. 7, L. Ed. 160, 163; United States v. Nicholl, 25 U. S. (12 Wheat.) 505; bk. 6, L. Ed. 709; United States v. Vanzandt, 24 U. S. (11 Wheat.) 184; bk. 6, L. Ed. 448; United States v. Kirkpatrick, 22 U. S. (9 Wheat.) 270; bk. 6, L. Ed. 400. These Wheat.) 720; bk. 6, L. Ed. 199. authorities must be regarded as having established the reasonable rule, that the directions of the public laws in such cases

1. Thus, under the provisions of the Ohio act of 1816, to prevent the circulation of unauthorized bank paper, demand and notice are not necessary to charge the drawers of a bill of exchange. Watson v. Brown, 14 Ohio, 473. The same doctrine has been held in Mississippi. Bailey v. Dozier, 47 U. S. (6 How.) 23; bk. 12, L. Ed. 328.

2. Barbaroux v. Waters, 3 Met. (Ky.) 304; Ross v. Bedell, 5 Duer (N. Y.), 462.

3. Platzer v. Norris, 38 Tex. 1.

4. Thus, where A drew an order on B in favor of C, expressed to be for value received; but before it was presented to B, A directed B not to pay it, -held, that C might maintain an action against A without first presenting the order to B.

Child v. Moore, 6 N. H. 33.

5. Hoffman v. Smith, I Cai. (N. Y.) are not to be assimilated to a notice and request by a private surety for the prose-cution of the principal, and that laches Sullivan v. Deadman, 23 Ark. 14; McRae cannot be imputed to the State or people, v. Rhodes, 22 Ark. 315; Hoyt v. Seeley, for a failure on the part of these officers 18 Conn. 353; Brower v. Rupert, 24 Ill. to comply with such directions. These provisions of law are intended, as I have provisions of law are intended, as I have not the government, and not for the benefit of the surety. The sureties for one public officer will not be allowed to plead in their own discharge, the neglect of another to discharge a duty to the public."

18 Conn. 353; Brower v. Rupert, 24 Ill.
182; Anderson v. Folger, 11 La. An. 269; w. Merle, 22 Mass. (5 Pick.) 88; Cushing v. Gore, 15 Mass. 69; Warder v. Tucker, 7 Mass. 452; Carson v. Alexander, 34 Miss. 528; Cook v. Martin, 13 Miss. (5 Smed. & M.) 379; Brush v. Barrett, 82 N. 401; Mobley v. Clark, 28 Barb. (N. drawer has reasonable grounds to believe that the bill will be honored, he is entitled to notice, although he has no funds in the hands of the drawee. And where the drawer has effects when the bill is drawn, but none at the time of its dishonor; or where there is a running account, and a fluctuating balance; or a bona fide expectation of assets; or where he has no assets at the time of drawing, but has assets before the bill becomes due,-notice is necessary.2

(f) WHEN OMISSION WOULD NOT INJURE DRAWER.—It has been said that the drawer is not discharged from liability upon a draft by want of non-acceptance or non-payment, unless he sustained injury thereby; 3 but want of injury is not sufficient excuse for failure to make a demand and give notice of non-payment.4

Y.) 390; Healy v. Gilman, I Bosw. (N. Y.) 235; Murray v. Judah, 6 Cow. (N. Y.) 484; Dollfus v. Frosch, I Den. (N. Y.) 367; Coyle v. Smith, I E. D. Smith (N. Y.), 400; Commercial Bank of Albany v. Hughes, I7 Wend. (N. Y.) 94; Van Wart v. Smith, I Wend. (N. Y.) 219; Miser v. Trovinger, 7 Ohio St. 281; Wollenweber v. Ketterlinus, I7 Pa. St. 389; Kinyon v. Stanton, 44 Wis. 479; s. c., 28 Am. Rep. 601; Rhett v. Poe, 43 U. S. (2 How.) 457; bk. II, L. Ed. 338; Hopkirk v. Page, 2 Brock. C. C. 20; Cox v. Simms, I Cr. C. C. 238; Allen v. King, 4 McL. C. C. 128; In re Brown, 2 Story C. C. 502; Read v. Wilkinson, 2 Wash. C. C. 461; Nicholson v. Gouthit, 2 H. Bl. 609; Rogers v. Stephens, 2 D. & E. 713; Legge v. Thorp, I2 East, 171; Orr v. Maginnis, 7 East, 359; Dennis v. Morrice, 3 Esp. 188. Wilkins v. Legler Peaker 600. 7 East, 359; Dennis v. Morrice, 3 Esp.
 158; Wilkes v. Jacks, Peake, 202.
 There is an Implied Promise on the part

of the holder of a draft or order that he will within a reasonable time present the draft to the drawee, unless he should be satisfied that the drawer had no funds in the hands of the drawee to satisfy such draft, and in case he neglected so to present it he must be able to prove positively that the same would not have been paid if presented. Fromme v. Kaylor, 30 Tex.

1. Hill v. Norris, 2 Stew. & P. (Ala.) 114; Campbell v. Pettengill, 7 Me. (7 Greenl.) 126; s. c., 20 Am. Dec. 349; Grosvenor v. Stone, 25 Mass. (8 Pick.) 83; Stanton v. Blossom, 14 Mass. 116; s. c., 7 Am. Dec. 198; Robinson v. Ames, 20 Johns. (N. Y.) 146; s. c., 21 Am. Dec. 259; French v. Bank of Columbia, 8 U. S. (4 Cr.) 144; bk. 2, L. Ed. 576; Hop-kirk v. Page, 2 Brock. C. C. 20.

English Doetrine.—In Claridge v. Dalton, 4 Maul. & Sel. 226, Lord Ellenborough says: "Even where there are not any

funds, if the bill be drawn under such circumstances as may induce the drawer to entertain a reasonable expectation that the bill will be accepted and paid, the person so drawing is entitled to notice." And in the same case Le Blanc, J., remarks: "I perfectly agree that it is not necessary that the drawer should have effects or money in the hands of the drawee, either at the time when the bill is drawn or when it becomes due. For if the bill be drawn in the fair and reasonable expectation that in the ordinary course of mercantile transactions it will be accepted, or paid when due, the case does not range itself under that class of cases of which Bickerdicke v. Bollman, IT. R. 405, is the first." Campbell v. Pettengill, 7 Me. (7 Greenl.) 126; s. c., 20 Am. Dec. 351.

2. Campbell v. Pettengill, 7 Me. (7 Greenl.) 126; s. c., 20 Åm. Dec. 350; Thackray v. Blackett, 3 Campb. 164; Rucker v. Hiller, 16 East, 43; Brown v. Maffey, 15 East, 221; Orr v. Maginnis, 7

East, 359.
3. Patten v. Newell, 30 Ga. 271; Pack v. Thomas, 21 Miss. (13 Smed. & M.) 11; s. c., 51 Am. Dec. 235; Vantrot v. McCulloch, 2 Hilt. (N. Y.) 272; Commercial Bank v. Hughes, 17 Wend. (N. Y.) 94; Flemming v. Denny, 2 Phila. (Pa.) 111. 4. Hill v. Martin, 12 Mart. (La.) 177;

4. Hill v. Martin, 12 Mart. (La.) 177; s. c., 13 Am. Dec. 372; May v. Coffin. 4 Mass. 341; French v. Bank of Columbia. 8 U. S. (4 Cr.) 141; bk. 2, L. Ed. 576; Bickerdicke v. Bollman, 1 T. R. 405; Clegg v. Cotton, 3 Bos. & P. 239; Carter v. Flower, 16 Mees. & W. 743; Ex parte Heath, 2 Ves. & B. 240; Edwards on Bills, 446, 636; 2 Dan. Neg. Inst. sec. 170; Story on Bills, secs. 280, 306. Compare Smith v. Miller, 52 N. Y. 545; Clift v. Rodger, 25 Hun (N. Y.), 39; Mechanics Bank v. Griswold, 7 Wend. (N. Y.) 165; Cory v. Scott, 3 Barn. & Ald. 619. Cory v. Scott, 3 Barn. & Ald. 619.

(g) When Parties Partners, etc.—If the drawer is a partner of the firm on which the bill is drawn, the holder in an action on the hill need not prove notice to the drawer that it was dishonored, 1 whether the bill has been accepted or not.2 The same principle applies when a bill is drawn by a firm on one of its members,3 or where one firm draws on another having a common member.4

1. Gowan v. Jackson, 20 Johns. (N.

Y.) 176.

2. New York, etc., Co. v. Meyer, 51 Ala. 325; Fuller v. Hooper, 69 Mass. (3 Ma. 325; Funct v. Hooper, og Mass. (3 Gray) 334; Taylor v. Young, 3. Watts (Pa.), 339; Rhett v. Poe. 43 U. S. (2 How.) 457; bk. 11, L. Ed. 338; Port-house v. Parker, 1 Campb. 182.

3. New York, etc., Co. v. Meyer, 51 Ala. 325. See also Foland v. Boyd, 23

Pa. St. 476.

4. New York & Ala. Contr. Co. v. Selma Sav. Bank, 51 Ala, 305; s. c., 23 Am. Rep. 552. See also Foland v. Boyd.

23 Pa. St. 476.

General Rule — As a general rule, when notice of a fact is necessary to fix the liability of a partnership, notice to any one of the partners is notice to all. This results from the legal nature and character of a partnership. Each member represents, not himself, but the partnership in its entirety or personality. can exercise all the authority, transact all the business, incur or discharge all the liabilities, which the partners acting conjointly could, unless restrained by special contract or agreement. Whatever is known to him, and falls within the line of partnership business, is necessarily known to the firm. Whatever notice is given to him, pertaining to partnership affairs, is given the partnership. it was held by this court in Brown v. Turner, 15 Ala. 832, that a demand of payment of a bill of exchange, accepted by a partnership which was subsequently dissolved, could be well made of an agent of one of the partners. On the same principle rests the case of Coster v. Thomason, 19 Ala, 717, in which it is held that when a bill indorsed by a partnership is dishonored after the dissolution, notice to any one of the late partners charges all. The general rule is thus stated by the elementary writers: "Notice to one member of a partnership which indorses a note or bill is notice to all, because each, partner represents the interest of the other partners and of the partnership." New York & Ala. Contr. Co. v. Selma Savings Bank, 51 Ala. 305; s. c., 23 Am. Rep. 552; 1 Parsons on Notes and Bills, 502.

Not Necessary where between Partnerships having Common Member, etc. - Object of Notice. - There can be no solid reason for refusing to apply this general rule when a bill is made and indorsed by one partnership and accepted by another, each partnership having a common member. If the bill is dishonored, it is the fault of the acceptors, who are primarily liable to pay for it. The object of notice of dishonor-of notice of the default-is, that the drawer or indorser may have seasonable opportunity of protecting himself by arranging his affairs with the drawer or acceptor,—withdrawing any funds he may have transmitted for meeting the bill, or taking any other necessary or legal steps for his protection. The injury which may be consequent on the failure to afford the drawer this seasonable opportunity, by notice of the dishonor, is the reason of his discharge. When the failure works him no injury he is not discharged, for the reason ceases. A drawer who has no funds in the hands of the drawee from the drawing to the maturity of the bill is not entitled to notice of its dishonor. Tarver v. Nance, 5 Ala. 712; Foard v. Womack, 2 Ala. 368. So if the bill is accepted for his accommodation. Evans v. Norris, 1 Ala. 511.

In these cases the drawer on the dishonor has no right of recovery against the drawee or acceptor, and no injury ensues for the want of notice. A partnership being regarded as an entirety, each partner having all the power the partnership has, subject to all its duties and liabilities, bound to take every step for its protection which any other or all the members could conjointly take, if they so acted, where is the necessity of giving notice of the dishonor of the bill when the dishonor is the fault of one of the partners? What injury can ensue which his knowledge of the dishonor does not afford him full opportunity of providing against-as full opportunity as if notice was given every other individual member of the partnership? Why should notice of his own default be required? The only right of recovery which the drawing partnership has is equitable. No suit at law could be maintained against the defaulting acceptors or drawees, for in suits by or against a partnership all the partners must be joined, and one person would stand in the relation of plaintiff

When a draft on a bank was given by its public and authorized agent, the transaction was equivalent to the giving of a promissorv note, payable on demand, and the drawer thereof is not entitled to notice. It is not necessary, in an action against the bank to prove a demand; the commencement of a suit is sufficient.1

An order drawn by the president of a railroad corporation upon its treasurer for a certain sum of money, in favor of a creditor of the corporation, is not a bill of exchange, but it is in the nature of a promissory note, payable at the office of the treasurer; and it is

immaterial whether it is presented for payment or not.2

(2) To Charge the Acceptor.—Demand on the drawer and notice to the acceptor are not necessary to charge the latter, though the acceptance is for the drawer's accommodation.3

and of defendant. The remedy in equity is rather for an accounting than for the recovery of a specific debt. The state of accounts is supposed to be known to each partnership, and to each individual member thereof. This equitable remedy the common partner can as well pursue, if necessary for the protection of the drawing partnership, as any other partner. No possible legal injury results from the failure to give the partnership notice of the dishonor of the bill, which is already known to one partner, and whose knowledge is notice. Porthouse v. Parker, I Campb. 82. Any other rule seems to contemplate a severance of the partnership, as if its individual members had distinct rights and antagonistic duties and liabilities, which cannot be admitted at law, in transactions involving the rights of third persons. New York & Ala. Contr. Co. v. Selma Sav. Bank, 51 Ala. 305; s. c., 23 Am. Rep. 552.

Instances. -- In Jacaud v. French. 12 East, 317, Jacaud was a partner with Blair in one mercantile house, and with Gordon in another. A bill of exchange was indorsed by one firm to the other, and subsequently the indorsers were provided with funds, which they promised to apply to the satisfaction of the bill at maturity. They failed to make the application, and the indorsees on the dishonor of the bill sued the acceptors. The suit was not maintained. Lord Ellenborough said: "It is impossible to sever the individuality of the person. Jacaud, being a partner with Blair, received money from the drawers to take up this very bill. How can he, because he is also a partner with Gordon in another house, be permitted to contravene his own act, and sue upon the bill, which has been already satisfied as to him. If A and B, partners, receive money to apply to a particular purpose, A and C, in another partnership, could never be permitted to contravene the receipt of it for that purpose and apply it to another. See also New York & Ala. Contr. Co. v. Selma Savings Bank, 51 Ala. 305; s. c., 23 Am. Rep. 554.

Unity of Partnership .- The principle of the decision in Jacaud v. French, supra, is the unity of a partnership-the impossibility of severing the act of one partner in partnership affairs from the act of the partnership. It has a proper application to the question we are considering. Notice to Roddy of the dishonor of the bill must, unless we recognize a severance of partnership, separate him from, treat him as standing in an antagonistic real tim as standing in an antagonistic relation to, the partnership, be deemed notice to the partnership. Such was in effect the decision in New York & Ala. Contr. Co. v. Selma Sav. Bank, 51 Ala. 305; s. c., 23 Am. Rep. 555; Gowan v. Jackson, 20 Johns. (N. Y.) 176; West Branch Bank v. Fulmer, 3 Pa. St. 399; Parthay v. Camph 83. Porthouse v. Parker, 1 Campb. 82.

1. Bailey v. Southwestern, etc., Bank,

11 Fla. 266.

2. Fairchild v. Ogdensburgh C. & R. R. Co., 15 N. Y. 337; s. c., 69 Am. Dec. 606.

3. Cox v. Mechanics' Saving Bank, 28 Ga. 529; Lang v. Brailsford, I Bay (S.C.), 222; James v. Ocoee Bank, 2 Coldw. (Tenn.) 57; Blair v. Bank of Tennessee,

Notice Necessary to Charge Interest. Protest for non-payment is not necessary to charge the acceptor with the principal sum; but if no other evidence of a demand is given, a protest is necessary to charge him with interest. Lang v. Brailsford, I Bay (S. C.), 222.

Presentment at a Specified Place as against the acceptor of a bill is not neces-Cox v. National Bank of N. Y. sary.

(3) Inland Bills.—Where no statutory regulations intervene to control the matter, a protest of an inland bill is not necessary, nor

is such protest evidence of the facts stated in it.1

(4) If for Acceptance.—A bill payable at a given time after date need not be presented for acceptance; payment may be at once demanded at its maturity.² While a bill of exchange payable at a time certain need not be presented for acceptance until maturity, yet if it is presented before maturity notice and protest are necessary.³

("Clardy v. Nat. Bank"), 100 U. S. (10

Otto) 704: bk. 25, L. Ed. 739.

In an action by the payee against the acceptor of a bill payable at a particular place, demand need not be averred, but defendant may plead want of demand and a readiness to pay, to defeat damages and costs. Wolcott v. Van Santvoord, 17 Johns. (N. Y.) 248; s. c., 8 Am. Dec. 396.

Relation of the Parties.—In general, the acceptor of a bill of exchange stands in the same relation to the drawee as the maker of the note does to the payee; and the acceptor is the principal debtor in the case of a bill, precisely like the maker of a note. The liability of the acceptor grows out of, and is governed by, the terms of his acceptance; and the liability of the maker of a note grows out of, and is to be governed by, the terms of the acceptance. The place of payment is always a matter of arrangement between the parties, and can be of no more importance in one case than in the other. Wallace ν . McConnell, 38 U.S. (13 Pet.) 136; bk. 10, L. Ed. 95.

U. S. (13 Pet.) 136; bk. 10, L. Ed. 95.

1. Randel v. Chesapeake, etc., Canal Co., 1 Harr. (Del.) 234; Taylor v. Bank of Illinois, 7 T. B. Mon. (Ky.) 579; Miller v. Hackley, 5 Johns. (N.Y.) 375; s. c., 4 Am. Dec. 372; Payne v. Winn, 2 Bay (S.C.), 376; Union Bank v. Hyde, 19 U. S. (6 Wheat.) 572; bk. 5, L. Ed. 333; Young v. Bryan, 19 U. S. (6 Wheat.) 146; bk. 5,

L. Ed. 228

Protest of a Domestic Note is not necessary, and where the complaint on such a note separately alleges protest and demand and refusal, an allegation in the answer denying the protest does not put in issue the question of demand and refusal. Brennan v. Lowry, 4 Daly (N. V.) 252.

Brennan v. Lowry, 4 Daly (N. Y.), 253, 2. Davies v. Byrne, 10 Ga. 329; Walker v. Stetson, 19 Ohio St. 400; Townsley v. Sumrall, 27 U. S. (2 Pet.) 170; bk. 7, L. Ed. 386; Bank of Washington v. Triplett, 26 U. S. (1 Pet.) 35; bk. 7, L. Ed. 27

26 U. S. (I Pet.) 25; bk. 7, L. Ed. 37.

What a Sufficient Presentment. — The presentation of a bill of exchange payable at a certain period after date, for payment, is, in the absence of an acceptance, a suffi-

cient presentment of the bill to charge the drawer or indorser. So held where, at the maturity and protest of the bill, the drawee was in funds, and would have paid it had he been advised of its existence, but subsequently became insolvent. Walker v. Stetson, 10 Ohio St. 400.

Omission of Bank to give Notice.—The omission of a bank holding a bill payable at a given time after date, for collection, to give notice to the drawer, that the drawee was not found at home when called upon to accept the bill, is not such negligence as discharges the drawer from his liability, for presentment of such a bill is not strictly necessary, and absence is not refusal to accept. Bank of Washington v. Triplett, 26 U. S. (1 Pet.) 25; bk. 7, L. Ed. 37.

Foreign Bill of Exchange.—It is not necessary to present a foreign bill for acceptance when it is payable at a time certain. Davies v. Byrne, 10 Ga. 329.

3. Carmichael v. Pennsylvania Bank, 5 Miss. (4 How.) 567; s. c., 35 Am. Dec. 408; Glasgow v. Copeland, 8 Mo. 268; Bank of Bennington v. Raymond, 12 Vt. 401.

Bill Dishonored, when.—A bill of exchange payable after date need not be presented for acceptance before the day of payment; but if presented and acceptance be refused, it is dishonored. Townsley v. Sumrall, 27 U. S. (2 Pet.) 170; bk. 7. L. Ed. 386; Bank of Washington v. Triplett, 26 U. S. (1 Pet.) 25; bk. 7, L. Ed. 37.

Foreign Bill of Exchange—Protest for Non-Acceptance.—As to bills of exchange drawn in the United States, payable in Europe, the custom of merchants in this country does not ordinarily require, to recover on a protest for non-payment, that a protest for non-acceptance shall be produced, though the bill was not accepted. The right of action upon a protest for non-payment does not depend upon the fact of non-acceptance. Hence, in an action on a bill of exchange which has been protested for non-payment it is not necessary to aver in the declaration that the bill was protested for non-acceptance. Clarke v.

(5) For Payment when Acceptance Refused.—After presentment and non-acceptance of a bill of exchange, and due notice given it is not necessary that it should be protested for non-payment 1 And where a draft has been protested for non-acceptance, the holder is not bound to present it at maturity for payment.2

m. In Case of Checks.—(1) To Charge Drawer.—(a) When Payment Stopped.—Where the drawer of a check stops payment. subsequent presentation by the holder at the place of payment is

excused, and he may sue without presentation.3

(b) Unless Injured Thereby.—In order to charge the drawer of a check, the same strict rule of diligence in making demand and giving notice of non-payment does not obtain as in cases of ordinary bills of exchange. As a general rule, he is not discharged unless he suffers some loss in consequence of the delay of the holder.4

(2) When Transaction Affected with Fraud.—Where a party pays his debt to a third person, by check left in his hands merely as evidence of debt, the holder, on discovery of the fraud, is not

bound to present it for payment.5

n. To Make Note a Set-off.—A demand is not necessary to entitle the holder to use a note as a set-off. But if the defendant shows he was ready at the time and place to make payment, he is discharged from interest and costs.7

o. IN CASE OF DUE BILL.-No demand is necessary as a condition precedent to a right of action upon due bill; the commence-

ment of a suit is a sufficient demand.8

Russel, 3 U. S. (3 Dall.) 415; bk. 1, L. Ed. 661: Brown v. Barry, 3 U. S. (3 Dall.) 365; bk. I, L. Ed. 638.

1. Bank of Rochester v. Gray, 2 Hill (N. Y.) 227.

2. Exeter Bank v. Gordon, 8 N. H. 66. A Bill of Exchange Payable on a Day Certain was presented for acceptance on the day it became due, and acceptance was refused. Held, that this was a refusal to pay, and rendered the demand of payment unnecessary to change the drawer or indorser. Plato v. Reynolds, 27 N.Y.

Demand not Necessary After Protest for Non-Acceptance. —After protest for non-acceptance, no demand of payment is necessary, and the holder may at once bring suit; he need not wait until the bill matures. Watson v. Tarpley, 59 U. S. (18

How.) 517; bk. 15, L. Ed. 509.

Upon Protest for Non-Acceptance of a Sight Bill of Exchange, and notice given to the drawer and indorsers, they are im-mediately responsible to the holder, without again presenting the bill for payment on the last day of grace. Lucas v. Ladew, 28 Mo. 342.
3. Woodin v. Frazee, 38 N. Y. Super.

Ct. (6 J. & S.) 190.

4. Gregg v. George, 16 Kan. 546. The Drawer of a Check is not Discharged by any delay of the holder to present it unless he has been injured thereby, and the burden is on the holder to show that he has not been injured. But if he show that the drawer has himself drawn out the funds against which the check was drawn, or that the drawer was solvent when the check was presented, the burden is shifted upon the drawer to show that he has sustained damage. Planters' Bank v. Keesee, 7 Heisk. (Tenn.) 200; Planters' Bank υ. Merritt, 7 Heisk. (Tenn.) 177.

5. Devoe v. Moffat, Anth. (N. Y.) 161.

6. Bank of Niagara v. McCracken, 18 Johns. (N. Y.) 493. 7. Bank of Niagara v. McCracken, 18 Johns. (N. Y.) 493

8. Boustead v. Cuyler (Pa. St.), 8 Cent.

Rep. 128.

The court say: The plaintiff declared on a "promissory note or due bill." It is payable on demand. It is therefore evidence of a present debt. It is due and demandable immediately. The commencement of a suit is a sufficient demand. No demand is necessary as a condition precedent to a right of action. Smith v. Bell, 107 Pa. St. 352; Andress'

3. Sufficiency.—a. As to Time.—(1) Notes.—(a) Day.—a. When Due.—A note must be presented for payment when due, and reasonable notice of non-payment given to bind the indorser. A demand made the day before the maturity2 or the day after the maturity of a note is insufficient.3

nº Within Reasonable Time.—But to charge an indorser demand must be made within a reasonable time, although he has not been prejudiced by delay.4 What is a reasonable time within which to demand payment, is a question of law, and is to be determined

Appeal, 99 Pa. St. 421; Milne's Appeal, 99 Pa. St. 483.

1. Ferris v. Saxton, 4 N. J. L. (1 South.) 2. See Staples v. Franklin Bank, 12 Mass. (1 Metc.) 49; s. c., 35 Am. Dec. 345; Henry v. Jones, 8 Mass. 453.

Demand to be Made upon Day Note

Falls Due .- Where the demand was made upon the promisor on the day when the note was supposed to be due, without reckoning the days of grace and the notice to the indorser predicated upon that demand, it was wholly nugatory; it having been settled in the case of Jones v. Fales, 4 Mass. 245, that the days of grace must be computed, to ascertain when a note so payable becomes due. Farnum v. Fowle, 12 Mass. 80; s. c., 7 Am. Dec. 36.

Demand when Note Falls Due on Sunday.-It is also settled, as a part of the law-merchant, that when a note or bill is payable with grace, and the third day of grace falls on Sunday, or any other great holiday, when money is not usually paid, it becomes due on the second day of grace, namely, on Saturday. Bailey, 34; Chitty, 141; Ld. Raym. 743. This principle is adopted and practised in the commonwealth as a part of the lawmerchant, so far as respects Sunday. Farnum v. Fowle, 12 Mass. 89; s. c., 7 Am. Dec. 36.

2. Farnum v. Fowle, 12 Mass. 89; s. c., 7 Am. Dec. 35; Henry v. Jones, 8 Mass. 453; Jones v. Fales, 4 Mass. 245; Hough

v. Young, 1 Ohio, 504.

3. Barker v. Parker, 23 Mass. (6 Pick.) 80; Woodbridge v. Brigham, 12 Mass. 403; s. c., 7 Am. Dec. 85; Farnum v. Fowle, 12 Mass. 89; s. c., 7 Am. Dec. 35; Davis v. Herrick, 6 Ohio, 55.

4. Where all Parties Reside in the Same

Place, delay of six days held unreasonable. Gough v. Staats, 13 Wend. (N.Y.) Where all parties reside in the same city, five months is an unreasonable delay. Sice v. Cunningham, I Cow. (N. Y.) 397. In Hadduck v. Murray, I N. H. 140; s. c., 8 Am. Dec. 43, the court say: "If they [the parties] reside in the same village or city, the communication between them is presumed to be easy and often. The demand in such case must. therefore, be made on the day the note becomes due, unless sickness, accident, or some other reasonable excuse justify a delay." Farnum v. Fowle, 12 Mass. 89, 91; s. c., 7 Am. Dec. 35; Henry v. Jones. 8 Mass. 453; Hadduck v. Murray, I N. H. 140; s. c., 8 Am. Dec. 43; Ireland v. Kip, 11 Johns. (N. Y.) 232; Tunno v. Lague, 2 Johns. Cas. 1; s. c., 1 Am. Dec. 141; Darbishire v. Parker, 6 East, 3; Chitty on Bills, 200.

A Note Payable One Day after Sight

is not a continuing obligation, as against an indorser thereon, for an indefinite period, within the Statute of Limitations and at the will of the holder, but, on the

contrary, is an obligation upon which the liability of the indorser is dependent upon the reasonable diligence of the holder in demanding payment of the maker, and will be discharged by laches in making such demand. Alexander v.

Parsons, 3 Lans. (N. Y.) 333.

5. Hadduck v. Murray, I N. H. 140;

s. c., 8 Am. Dec. 43.

English and American Doctrine.-It was long disputed in England whether the seasonableness of demand and notice was a question of law or of fact. v. Brown, I T. R. 167. After some decisions apparently contradictory, and after courts had become acquainted with the practice and opinions of intelligent merchants on the subject, it was regarded as an inquiry for the jury no farther than to ascertain the situation of the parties, their distance from each other, the course of the mail, and times of presentment and notice. These once settled, the court undertook to decide whether the holder had or had not exercised due diligence. Tatlock v. Harris, 3 T. R. 167; Smith v. Lascelles, 2 T. R. 136; Tindall v. Brown, I T. R. 167; Haynes v. Birks, 3 Bos. & P. 599, 602; Parker v. Gordon, 7 East, 385; Darbishire v. Parker, 6 East, 3; Chitty on Bills, 165, 198. In some of the States of the United States the question

by the circumstances of each case. 1.

Where the holder and maker of a promissory note live in differ. ent towns, to render the indorser liable, demand must be made on the maker as soon after the note becomes due as it can conveniently be done, taking into consideration the situation of the parties; and where the facts as to such situation are agreed on, or found by a jury, the reasonableness of the demand is a question

If a note is indorsed overdue, a demand is sufficient if made within a reasonable time after the indorsement.³ Where commercial paper past due is indorsed, it cannot be assumed as a legal conclusion that a demand of payment should be made by the holder, and notice of its dishonor given within any precise time: but in such case all that can be said is that the demand must be

is still disputed, and in others has travelled the course as in England. See elled the course as in England. See Hussey v. Freeman, 10 Mass. 86; Furman v. Haskin, 2 Cai. (N.Y.) 369; Miller v. Hackley, 5 Johns. (N. Y.) 375; s. c., 4 Am. Dec. 372; Tunno v. Lague, 2 Johns. Cas. (N.Y.) 1; s. c., 1 Am. Dec. 141; Bryden v. Bryden, 11 Johns. (N.Y.) 188; Robertson v. Vogle, 1 U. S. (1 Dall.) 252; bk. I. L. Ed. 123; Chitty on Bills, 198. What is Reasonable Time Depends on Dis-

tance, etc. —Adopting the above general rule, then, though we were to enforce it rigorously, still the length of time after the note becomes due, in which the demand must be made, will be longer or shorter, as the distance between the holder and maker is greater or less; as the intercourse between the places, though at a like distance, is more or less frequent. Hussey v. Freeman, 10 Mass. 86; Bryden v. Bryden, 11 Johns. (N. Y.) 188; Muilman v. D'Eguino, 2 H. Bl. 565; Darbishire v. Parker, 6 East, 3.

1. Bank of Utica v. Smedes, 3 Cow. (N. Y.) 662.

What Delay will Discharge the Indorsers. -Where a note was assigned to the plaintiff, November 10, 1848, and no notice of demand and non-payment was given till April 25, 1849, held, that such a delay to present the note for payment, unexplained, amounted to gross negligence. Ellis v. Dunham, 14 Ark. 127. Compare Littlehale v. Maberry, 43 Me. 264; Estell v. Vanderveer, 5 N. J. L. (2 South.) 782.

2. Hadduck v. Murray, 1 N. H. 140;

s. c., 8 Am. Dec. 43.

Where the Holder and Maker Live in Different Places, then the demand should be made as soon after the day of payment arrives as the holder can, with convenience, forward the note to an agent or friend, for the purpose of presenting it. It need not be sent till after due, because till then the holder hath right to expect it will be paid him at his own Freeman v. Boynton, 7 Mass. 486. Nor is he "bound omissus omnibus aliis negotiis to post off immediately" himself. Scott v. Sifford, 9 East, 347,nor "to send a special messenger, Haynes v. Birks, 3 Bos. & P. 602, -because personal communication between different places is not in the common course of business. It is sufficient if he forward the note by the next regular mail. Muilman v. D'Eguino, 2 H. Bl. 565. That must be one as speedy, but need be no more speedy than the mail itself. Haynes v. Birks, 3 Bos. & P. 599; Darbishire v. Parker, 6 East, 3.

Where the maker lived 200 miles from the holder, a demand within six days from maturity was held to be in season. Freeman v. Boynton, 7 Mass. 483. But a delay of 29 days was held unreasonable, there being a regular mail between the

two places. Id.

3. Sanborn v. Southard, 25 Me. 409; s. c., 43 Am. Dec. 288; Colt v. Barnard, 35 Mass. (18 Pick.) 260; s. c., 29 Am. Dec. 584.

Where a Note Overdue was transferred September 20, and demand made and notice given October 13 following, held, to have been made within a reasonable time. Goodwin v. Davenport, 47 Me.

112; s. c., 74 Am. Dec. 478.

Delay of Twenty Days.—Where an indorsee of a note past due has delayed for 20 days after the indorsement making a demand of payment from the maker, and giving notice of non-payment to the indorser, all the parties residing in the same town, the indorser will be discharged. Levy v. Drew, 14 Ark: 334.

made and the notice given within a reasonable time. The fact must be ascertained by the jury, and their verdict should be influ-

enced by such legal analogies as are established.1

a³. In Case of Demand Notes.—Notes payable on demand must be presented for payment by the holder within a reasonable time in order to charge the indorser. What is a reasonable time is a question of law when facts conceded. The general test is whether, from the circumstances of the case and the general conduct of business men, such time has elapsed as will warrant a presumption of payment or refusal.

1. Branch Bank of Montgomery v.

Gaffney, 9 Ala. 153.

2. Somerville v. Williams, I Stew. (Ala) 484; Keyes v. Fenstermaker, 24 Cal. 329; Jerome v. Stebbins, 14 Cal. 457; Beebe v. Brooks, 12 Cal. 308; Gallagher v. Raleigh. 7 Ind. 1; English v. Trustees, etc., 6 Ind. 438; Dumont v. Pope, 7 Blackf. (Ind.) 367; Richardson v. Fenner, 10 La. An. 599; Veazie Bank v. Winn. 40 Me. 60; Mudd v. Harper, I. Md. 110; Ranger v. Cary, 42 Mass. (11 Pick.) 267; Field v. Nickerson, 13 Mass. (21 Pick.) 267; Field v. Nickerson, 13 Mass. 131; Thayer v. Brackett, 12 Mass. 450; Phœnix Ins. Co. v. Allen, 11 Mich. 501; Furman v. Haskin, 2 Cai. (N. Y.) 369; Sice v. Cunningham, I Cow. (N. Y.) 397; Vreeland v. Hyde, 2 Hall (N. Y.), 429; Elting v. Brinkerhoff, 2 Hall (N. Y.), 459; Chambers v. Hill, 26 Tex. 472; Martin v. Winslow, 2 Mason C. C. 241. Compare Lockwood v. Crawford, 18 Conn. 361; Shutts v. Fingar, 100 N. Y. 739; Merritt v. Todd, 23 N. Y. 28; s. c., 70 Am. Dec. 343.

The Massachusetts Statute. - The provision in Mass. Stat. 1839, ch. 121, sec. 2, that "on any promissory note payable on demand, a demand made at or before the expiration of 60 days from the date thereof shall be deemed to be made within reasonable time, and shall authorize the holder of such note to give notice of the dishonor thereof to the indorser," does not apply to such note when it is indorsed after 60 days from its date have elapsed; and it seems that in such case a demand on the maker is within reasonable time if made not later than at the expiration of 60 days from the time of the indorsement of the note. Rice v.

Wessen, 52 Mass. (II Metc.) 400.

The Statute Commences to Run upon a Note Payable on Demand in favor of the maker from its date. Shutts v. Fingar,

100 N. Y. 539.

The court say: "The authorities now uniformly hold the statute commences to run upon a note payable on demand

in favor of the maker at its date. Parker v. Stroud, 98 N. Y. 379; Wheeler v. Warner, 47 N. Y. 519; s. c., 7 Am. Rep. 478; Herrick v. Woolverton, 41 N. Y. 581; s. c., 7 Am. Rep. 461. And that the expiration of six years from such date constitutes a bar to any action thereon, unless a renewal of the cause of action has been effected by partial payments or otherwise." Shutts v. Fingar, 100 N. Y. 520.

Overdue Note.—A note indorsed and delivered when overdue is to be treated as between indorser and indorsee as a note on demand dated at the time of the transfer, so far as relates to demand and notice. Goodwin v. Davenport, 47 Me. 112; s. c., 74 Am. Dec. 478.

3. Furman v. Haskin, 2 Cai. (N. Y.)

369.

4. Dennen v. Haskell, 45 Me. 431; Parker v. Tuttle, 44 Me. 459; Seaver v. Lincoln, 38 Mass. (21 Pick.) 267; Stevens v. Bruce, 38 Mass. (21 Pick.) 193; Field v. Nickerson, 13 Mass. 131; Ayer v. Hutchins, 4 Mass. 370; s. c., 3 Am. Dec. 232; Carll v. Brown, 2 Mich. 401; Odiorne v. Howard, 10 N. H. 343; Weeks v. Pryor, 27 Barb. (N. Y.) 79; Aymar v. Beers, 7 Cow. (N. Y.) 705; s. c., 17 Am. Dec. 538; Sice v. Cunningham, 1 Cow. (N. Y.) 397; Wethey v. Andrews, 3 Hill (N. Y.), 582; Gowan v. Jackson, 20 Johns. (N. Y.) 176; Robinson v. Ames, 20 Johns. (N. Y.) 146; s. c., 11 Am. Dec. 259; Loomis v. Pulver, 9 Johns. (N. Y.) 244; Losee v. Dunkin, 7 Johns. (N. Y.) 244; Losee v. Dunkin, 7 Johns. (N. Y.) 70; s. c., 5 Am. Dec. 245; Brower v. Jones 3, Johns. (N. Y.) 230; Cruger v. Armstrong, 3 Johns. Cas. (N. Y.) 5; s. c., 2 Am. Dec. 126; Conroy v. Warren, 3 Johns. Cas. (N. Y.) 259; s. c., 2 Am. Dec. 156; Smith v. Janes, 20 Wend. (N. Y.) 192; s. c., 32 Am. Dec. 527; Camp v. Scott, 14 Vt. 387; Wallace v. Agry, 4 Mason C. C. 336; s. c., 5 Mason C. C. 241; Mellish v. Rawdon, 9 Bing. 416; Muilman v. D'Eguino, 2 H. Bl. 565; Mullick v. Radakissen, 9 Moore P. C. 46;

s. c, 28 Eng. L. & Eq. 86. Compare Barough v. White, 4 Barn. & Cress. 325; Brooks v. Mitchell, 9 Mees. & W. 15.

In England a promissory note payable on demand is not overdue or deemed dishonored by lapse of time, nor till an actual demand is made. Such a species of security is probably rare in England, and is regarded as a continuing security until the holder shall see fit to render it due by demand. In America it has long been in use, and the rules applicable to it have been firmly fixed. Sylvester v. Crapo, 32 Mass. (15 Pick.) 92.

There is no Precise Time when a note payable on demand is to be deemed dishonored; it depends upon the circumstances of the case and the situation of the parties. Bank of Utica v. Smedes, 3 Cow. (N. Y.) 662; Losee v. Dunkin, 7 Johns. (N. Y.) 70; s. c., 5 Am. Dec. 245.

What is within Reasonable Time.—It

What is within Reasonable Time.—It has been held that a demand made within seven days (Seaver v. Lincoln, 38. Mass. (21 Pick.) 267), 23 days (Mitchell v. Cutchins, 23 Fed. Rep. 710; s. c., 20 Cent. L. J. 464), one month (Ranger v. Cary, 42 Mass. (1 Metc.) 369), and seven months (Martin v. Winslow, 2 Mason C. C. 241), were presented within reasonable time. And where a promissory note payable on demand was presented in 19 months, it was held to be in good season, being made to secure the payment of money loaned to one of the makers not for business purposes. Vreeland v. Hyde, 2 Hall (N. Y.) 429.

What is Not within a Reasonable Time.

—A delay of two weeks in presenting a demand note for payment after it comes into the hands of a holder who seeks to charge an indorser is prima facie unreasonable. Keyes v. Fenstermaker, 24 Cal. 239. And where a note was payable on demand, a demand made eight months after date, the parties living in the same place, held insufficient to charge indorser. Field v. Nickerson, 13 Mass.

A delay of thirteen months after indorsement in the presentation for payment of a demand note is prima facie so unreasonable as to discharge the indorser. Jerome v. Stebbins, 14 Cal. 457. And where a negotiable promissory note, payable on demand, was indorsed 10 months after its date, and the indorsee neglected for four days to demand payment of the promissor, and for three months to notify the indorser of the nonpayment, the indorser was held to be discharged. See Thayer v. Brackett, 12 Mass. 450; McKinney v. Crawford, 8

Serg. & R. (Pa.) 351; Poole v. Tolleson, I McC. (S. C.) 199; s. c., 10 Am. Dec. 663.

New York Doctrine.—In New York and some other States a different rule prevails. See Lockwood v. Crawford, 18 Conn. 361; Shutts v. Fingar, 100 N. Y. 539; Merritt v. Todd, 23 N. Y. 28; s. c., 80 Am. Dec, 243.

In Merritt v. Todd, supra, the court say that "the contract is interpreted according to its terms, that is to say, a promissory note payable on demand with in-terest and indorsed is regarded as a continuing security; so that on the one side the maker is not deemed in default until the money is actually demanded, while on the other the holder may make the demand when he pleases, and is not chargeable with neglect if he does not make it within any particular time. In this view, which gives the most obvious interpretation to the language of the contract, no dishonor attaches to such a note until payment is required and refused; and the indorser is held it notice of the refusal is given to him with due diligence. And this is the doctrine of the English courts. In Brooks v. Mitchell, o Mees. & W. 15, a note of £1000 pavable on demand with interest had, been indorsed and transferred several vears after its date; and the question was whether the indorsee took it subject to equities between prior parties. The court observed: 'If a promissory note payable on demand is after a certain time to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security. It is quite unlike the case of a check which is intended to be presented speedily." Merritt v. Todd, 23 N. Y. 28; s. c., 80 Am. Dec. 243; Barough v. White, 4 B. & C. 325.

In Shutts v. Fingar, 100 N. Y. 539, the court say, that a note payable on demand with interest is a continuing security against indorser until actual payment. The rule which, upon payment of a note, implies a promise by the maker to repay indorser the amount paid by the latter, proceeds upon the theory that payment had been made at the request of the maker; and the cause of action arising in favor of the indorser is based upon the act of payment and not upon the note. Where commercial paper is indorsed, after its execution, to subserve the interests of the indorser, no such promise of repayment can be implied, and the only rema. In Case of Notes Payable after Date.—A promissory note made payable a certain number of months after date, without grace, falls due on the same day of the month as that of its date; but of course it is otherwise when the note carries days of grace. Thus a demand of payment upon the sixtieth day after the date of a note, payable sixty days after date, is sufficient.

edy for indemnity against prior parties is by resorting to the paper itself. Id.

Demand Note to Secure Option-Gam bling Contract.—The circuit court of the United States for the Eastern District of Missouri has held that a demand note given to secure a continuing option transaction, and not negotiated until twentythree days after date, is negotiated within a reasonable time, and that the indorsee is a bona fide holder, without notice, though he knew that the parties to the note dealt in options, and suspected, though he did not know, that the note had been given in an option transaction. The learned judge says: "Twenty-three days elapsed between the making of the paper and the transfer. Is that such a length of time that the court is justified in presuming a demand, and holding that the paper was taken overdue? The books show it is a reasonable time within which demand must be made. In Daniels on Negotiable Instruments, quoting, I think, from Parsons on Notes and Bills, the author makes use of an expression something like this, that it is unquestionable that one day would not be a reasonable time, and that five years would be an unreasonable delay. Intermediate these times there is nothing settled, and each case must be left to be determined upon its own peculiar circumstance. This note was given as security for continuing transactions. In the contemplation of the parties, it was not to be immediately paid. So the defendant says, and claims really a breach of contract on the part of the payees, in that they closed out his deals more speedily than they were warranted. Hence, as between the parties, it being contemplated that it was to stand as security for a continuing transaction, and not as paper which was to be immediately collected and paid, it does not seem to me that the twenty-three days can be held to be an unreasonable time. Counsel said in the argument (I do not know whether correctly or not. for I have not had time to examine) that no case can be found in the books in which any period less than thirty days has been held to be an unreasonable time. Applying the law, as thus laid down in the books, I

cannot hold that the note was transferred after due. The purchaser suspected that the note was given for one of these gambling contracts. He knew the parties from whom he purchased, and that they were engaged in that kind of business, and so he says he was not blind, but suspected the nature of the transaction. Still, he knew nothing about it. bought it in the regular course of business at his bank, and paid his money for it. I have a strong feeling in reference to these transactions (purely gambling transactions-that is the long and short of it); and it is a sore temptation to ignore the law laid down by the supreme court, and say that the man who buys under such circumstances does not buy as a bona fide purchaser. But the supreme court have held in several cases, and of course that must here be taken as settled law, that mere suspicions or negligence do not invalidate the purchase, or make the purchaser not a bona fide purchaser. There must be (and that is the language of the court) 'mala fides;' and it could hardly be said there was mala fides in this case. The note on the face was all right; the plaintiff bought it in the regular course of business, and paid his money for it, paying full value; and while, from the knowledge that he possessed of the business in which the payees were engaged, he must have suspected, and did suspect, the origin of the note, yet he did not know it. I am therefore reluctantly compelled to say, that I cannot hold he was guilty of mala fides in purchasing the paper, and that, being a bona fide purchaser, he is entitled to recover." Mitchell v. Cutchins, 23 Fed. Rep. 710; 20 Cent. L. J. 464.

1. Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 160. See Hartford Bank v. Barry, 17 Mass, 94; Ripley v. Greenleaf, 2 Vt. 120.

leaf, 2 Vt. 129.
2. Randolph v. Cook. 2 Port. (Ala.) 286; Farmers' Bank v. Duvall. 7 Gill & J. (Md.) 78; Griffin v. Goff, 12 Johns. (N. Y.) 423. Compare Littlehale v. Maberry, 43 Me. 264.

A note was dated February 3, 1860, payable one hundred and twenty days after date. *Held*, that presentment on

a. In Case No Date Mentioned.—A promissory note, expressing no time when payable, is, in judgment of law, payable on demand. and draws interest and the Statute of Limitations runs from its date.1

a. Effect of Holidays.—The effect of a legal holiday is to make notes and bills with grace, maturing on such day, due on the preceding day; but where notes or bills without grace

June 5, 1860, was premature by one day. Kohler v. Montgomery, 17 Ind. 220. promissory note dated October 17, 1849, and pavable twelve months after date, falls due on the 20th day of October, 1850, and if the latter day is Sunday, the demand should be made on the preceding Saturday. Sheppard v. Spates, 4 Md. 400.

Notes Payable in Six Months from Date are all payable the same day, and in all the day of the date is excluded in calculating the time of payment. One dated December 9, entitled to grace, would be payable June 12, and if payment of such a note is demanded at 3 P.M. June 12, there being no bank in the town nor within thirty miles, and the promisor replies that he will never pay it, a suit commenced immediately thereupon on the same day is not premature. Ammidown v. Woodman. 31 Me. 580.

A Note Dated February 25, 1848 (leap

year), was made payable ninety days after date. Held, that it was not due till May 29, and a protest and notice to indorser on Saturday, May 27, was premature. Craft v. State Bank, 7 Ind. 219.

The month of February, commercially speaking, never has more than twentyeight days. Kohler v. Montgomery, 17

Ind. 220.

1. Keyes v. Fenstermaker, 24 Cal. 329; Bacon v. Page, I Conn. 404; Freeman v. Ross, 15 Ga. 252; Porter v. Porter, 51 Me. 376; Kendall v. Galvin, 15 Me. 131; Me. 370; Kenuali v. Galvin, 15 Me. 131; s. c., 32 Am. Dec. 141; Jones v. Brown, 11 Ohio St. 601; Cornell v. Moulton, 3 Den. (N. Y.) 374; Thompson v. Ketcham, 8 Johns. (N. Y.) 189, note; s. c., 5 Am. Dec. 332; Gaylord v. Van Loan, 15 Wend. (N. Y.) 208; Dodd v. Danny 6 Corn. (N. Y.) 308; Dodd v. Denny, 6 Oreg. 157; Bowman v. McChesney, 22 Gratt. (Va.) 609; Stover v. Hamilton 21 Gratt. (Va.) 273; Whitlock v. Underwood, 2 Barn. & Cres. 157. See also Lang v. Phillips, 27 Ala. 311; Owen v. Slatter, 26 Ala. 547; 27 Ala. 311, Owell v. Slatter, 20 Ala. 347, Blackman v. Nearing, 43 Conn. 56; s. c., 21 Am. Rep. 634; Weeks v. Hull, 19 Conn. 377; Bemis v. Leonard, 118 Mass. 502; s. c., 19 Am. Rep. 470; Presbrey v. Williams, 15 Mass. 193; Wheeler v. Warner, 47 N. Y. 519; Howland v. Ed-

monds, 24 N. Y. 307; Merritt v. Todd, 23 N. Y. 28; Hirst v. Brooks, 50 Barb. 23 N. Y. 28; FIITSI V. Brooks, 50 Bard. (N. Y.) 334; Colgate v. Buckingham, 39 Barb. (N. Y.) 177; Judd v. Fulton, 10 Barb. (N. Y.) 117; McGraw v. Walker, 2 Hilt. (N. Y.) 404; Bartholomew v. Seaman, 25 Hun (N. Y.), 619; Wenman v. Mohawk Ins. Co., 13 Wend. (N. Y.) 267; s. c., 28 Am Dec. 464; Smith v. Cassity.

9 B. Mon. (Ky.) 192.

2. Offut v. Stout, 4 J. J. Marsh. (Ky.) 332; Homes v. Smith, 20 Me. 264; Sheppard v. Spates. 4 Md. 400; Barker v. Parker, 23 Mass. (6 Pick.) 80; Barlow v. Planters' Bank, 8 Miss. (7 How.) 129; Fleming v. Fulton, 7 Miss. (6 How.) 473; Jackson v. Richards, 2 Cai. (N. Y.) 343; Lewis v. Burr. 2 Cai. Cas. (N. Y.) 196; Sheldon v. Burr, 2 Cai. Cas. (N. Y.) 196; Sheldon v. Benham, 4 Hill (N. Y.), 129; s. c., 40 Am. Dec. 271; Ransom v. Mack, 2 Hill (N. Y.), 587; s. c.. 38 Am. Dec. 602; Griffin v. Goff, 12 Johns. (N. Y.) 423; Cuyler v. Stevens, 4 Wend. (N. Y.) 566; Ontario Bank v. Petrie, 3 Wend. (N. Y.) 456; Bussard v. Levering, 19 U. S. (6 Wheat.) Burton, 5 Biss. C. C. 57; Irwin v. Brown, 2 Cr. C. C. 314; Tassell v. Lewis, 1 Ld. Raym. 743. Compare Sanders v. Ochiltree, 5 Port. (Ala.) 73; s. c., 30 Am. Dec.

Note Falling Due on Fourth of July .-Payment of a note cannot be demanded on the 4th of July; if due on the fourth, payment should be demanded on the third. Lewis v. Burr, 2 Cai. Cas. (N.Y.) 195; Ransom v. Mack, 2 Hill (N. Y.), 587; s. c., 38 Am. Dec. 602; Cuyler v. Stevens, 4 Wend. (N. Y.) 566.
Note Falling Due on New Year's Day.—

Where a note fell due on the 1st day of January, and demand was made on the 31st day of December, on the ground that the 1st day of January was a holiday, held, that the demand was not sufficient to charge the indorsers, unless they had express knowledge of this usage of the bank, or had had previous dealings with the bank from which such knowledge could be inferred. Dabney v. Campbell,

of Humph. (Tenn.) 680.
Commencement Day at Harvard University is Not a Holiday within this rule

fall due on such days, they are not payable until the following

dav.1

a. Note Due on Sunday.—Where the day of maturity of a note with days of grace would otherwise fall on Sunday, it becomes due the day before. And where a note drawn without grace

but a usage of banks so to regard it will make a demand and notice on that day valid, as against parties conusant of such usage. City Bank v. Cutter, 20 Mass. (3 Pick.) 414. The court say: "We think the counsel for the defendants has satisfactorily shown by authorities, that commencement day cannot be enforced as a day of reduction of the credit on a note, by the general principles of law. It is not in the language of the common law a holiday, though it is a day of festivity and amusement in the neighborhood of the university. But it is a fit subject of usage, which will bind all those dealing with a bank which has adopted it as a day when business is not there to be done. It is found to have been the usage of the City Bank to regard it in this light, and the report finds that the defendants

Last Day of Grace a Holiday.—The court say in Cuyler v. Stevens, 4 Wend. (N. Y.) 566: "If the third day of grace fall on Sunday, or a great holiday, or a day of public rest, as Christmas, or Good Friday, in England, the demand must be made on the day preceding. Lewis v. Burr, 2 Cai. Cas. (N. Y.) 195; Bussard v. Levering, 19 U. S. (6 Wheat.) 102; bk. 5, L.Ed. 215; Tassell v. Lewis, I Ld. Raym. 743. July 4th was held to be a public holiday, and it was decided that a note or bill falling due on that day was payable on the 3d day of July. In Lindo v. Unsworth, 2 Campb. 602, Ld. Ellenborough held that a Jew was excused from giving notice on a great festival day, during which, according to their religion, it is unlawful for persons of that persuasion to attend to any secular See also 3 Kent Com. 70, 75. business. Where the demand is made on Saturday, notice on Monday is in time, although it may be given on the day of refusal. The holder is always entitled to one day after the dishonor of the note, for the purpose of giving notice. Mead v. Engs, 5 Cow. (N.Y.) 303; Chit. Bills, 285; I Kent Com. 73, 74, notes. The reason of all these cases why a demand on the second day of grace is good, is, that the third day is, either by law or by general or universal custom, not a day of business for the purpose of demanding or receiving payment of a note. I should apprehend the

holder would also be excused from giving notice to the indorser on that day."

1. Sands v. Lyon, 18 Conn. 18; Avery v. Stewart, 2 Conn. 69; s. c., 7 Am. Dec. 240; Staples v. Franklin Bank, 42 Mass. (1 Metc.) 43; s. c., 35 Am. Dec. 345; Salter v. Burt, 20 Wend. (N. Y.) 205; s. c., 32 Am. Dec. 530; Barrett v. Allen, 10 Ohio, 426. Compare Osborne v. Smith, 14 Conn. 366, note; Blodgett v. Durgin, 32 Vt. 361. See also, infra, Note Due on Sunday.

Check Falling Due on Sunday. -- In Salter v. Burt, 20 Wend. (N. Y.) 205; s. c., 32 Am. Dec. 530, a post-dated check fell due on Sunday. The court say: "The question is whether the demand of payment was well made on the previous Saturday. or whether it should have been made on the following Monday. When days of grace are allowable on a bill or note, and the third day falls on Sunday, the bill or note is payable on the previous Saturday. The same custom of merchants, which, as a general rule, allows three days of grace to the debtor, has limited that indulgence to two days in those cases where the third is not a day for the transaction of business. But when there are no days of grace, and the time for payment or performance specified in the contract falls on Sunday, the debtor may, I think, discharge his obligation on the following Monday. This question was very fully considered in Avery v. Stewart, 2 Conn. 69, which was an action on the note, not negotiable, which fell due on Sunday; and the court held that a tender on Monday was a good bar to the action. I agree to the doctrine laid down by Gould, J., that Sunday cannot, for the purpose of performing a contract, be regarded as a day in law, and should, as to that purpose, be considered as stricken from the calendar. In computing the time mentioned in the contract for the doing of an act, intervening Sundays are to be counted, but when the day for performance falls on Sunday, it is not to be taken into the computation."

Note Payable in Specific Articles.— Where a note payable in specific articles falls due on Sunday, a tender on the Monday following is sufficient. Barrett v. Allen, 10 Ohio, 426. falls on Sunday, demand and protest on Saturday is good to hold the indorsers. However, the rule that notes falling due on Sunday are payable on the Saturday previous does not apply to a note made on Saturday, payable one day after date, without grace. such note becomes pavable on Monday.2

a. In Case of War.—The prevalence of civil war in a country will excuse a failure to make presentation of a note or bill at its maturity, demand payment, and give notice to the indorsers of the non-payment; yet he must, in order to charge the indorser, make such demand within a reasonable time after the close of the war 3

a. Note Payable in Instalments.—When a note is payable in instalments, and demand is not made on the maker until all the instalments are due, and then demand is for the whole note, the indorser will be charged for the last instalment.4

(b) Grace.—b1. Who Entitled to.—Where the maker of a note is

entitled to grace, the indorser has the same privilege.5

b2. Demand to be on Last Day of .- The demand of payment on a promissory note should be made on the last day of grace, at the place of payment, on to the payee, during business hours: where no place of payment is designated, and notice of default of payment on the part of the maker, is put in the post-office in season for the mail of the succeeding day it will be sufficient.6

7 Am. Dec. 35; Barker v. Parker, 23 Mass. (6 Pick.) 80; Barlow v. Planters' Rass. (6 Fic.) 30, Bankow 2. Flathers Bank, 8 Miss. (7 How.) 129; Jackson v. Richards, 2 Cai. (N. Y.) 343; Johnson v. Haight, 13 Johns. (N. Y.) 470; Griffin v. Goff, 12 Johns. (N. Y.) 423.

1. Doremus v. Burton, 5 Biss. C. C.

57. Compare authorities supra, a⁶ note 1.
2. Sanders v. Ochiltree, 5 Port. (Ala.)

73; s. c., 30 Am. Dec. 551.
3. Ray v. Smith, 84 U. S. (17 Wall.)
411; bk. 21, L. Ed. 666.
4. Eastman v. Turman, 24 Cal. 379.

5. Howe v. Bradley, 19 Me. 31; Central Bank v. Allen, 16 Me. 41; McDonald

trai Bank v. Alien, 16 Me. 41; McDonald v. Smith, 14 Me. 99; Pickard v. Valentine, 13 Me. 412; Hogan v. Cuyler, 8 Cow. (N. Y.) 203.

6. Eldrige v. Rogers, Minor (Ala.), 392; Crenshawe v. McKiernan, Minor (Ala.), 295; Fisher v. State Bank, 7 Blackf. (Ind.) 610; Piatt v. Eads, 1 Blackf. (Ind.) \$2; Sharp v. Barker, II Kan. 381; Tholan v. Duffy, 7 Kan. 405, 409 et seq. Stanley v. Farmers' Bank. 17 Kan. 592; s. c., 4 Cent. L. J. 431; Pearson v. Duckham, 3 Litt. (Ky.) 385; Gordon v. Parmelee, 81 Mass. (15 Gray) 413; Staples v. Franklin Bank, 42 Mass. (1 Metc.) 43; 38 Mass. (21 Pick.) 310; Whitwell v. Clark, 38 Mass. (21 Pick.) 310; Whitwell v. Brigham, 36 Mass. (19 Pick.) 117; City Bank v. Cutter, 20 Mass. (3 Pick.) 414;

New England Bank v. Lewis, 19 Mass. (2 Pick.) 125; Shed v. Brett, 18 Mass. (1 Pick.) 401; s. c., 11 Am. Dec. 209; Piscataqua Bank v. Carter, 20 N. H. 246; cataqua Bank v. Carter, 20 N. H. 246; s. c., 51 Am. Dec. 217; Leavitt v. Simes, 3 N. H. 14; Etheridgy v. Ladd, 44 Barb. (N. Y.) 69; Johnson v. Haight, 13 Johns. (N. Y.) 470; Griffin v. Goff, 12 Johns. (N. Y.) 423; Corp v. McComb, 1 Johns. (N. Y.) 423; Corp v. McComb, I Johns. Cas. (N. Y.) 328; Ontario Bank v. Petra, 3 Wend. (N. Y.) 456; Coleman v. Carpenter, 9 Pa. St. 178; s.·c., 49 Am. Dec. 552; Jackson v. Newton, 8 Watts (Pa.), 401; Lovel v. Wartenburgh, 1 Nott & McC. (S. C.) 83; Bank of Alexandria v. Swann, 34 U. S. (9 Pet.) 33; bk. 9, L. Ed. 40; Mills v. Bank of United States, 24 U. S. (II Wheat.) 431; bk. 6, L. Ed. 512; J. S. (11 Wheat.) 431; bk. 6, L. Ed. 512; Bank of Washington v. Triplett. 26 U. S. (1 Pet.) 25; bk. 7, L. Ed. 37; Renner v. Bank of Columbia, 22 U. S. (9 Wheat.) 581; bk. 6, L. Ed. 166; Bussard v. Levering, 19 U. S. (6 Wheat.) 102; bk. 5, L. Ed. 215; Lenox v. Roberts, 15 U. S. 215; Lenox v. Roberts, 15 U. S. (2 Wheat.) 373; bk. 4, L. Ed. 264; Bank of United States v. Oneale, 2 Cr. C. C. 466; Neale v. Peyton, 2 Cr. C. C. 313; Auld v. Peyton, 2 Cr. C. C. 182; Beeding v. Pic. 2 Cr. C. C. 152; Mitchell v. Degrand, 1 Mason C. C. 176.

By the General Rule, Demand of Payment must be made on the Third Day of Grace; but where a note is made for the purpose of being negotiated at a bank whose custom is to demand payment and give notice on the fourth day, the custom forms a part of the law of the contract: and it is not necessary that a personal knowledge of the usage should be brought home to the indorser. Bank of Washington v. Triplett, 26 U. S. (1 Pet.) 25; bk. 7, L. Ed. 37; Mills v. Bank of United States, 24 U. S. (11 Wheat.) 431; bk. 6,

L. Ed. 512.

Where a promissory note became due April 4th, 1874, and the last day of grace was April 7th, 1874, and two demands for payment were made, one April 7th, 1874, by a general agent of the holder of the note, and the other one April 8th, 1874. by a notary public, and no notice of the first demand was ever given to the indorser, but only a notice of the second demand was given to him, which second demand was one day too late; held, that the indorser was discharged. Sharp v. Barker, 11 Kan. 381; Tholan v. Duffy, 7 Kan. 405, 400; Stanley v. Farmers' Bank, 17 Kan. 592; s. c., 4 Cent. L. J.

Where demand on day of payment of note, but notice not sent until third day of grace, indorser discharged. Johnson v. Haight, 13 Johns. (N. Y.) 470; Griffin v. Goff, 12 Johns. (N. Y.) 423.

Maker of note has whole of last day of grace in which to pay it. Osborn v. Moncure, 3 Wend. (N. Y.) 170. Thus where three days of grace are allowed, a note due on the 1st is payable on the 4th.

Ripley v. Greenleaf, 2 Vt. 129.

Demand when Last Day of Grace is Sunday and Second Day a Holiday .- If a holiday falls on the Saturday before the Sunday of the maturity of the bill or note, it would fall due on the Friday preceding. I Dan. on Neg. Inst. sec. 627; Parsons N. & B. 402; Story on Bills, 338. Thus if a holiday or Sunday intervenes, or is the nominal day of grace, it is counted as one of the days of grace. Wooley v. Clements, 11 Ala. 220; 1 Dan. Neg. Inst.

Notice of Protest to Indorsers-What a Sufficient.-The question of reasonable notice is a question of fact to be sub-mitted to a jury, where the facts are doubtful or disputed, contradictory or complicated; but where they are clear and uncontradicted, or ascertained and established, it is a question of law for the court. Belden v. Lamb, 17 Conn. 442; Kelsey v. Ross, 6 Blackf. (Ind.) 536; Prescott Bank v. Caverly, 73 Mass. (7 Gray) 217; Wyman v. Adams, 66 Mass. (12 Cush.) 210; Wheeler v. Field, 47

Mass. (6 Metc.) 290; Field v. Nickerson. Mass. (6 Metc.) 290: Field v. Nickerson, 13 Mass. 131; Hussey v. Freeman, 10 Mass. 84, 86; Aymar v. Beers, 7 Cow. (N. Y.) 705; s. c., 17 Am. Dec. 538; Bryden v. Bryden, 11 Johns. (N. Y.) 187; Taylor v. Bryden, 8 Johns. (N. Y.) 173; Bank of Utica v. Bender, 21 Wend. (N. Y.) 643; s. c., 34 Am. Dec. 281; Walker v. Stetson, 14 Ohio St. 89; Newark Banking Co. v. Bank of Erie, 63 Pa. St. 404; Fernandez v. Lewis, I McC. (S. C.) 322; Nichols v. Blackmore, 27 Tex. 586; Chambers v. Hill, 26 Tex. 472; Harris v. Chambels v. Hill, 20 1ex. 472; Harris v. Robinson, 45 U. S. (4 How.) 336; bk. II, L. Ed. 1000; Rhett v. Poe, 43 U. S. (2 How.) 457; bk. II, L. Ed. 338; Bank of Alexandria v. Swann, 34 U. S. (9 Pet.) 33; bk. 9, L. Ed. 40; Bank of Columbia v. Lawrence, 26 U. S. (I Pet.) 578; bk. Pettit, 4 U. S. (4 Dall.) 129; bk. I, L. Ed. 770; Bank of North America v. McKnight, 2 U. S. (2 Dall.) 158; bk. 1, L. Ed. 330; Mallory v. Kirwan, 2 U. S. (2 Dall.) 192; bk I, L. Ed. 344; Wallace v. Agry, 4 Mason C. C. 336; Mellish v. Rawdon, 9 Bing. 416; Muilman v. D'Eguino, 2 H. Bl. 565; Scott v. Lifford, 1 Campb. 248; Shute v. Robins, 3 Car. & P. 80; Scott v. Lifford, 9 East, 347; Parker v. Gordon, 7 East, 386; Darbishire v. Parker, 6 East, 3; Mullick v. Radakissen, 28 Eng. L. & Eq. 86; Straker v. Graham, 4 Mees. & W. 721: Fry v. Hill, 7 Taunt. 397; Goupy v. Harden, 7 Taun. 159; s. c., 2 Marsh. 454; Bell v. Wardell, Willes, 204; Bayley on Bills (2d Am. Ed.) 222, 224; Chitt. on Bills (9th Am. Ed.) 366; Edw. on Bills, 648; Kyd on Bills, 117

Same-How Given .- The rule formerly was that notice of the dishonor of a bill or note must be served personally on the drawer or indorser, or be left at his dwelling-house or place of business; and that rule still prevails in this country when the party to be charged resides in the same place where the presentment or demand is made. Shepard v. Hall, I demand is made. Snepard 2. Hall, I Conn. 320; Louisiana State Bank v. Rowel, 6 Mart. (La.) N. S. 506; Laporte v. Landry, 5 Mart. (La.) N. S. 137; Smedes v. Oakley. 5 Mart. (La.) N. S. 137; Smedes v. Bank of Utica, 20 Johns. (N. Y.) 372; Ireland v. Kip, 10 Johns. (N. Y.) 490; s. c., 11 Johns. (N. Y.) 231. See also Hartford Book v. Stedman 2 Con. 483; Hartford Bank v. Stedman, 3 Conn. 489; Bank of Columbia v. Lawrence, 26 U. S. (I Pet.) 578; bk 7, L. Ed. 269. But where the drawer or indorser resides in a different place from that in which the demand or presentment is made, the old rule, which required personal service,

b3. Last Day on Sunday.—If the last day of grace comes on Sunday, the demand must be made on Saturday. 1

has been relaxed, and it is now well settled that notice may be sent by mail. Ransom v. Mack, 2 Hill (N. Y.), 590; s.

c., 38 Am. Dec. 602.

Same-When Given .- Notice of protest may be given to indorsers on a third day of grace after business hours. chants' Bank v. Elderkin, 25 N. Y. 178; Manhattan Co. v. Hackley, 3 Johns. Cas. (N. Y.) 563; Corp. v. McComb, I Johns. Cas. (N. Y.) 328; Coleman v. Carpenter, Cas. (N. Y.) 328; Coleman v. Carpenter, 9 Pa. St. 178; s. c., 49 Am. Dec. 552; Price v. Young, I McC. (S. C.) 339; Bank of Alexandria v. Swann, 34 U. S. (9 Pet.) 33; bk. 9, L. Ed. 40; Lenox v. Roberts, 15 U. S. (2 Wheat.) 373; bk. 4, L. Ed. 264; Ex parte Moline, 19 Ves. 216; Edw. on Bills, 615, 622.

Earliest possible notice not required. The next practicable post is sufficient. Mead v. Engs, 5 Cow. (N. Y.) 303; Howard v. Ives, r Hill (N. Y.), 263; Cuyler v. Stevens, 4 Wend. (N. Y.) 566; Darbishire

v. Parker, 6 East, 3.

Same-When Parties Reside in Same Place. - Where party to be notified resides in same place as holder, holder has day after dishonor to give notice at dwelling, and business hours' at place of business. Vance v. Collins, 6 Cal. 435; Kock v. Bringier, 19 La. An. 183; Davis v. Boyd v. City Bank, 15 Gratt. (Va.) 501; Bowling v. Harrison, 47 U. S. (6 How.) 248; bk. 12, L. Ed. 425; Williams v. Bank of United States, 27° U. S. (2 Pet.) 96; bk. 7, L. Ed. 260; Bank of Columbia v. Lawrence, 2 Cr. C. C. 510; Vowell v. Patton, 2 Cr. C. C. 312; Hill v. Norvell, 3 McL. C. C. 583; Hyslop v. Jones. 3 McL. C. C. 96; Parker v. Gordon, 7 East, 285; Garnett v. Woodcock 6 Maule & S. 385; Garnett v. Woodcock, 6 Maule & S. 44; Crosse v. Smith, I Maule & S. 545; Jameson v. Swinton, 2 Taunt. 224. And if his dwelling-house or place of business be in a compact part of a city, within the district of a letter-carrier, a letter containing such notice, addressed to the party and left at the post-office, post-paid, is sufficient. Bank of Columbia v. Law-rence, 26 U. S. (1 Pet.) 578; bk. 7, L. Ed. 269.

Same-Where Parties Reside in Different Places - Where party to be notified

resides in different place, notice should be sent by mail of day after dishonor, and if that closes before early business hours, that closes before early business hours, by next mail thereafter. Hartford Bank v. Stedman, 3 Conn. 489; Chick v. Pillsbury, 24 Me. 458; Haskell v. Boardman, 90 Mass. (8 Allen) 40; Eagle Bank v. Chapin, 20 Mass. (3 Pick.) 180; Shed v. Brett, 18 Mass. (1 Pick.) 401; s. c., 11 Am. Dec. 209; Munn v. Baldwin, 6 Mass. 316; Ellis v. Commercial Bank, 8 Miss. (7 How.) 294; s. c., 40 Am. Dec. 66; Carter How.) 294; s. c., 40 Am. Dec. 60; Carter v. Burley, 9 N. H. 558; Burgess v. Vree-land, 24 N. J. L. (4 Zab.) 71; s. c., 59 Am. Dec. 408; Miller v. Hackley, 5 Johns. (N. Y.) 376; s. c., 4 Am. Dec. 372; Lawson v. Farmers' Bank of Salem, 1 Ohio St. 206; Stephenson v. Dickson, 24 Ohio St. 206; Stephenson v. Dickson, 24
Pa. St. 148; s. c., 62 Am. Dec. 369;
Friend v. Wilkinson, 9 Gratt. (Va.) 31;
Dickins v. Beal, 35 U. S. (10 Pet.) 572;
bk. 9, L. Ed. 538; Bank of United States
v. Carneal, 27 U. S. (2 Pet.) 543; bk. 7,
L. Ed. 513; Fullerton v. Bank of United
States, 26 U. S. (1 Pet.) 605; bk. 7, L. Ed. 280; United States v. Barker, 25 U. S. (12 Wheat.) 559; bk. 6, L. Ed. 728; s. c., 4 Wash. C. C. 465; Lidenberger v. Beall, 19 U. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, 19 U.S. (6 Wheat.) 102; bk. 5, L. Ed. 215; Lenox (0 Wheat.) 102; bk. 5, L. Ed. 215; Lenox v. Roberts, 15 U. S. (2 Wheat.) 373; bk. 4, L. Ed. 264; Whitney v. Huntt, 5 C. C. 120; Fowler v. Warfield, 4 Cr. C. C. 71; Saunderson v. Judge, 2 H. Bl. 509; Parker v. Gordon, 7 East, 385; Kufh v. Weston, 3 Esp. 54; Woodcock v. Houldsworth, 16 Mees. & W. 126; Story on Bills sec. 288 on Bills, sec. 288.

Sufficiency

Same-Where Saturday Last Day of Grace. - When Saturday is the proper day for demand, notice on Monday, early enough to go by the mail of that day, is sufficient. McElroy v. English, 2 Cr. C. C. 528; Crawford v. Milligan, 2 Cr. C. C. 226; Seventh Ward Bank v. Hanrick, 2 Story C. C. 416. But in such case demand and notice on Saturday is good to hold the indorsers. Doremus v. Burton,

5 Biss. C. C. 57.
1. Homes v. Smith, 20 Me. 264; Fleming v. Fulton, 7 Miss. (6 How.) 473; Williams v. Matthews. 3 Cow. (N. Y.) 252; West v. Lee, 50 How. (N. Y.) Pr. 313; Johnson v. Haight, 13 Johns. (N. Y.) 470; Mechanics and Farmers' Bank v. Gibson, 7 Wend. (N. Y.) 460; Furnan v. Harman, 2 McC. (S. C.) 436; Bussard v. Levering, 19 U. S. (6 Wheat.) 102; bk. 5,

h' What Notes Entitled to.—It is a general rule established by usage, that all commercial paper is entitled to three days of grace. 1 However, it has been said that all negotiable notes made payable at a specified time, but at no specified place, in the absence of any statute or proof of usage to the contrary, are not entitled to days of grace.2 And the party setting up such local usage has the

L. Ed. 215; Irwin v. Brown, 2 Cr. C. C. 314; Thornton v. Stoddert, I Cr. C. C.

534.
The Provisions of the New York Act of May 22, 1873, that promissory notes payable should be deemed to be due and payable on the business day next succeeding, is abrogated by the amendment in the act of May 29, 1873, and bills and notes when days of grace are given, and the third day falls on Sunday, are still payable on the previous Saturday accordv. Lee, 50 How. (N. Y.) Pr. 313.

1. See Shepard v. Hall. 1 Conn. 329;

1. See Shepard v. Hall, I Conn. 329; Coffin v. Loring, 87 Mass. (5 Allen) 153; Hogan v. Cuyler, 8 Cow. (N. Y.) 203; Bank of Utica v. Wager, 2 Cow. (N. Y.) 712, 766; Dollfus v. Frosch, I Den. (N. Y.) 367; Fields v. Mallett, 3 Hawks. (N. C.) 465; Cook v. Darling, 2 R. I. 385; Renner v. Bank of Columbia, 22 U. S. (9 Wheat.) 581; bk. 6, L. Ed. 116; Smith v. Kendall, 6 T. R. 124; Brown v. Harraden, 4 T. R. 148, 151; Chit. on Bills (Phila. Ed. 1821), 420, 421, and notes.

A Note Payable by Instalments at future times certain, with interest, is entitled to days of grace, both on the principal and interest. Coffin v. Loring, 87

Mass. (5 Allen) 153.

Commercial Paper Payable in France, on a day certain named, in the absence of any proof respecting the laws of that country is payable on the third day of grace. Dollfus v. Frosch, I Den. (N. Y.) 367.

2. Isham v. Fox. 7 Ohio St. 317.

Force of Rule of Law Adopted by Court. -Where, in the absence of any statutory provisions on the subject, a rule of commercial law has been adopted by the court of last resort in a State, the usage will thenceforth be presumed to conform to such rule throughout the State; and this presumption, if not conclusive, can only be rebutted by clear proof of a uniform and settled local usage to the contrary. Isham v. Fox, 7 Ohio St. 317. In Massachusetts, by the common law

of the State, a note is not entitled to grace unless made payable with grace. See Barker v. Parker, 23 Mass. (6 Pick.) 80; Jones v. Fales, 4 Mass. 245.

Under Mass, Rev. Stat. ch. 33, sec. 5. however, grace is to be allowed on postnotes issued by the bank and made payable at a day certain, "with interest until due, and no interest after," though the bank insert a memorandum on the margin of the note that is "due" on such day. Mechanics' Bank of Baltimore v. Merchants' Bank of Boston, 47 Mass. (6 Metc.) 13.

Ohio Doctrine.—In Isham v. Fox. 7 Ohio St. 317, 320, the court say: "The main question presented is this: As the law stood in Ohio in 1837, was the note in question entitled to days of grace? If it was, the demand and notice shown in this case were premature, and the indorser is not liable; but if otherwise, the demand and notice of non-payment were regular, and the indorser is liable.

The statute in force at that time, defining negotiable paper, and prescribing the rights and obligations of the parties thereto, was the act of February 25, 1820 (29 Ohio L. 217), which was entirely silent as to days of grace. These were expressly allowed by statute until the act of March 14, 1830, which gave three days of grace to all negotiable instruments. In 1835, the question arising in this case came before the supreme court of this State, in the case of Sharp v. Ward, 7 Ohio, 273, which was reserved, as appears from the report, in order "to settle and publish a rule of mercantile law respecting days of grace upon negotiable notes payable at no particular place." In that case it was held that some descriptions of negotiable paper, such as notes payable at bank, and commercial bills of exchange, were, by well-established usage, entitled to days of grace. But the general usage, and therefore the rule, was held to be otherwise in this State, in regard to "mere ordinary notes of hand in the common transactions of life." This decision, doubtless, occasioned the subsequent legislation upon the subject in 1839, to which we have referred. Whether such a rule thus adopted and published by the supreme court could be controlled by subsequent local custom may well be doubted. Frith v. Barker, 2 Johns. (N. Y.) 327; Hone v. Mutual Safety Ins. Co.,

burden of proving it.1

b. What Not Entitled to.—Days of grace are allowable upon a written instrument for the payment of money, only when such instrument is recognized by the law-merchants as "negotiable paper." 2

It has been held that notes payable on demand, common notes of hand.4 and bank checks, payable immediately on presentment 5 are not entitled to days of grace. And though single bills (sealed) are made negotiable by statute, yet grace is not allowed to them, as between the original parties.6

b. Rule in Particular States.—In those States where days of grace are regulated by statutory provisions the rules are various and can be ascertained only by reference to the statutes themselves

and their constructions by the courts.7

b. What Laws Regulated By.—Days of grace are regulated by the place of payment, if any is specified; otherwise, by the lex local contractus.8

1 Sandf. (N. Y.) 137. But without determining this question, it is sufficient in this case to say that where, in the absence of any statutory provisions on the subject, a rule of commercial law has been adopted by a court of last resort in a State, the usage will thenceforward be presumed to conform to such rule throughout the State; and this presumption, if not conclusive can only be rebutted by clear proof of a uniform and settled local usage to the contrary."

 Cook v. Darling, 2 R. I. 385.
 Lamkin v. Nye, 43 Miss. 241.
 Sommerville v. Williams, 1 Stew. (Ala.) 484.

4. Sharp v. Ward, 7 Ohio, 223. also Isham v. Fox, 7 Ohio St. 317.

Massachusetts Doctrine.-By the common law of Massachusetts, a note is not entitled to grace unless made payable with grace. Barker v. Parker, 23 Mass. (6 Pick.) 80; Jones v. Fales, 4 Mass. 245.

5. Barbour v. Bayon, 5 La. An. 304; s. c., 52 Am. Dec. 593; Trask v. Martin, I. E. D. Smith (N. Y.), 505.

6. Jarvis v. McMain, 3 Hawks. (N. C.) 10.

7. Under the California Statute 1851, 523, providing that on a promissory note and bills of exchange "three days, commonly called days of grace, shall be allowed, except on sight bills or drafts," a promissory note, payable on demand, is entitled to three days of grace; and the day on which the note is delivered or payment demanded is not to be counted as one of the days of grace. Bell v. Sackett, 38 Cal. 407.

In Georgia. - Days of grace are not allowed in Georgia on promissory notes not payable at a bank or at a broker's office. Dalton City Co. v. Haddock, 54 Ga. 584.

In Illinois.-Prior to the act of the general assembly of 1861, days of grace could not be claimed by the maker of a note. Reese v. Mitchell, 41 Ill. 365; Elston v. Dewes, 28 Ill. 436.

In Iowa. - The lex mercatoria is in force in Iowa in respect to allowing three days of grace on promissory, notes. Hudson

v. Matthews, 1 Morr. (Iowa) 94.

In Louisiana. - The statutes of Louisiana in 1855 and 1858, declaring that on all bills and notes made negotiable by law or custom three days of grace shall be allowed, do not repeal or modify the general law-merchant, which allows three days of grace on non-negotiable as well as negotiable notes. Therefore notice to the indorser of a non-negotiable note is in time, if given at the expiration of the three days of grace allowed by the law merchant. Dubuys v. Farmer, 22 La. An. 478.

Massachusetts Rule. - See supra, note

In New York.—The act of 1857 (Laws of 1857, ch. 416), abolishing grace upon certain notes and bills of exchange, explained. Commercial Bank of Kentucky

v. Varnum, 49 N. Y. 269.

Ohio Doctrine.—See supra, b4, note 2.

8. Bryant v. Edson, 8 Vt. 333; s. c.,

30 Am. Dec. 472.

Thus a note dated at St. Louis, and made payable there, although in fact exe-

h. How Affected by Usage. The usage in respect to bills of exchange and promissory notes, of making demand on the third day of grace, has become so general, that courts of justice will notice it ex officio; and in the absence of any proof to the contrary, will presume that such was the understanding of all parties to a note, when they put their names upon it. The allowance of days of grace mon negotiable notes being founded wholly upon custom, the custom is to be regarded as contemplating the state of things, affecting the days of grace, which may happen to exist when the note falls due.2

And where the days of grace to be allowed on a note are not fixed in a State by statute, they are fixed by custom, which must be proved, and three days of grace allowable will not be presumed in

the absence of all evidence.3

But where a note is made payable at a bank, the usages and customs of the bank constitute a part of the contract.4 But no usage

cuted in Kentucky, is in respect to days of grace governed by the laws of Goddin v. Shipley, 7 B. Mon. Missouri. (Ky.) 575.

1. Renner v. Bank of Columbia, 22

U. S. (9 Wheat.) 581; bk. 6, L. Ed. 166.
The Usage of Allowing Grace has no attributes so inviolable as to not be capable of control by the express agreement of the parties to a negotiable instrument. It had its origin in a custom of comparatively recent date, and is in derogation of the common-law rule applicable to other contracts; by which the party has until the last day limited by his agreement to perform his engagement, and even until the last hour of that day, but no longer. There is no good reason why a variation of this rule to a demand on the fourth day, by an established custom of a particular bank extending over a series of years, should not be binding upon those who contract with a knowledge of the custom; nor why the general commercial law should not be controlled by a special local usage, so far as that usage extends. Renner v. Bank of Columbia, 22 U. S. (9 Wheat.) 581; bk. 6, L. Ed. 166.

2. Barlow v. Gregory, 31 Conn. 261. 3. Goddin v. Shipley, 7 B. Mon. (Ky.)

575. 4. Planters' Bank v. Markham, 6 Miss.

(5 How.) 397; s. c., 37 Am. Dec. 162.
Local Usage.—Where a note is made for the purpose of being negotiated at a bank, whose custom, known to the parties, is to demand payment and give notice on the fourth day after nominal maturity, that custom forms a part of the law of such contract, at least so far as to v. Norvell, 3 McL. C. C. 583.

bind their rights. Renner v. Bank of Columbia, 22 U. S. (9 Wheat.) 581; bk. 6, L. Ed. 166.

By the Custom of the Banks in the District of Columbia, payment of a promissory note is to be demanded on the fourth day after the time limited for the payment thereof, in order to charge the indorser. Bank of Washington v. Triplett, 26 U. S. (1 Pet.) 25; bk. 7, L. Ed. 37; Renner v. Bank of Columbia, 22 U. S. (9 Wheat.) 581; bk. 6, L. Ed. 166.

It was formerly the usage in the city of Washington to allow four days of grace upon notes discounted by banks, and also upon notes merely deposited for collection. Since 1818, notes deposited for collection in the Bank of Washington, are allowed only three days of grace; the former rule giving four days being after that date restricted to paper discounted by those banks. Cookendorfer v. Preston, 45 U.S. (4 How.) 317; bk. 11, L. Ed. 992; Hill v. Norvell, 3 McL. C. C. 583.

The foregoing decisions were made with reference to a usage formerly prevailing among the banks of the District of Columbia, that payment of a note or bill held by one of such banks should be demanded on the fourth day in order to charge the indorser; as to which usage see Adams v. Otterback, 56 U. S. (15 How.) 539; bk. 14, L. Ed. 805; Bank of Columbia v. McKenny, 3 Cr. C. C. 361; Patriotic Bank of Washington v. Farmers, Pank, 2 Cr. C. C. 560; Bank of Columbia v. Lawrence, 2 Cr. C. C. 510; Bank of Washington v. Reynolds, 2 Cr. C. C. 289; Brent v. Coyle, 2 Cr. C. C. 287; Bank of Alexandria v. Wilson, 2 Cr. C. C. 5; Hill v. Norvell, 3 McL. C. C. 583. The nor any agreement, tacit or express, of the parties to a promissory note, as to presentment, demand, and notice will accelerate the time of payment, and bind the maker to pay it at an earlier day than that which is fixed by the law that applies to the note.1

b. Stipulations Waiving.—A memorandum on the margin of a note on time, with interest, "until due" and not after, "due July 7," which was the last day of that time, has been held not to be an express stipulation within the statute 2 providing that no grace should be allowed.3

c. Hour.—c1. In Business Hours.—An agreement to send a note to a bank for collection will be complied with if the note is presented to the bank at its maturity in banking hours, and payment demanded.4

Where a note was made payable at a bank, and funds for its payment were in fact provided there, and the note was not presented till after business hours, and then to a clerk who had no custody or control of the funds and could not pay it, and who, not knowing that funds had been provided, answered "No funds," though, had he known of the funds he might have certified it, held, that the note having been presented in business hours to one unauthorized to pay it, the presentment was not sufficient to charge the indorser.5

c². After Business Hours.—A presentation after business hours is sufficient if the proper officer is present to answer to the demand.6

usage having been changed by the banks in 1818, so as to conform to the general commercial usage of demanding payment on the last day of grace, the supreme court afterwards held that an action might be maintained against the indorser of a promissory note upon a demand made on the third day of grace, and notice given the day following. Cookendorfer v. Preston, 45 U.S. (4 How.) 317;

bk. 11, L. Ed. 992.

1. Mechanics' Bank v. Merchants'
Bank, 47 Mass. (6 Metc.) 13; Perkins v.
Franklin Bank, 38 Mass. (21 Pick.) 483:
2. Mass. Rev. Stat. ch. 33, sec. 5.
3. Perkins v. Franklin Bank, 38 Mass.

(21 Pick.) 483. 4. Camden v. Doremus, 44 U.S. (3

5. Newark I. R. Manuf. Co. v. Bishop., 3 E. D. Smith (N. Y.), 48.

Bill or Note Payable in Bank—Demand

During Business Hours .- When a bill or note is payable at a bank, banking-house, or other place, where it is well known that business is transacted only during certain hours of the day, the law presumes that the parties intended to conform to such established course of business, and requires that a demand should be made during those business hours. Parker v. Gordon, 7 East, 385. The cases of Garnett v. Woodcock, 1 Stark. 475, and of Henry v. Lee, 2 Chit, 124, may show an exception to this rule, that when a person is found at such place after business hours authorized to give an answer, the demand will be good, while it may be difficult to reconcile these cases with the case of Elford v. Teed, I Maule & S. 28; Dana v. Sawyer, 22 Me.

244; s. c., 39 Am. Dec. 574.
6. Allen v. Avery, 47 Me. 287; Commercial and Railroad Bank v. Hamer, 8 Miss. (7 How.) 448; s. c., 40 Am. Dec. 80; Reed v. Wilson, 41 N. J. L. (12 Vr.) 29; Salt Spring National Bank v. Burton, 58 N. Y. 430; s. c., 17 Am. Rep. 265; Bank of Syracuse v. Hollister, 17 N. Y. 46; s. c., 72 Am. Dec. 416; Bank of Utica υ. Smith, 18 Johns. (N. Y.) 230.

Demand After Business Hours .- When the bill or note is not payable at a place where there are established hours, a presentment for payment may be made at any reasonable time during the day. Wilkins v. Jadis, 2 Barn. & Ad. 188; Barclay v. Bailey, 2 Camp. 527; Triggs v. Newnham, 10 Moore, 249; Leftly v. Mills, 4 T. R. 174. What hour may be a reasonable one has come under consideration in those cases. In the first of them Mr. Justice Buller observes, that "to say, that the demand should be postponed till midnight, would be to establish a rule attended with mischievous consequences."

e. What are Business Hours.—Business hours for presentment and demand include the whole day to the hours of rest at night. except where payment is due from a bank.1

In the second, Lord Ellenborough said: "If the presentment had been during the hour of rest, it would have been altogether unavailing." In the third, this remark, among others, is quoted and approved by Chief Justice Best. In the fourth, Lord Tenterden remarked, "that a presentment at twelve o'clock at night. when a person has retired to rest, would be unreasonable. These observations, so just and so applicable to this case. authorize this conclusion, that the demand was not made at a reasonable hour. unless the fact that the maker was seen and actually called upon at that time should make a difference. Perhaps, in analogy to the exception already noticed. it might be proper to admit of one in this and the like cases, if it should appear from the answer made to the demand, that there was a waiver of any objection as to the time, or that payment would not have been made upon a demand at a reasonable hour. Dana v. Sawyer, 22

Me. 244; s. c., 39 Am. Dec. 575.

Presentation at Bank After Banking Hours .- Presentment at open bank a few minutes after time for closing is sufficient. Bank of Utica v, Smith, 18 Johns. (N.

Same-In Maine. - Soon after the usual business hours of a bank, but before its officers had left, a notary public, at the request of the cashier, presented a note due on that day, to pay which no funds had been provided by the maker, and demanded its payment; which being refused, the note was protested. Held, that the demand was well made to charge the indorsers. Allen v. Avery, 47 Me. 287.

Same—In Massachusetts.—A promissory note, dated at Boston, but expressing no place of payment, falling due at the end of August, was presented for payment at nine o'clock in the evening of the last day of grace, at the house of the maker, ten miles from Boston, after he and his family had retired for the night. Held, that demand was sufficient to charge an indorser. Farnsworth v. Allen, 70 Mass. (4 Gray) 453.

Same—In Mississippi.—A notary did not demand payment of a note, payable at a bank, until after banking hours, and when the front door of the bank was closed, but he went to the back door, and finding the teller in the bank, according to the custom of the bank, demanded payment, which was refused, there having been no funds for payment in the bank during the day. Held, that the demand was sufficient to charge the indorser. Commercial & Railroad Bank v. Hamer 8 Miss. (7 How.) 448; s. c., 40 Am. Dec.

Same—In New York.—A note, payable at a bank, was presented to the first teller fifteen minutes after 3 o'clock P.M., on the day it was payable, and payment was de-The bank closed at 3 o'clock: manded. but it appeared to be the usual course of business at the bank to allow that time for the presentment and payment of notes. *Held*, that this was a sufficient presentment. Bank of 18 Johns. (N. Y.) 230. Bank of Utica v. Smith,

A note was made payable at bank A... where the maker had no funds. It was placed in the hands of a notary, being unpaid, after business hours on the last day of grace. The notary was teller of bank He went with the note to the bank and could not obtain admittance, and demanded payment of himself at the door. Held, sufficient presentment and demand to charge the indorser. Bank of Syracuse v. Hollister, 17 N. Y. 46; s. c.,

72 Am. Dec. 416.

In an action against an indorser upon a promissory note made payable at a bank, it appeared that upon the day the note fell due the indorser was ready to pay it, and sent the maker to the bank several times during banking hours to see if the note was there, and to ascertain the amount. The note was not presented for payment until an hour after the close of the customary banking hours, when the holder was admitted into the bank, found the cashier, and demanded payment, which was refused on the ground that no funds had been left with the bank Held, that the demand was sufficient to charge the indorser. Salt Springs National Bank v. Burton, 58 N. Y. 430;

S. C., 17 Am. Rep. 265.

1. McFarland v. Pico, 8 Cal. 633;
Dana v. Sawyer, 22 Me. 244; s. c., 39
Am. Rep. 574; Farnsworth v Allen, 70
Mass. (4 Gray) 453; Cayuga Co. Bank v.
Hunt, 2 Hill (N. Y.). 635.

Where there are No Established Hours

Where there are No Established Hours of Business. - Where a note is payable at a place in which there are no established business hours, a presentment for payment may be made at any reasonable

- c'. At Close of Banking Hours.—A note payable at a bank may be presented at any business hour; and if not then paid, may be treated as dishonored, and notice given forthwith, before the close of banking hours, to indorsers. But a demand at a bank, on a note pavable at such bank, must be made at the close of the business hours: for the maker has until that time to deposit the money for the payment of the note.² And where, by the usage of a bank. notes payable there are allowed to the close of banking hours for payment, a demand of payment before that time is not sufficient. unless the note is permitted to remain until the close of banking
- c⁵. Presumption as to Time of Making.—Proof that the cashier of the bank at which the note was payable refused payment, raises, the presumption that the demand was made during business hours. 4
- (2) Bills.—(a) Day.—a. When Due.—Presentment for payment. must be made on the day the bill falls due; and if there be no one ready at the place to pay the bill, it should be treated as dishonored and protested.⁵ But the holder of a draft is not bound. as between himself and the drawer, to present it for payment at maturity. The only risk he runs by delay is that of the intervening insolvency of the drawee.6

a². When Due on Sunday.—A draft falling due on Sunday may

be presented on the preceding day.7

hour of the day. Dana v. Sawyer, 22 Me. 244; s. c., 39 Am. Dec. 574. But a presentment a few minutes before twelve o'clock at night is not a reasonable hour. and is insufficient to hold an indorser. Id.

1. Thorpe v. Peck, 28 Vt. 127.
2. Harrison v. Crowder, 14 Miss. (6 Smed. & M.) 464; s. c., 16 Am. Dec. 290. See Church v. Clark, 38 Mass. (21 Pick.)

3. Planters' Bank v. Markham, 6 Miss. (5 How.) 397; s. c., 37 Am. Dec. 162. 4. Reed v. Wilson, 41 N. J. L. (12 Vr.)

5. Wiseman v. Chiappella, 64 U. S. (23 How.) 368; bk. 16, L. Ed. 466. See Orear v. McDonald, 9 Gill (Md.), 350; Wheeler, 12 Abb. (N. Y.) Pr. 139. Compare Springfield M. & F. Ins. Co. v.

Tincher, 30 Ill. 399.
Under the New York Act of 1857, relative to commercial paper (1 Laws 1857, 839, ch. 416), a draft on a bank, payable on a designated day after its date, must be presented on the day designated for payment, in order to charge the drawer for non-payment, unless it can be affirmatively shown that he had no funds to meet it. Ransom v. Wheeler, 12 Abb. (N. Y.) Pr. 139.

Delay in Demand.—Where payment of

a bill of exchange was not demanded, nor the bill protested, until four days after its maturity, held, that the drawers were discharged. Orear v. McDonald, 9. Gill (Md.), 350. But a drawer is liable notwithstanding a delay in presentment v. Warren, 3 Johns. Cas. (N. Y.) 259; s. c., 2 Am. Dec. 156. 6. Springfield M. & F. Ins. Co. v.

Tincher, 30 Ill. 399.

7. Ontario Bank v. Petrie, 3 Wend. (N. Y.) 456. See also Offut v. Stout, 4 (N. 1.) 450. See also Ollut v. Slout, 4 J. J. Marsh. (Ky.) 232; Homes v. Smith, 20 Me. 264; Sheppard v. Spates, 4 Md. 400; Barker v. Parker, 23 Mass. (6 Pick.) 80; Barlow v. Planters' Bank, 8 Miss. (7 How.) 129; Fleming v. Fulton, 7 Miss. How.) 129; Fleming v. Fulton, 7 Miss. (6 How.) 473; Jackson v. Richards, 2 Cai. (N. Y.) 343; Lewis v. Burr, 2 Cai. Cas. (N. Y.) 196; Ransom v. Mack, 2 Hill (N. Y.), 587; s. c., 38 Am. Dec. 602; Shelden v. Benham, 4 Hill (N. Y.), 129; s. c., 40 Am. Dec. 271; Griffin v. Goff, 12 Johns. (N. Y.) 423; Cuyler v. Stevens, 4 Wend. (N. Y.) 506; Bussard v. Levering, 19 U. S. (6 Wheat.) 102; bk. 5. L. Ed. 215, note; Irwin v. Brown, 2 Cr. C. C. 214: Doremus v. Burton, 5 Riss. C. C. 314; Doremus v. Burton, 5 Biss. C. C. 57; Tassel v. Lewis, 1 Ld. Raym. 743.
Notes and Bills Without Grace.—Notes

and bills without grace falling due on.

a'. What is Reasonable Time.—The law requires reasonable diligence in presenting a note or bill for payment, and in giving notice of dishonor. But what is due diligence depends upon local custom and the circumstances surrounding each case.2

Sunday or a legal holiday are not payable till the following day. Sands v. Lyon, 18 Conn. 18; Avery v. Stewart, 2 Conn. 69; s. c., 7 Am. Dec. 240; Staples v. Franklin Bank, 42 Mass. (1 Metc.) 43; s. c., 35 Am. Dec. 345; Salter v. Burt, 20 s. c., 35 Am. Dec. 345; Salter v. Burt, 20 Wend. (N. Y.) 205; s. c., 32 Am. Dec. 530; Barrett v. Allen, 10 Ohio, 426. Compare Sanders v. Ochiltree, 5 Port. (Ala.) 73; s. c., 3 Am. Dec. 551; Osborne v. Smith, 14 Conn. 366, note; Blodgett v. Durgin, 32 Vt. 361.

1. See Farmers' Bank v. Vail, 21 N. Y. 485; Stewart v. Eden, 2 Cai. (N. Y.) 121; s. c., 2 Am. Dec. 222; Mead v. Engs, 5 Cow. (N. Y.) 303; Bank of United States v. Davis, 2 Hill (N. Y.), 451; Smedes v. President of Bank of Utica, 20 Johns. (N.Y.) 372, n.; Stafford v. Yates, 18 Johns. (N. Y.) 327; Bank of Utica v. Smith, 18 Johns. (N. Y.) 230; Bryden v. Bryden, 11 Johns. (N. Y.) 230; Bryden v. Robinson, 9 Johns. (N. Y.) 121; s. c., 6 Am. Dec. 267; Miller v. Hackley, 5 Johns. (N. Y.) 237, Milki V. Hackley, 5 Johns. (N. Y.) 375, n.; s. c., 4 Am. Dec. 372; Manhattan Co. v. Hackley, 3 Johns. Cas. (N. Y.) 563; Corp. v. McComb, 1 Johns. Cas. (N. Y.) 329. See also Belden v. Lamb, 17 Conn. 442; Palmer v. Whitney, 21 Ind. 58; Clark v. Bigelow, 16 Me. 246; Grafton Bank v. Cox, 79 Mass. (13 Gray) 513; Wheeler v. Field, 47 Mass. (6 Metc.) 299; Pierce v. Pendar, 46 Mass. (5 Metc.) 352; Granite Bank v. Ayers, 33 Mass. (16 Pick.) 392; s. c., 28 Am. Dec. 253; Shed v. Brett, 20 Mass. (1 Pick.) 413; s. c., 11 Am. Dec. 200; Plahto v. Patchin, 26 Mo. 389; Manchester Bank v. Fellows, 28 N. H. (8 Fost.) 302; Perry v. Green, 19 N. J. L. (4 Harr.) 61; s. c., 38 Am. Dec. 536; Bartlett v. Robinson, 39 N. Y. 187; Adams v. Leland, 30 N. Y. 309; Manu-Adams v. Leland, 30 N. Y. 309; Manufacturers & Traders' Bank v. Hazard, 30 N. Y. 226; Beale v. Parrish, 20 N. Y. 407; s. c., 75 Am. Dec. 414; Carroll v. Upton, 3 N. Y. 272; Spencer v. Bank of Salina, 3 Hill (N. Y.), 520; Ransom v. Mack, 2 Hill (N. Y.), 587; s. c., 38 Am. Dec. 602; Reid v. Payne, 16 Johns. (N. Y.) 218; c. 8 Am. Dec. 602; Reid v. Payne, 213; Octobra (N. Y.) 218; c. 8 Am. Dec. 613; Octobra (N. Y.) 218; c. 8 Am. Dec. 613; Octobra (N. Y.) 218; c. 8 Am. Dec. 613; Octobra (N. Y.) 218; c. 8 Am. Dec. 613; Octobra (N. Y.) 218; c. 8 Am. Dec. 613; Octobra (N. Y.) 218; c. 8 Am. Dec. 613; Octobra (N. Y.) 218; c. 8 Am. Dec. 613; Octobra (N. Y.) 218; c. 8 Am. Dec. 613; Octobra (N. Y.) 218; c. 8 Am. Dec. 613; Octobra (N. Y.) 218; c. 8 Am. Dec. 613; Octobra (N. Y.) 218; c. 8 Am. Dec. 613; Octobra (N. Y.) 218; c. 8 Am. Dec. 614; Octobra (N. Y.) 218; c. 8 Am. Dec. 614; Octobra (N. Y.) 218; c. 8 Am. Dec. 614; Octobra (N. Y.) 218; c. 8 Am. Dec. 614; C. Y.) V.) 218; s. c., 8 Am. Dec. 311; Ogden v. Cowley, 2 Johns. (N. Y.) 274; Tardy v. Boyd, 26 Gratt. (Va.) 631; Lambert v. Ghislin, 50 U. S. (9 How.) 559; bk. 13. L. Ed. 257; Harris v. Robinson, 45 U. S. (4 How.) 336; bk. II, L. Ed. 1000; Camden v. Doremus, 44 U. S. (3 How.) 515; bk. II, L. Ed. 705; Bank of United States

v. Corcoran, 27 U. S. (2 Pet.) 121; bk. 7, L. Ed. 368; Williams v. Bank of U. S., 27 U. S. (2 Pet.) 96; bk. 7, L. Ed. 360. 2. See Mohawk Bank v. Broderick, 13

2. See Monark Bank 9. Broderick, 13. Wend. (N. Y.) 133; s. c.. 27 Am. Dec. 192; aff'g s. c., 10 Wend. (N. Y.) 304; Van Hoesen v. Van Alstyne, 3 Wend. (N. Y.) 75; Wallace v. Agry, 4 Mason C. C. 336.

Liability Upon a Bill of Exchange depending on the question as to whether the holder had been guilty of negligence in not presenting the bill for payment within a reasonable time discussed in a charge to the jury. Olshausen v. Lewis,

I Biss. C. C. 419.

Reasonable Time must be judged of with reference to the usage among merchants as to delays in the negotiation and transmission of such bills Wallace v. Agrv. 4 Mason C. C. 336. Thus the lapse of four days after bill is put in circulation by second indorser before presentment is not presumptive evidence of laches. Smith v. Janes, 20 Wend. (N. Y.) 192; s. c., 28 Am. Dec. 527.

Same-The Mere Lapse of Three Months before presentment of a bill drawn at New York on Liverpool, payable sixty days after sight, held not unreasonable delay, especially during war. United States v. Barker, I Paine C. C. 156. And a delay of six months in presenting a foreign bill payable at sight under peculiar circumstances held not unreasonable. v. Jackson, 20 Johns. (N. Y.) 176.

Bill Drawn in one Country and Payable in Another.—A bill payable at sixty days after sight was drawn in Havana upon London. It was held that it need not be sent from Cuba direct to London, but might be sent indirectly in any manner justified by the course of trade, and might be sent for sale to the United States. Wallace v. Agry, 4 Mason C. C. 336. But in instances where a drawee promised to pay in ten or fifteen days, and the holder did not present the bill till eighty or ninety days had elasped, it was held that he had lost his claim on the drawer. Eldridge v. Rogers, Minor (Ala.), 392; Brower v. Jones, 3 Johns. (N. Y.) 230.

A Holder in Texas indorsed a foreign

sight bill a month old drawn in Ohio on drawees in Louisiana; three weeks later it came to the hands of one who kept it a month, and then presented it for acceptance. *Held*, in view of the usage (which the jury found to have been reasonably followed), that the presentation was in reasonable time so as to charge the indorser. Jordan v. Wheeler, 20 Tex. 698.

Due Diligence.—It is enough that holder of a bill make diligent inquiry for the indorser and acts upon the best information he is able to procure. If after doing so the notice fail to reach the indorser, the misfortune falls on him, not on the holder. There must be ordinary or reasonable diligence, such as men of business usually exercise when their interest depends upon obtaining correct information. But he must act in good faith, and not give credit to doubtful intelligence when better could have been obtained. Bank of Utica v. Bender, 21 Wend. (N. Y.) 643; s. c., 27 Am. Dec, 71.

What Constitutes Due Diligence.—In those cases where the facts are undisputed, what constitutes due negligence is a question of law. Thorn v. Rice, 15 Me. 263; Bartlett v. Robinson, 39 N. Y. 187; Remer v. Downer, 25 Wend. (N. Y.) 277; Bank of Utica v. Bender, 21 Wend. (N. Y.) 643; Walker v. Stetson, 14 Ohio St. 89; Harris v. Robinson, 45 U. S. (4 How.) 336; bk. 11, L. Ed. 1000; Bank of Alexandria v. Swann, 34 U. S. (9 Pet.) 33; bk. 9, L. Ed. 40; Bank of Columbia v. Lawrence, 26 U. S. (1 Pet.) 578; bk. 7, L. Ed. 269. Compare Belden v. Lamb, 17 Conn. 441; Winans v. Davis, 18 N. J. L.

Where Parties Reside in Same Place.—Where Parties reside in the same place, the holder has until the close of the following day to give notice. Kock v. Bringier, 19 La. An. 183; Davis v. Gowen, 19 Me. 447; Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177; s.c., 3 Am. Rep. 445; Pierce v. Pendar, 46 Mass. (5 Metc.) 352; Grand Bank v. Blanchard, 40 Mass. (23 Pick.) 305; Whiting v. City Bank of Rochester, 77 N. Y. 363; West River Bank v. Taylor, 34 N. Y. 128; Farmers' Bank v. Vail, 21 N. Y. 488; Vance v. Collins, 6 Cal. 435; Cayuga Co. Bank v. Hunt, 2 Hill (N. Y.), 628; Guyler v. Stevens, 4 Wend. (N. Y.) 567; Nashville Bank v. Bennett, 1 Yerg. (Tenn.) 166; Boyd v. City Sav. Bank, 15 Gratt. (Va.) 501; Adams v. Wright, 14 Wis. 408; Bowling v. Harrison, 47 U. S. (6 How.) 248; bk. 12, L. Ed. 425; Williams v. Bank of United States, 27 U. S. (2 Pet.) 96; bk. 7. L. Ed. 360; Hill v. Norvell, 3 McL. C. C. 583; Hyslop v. Jones, 3 McL. C. C. 6, 583; Hyslop v. Jones, 3 McL. C. C. 561

Vowell v. Patton, 2 Cr. C. C. 312; Allen v. Edmonson, 2 Carr. & K. 547; Parker v. Gordon, 7 East, 385; Crosse v. Smith, 1 Maule & S. 545.

Where the Parties Reside in Different Places .- Where the parties live in different places notice must be mailed by the following day. Hartford Bank v. Stedman, 3 Conn. 489; Goodman v. Norton. 17 Me. 381; Housatonic Bank v. Laflin. 59 Mass. (5 Cush.) 546; Shed v. Brett, 18 Mass. (1 Pick.) 401; s. c., 11 Am. Dec. 209; Munn v. Baldwin, 6 Mass. 316; Ellis v. Commercial Bank, 8 Miss. (7 How.) 294; Carter v. Burley, 9 N. H. 558; s. c., 1 Am. Lead. Cas. 390; Hazelton Coal Co. v. Ryerson. 20 N. J. L. (1 Spen.) 129; s. c., 40 Am. Dec. 217; Howard v. Ives. I Hill 40 Am. Dec. 217; Howard v. Ives, I Hill (N. Y.), 263; Smith v. Poillen, 23 Hun (N. Y.), 628; Miller v. Hackley, 5 Johns. (N.Y.) 375; s. c., 4 Am. Dec. 372; Remer v. Downer, 23 Wend. (N. Y.) 620; Cuyler v. Stevens. 4 Wend. (N. Y.) 567; Bank of Utica v. Phillips, 3 Wend. (N. Y.) 408; Lawson v. Farmers' Bank, I Ohio St. 206; Margare v. J. 2020ster v. P. St. 160 Peak Mercer v. Lancaster, 5 Pa. St. 160; Bank of Manchester v. Slason, 13 Vt. 334; Friend v. Wilkinson, 9 Gratt. (Va.) 31; Dickins v. Beal, 35 U. S. (10 Pet.) 572; Dickins v. Beal, 35 U. S. (10 Pet.) 572; bk. 9, L. Ed. 538; Bank of United States v. Carneal, 27 U. S. (2 Pet.) 543; bk. 7, L. Ed. 513; Fullerton v. Bank of United States, 26 U. S. (1 Pet.) 605; bk. 7, L. Ed. 280; United States v. Barker, 25 U. S. (12 Wheat.) 559; bk. 6, L. Ed. 728; Lidenberger v. Beall, 19 U. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. 216; Bussard v. Levering, O. II. S. (6 Wheat.) 104; bk. 5, L. Ed. (7 Wheat.) 104; bk. 5 19 U. S. (6 Wheat.) 102; bk. 5, L. Ed. 215; Lenox v. Roberts, 15 U. S. (2 Wheat.) 215; Lenox v. Roberts, 15 U. S. (2 Wheat.)
373; bk. 4, L. Ed. 264; Whitney v. Huntl,
5 Cr. C. C. 120; Fowler v. Warfield, 4 Cr.
C. C. 71; Saunderson v. Judge, 2 H. Bl.
509; Parker v. Gordon, 7 East, 385; Kufh
v. Weston, 3 Esp. 54; Woodcock v.
Houldsworth, 16 Mees. & W. 126; Story on Bills, sec. 288.

Where Indorser Resides and Does Business in Different Places.—Where an indorser resides in one town, and does business in another, notice sent to either is sufficient. Montgomery Co. Bank v. Marsh, 7 N.Y. 481; Bank of Geneva v. Howlett, 4 Wend. (N. Y.) 328. But where protest is made in the village where the indorser lives, notice by mail to his place of business in another is insufficient. Notice must be personal. Van Vechten v. Pruyn, 13 N. Y. 549. However, notice actually received in due time is sufficient, although improperly sent. Cabot Bank v. Warner, 92 Mass. (10 Allen) 524. See Dicken v. Hall. 87 Pa. St. 379.

Holder for Collection .- One who is the

a. To Charge Drawer.—In order to fix the liability of the drawer of a bill or check, the holder may present it to the drawee for payment at any time before suit brought, provided the drawer has received no injury, by the failure of the drawee, or otherwise,

from a delay in demanding payment.1

a. Effect of Delay in Mail.—Diligence is required in the presentation of a bill or note.² However, an impossibility to present a bill for payment on the day it falls due, where the holder is in no fault, may render a subsequent presentment sufficient to charge the drawer. But it seems that it is otherwise of oversights or negligence in the post-office, by which a bill miscarries, so that it cannot be presented till after it is due.³

Thus where a bill was sent by mistake to Liverpool instead of London, to be presented for payment, and on discovering the mistake was sent on to London, where it arrived two days late, but would have arrived in time but for the negligence of the post-office clerks; held, not a sufficient excuse. But it has been said if the holder of a bill sends it within a proper time for acceptance he is

not responsible for a delay in the mail.5

a. Allowance of Twenty-four Hours Before Acceptance.—Where a drawee of a bill of exchange requires time to examine his accounts before accepting or refusing to accept such bill of exchange, he is

holder of a note or bill for collection merely is a holder within the rule, and must observe the same rules in presenting, demanding payment, and giving notice of non-payment. See Freemen's Bank v. Perkins, 18 Me. 292; Warren v. Gilman, 17 Me. 360; Shelburne Fall Nat. Bank v. Townsley, 107 Mass. 448; s. c., 3 Am. Rep. 445; Manchester Bank v. Fellows, 28 N. H. (88 Fost.) 311; Mead. v. Engs, 5 Cow. (N. V.) 308; Bowling v. Harrison, 47 U. S. (6 How.) 248; bk. 12, L. Ed. 425. Compare Philipe v. Harberlee, 45 Ala. 597.

1. Daniels v. Kyle, I Ga. 304; Tryon

v. Oxley, 3 G. Greene (Iowa), 289, 2. Windham Bank v. Norton, 22 Conn. 213; s. c., 56 Am. Dec. 397; Whitaker v. Morrison, 1 Fla. 25; s. c., 44 Am. Dec. 627; Allen v. Avery, 47 Me. 287; Flint v. Rogers, 15 Me. 67; Haines v. Pearce, 41 Md. 233; Tate v. Sullivan, 30 Md. 470; Orear v. McDonald, 9 Gill (Md.), 350; s. c., 52 Am. Dec. 701; White v. Stoddard, 76 Mass. (11 Gray) 258; Shepherd v. Chamberlain, 74 Mass. (8 Gray) 225; Cohea v. Hunt, 10 Miss. (2 Smed. & M.) 227; s. c., 41 Am. Dec. 589; Hazelton Coal Co. v. Ryerson, 20 N. J. L. (1 Spen.) 129; s. c., 20 Am. Dec. 217; Salt Springs Nat. Bank v. Burten, 58 N. Y. 430; s. c., 17 Am. Rep. 265; Benton v. Martin, 31 N. Y. 382; Bank of Syracuse v. Hollister, 17 N. Y.

46; s. c., 72 Am. Dec. 416; Kelty v. Second Nat. Bank, 52 Barb. (N. Y.) 328; Brady v. Little M. R. Co., 34 Barb. (N. Y.) 329; Brady v. Little M. R. Co., 34 Barb. (N. Y.) 249; Aymar v. Beers, 7 Cow. (N. Y.) 705; s. c., 17 Am. Dec. 538; Sice v. Cunningham, r Cow. (N. Y.) 397; Wethey v. Andrews, 3 Hill (N. Y.), 582; Vantrot v. McCullough, 2 Hilt. (N. Y.) 272; Gowan v. Jackson, 20 Johns. (N. Y.) 176; Robinson v. Ames, 20 Johns. 146. n.; s. c., 11 Am. Dec. 259; Conroy v. Warren. 3 Johns. Cas. (N. Y.) 259, n.; s. c., 2 Am. Dec. 156; Smith v. Janes, 20 Wend. (N. Y.) 192; s. c., 32 Am. Dec. 527; Schofield v. Bayard, 3 Wend. (N. Y.) 488; Wallace v. Agry, 4 Mason C. C. 336; Mitchell v. Degrand, 1 Mason C. C. 176; Henry v. Lee, 2 Chitt. 124; Hilton v. Shepard, 6 East. 16, note; Garnett v. Woodcock, 1 Stark, 475; Dan. Neg. Inst, secs. 454, 466–478. 1125; Story Bills, sec. 228; 1 Pars. N. & B. 267.

Schofield v. Bayard, 3 Wend. (N.Y.)
 Schofield v. Bayard, 3 Wend. (N.Y.)
 488.

5. Walsh v. Blatchley, 6 Wis. 422; s. c.,

70 Am. Dec. 469.

Delay of Mail is a good excuse for not immediately presenting a bill of exchange for acceptance, and its immediate presentation after arrival is sufficient to charge the indorser. Walsh v. Blatchley, 6 Wis. 422; s. c., 70 Am. Dec. 469.

entitled to twenty-four hours for that purpose. The object of giving the drawee twenty-four hours to consider whether he will accept. is not to enable him to inquire as to the holder's title, but to ascertain whether he has effects of the drawer, or other reason for honoring the bill; and an acceptance at once, without taking advantage of his delay, is not of itself evidence of negligence in not inquiring as to the holder's title.2

(b) Grace.—b1, Allowed, when.—A foreign bill of exchange or promissory note, payable at sight, is entitled to grace by the general law-merchant, unless the contrary is shown to be the law

of the place where it is to be paid.³
b². Bill Due on Last Day.—The allowance of days of grace for the payment of a bill of exchange or note is now universally understood to enter into every bill or note of a mercantile character: it does not become due until the last day of grace.4

b's. Effect of Usage.—The usage of a place on which a bill is

1. Case v. Burt, 15 Mich. 82.

 Wilcox v. Beal, 3 La. An. 404.
 Wooley v. Clements, 11 Ala. 220; Cribbs v. Adams, 79 Mass. (13 Gray) 597; Wood v. Corl, 45 Mass. (4 Metc.) 203; Story on Notes, secs. 29, 224, 225a; Chit. on Bills (10th Am. Ed.), 273, 365; I

Dan. on Neg. Inst. § 613 et seq.

A Bill of Exchange on a Bank.—An instrument in form of bill of exchange drawn upon and accepted by cashier of a bank payable to order in the city of New York at a specified period after date is entitled to days of grace; and evidence of local usage cannot be received for the purpose of varying its legal effect in this particular. Merchants' Bank ν . Woodruff, 6 Hill (N. Y.), 174; aff'g 25 Wend. (N. Y.) 673.

This instrument addressed to a bank, "Pay to M. C. & Co., or order, five hundred dollars, on the 22d of October, \$500.00, Bf. T. W. & Co.," dated Oct. 12, is a bill of exchange, and as such entitled to grace. Ivory v. Bank of State

of Missouri, 36 Mo. 475.

An Order upon a Bank for the payment of money, at a certain number of days after date, is not a check but a bill of exchange, on which days of grace should be allowed. Henderson v. Pope, 39 Ga. 361.

An Order Payable at a Future Day .--It is an inland bill of exchange, and the drawer is entitled to notice of non-payment. Minturn v. Fisher, 4 Cal.

A Foreign Bill of Exchange or promissory note, payable at sight, is entitled to days of grace unless the contrary is shown to be the law of the place where it is to be paid. Cribbs v. Adam. 70 Mass. (13 Gray) 597.

An Inland Bill or note left at a bank for collection is entitled to three days of grace. McDonald v. Smith, 14 Me. 99; Pickard v. Valentine, 13 Me. 412. Thus a bill drawn in another State, payable in Ohio, is entitled to three days of grace, McMurchey v. Robinson, 10 Ohio, 496.
4. Bank of Washington v. Triplett, 26

U. S. (1 Pet.) 25; bk. 7, L. Ed. 37; Lenox v. Roberts, 15 U. S. (2 Wheat.) 373;

bk. 4, L. Ed. 264.

Bills of Exchange Drawn in Kentucky on parties in another State, payable in that State, may be legally protested on the last day of grace. Mills v. Rouse, 2

Litt. (Ky.) 203.

Days of Grace.—There is no rule that if a bill is not presented for acceptance, payment should be demanded on the day named in the bill. The allowance of days of grace is a usage which pervades the whole commercial world. It is now universally understood to enter into every bill or note of a mercantile character, and to form so completely a part of the contract, that the bill does not become due in fact or in law on the day mentioned on its face, but on the last day of grace. And a demand of payment previous to that day will not authorize a protest or charge the drawer of the bill. There is no reason why a bill never presented for acceptance should be demandable at an earlier day than one which has been accepted, or of which acceptance has been refused. Bank of Washington v. Triplett, 26 U. S. (1 Pet.) 25; bk. 7, L. Ed. 37.

drawn, or where payment is demanded, uniformly regulates the

number of days of grace which must be allowed.1

b'. Presumption as to.—In the absence of proof to the contrary, the legal presumption is that in every State in the Union three days' grace are allowed by law on bills of exchange and promissory notes.2

(c) Hour.—It is sufficient if a bill of exchange is presented by the cashier to the acting teller of a bank where payable on the

proper day, though after banking hours.3

(d) Sight Bills.—d¹ Payable, where.—A bill payable on sight is

entitled to grace, and is payable on the last day of grace.4

d'. Diligence Required.—Where a bill is payable at sight, or a certain number of days after sight, due diligence in putting the bill

in circulation is required.5

d's. To be Presented, when.-No absolute rule can be laid down as to the time within which a bill made payable after sight must be presented for acceptance. The only rule is that it must be presented within a reasonable time. What will be a reasonable time depends upon the circumstances of each particular case.6 . There is a difference between the case of a bill of exchange drawn payable at so many days after date, and one drawn payable at so

1. Bank of Washington v. Triplett, 26 U. S. (I Pet.) 25; bk., 7 L. Ed. 37. 2. Wood v. Corl, 45 Mass. (4 Metc.)

The court say: "Another ground of defence was that it does not appear that by the law of Ohio three days of grace are allowed, and therefore it is not shown that demand on the third day was right. But we consider it well settled, that by the general law-merchant, which is part of the common law as prevailing throughout the United States, in the absence of all proof of particular contract or special custom, three days' grace are allowed on bills of exchange and promissory notes; and when it is relied upon that by special custom no grace is allowed, or any other term of grace than three days, it is an exception to the general rule, and the proof lies on the party taking it. Mills v. United States Bank. 24 U. S. (11 Wheat.) 431; bk. 6, L. Ed. 512; Renner v. Bank of Columbia, 22 U. S. (9 Wheat.) 581; bk. 6, L Ed. 166; Bussard v. Levering, 19 U. S. (6 Wheat.) 102; bk. 5, L. Ed. 215; Lindenberger v. Beall, 19 U. S. (6 Wheat.) 104; bk. 5, L. Ed. 216.

Ohio Bule.—It appears from the Ohio

report that three days' grace are allowed by law in that State on the promissory notes and bills of exchange. Remington v. Harrington, 8 Ohio, 507; McMurchy

v. Robinson, 10 Ohio, 496.

3. First National Bank v. Owen, 23 Ohio, 185; Browning v. Andrews, 3 McL. C. C. 576.

Under the Practice of Exchange Brokers in Pittsburg of closing their business at five o'clock, the acceptor of a bill held by one of such brokers has a right to pay it at any time before that hour; but payment of the bill does not invalidate a previous protest of it made at any time after three and before five P.M. King v. Holmes, 11 Pa. St. 456.

4. A bill drawn payable at five days after sight, and accepted on the first day of a month, is payable on the ninth day of the same month, the day of the acceptance being excluded, and the three days of grace allowed. A demand on the eighth, and protest for non-payment on that day, is too early, and therefore void. Mitchell v. Degrand, I Mason C. C. 176.

Alabama Doctrine.—A bill drawn and payable within the State of Alabama nine months after sight, it is payable nine months after it is presented for

sight. Brown v. Turner, 11 Ala. 752.

5. Furman v. Haskin, 2 Cai. (N. Y.)
369; Robinson v. Ames, 20 Johns. (N. Y.) 146; s. c., 11 Am. Dec. 259. See
Gowan v. Jackson, 20 Johns. (N. Y.)
176; Conroy v. Warren, 3 Johns. Cas.
(N. Y.) 259; s. c., 2 Am. Dec. 156.

6. Wallace v. Agry 4 Mason C. C.

6. Wallace v. Agry, 4 Mason C. C. 336.

many days after sight. In the former case the bill must be presented at the period of its maturity; in the latter, it is sufficient if it be presented in a reasonable time.¹

d⁴. Must be Presented for Acceptance.—A bill of exchange payable at sight must be presented for acceptance, and a demand of payment and notice to the drawer, without a previous presentation

for acceptance, are insufficient to charge him.2

(3) Checks.—(a) Day.—a¹. Day of Date or Day Following.—By the law-merchant it is sufficient if a check drawn upon one day is presented for payment in the usual banking hours upon the next succeeding day, when the payee resides in the immediate vicinity of the place of payment.³ But the day succeeding that on which

1. Wallace v. Agry, 4 Mason C. C. 336.

2. Hart v. Smith, 15 Ala. 807; s. c.,

80 Am. Dec. 161.

When Sight Bill Must be Presented .-A bill payable on demand or at any fixed time need not be presented for acceptance, but a demand of payment at the time the holder has the legal right to demand payment is all that is necessary. And if the bill be not paid, the holder may protest it for non-payment, and on his giving due notice to the drawer and indorsers the liability is fixed. Evans v. Bridges, 4 Port. (Ala.) 348; Townsley v. Sumrall, 27 U. S. (2 Pet.) 170; bk. 7, L. Ed. 386; Bank of Washington v. Triplett, 7 U. S. (1 Pet.) 25; bk. 7, L. Ed. 37; Chitt. on Bills (10th Ed.), 272. But when the time of payment is uncertain, a presentation of the bill is necessary in order to ascertain and fix the time of payment. As, if the bill be payable at a number of days after sight, then the bill must be presented for acceptance before payment is demanded. Hart v. Smith, 15 Ala. 807; s. c., 50 Am. Dec. 161; Story on Bills, secs. 112, 227; Chitty on Bills (10th Ed.), 272; Bayl. on Bills (5th Ed.), 217, 218.
3. Ritchie v. Bradshaw, 5 Cal. 228;

3. Ritchie v. Bradshaw, 5 Cal. 228; Ocean T. B. Co. v. The Ophelia, 11 La. An. 28; Kelty v. Second, etc., Bank, 52 Barb. (N. Y.) 328; Hazelton v. Colburn, 1 Robt. (N. Y.) 345; Gough v. Staats, 13 Wend. (N. Y.) 549; Merchants' Bank v. Spicer, 6 Wend. (N. Y.) 443; O'Brien v. Smith, 66 U. S. (1 Black) 99; bk. 17, L. Ed. 383.

When Check to be Presented for Payment.—The holder of a bank check, drawn upon a bank located where the drawer resides, and delivered by him there, is not bound to present it for payment on the day of its delivery. A demand of payment on the next day will

be equally effectual for fixing the liability of the drawer. The presenting of it for payment implies that the holder desires and is ready and willing to accept payment. If he present it for the sole purpose of ascertaining whether the signature is genuine, or the drawer has funds to his credit, or merely to be identified, and without intending to demand payment, it is not such a demand as will release the drawer. Having once demanded payment in due form and within the proper time, and the bank offering to pay the check, the holder cannot waive his demand and decline to accept payment without thereby releasing the drawer from further liability. Simpson v. Pacific Mut. Life Ins. Co., 44 Cal. 139.

No negligence will be imputed to the

No negligence will be imputed to the holder of a check upon a bank for the payment of money if he demand payment on the day following that in which he received it. But if he unreasonably delays in presenting it, and in the mean while the bank fails, the loss will be his, and not that of the drawer. So, if payment of the check is refused, and the holder retains it in his possession, and delays in communicating notice of non-payment to the drawer, and the bank fails, the loss ought to fall upon the holder. Clark v. National Metropolitan Bank, 2 McAr. C. C. 249.

Payment of Draft by Check—Presentation of Check.—The payee of a check which is given in payment of a draft is not bound to exercise any special diligence in demanding payment, for demand on the following day is sufficient to charge the maker. Johnson z. Bank of North America, 5 Robt. (N. Y.) 554. Thus where, upon presentation of a draft for payment, the drawee gives his check for the amount due upon a bank in the city of New York, and the check is presented the next day through the clear-

the check is received is the latest on which demand may be made where parties reside in same place, or on which the check may be mailed where payable in a different place. 1 And a bank check. payable at a future day, is subject to the same rule as regards presentment for payment as a check payable on demand, and the holder has until the close of banking hours of the day next after the date it becomes payable in which to present it for payment.²

a' Within Reasonable Time.—The holder of a check must present it to the bank and demand payment within a reasonable time,3

ing-house and payment refused, the drawee will be liable, notwithstanding that the check would have been paid if presented on the previous day.

v. Miller, 6 Robt. (N. Y.) 157.
Where a party to whom a draft has been delivered for collection receives in payment therefor the check of the company on which the draft is drawn, upon a bank, and neglects to present the same at the bank during the business hours of the next day thereafter, and on presentation the following day it is dis-honored in consequence of the failure of the company, he will be held liable to the party of whom he received the draft. Nunnemaker v. Lanier, 48 Barb. (N. Y.)

1. Smith v. Janes, 20 Wend. (N. Y.)

192; s. c., 32 Am. Dec. 527.

Drawer's Rights.—The drawer has a right to have his check paid on the day presented, if there are funds to meet it, and it is the duty of the holder to see that it is so paid or protested; and if the holder accepts the check or draft of the bank in payment in lieu of money, he must present and collect it the same day. or he is chargeable with laches. Deener v. Brown, r McAr. C. C. 350. drawer of a bank check given and payable in the city of New York is not liable to the holder in case of the subsequent insolvency of the bank, unless the check is presented upon the same or the following day, during banking hours. Nor will a later presentment be excused on the ground that the payee of the check was an agent, and that delay occurred in transmitting the check to his principal, before it was presented. Hazelton v. Colburn, I Robt. (N. Y.) 345.

No Negligence will be Imputed to the

holder of a check upon a bank for the payment of money, if he demands pay-ment on the day following that in which he received it. But if he unreasonably delays in presenting it, and in the mean while the bank fails, the loss will be his, and not that of the drawer. So, if pay-

ment of the check is refused, and the holder retains it in his possession, and delays in communicating notice of nonpayment to the drawer, and the bank fails, the loss ought to fall upon the holder. Clark v. National Metropolitan Bank, 2 McAr. C. C. 249. 2. Blachly v. Andrew, 1 Disney

(Ohio), 78.

3. Murray v. Judah, 6 Cow. (N. Y.) 484; Conroy v. Warren, 3 Johns. Cas. (N. Y.) 259; s. c., 2 Am. Dec. 156; Cruger v. Armstrong, 3 Johns. Cas. (N. Y.). 528; s. c., 2 Am. Dec. 558; Smith v. Janes, 20 Wend. (N. Y.) 192; s. c., 32 Janes, 20 Wend. (N. 1.) 192, 5. C., 32 Am. Dec. 527; Mohawk Bank v. Broder-ick, 13 Wend. (N. Y.) 133; s. c., 27 Am. Dec. 192, aff'g s. c., 10 Wend. (N. Y.) 304; Farwell v. Curtis, 7 Biss. C. C.

Necessity of Demand and Notice. - A creditor who receives for his demand the debtor's check on a bank, although it is accepted, not in payment, but as a means of payment, impliedly undertakes to present it within reasonable time, and to notify the drawer promptly if payment is refused. If through his delay the funds are lost by failure of the bank, he must bear the loss. Presentment should be made ordinarily by express or other special messenger, not by mailing the check to the drawee. Farwell v. Curtis. 7 Biss. C. C. 160.

The non-presentation of a check within a reasonable time may, under the circumstances of the case, amount to such laches as will release such indorser there-

Miller v. Moseley, 26 La. An. 667. Demand in Reasonable Time. - The day following that on which a check is drawn following that on which a check is drawn will be in season. Daniels v. Kyle, I Ga. 304; First Nat. Bank of Meadville v. Fourth Nat. Bank of N. Y., 77 N. Y. 320; s. c., 33 Am. Rep. 618; 24 Hun (N. Y.), 241; Murray v. Judah, 6 Cow. (N. Y.) 484; Harbeck v. Craft, 4 Duer (N. Y.), 129; Little v. Phenix Bank, 2 Hill (N. Y.), 425; Hazelton v. Colburn, I Robt. (N. Y.) 345; s. c., 2 Abb. (N. Y.) the drawee being entitled to such presentment and demand as will save him from loss.1

a. What Unreasonable Delay.—What amounts to due diligence and what is unreasonable delay is to be determined by the circumstances in each particular case.2

Pr. N. S. 199; Kobbi v. Underhill, 3 Sandf. Ch. (N. Y.) 277; Merchants' Bank v. Spicer. 6 Wend. (N. Y.) 443.

Demand of Check Must be Made on Drawee before Suit against drawer, and must be made in reasonable time, but drawer cannot object to time unless injured by the delay. Murray v. Judah, 6 Cow. (N. Y.) 484.

Negotiation and Circulation of Bank Check does not dispense with the necessity of a demand of payment within a reason-Mohawk Bank v. Broderick, able time.

13 Wend. (N. Y.) 133; s. c., 27 Am. Dec. 192, aff'g s. c., 10 Wend. (N. Y.) 304.

To Bind Indorser of Check, holder must have used due diligence in presenting and in giving notice of demand and nonpayment. Smith v. Janes, 20 Wend. (N.

Y.) 192; s. c.. 32 Am. Dec. 527. Y.) 192; s. c.. 32 Am. Dec. 527.

1. Stevens v. Park, 73 Ill. 387; Howes v. Austin, 35 Ill. 396; Gregg v. George, 16 Kan. 546; Morrison v. McCartney, 30 Mo. 183; Murray v. Judah, 6 Cow. (N. Y.) 490; Little v. Phenix Bank, 2 Hill (N. Y.), 425; Scott v. Meeker, 20 Hun (N. Y.), 163; Conroy v. Warren, 3 Johns. Cas. (N. Y.) 259; s. c., 2 Am. Dec. 156; Stewart v. Smith 17 Ohio 51 20. Dec. 156;

(N. Y.), 163; Conroy v. Warren, 3 Johns. Cas. (N. Y.) 259; s. c., 2 Am. Dec. 156; Stewart v. Smith, 17 Ohio St. 82; Purcell v. Allemong, 22 Gratt. (Va.) 743; Cox v. Boone, 8 W. Va. 500; s. c., 23 Am. Rep. 627; Cork v. Bacon, 45 Wis. 192; s. c., 30 Am. Dec. 712.

2. See Willetts v. Paine, 43 Ill. 432; Norris v. Despard, 38 Md. 487; Morrison v. McCartney, 30 Mo. 183; Taylor v. Sip, 30 N. J. L. (1 Vr.) 284; Stephens v. McNeill, 26 Barb. (N. Y.) 651; Hooker v. Franklin, 2 Bosw. (N. Y.) 500; Little v. Phenix Bank, 2 Hill (N. Y.), 425; s. c., aff'g 7 Hill (N. Y.), 359; Smith v. Janes, 20 Wend. (N. Y.) 192; s. c., 32 Am. Dec. 527; Mohawk Bank v. Broderick, 13 Wend. (N. Y.) 133; s. c., 27 Am. Dec. 192, aff'g s. c., 10 Wend. (N. Y.) 304; Werk v. Mad River Valley Bank, 8 Ohio St. 301; Cox v. Boone, 8 W. Va. 500; s. c., 23 Am. Rep. 627; O'Brien v. Smith, 66 U. S. (1 Black) 99; bk. 17, L. Ed. 64. Check Drawn on Saturday and Presented

Check Drawn on Saturday and Presented on Monday. - Thus where a check drawn in the afternoon of Saturday is presented for payment on the morning of the next Monday, there is no delay or negligence which will discharge the drawer. O'Brien v. Smith, 66 U. S. (1 Black) 99; bk. 17, L. Ed. 64. But it has been held that one who holds a bill or check in his possession for seven days before presentment is chargeable with want of due diligence. Smith v. Janes, 20 Wend. (N. Y.) 192; s.

c., 32 Am. Dec. 527.
What is an Unreasonable Delay.— Twenty-three days held unreasonable. Mohawk Bank v. Broderick, 13 Wend. (N. Y.) 133; s. c., 27 Am. Dec. 192; 10 Wend. (N. Y.) 304. So is twenty-five,— Willetts v. Paine, 43 Ill. 432:—and ten months. Little v. Phenix Bank, 2 Hill

(N. Y.), 425; s. c., 7 Hill (N. Y.), 359.

Instances.—And where the payee of a check drawn by a depositor of current funds neglects to present it for payment tili twenty-five days after drawn, and meanwhile either the drawee fails or the funds depreciate, his laches will discharge the drawer from the loss. Willetts v. Paine, 43 Ill. 432.

A check drawn on October 2, 1857, by A. on B. a banker, in favor of C, was by the latter transferred to D on the same day for value, B having failed on the next day about 2 o'clock P.M. The check was not presented until the 20th of the next January, but A, on the 6th of October, compromised suits against B, in which he had previously levied attachments, and received his deposits. Held, presentment and notice being shown, that A was liable to D on the check. Morrison v. McCartney, 30 Mo. 183.

W. & Co., in Cincinnati, being indebted to H., in Springfield, forwarded to him by mail, at his request, on Saturday their check of that date, drawn on a Cincinnati bank, for the amount due. The check was received by H. by due course of mail on the following Monday morning, and immediately negotiated and mailed by the holder on the following day at Springfield to Cincinnati for collection. It was received at Cincinnati by due course of mail on the following Thursday morning, and presented for payment on that day. Held, that there was no want of diligence. Werk v. Mad River Valley Bank, 8 Ohio St. 301.

Payment of Bill by Check of Third Person,-A bank received from a customer a check drawn by a third person on another bank, and gave him credit for it. The depositary bank, in accord-

a'. How Far Drawer Discharged by Laches.—The non-presentment or delay in presenting a check does not excuse payment. although, if the drawer suffers damages by the laches of the drawee, such damages may defeat a recovery to their extent; yet if no damages arise, the drawer's liability continues until barred by the Statute of Limitations.1

(b) Post-dated Check .- A post-dated bank-check is payable on demand on or after the day it bears date, and demand must be made with reasonable diligence.2 And where a post-dated check falls due

ance with the usage of banks in such cases, did not present the check to the drawee till the following day. On the day the check was deposited, and subsequently to the deposit, the drawer had funds in the bank drawn on. The depositor indorsed the check at the time he made the deposit. The check when pre-sented the next day was dishonored. Held, that the bank was guilty of no laches, and that on presentment, demand, refusal, and notice to the indorser it had a right of action against him for the amount. Hooker v. Franklin, 2 Bosw. (N. Y.) 500.

A Post-dated Check was discounted for the holder a few days before it matured, by a bank which transmitted it at maturity to the bank upon which it was drawn through the usual channel. Each bank through which the check passed retained it a day, so that it did not reach the drawee until the bank had become insolvent. Held, that the drawer was dis-Taylor v. Sip. 30

charged by the delay. N. J. L. (I Vr.) 284.

Where a Debtor in New York City paid his creditor by a certified check, and with an understanding that it should be discounted at Syracuse or Auburn, and it was so discounted; but before reaching New York by the ordinary course of mail the bank on which it was drawn had failed. Held, that the debtor was liable on the check in question, and could not object that the check was not sooner presented. Stephens v. McNeill, 26 Barb. (N. Y.) 651. But where a negotiable check, payable on demand, was drawn in New York upon one of the Mississippi banks, and not presented for payment until more than ten months after its date, the bank having suspended a few days. before the presentment, and being at the time indebted to the drawer, held, that the holder could not recover against the drawer, as the latter had sustained loss by the delay in making presentment.

Little v. Phenix Bank, 7 Hill (N. Y.),

359; affirming s. c., 2 Hill (N. Y.), 425.

Interruption of Mails by War—Pres-

entation of Check.—The holders of a check drawn on a bank in omitted to present the same for payment. alleging in excuse the interruption of mail communication during the late civil There was no evidence that the check was ever presented to the bank after the close of the war, or that there were no funds there to meet the check, or that notice of non-payment was ever given to the drawer. Held, that the holder could not recover against the drawer.

Norris v. Despard, 38 Md. 487.

1. Woodin v. Frazee, 38 N. Y. Super, Ct. (6 J. & S.) 190. See Morrison v. Ct. (6 J. & S.) 190. See Ministra M. McCartney, 30 Mo. 183; Little v. Phenix Bank, 2 Hill (N. Y.), 425; affirmed, s. c., 7 Hill (N. Y.), 359; Gough v. Staats, 13 Wend. (N. Y.) 549; Stewart v. Smith, 17

Ohio St. 82.

Laches on the Part of the Assignee of a Check will not discharge the drawer if the drawee remain insolvent, notwithstanding the loss of a secret equity between the drawer and payee; and if there be loss by such insolvency the reduction will be but pro tanto. Stewart v. Smith, 17 Ohio St. 82.

The Drawer of Check is not Liable for its payment until demand of drawee. which demand may be made at any time before suit, unless drawer has sustained

injury by the delay. Gough v. Staats, 13 Wend. (N. Y.) 549.

An Unreasonable Delay to Present Check will not discharge drawer unless he was injured by the delay; but in such case the holder must show affirmatively that the drawer has not been injured thereby. Little v. Phenix Bank, 2 Hill (N. Y.), 425; affirmed, s. c., 7 Hill (N. Y.), 359.

The Drawer of an Accommodation Check

is not discharged by the fact that the plaintiff, who without notice took it as collateral security before its date, did not demand payment until after the insolvency of the payee, more than six months after the date of the check. Stewart v. Smith, 17 Ohio St. 82.

2. Gough v. Staats, 13 Wend. (N. Y.) 549; Mohawk Bank v. Broderick, 13

on Sunday, presentment must be made on Monday.1

(c) How Far Laches Presumed.—In an action by a second indorsee of the check against a payee, laches on the part of the first indorsee will not be presumed.2

(d) Presumption as to Ownership.—The presumption is that a check indorsed in blank is the property of the holder until rebut-

ted 3

- (e) Check Sent to Drawee for Collection.—If the payee sends a check by mail to the drawee for collection and return, he makes the drawee his agent, and must bear any loss arising after the time when the check could have been presented by express or other usual methods.4
- (f) How Far Delay in Returning an Acceptance.—A check drawn upon the defendant, a bank in New Jersey, was deposited with a bank in the city of New York for collection, and transmitted by such bank to the defendant. The check was kept by the defendant for about twenty-four hours, and then returned dis-

Wend. (N. Y.) 133; s. c., 27 Am. Dec. 192; affirming s. c., 10 Wend. (N.Y.) 304.

1. Salter v. Burt, 20 Wend. (N. Y.) 205; s. c., 32 Am. Dec. 530. See Avery v. Stewart, 2 Conn. 69; s. c., 7 Am. Dec.

In Salter v. Burt, supra, it is said that: "To charge the indorser of a post-dated bank check, falling due on Sunday, presentment for payment must be made on the next day, and notice of non-payment given to the indorser; presentment on Saturday, the day preceding its maturity, is a nullity, and discharges the indorser. When the day of performance of contracts, other than instruments upon which days of grace are allowed, falls on Sunday, that day is not counted, and compliance with the stipulations of the contract on the next day (Monday) is deemed in law a performance.

2. Smith v. Janes, 20 Wend. (N. Y.) 192; s. c., 32 Am. Dec. 527. Negligence Must be Shown.—If there were negligence in making the presentment and demanding payment, it must be affirmatively shown by the defendant. The court say in Smith v. Janes, 20 Wend. (N. Y.) 192; s. c., 32 Am. Dec. 527: "If the defendant intended to rely on any default after the check passed from the plaintiff, the burden of making out the case lay upon him. We cannot presume laches especially in a case where the paper was in circulation for so short a period. How long a bill or check, payable on demand, or at a given number of days after sight, may be kept in circulation before presentment, without dis-

charging some of the parties, is not a settled question. Chit, on Bills, 276. It depends in a great degree on the circumstances of each particular case. In Robinson v. Ames, 20 Johns. (N. Y.) 146; s. c., 11 Am. Dec. 259, the bill was drawn in Georgia on merchants residing in New York, and although seventy-five days elapsed before the presentment, it was held that the drawers were not discharged. In Gowan v. Jackson, 20 Johns. (N.Y.) 176, the bill was drawn in Antigua on merchants residing in London, and having been put in circulation, it was held that the drawer was not discharged, although six months had elapsed before the presentment. In Aymar v. Beers, 7 Cow. (N. Y.) 705; s. c., 17 Am. Dec. 538, the bill was drawn in New York on a house in Richmond, Va., at three days' sight, and it was held that the drawer was not discharged by delay of twenty-nine days in presenting the bill for acceptance. The bill had not been put in circulation, but there were other special circumstances to show that the payee was not chargeable with the negligence. In the case at bar, three days were necessary for the transmission of the check from New York to Buffalo, and it could not have been in circulation after it passed from the plaintiff more than four or five days before it was presented at the bank for payment. There is no authority for imputing laches on such a state of facts, and the judge was right in overruling the objection."

3. Stephens v. McNeill, 26 Barb. (N.

4. Deener v. Brown, 1 McAr. C. C. 350.

honored. It was held that such delay did not of itself constitute

an acceptance.1

(A) Drafts.—(a) What Diligence Required.—The same diligence is required of the holder in presenting drafts for payment that is required of the holder of checks,—they must be presented with due diligence, which is usually at the first opportunity.2

(b) What is Reasonable Time.—What is a reasonable time within which a draft must be presented to the drawee depends

upon the circumstances of the case.3

(c) Delay Excused, when.—An unavoidable delay, the party not being in fault, will excuse delay in presenting a draft. Thus, where a sight draft had been lost before presentation for payment, and a duplicate one had been obtained therefor of the drawer, it

1. Overman v. Hoboken City Bank, 31

N. J. L. (2 Vr.) 563.

2. See Bridgeford v. Simonds, 18 La. An. 121; Phœnix Ins. Co. v. Gray, 13 An. 121; Phoenix Ins. Co. v. Gray, 13 Mich. 191; Burkhalter v. Second National Bank, 42 N. Y. 538; s. c., 40 How. (N.Y.) Pr. 324; Brady v. Little Miami R. Co., 34 Barb. (N. Y.) 249; National Newark Banking Co. v. Second National Bank, 63 Pa. St. 404; Nichols v. Blackmore, 27 Tex. 586; Ford v. McClung, 5 W. Va. 156; Walsh v. Dart, 23 Wis. 334.

Thus, a neglect for four days to present

Thus, a neglect for four days to present a demand draft, during which the drawee fails, discharges the drawer. Brady v. Little Miami R. Co., 34 Barb. (N. Y.) 249. A delay of twenty-one days in presenting a draft is unreasonable, and is not excusable by the fact that the draft was payable in "current funds," an unusual term, which the holder wrote to the maker to have explained, and in the mean time retained the draft. Phoenix Ins. Co. v. Gray, 13 Mich. 191. And where there was no demand or presentment of a draft for nearly two years, held, that action had not been taken within a reasonable time, and the drawer was discharged. Bridgeford v. Simonds. 18 La. An. 121.

Instances.—A draft was drawn on New York by a bank in Erie, Pennsylvania, in favor of a travelling agent, who, in pursuance of his business, did not return to his home in New Jersey, where he had the first opportunity to negotiate it, until ten days after its date. Held, that the delay was not unreasonable, considering the agent's business. National Newark Banking Co. v. Second National Bank, 63 Pa. St. 404.

A draft was drawn on a bank in West Virginia in September, 1862, but was not presented for payment or acceptance until the close of the war. *Held*, that the drawer and indorsers were discharged by

reason of the delay. Ford v. McClung. 5 W. Va. 156.

A Draft Payable at Sight was drawn in Fairfield, Texas, on March 30, 1859, on Galveston. It was accepted on May 17, 1859, protested for non-payment, and suit was instituted against the drawer and acceptors June 11, 1859. Held, that the delay to present the draft for a period of forty-seven or forty-eight days was not such laches as forfeited the right of the holder to recourse against the drawer upon default of payment by the drawees. Nichols v. Blackmore, 27 Tex. 586. A sight draft on New York, indorsed

to a party in Wisconsin, was not mailed to New York to be presented for pay-ment until after fourteen days, when it was miscarried, and the second subsequently sent forward was protested. Held, that the delay in mailing the first was presumptive evidence of laches.

Walsh v. Dart, 23 Wis. 334.

Draft Payable on Demand .- The plaintiffs, holders of a draft payable on demand, drawn by the defendant, presented the same for payment the day they re-ceived it. The drawees gave their check to the plaintiffs, receiving the draft from them, and charged the amount to the defendant. On the following day the check was presented in the ordinary course of business through the clearinghouse, and was dishonored, the drawees of the draft having that day failed. plaintiffs thereupon returned the check and reclaimed the draft, which they caused again to be presented, and payment being refused, protested, notice of protest being mailed on the next day. Held, that the defendant was liable on the draft. Burkhalter v. Second National Bank, 42 N. Y. 538; s. c., 40 How. (N. Y.) Pr. 324.

3. Knott v. Venable, 42 Ala. 186; Salis-

was held that the necessary delay in presenting the second draft

for payment should be excused.1

(d) Evidence of Due Presentation.—The promise of an indorser of a draft made after the dishonor thereof, that he would pay the same, is presumptive evidence that such draft had been presented for payment in due time and dishonored, and that the indorser had received due notice thereof. The presumption, however, is one of fact for the jury, and not an absolute legal conclusion to be drawn by the court; it is prima facie only, and liable to be rebutted.2

(5) Certificates of Deposit.—Where a certificate of deposit was delivered by a debtor to his creditor, and the bank became insolvent before the certificate became due, it was held that there was no ground for the imputation of negligence in the collection of the certificate by the holder, as no loss accrued to the debtor.3

bury v. Renick, 44 Mo. 554; Fugitt v.

Nixon, 44 Mo. 295.

1. Benton v. Martin, 31 N. Y. 382.
But this case was twice afterwards before the court of appeals, and the later decisions materially weaken, if they do not virtually overrule, this first decision. See 40 N. Y. 345, and 52 N. Y. 570, so that now the case is of doubtful authority on

this point.

2. Lewis v. Brehme, 33 Md. 412; s. c. 3 Am, Rep. 190. The court say that "if in point of fact there had been no demand and notice of dishonor, or insufficient demand and notice, we think this second prayer defective, because it does not submit to the jury to find whether the defendant was fully informed, at the time of the promise and other conduct relied on, of all the facts of the neglect to make demand and to give notice. The promise and other circumstances stated in this prayer would certainly be sufficient to charge the defendant as indorser, if he possessed full knowledge at the time. Without such knowledge, however, his promise or acknowledgment would not bind him. It is therefore essential, in this aspect of the case, that the fact of knowledge be found by the jury, in addition to the fact of the defendant's treatting the debt as his own, and promising to pay it to the plaintiffs." Beck v. Thompson, 4 Harr. & J. (Md.) 531; I Parsons on N. & B. 595.

But if the Party is sought to be Charged on his Indorsement, and his promise or assumption be used as evidence of the previous demand and notice, a different principle applies. In such case, any promise to pay, or admission made by the indorser that he continues liable sub-

sequent to the dishonor, is good evidence upon which to found a presumption that everything has been properly done to render him liable. This is a principle now well established. As in the case of Lundie v. Robertson, 7 East, 231, which was an action by an indorsee against an indorser, and the only evidence of notice of dishonor being the promise of the defendant, Lord Ellenborough said: "When a man against whom there is a demand promises to pay it, for the necessary facilitating of business between man and man everything must be presumed against him. It was therefore to be presumed primafacie from the promise so made, that the bill had been presented for payment in due time and dishonored, and that due notice had been given of it to the defendant." And so in the case of Hicks v. Beaufort, 4 Bing. (N. C.) 229, where the question was similar to that in Lundie v. Robertson, Tindall, C. J., said: "The cases go on this point only-that if, after the dishonor of a bill, the drawer distinctly promises to pay, that is evidence from which it may be inferred he has received. notice of the dishonor, because men are not prone to make admissions against themselves; and therefore, when the drawer promises to pay, it is to be presumed he does so because the acceptor has re-fused." This presumption, however, is one of fact for the jury, and not an abso-lute legal conclusion to be drawn by the court. It is prima facie only, and liable to be rebutted. Hicks v. Beaufort, 4 Bing. (N.C.) 229; Pickin v. Graham, I Cr. & M. 728; Booth v. Jacobs, 3 Nev. & M. 351; Brownell v. Bonney, I Q. B. 39.
3. Downey v. Hicks, 55 U. S. (14 How.) 240; bk. 14, L. Ed. 404.

(6) Diligence.—(a) Required.—The holder of a bill of exchange is under a perpetual duty of diligence in making demand of the acceptor if he wishes to hold the drawer. Therefore, although demand at maturity may be rendered impracticable by some circumstances beyond the control of the holder,—e.g., a war,—he is bound to make demand promptly as soon as the hindering cause is removed.1

(b) What Sufficient.—Whether or not due diligence is used in making inquiry for the residence or place of business of the maker or indorser of a note is, in most cases, a mixed question of law and

fact 2

1. Durden v. Smith, 44 Miss. 548; Dunbar v. Tyler, 44 Miss. I. See also

supra, (1) (a), a².
2. Oxnard v. Varnum, 111 Pa. St. 193; s. c., 56 Am. Rep. 255. See First National Bank v. Needham. 29 Iowa, 249; Hume v. Watt, 5 Kans. 34; Cadillon v. Rodriguez, 25 La. An. 79; Wogan v. Thompson, 9 La. An. 300; Peet v. Zanders, 6 La. An. 364; White v. Stoddard, 76 Mass. (11 Gray), 258; Durden v. Smith, 44 Miss. 548; Dunbar v. Tyler, 44 Miss. 1; National Bank of Metropolis v. Williams, 46 Mo. 17; Requa v. Collins, 51 liams, 40 Mo. 17; Requa v. Collins, 51 N. Y. 144; Burkhalter v. Second National Bank, 42 N. Y. 538; s. c., 40 How. (N. Y.) Pr. 324; Harger v. Bemis, 1 T. & C. (N. Y.) 460; Paton v. Lent, 4 Duer (N. Y.), 231; Cox v. National Bank of N. Y. ("Clardy v. Nat. Bank"), 100 U. S. (10 Otto), 704; bk. 25, L. Ed. 739.

The Degree of Diligence Required to

charge an indorser under the provisions of laws of 1857, chap. 416, sec. 3, authorizing service of notice of protest by mail, where the reputed residence of the indorser is at the same place where the note is payable, is no greater than that required by the common law in the case where payment differs from the place of residence. Requa v. Collins, 51 N. Y.

The holder of a promissory note not knowing the residence of an indorser thereof, inquired of an assistant internalrevenue assessor of the district within the bounds of which such residence was. The assessor said he knew the indorser, and that he resided at P. Notice of demand of payment, refusal, and protest of the note was sent by mail to the indorser at P. He did not live at P., but at A., five miles distant, to which place the notice was forwarded, and he received it nine days after it was sent. Held, that the holder of the note used due diligence, and the indorser was liable. Harger v.

Bemis, I. T. & C. (N. Y.) 460. Compare Cadillon v. Rodriguez, 25 La. An. 79. Payment by Check—Demanding Pay-ment.—The facts that the drawees had money on hand sufficient to pay the draft when they gave their check; that the plaintiffs would probably have received payment in money if they had demanded it; that the bank upon which the check was drawn certified and paid certain checks of the drawees on the 26th, and even on the following day, before this check was presented, and would perhaps have certified or paid this check if presented on the 26th,-did not show any regligence on the part of the plaintiffs, or discharge the defendant. Burkhalter v. Second Nat. Bank, 42 N. Y. 538; s. c., 40 How. (N. Y.) Pr. 324.

Demand by Administrator. - The holder of a negotiable promissory note died, and the executor named in his will found and filed it three days before it became due, and asked the indorsers to waive demand and notice, which they declined. Within a month he proved the will, but immediately relinquished the trust of executor, never having qualified. An administrator was appointed, found the note among the papers of the deceased, a week after he received them, presented it the next day, and notified the indorsers of non-payment. the day after. *Held*, that the demand and notice were seasonable. White v. Stoddard, 77 Mass. (II Gray) 258; s. c.,

71 Am. Dec. 711.

Where Impracticable to Make Demand at Maturity.—For degree of diligence required of the holder of a bill of exchange in demanding payment of the acceptor, in order to charge the drawer, when it was impracticable to make demand at the maturity of the bill, see Durden v. Smith, 44 Miss. 548; Dunbar v. Tyler, 44 Miss. 1. Where inquiry in order to present a

note for payment was made both at the maker's last place of business and his

last place of residence, from which he had recently removed, and he could not be found, held sufficient. Paton v. Lent,

4 Duer (N. Y.), 231.

A presentment at the store recently occupied by the maker, when the notary on going there finds it occupied by another person, who can give him no information as to where the maker can be found, and there is no evidence whatever to show that he had any other place of business, or dwelt or was present in the city at the time, is sufficient. Peet v.

Zanders, 6 La. An. 364.
Commercial Firm—Demand of Syndics of One Partner.-Where at the maturity on a note made by a commercial firm one of its three members is dead and his administrator absent from the State, the second has absconded, and the notary, after the most diligent inquiry for the proper persons, makes a demand from the syndic of the third, who himself states that he cannot pay the note it is sufficient Wogan v. Thompson, 9 La. An. 300.

Reasonable Time.—Circumstances con-

sidered determining the due diligence in the presentment of a bill of exchange. necessary to charge the drawer, or render the bill a stale demand in the hands of the indorsee. First National Bank v. Needham, 29 Iowa, 249; National Bank of the Metropolis v. Williams, 46 Mo. 17.

What Diligence is Required from a

notary in ascertaining the residence of an indorser, to serve notice of protest upon him, determined in a case where a notary inquired in a town where the indorser had formerly resided, but omitted to inquire in a town to which he has removed.

Hume v. Watt, 5 Kans. 34.

Where the notary-public made diligent inquiry for acceptors in the city at which they were addressed in the bill, and could not find them, and on the day of maturity demanded payment at the places frequented by them in said city, which was refused, and mailed notices of protest to the drawers and indorser at their postoffice address, held, that all necessary steps were taken to bind them. Cox v. National Bank of N. Y. ("Clardy v. Nat. Bank"), 100 U. S. (10 Otto) 704; bk. 25, L. Ed. 739.

Bill Accepted without Qualification—
Demand — A bill of exchange drawn by

A to the order of B on "Messrs. C. & D., New York, N. Y.," was accepted by them without qualification or condition. the parties then and at its maturity resided in Kentucky. The notary-public, after making on the day it matured diligent but unsuccessful inquiry in New

York City for C. & D., and for their place of residence or business, presented and demanded payment during business hours at the place frequented by them when in that city. Payment not having been made, he protested the bill, and on the next day, learning from those whom he believed to be informed on the subject the residence of A. & B., transmitted to them there by mail notice of such protest. Held, (1) that the bill was in law payable at that city. (2) That the presentment and demand were sufficient. (3) That the requisite steps to bind A. & B. were requisite steps to bind A. & B. were taken. Cox v. National Bank of N. Y. ("Clardy v. Nat. Bank"), 100 U. S. (10 Otto) 704; bk. 25, L. Ed. 739.

Demand where Made—When Note Dated

at Particular Place -In Oxnard v. Varnum, III Pa. St. 193, the court say that "it is very well settled that the making and dating of a note at a particular place is not equivalent to making it payable there, nor does it supersede the necessity for presentment and demand at the residence or place of business of the maker in order to charge the indorsers; it may have the effect of leading the holder, who has no knowledge of the proper place for presentment, to suppose that he might be there found,-Duncan v. McCullough, 4 Serg. & R. (Pa.) 480,—and where no residence or place of business can be found. an inquiry at the place of the date of the note might perhaps be regarded as essential to the exercise of due diligence. This subject was fully considered in Lightner v. Will, 2 Watts & S. (Pa.) 140. The note upon which suit was brought in that case was dated at Pittsburg, and no place of payment was specified; the question being upon the liability of the indorsers, the court said: 'It has been argued, however, that dating the notes at Pittsburg is equivalent to making them payable there, and that it was therefore unnecessary, in order to make the indorsers liable, to go beyond the precincts of the city of Pittsburg to demand payment of the drawers. And indeed it would seem that a notion of this sort prevailed to a certain extent in the city of Pittsburg, but certainly it is an errone-ous one. The circumstance of the notes being dated at Pittsburg might be considered by those who knew nothing to the contrary some indication that the drawers resided there, but by no reasonable interpretation can be regarded as being intended to make the notes payable there. The contrary, indeed, has been adjudged. Anderson v. Drake, 14 Johns. (N. Y.) 114; s. c., 7 Am. Dec. 442.

(c) What Not Sufficient.—To constitute a sufficient demand. efforts must be made to find the parties, and where they reside in the same place, a demand must be made of them personally or left at their residence; where they reside in a different place, an earnest effort must be made to ascertain the place of residence, and a demand must be mailed to them in due season.1

(d) What Will Excuse.—Inevitable accident, or events over which the party had no control, will in general excuse delay in the presentation of a note or bill; but mere negligence or oversight

It is prefixed or subjoined merely to show the place at which the note is drawn, in like manner and for the like purpose as it is done in writing a letter; but never done in either case with a view to show that the drawer of a note or the writer of the letter resides at the place: it at most only goes to show that the drawer of the note or writer of the letter was there at the time of drawing the note or writing the letter.' In Parsons on Bills and Notes, 453, it is said: 'Where the maker · at the time of signing the note, lives in another State from the one in which the note is dated and delivered, and in which the holder lives, a different question is presented. Where the party who receives a note under such circumstances knows, when he takes it, where the maker lives, and has sufficient time before the maturity of the note within which to cause a proper demand to be made upon the maker, it would seem to follow that he should be considered as taking the risk of a proper presentment in the State where the promisor resides.' We may also refer to Spies v. Gilmore, 1 N. Y. 321, and to Taylor v. Snyder, 3 Den. (N. Y.) 151; s. c., 45 Am. Dec. 457, where the same doctrine is declared. This statement of the law, it is true, has not been universally adopted, perhaps, but it would appear to be the view generally accepted; it is certainly in accord with the peculiar nature of the contract of indorsement, and is, we think, in harmony with the commercial usages of the country.'

1. What Demands are Not Sufficient. Where the maker of a promissory note resided in Baltimore, held, that inquiries for him by the notary at the post-office, exchange, and court-house were not alone sufficient to fix the liability of the indorser; efforts should have been made to learn if he had a residence in the city, and the directory should have been consulted, and demand made upon him or left at his residence. Tate v. Sullivan,

30 Md. 464.

The makers of a note were both ab-

sent from the city where the note was dated and signed, but had families residing there. The notary made some general inquiry, but did not find any one to pay the note; and thereupon served notice of protest without inquiring of the in-dorser for the makers, held that this showed a want of diligence. Mitchell v. Young, 21 La. An. 279.

Charge to the Jury in an Action, or on an Unpaid Bill of Exchange, involving the question as to whether the holder has been guilty of negligence in not present-ing the bill for payment within a reason-able time. See Olshausen v. Lewis, 1 able time. See Biss. C. C. 419.

2. Inclement Weather. - However, a hard rain not sufficient to make the roads impassable, held, an insufficient excuse for delaying for two days in making a demand of payment on the maker, who lived twenty miles from the holder. Barker v. Parker, 23 Mass. (6 Pick.) 80.

In the above case the court sav: "It [the note] became due and should have been demanded on the 12th, as the day of payment according to the note was Sunday. As, however, the holder might wait for payment to be made through the day, and the promisor living twenty miles distant, a demand on Monday, the 14th, might in the case have been seasonable. See Freeman v. Boynton, 7 Mass. 483; Hadduck v. Murray, T. N. H. 140; s. c., v. McKnight, 2 U. S. (2 Dall.) 158; bk. r, L. Ed. 330. Compare Johnson v. Haight, 13 Johns. (N. Y.) 470; Brown v. Lusk, 4 Yerg. (Tenn.) 210; Bayl. on Bills (2d Am. Ed.), 231, 232, and notes. The fact that Monday was a very rainy day can form no excuse. If it had appeared that a violent tempest had so broken up or destroyed the roads, or obstructed them, that they were impassable, perhaps it might have been considered a providential interception, on account of which the plaintiff would not have been charged with No such fact appearing, negligence. there was laches which will prevent the

and the like will not.1

The insolvency of the maker is sufficient to excuse the use of due diligence.2 And where the maker is notoriously abroad, dili-

gent inquiry need not be shown.3

b. As to Manner, etc.—(1) By Whom.—(a) Holder or Agent. -A demand for the payment of a note or bill should be made by the holder or his agent. 4 Where a negotiable certificate of deposit is in the hands of a third party, and there is no proof to show that it was not properly indorsed to him by the payee, he may have a legal right to demand payment, and the party issuing the certificate has therefore a right to demand delivery of the same when called upon by the payee to pay the debt, for his protection against the claim of the third party. It is not necessary that payment of a promissory note should be demanded by a notary-public; the demand may be made by any other agent of the holder.6

(b) By One in Lawful Possession.—A demand may be properly made by any one lawfully in possession of the note or bill. any one lawfully in the possession of a negotiable instrument. for the purpose of receiving payment, may make demand. Mere possession of a note payable to order of payee and indorsed by him in blank, or payable to bearer, is in itself sufficient evidence of the possessor's right to demand payment of it. But where a

plaintiff from recovering unless the defendant has waived exception to it. Barker v. Parker, 23 Mass. (6 Pick.) 81,

1. Delay in Presenting Drafts —Thus, upon a sale of property in New York, drafts for the price were given by the purchaser and received by the seller, who took them with him to Indiana, where he resided. By so doing the presentation of the drafts was delayed several days before the time when, in the exercise of legal diligence, they should have been presented, in consequence of which delay they could not be collected. Held, that the knowledge of the purchaser that the seller was at the time of the sale about to depart immediately for his home in Indiana, and that he would probably take the drafts with him, did not imply such an agreement of consent that he should do so, as would excuse his laches in presentation. Darnall v. Morehouse, 45 N. Y. 64.
2. Thompson v. Armstrong, I Ill.

(Breese) 23.

3. Cummings v. Fisher, Anth. (N. Y.) See Louisiana State Ins. Co. v. Shamburg, 7 Mart. (La.) 511; Staylor v. Williams, 24 Md. 199; Bank of Orleans v. Whittemore, 78 Mass. (12 Gray) 473; s. c., 74 Am. Dec. 605; Smith v. Philbrick, 76 Mass. brick, 76 Mass. (10 Gray) 252; s. c., 69 Am. Dec. 315; Meyer v. Hibsher, 47 N.

Y. 270; Spies v. Gilmore, r N. Y. 321; Taylor v. Snyder, 3 Den. (N. Y.) 145; Anderson v. Drake, 14 Johns. (N. Y.) 114; s. c., 7 Am. Dec. 442; Moore v. Coffield, 1 Dev. (N. C.) L. 247; Burrows v. Hannegan, 1 McL. C. C. 309.

Demand where Maker or Acceptor has Removed. - Central Bank v. Allen, 16 Me. Kemoved.—Central Bank v. Allen, 16 Me. 41; Grafton Bank v. Cox, 79 Mass. (13 Gray) 503; Wheeler v. Field, 47 Mass. (6 Metc.) 290; Herrick v. Baldwin, 17 Minn. 209; s. c., 10 Am. Rep. 161; Dennie v. Walker, 7 N. H. 199; Adams v. Leland, 30 N. Y. 309; Taylor v. Snyder, 3 Den. (N. Y.) 145; Reid v. Morrison, 2 Watts & S. (Pa.) 401: McGruder v. Bank of (N. Y.) 145; Reid v. Morrison, 2 Watts & S. (Pa.) 401; McGruder v. Bank of Washington, 22 U. S. (9 Wheat.) 598; bk. 6, L. Ed. 170; Bateman v. Joseph, 12 East, 433; Cromwell v. Hynson, 2 Esp. 511; Dan. Neg. Inst. sec. 1145; 3 Kent Com. 96. Compare Dennie v. Walker, 7 N. H. 199; Foster v. Julien, 24 N. Y. 28; s. c., 80 Am. Dec. 388; Eaton v. McMahon, 42 Wis. 487.

4. Williams v. Matthews, 3 Cow. (N.

Y.) 252.
5. Fell's Point Savings Inst. v. Wee

o. rens Foint Savings Inst. v. Weedon, 18 Md. 320.
6. Smith v. Ralston, I Morr. (Iowa) 87; Jex v. Tureaud, 19 La. An. 64; Cole v. Jessup, 10 N. Y. 96; Tayloe v. Davidson, 2 Cr. C. C. 434.
7. Bank of Utica v. Smith, 18 Johns. (N. Y.) 230.

note is payable to order of payee or indorsee, and has not been indorsed in blank by such payee or indorsee, mere possession is probably not sufficient evidence of the possessor's right to demand

(c) By Notary, etc.—Generally, demand of payment of a foreign bill of exchange must be made by a notary or some duly authorized officer, or the protest will be invalid; but when authorized by usage demand may be made, in accordance with the custom or law of the place where the bill is payable, by a notary's clerk.2 But generally the notary who fills up and certifies the protest must present the bill himself; it cannot be done by an agent.3

(d) By one Authorized by Parol.—A person may be authorized

by parol to make a presentment and demand.4

1. See Doubleday v. Kress, 50 N. Y. 413; s. c., 10 Am. Rep. 502; Dan. Neg. Inst. 516-518, secs. 572-575

2. Miltenberger v. Spaulding, 33 Mo.

Mode of Demand. - In order to fix the liability of the indorser of a foreign bill of exchange, both the presentation and protest thereof must be by the same notary, who must act in person. The law having determined what is the duty of a notary in regard to a foreign bill, evidence cannot be received of a custom contrary thereto. Commercial Bank v. Var-num, 3 Lans. (N. Y.) 86. Proof of Usage.—A usage for notaries

to present by deputy a foreign bill of exchange for payment is not proved by evidence of the general practice in case of "bills," unless it distinctly appears that the practice includes foreign bills. Ocean National Bank v. Williams, 102

Mass. 141.

Louisiana Stat. March 14, 1844, 1, No. 49, authorizes notaries in the city of New Orleans to employ deputies to make presentment and demand. The words of the statute, "in making protests," must be understood in an enlarged and popular sense, as comprehending whatever is necessary to the validity of a protest. Citizens' Bank v. Bry, 3 La. An. 630; Bank of Louisiana v. Lawless, 3 La. An.

In Mississippi, a demand of payment of a foreign bill is not good unless made by the notary himself. Ellis v. Commercial Bank of Natchez, 8 Miss. (7 How.) 294;

s. c., 40 Am. Dec. 66.

3. Carmichael v. Pennsylvania Bank,

5 Miss. (4 How.) 567.

Demand by Clerk.—However, it is held in New Jersey that a demand of the payment of a note may be made by a clerk of the notary. Sussex Bank v. Baldwin, 17 N. J. L. (2 Harr.) 487. But such a demand, it appears, is not sufficient unless authorized by statute or usage of the place where presentment is made. Cribbs v. Adams, 79 Mass. (13 Gray) 597. this case the court say that by common law "as we understand it, and according to the uniform practice in this commonwealth, the duties of a notary must be performed personally, and not by a clerk or deputy. He is a sworn officer, clothed with important public duties, which in their nature imply a personal confidence and trust." Kirtland v. Wanzer, 2 Duer (N. Y.), 278; Onondaga County Bank v. Bates, 3 Hill (N. Y.), 53; Hunt v. Maybee, 7 N. Y. 266; Chit. on Bills, 458, 460. Doubtless by well-settled usage in some places, and in others by express provision of statute, notaries are authorized to employ clerks or deputies to perform official acts coming within the sphere of their duty, and are empowered to certify and authenticate their acts by their own notarial certificates, in like manner as if such acts had been performed by themselves personally. But such usage or provision of law is a fact to be proved by evidence. I Greenl. Ev. secs. 486, 488.

4. Church v. Barlow, 26 Mass. (9 Pick.) 547; Shed v. Brett, 18 Mass. (1 Pick.) 401; s. c., 11 Am. Dec. 209; Hartord Bank v. Barry, 17 Mass. 94; Free-man v. Boynton, 7 Mass. 483; Stafford v. Yates, 18 Johns. (N. Y.) 327; Bank of Utica v. Smith, 18 Johns. (N. Y.) 230. Authentication by Parol.—The supreme

judicial court of Massachusetts say in the case of Shed v. Brett, 18 Mass. (1 Pick.) 401, 404; s. c., 11 Am. Dec. 209, that the demand "may be as well made by an agent as by the principal, and there is no need of a power of attorney or any written instrument to constitute an agent for

(e) By Feme Covert.—The drawer of a bill in favor of a feme covert cannot, in an action by the husband for the non-payment

on her demand, deny the wife's right to demand payment thereof.¹
(f) By Bank.—A bank having a bill for the purpose of collecting only, is considered the real holder for the purpose of making demand and giving notice.² In the negotiation of this business the cashier is the regular authorized agent of the bank, and any communications affecting them are properly addressed to him in his official capacity.3

(2) Where Made.—(a) At Bank.—a'. Sufficient when.—Where a promissory note is made payable at a bank, demand of payment is properly made there, and presentment of the note to the officers of the bank for payment is sufficient; no personal demand upon

the maker is necessary.4

this purpose; if he derived no peculiar, authority from his character as notarypublic, certainly his power as agent was not dismissed thereby; having the note with him for the purpose of making the demand, he was authorized to receive the money and deliver up the note."

1. Cathell v. Goodwin I Harr. & G.

(Md.) 468.

2. Freeman's Bank v. Perkins, 18 Me.

 Warren v. Gilman, 17 Me. 360.
 Roberts v. Mason, 1 Ala. 373; Cren-4. Roberts v. Mason, i Ala. 373; Crenshaw v. McKiernan, Minor (Ala.), 295; Gelpecke v. Lovell, 18 Iowa, 17; Moore v. Britton, 22 La. An. 64; Thiel v. Conrad, 21 La. An. 214; Thomas v. Marsh, 2 La. An. 353; Magoun v. Walker, 49 Me. 419; Längley v. Palmer, 30 Me. 467; s. c., 5 Am. Dec. 634; Central Bank v. Allen, 16 Me. 41; People's Bank v. Keech, 26 Md. 521; Way v. Butterworth, 108 Mass. 509; Hampden, etc., Ins. Co. v. Davis, 79 Mass. (13 Gray) 156, note; Malden Bank v. Baldwin, 79 Mass. (13 Gray) 154; s. c., 74 Am. Dec. Mass. (13 Gray) 154; s. c., 74 Am. Dec. 627; Shepherd v. Chamberlain, 74 Mass. 627; Shepherd v. Chamberlain, 74 Mass. (8 Gray) 225; s. c., 69 Am. Dec. 24; Lee Bank v. Spencer, 47 Mass. (6 Metc.) 308; s. c., 39 Am. Dec. 634; Cohea v. Hunt, 10 Miss. (2 Smed. & M.) 227; s. c., 41 Am. Dec. 589; Merchants' Bank v. Elderkin, 25 N. V. 178; Sullivan v. Mitchell, I Law Repos. (N. C.) 482; s. c., 6 Am. Dec. 546; Myers v. Standart, 11 Ohio St. 29; Hallowell v. Curry, 41 Pa. St. 322; Rahm v. Philadelphia Bank, 1 Rawle (Pa.), 335; Britiain v. Doylestown Bank, 5 Watts & S. (Pa.) 87; s. c., 39 Am. Dec. 110; Jenks v. Doylestown Bank, 4 Watts & S. (Pa.) 505; Bank of S. C. v. Flagg, 1 Hill (S. C.), 177; Camden v. Doremus, 44 U. S. (3 How.) 515; bk. 11. L. Ed. 705; Hildeburn v. Turner, 46 U. S. (5 How.) 69; bk. 12, L. Ed. 54; Covington v. Comstock, 39 U. S. (14 Pet.) 43; bk. 10, L. Ed. 346; Bank of the United States v. Carneal, 27 U. S. (2 Pet.) United States v. Carneal, 27 U. S. (2 Pet.) 543; bk. 7, L. Ed. 51; Fullerton v. Bank of United States, 26 U. S. (1 Pet.) 604; bk. 7, L. Ed. 280; Bank of United States v. Smith, 24 U. S. (11 Wheat.) 171; bk. 6, L. Ed. 443; Bank of Metropolis v. Brent, 2 Cr. C. C. 530.

When Note is Payable at a Bank it is

not necessary to make any personal demand upon the maker elsewhere. Bank

of the United States v. Carneal, 27 U. S. (2 Pet.) 543; bk. 7, L. Ed. 513.

Where a demand of a note drawn payable at a bank is regularly made at the bank, its effect to charge the indorser is not impaired by the fact that the maker, during the day of maturity, attended at the bank to pay the note, and on being informed it had not been presented, gave his address to the teller, with the request that the holder should be directed to call Moore v. Britton, on him for payment. 22 La. An. 64.

As against the maker of a note drawn and payable at a particular bank, etc., proof of presentment at that bank is not necessary to enable the holder to recover. That the maker had the money ready at the place and time specified, is matter of affirmative proof. Thiel v. Conrad, 21 La. An. 214.

Note Payable at any Bank.—A note drawn payable "at any bank in Boston" should be presented for payment at an incorporate bank. Way v. Butterworth, 108 Mass. 509. On a note payable at any bank in the city of Boston, a demand thank bank in the city is sufficient to at any bank in that city is sufficient to charge the indorser, without previous notice to him at what bank the demand would be made. Langley v. Palmer, 30

a². Insufficient, when.—A demand of payment of a promissory note made, not on the maker, but at a bank where the note was not made payable, is insufficient in the absence of a special agreement. where a bill of exchange not payable at a particular place comes to the hands of a bank, neither the indorsers nor acceptor knowing it to be there, and there being no custom relative to the negotiation of such paper from which they might conclude it to be there, a demand at the counter of a bank is not sufficient to hold an indorser.2

a³. Necessary, when.—When a note is made payable at a bank. demand of payment should be made at such bank; but where a note is simply negotiable at a particular bank, it is not payable at that bank, and a demand of payment there will not be sufficient; "payable" and "negotiable" are two very different things.³
(b) At Residence.—b'. Of Maker.—Where place of payment is

not specified, demand must be made either of the maker personally, or at his residence or place of business.4 But a demand for payment need not be personal, and it will be sufficient if it shall be made at the acceptor's house or place of business in business hours.⁵ And a promissory note, presented at the city residence of

Me. 467; s. c., 50 Am. Dec. 634; Hampden, etc., Ins. Co. v. Davis, 79 Mass. (13 Gray) 156, note; Malden Bank v. Baldwin, 79 Mass. (13 Gray) 154. For if a note is made payable at either of the banks in a town, it is not the duty of the holder to give notice to the maker at which of the banks it will be presented for payment. Allen v. Avery, 47 Me. 287; Page v. Webster, 15 Me. 249; Brickett v. Spaulding, 33 Vt. 107. Compare North Bank v. Abbot, 30 Mass. (13 Pick.)

465.
If the maker of the note desired to render the terms "any bank" more definite, he should either have called upon the holder to make his election at what bank he would receive payment, or else have made his own election, and given notice thereof to the holder. Brickett v.

Spaulding, 33 Vt. 107.
1. Farmers', etc., Bank v. Allen, 18

Md. 475. 2. Lewis v. Planters' Bank, 4 Miss. (3 How.) 267.

3. Thus a note made "negotiable at the Bank of Washington," was held not a note payable at that bank; and that it was not necessary to demand payment there in order to charge the indorser, because

"negotiable" does not mean "payable."
Beeding v. Thornton, 3 Cr. C. C. 698.
4. Levy v. Drew, 14 Ark. 334; Hartford Bank v. Green, 11 Iowa, 476; Watson v. Templeton, 11 La. An. 137; s. c., 66 Am. Dec. 194; Bateson v.

Clark, 37 Mo. 31; Simmons v. Belt, 35 Mo. 461; Smith v. Little, 10 N. H. 526; Winans v. Davis, 18 N. J. L. (3 Harr.) 276; Sussex Bank v. Baldwin, 17 N. J. L. (2 Harr.) 487; Holtz v. Boppe, 37 N. Y. 634; Adams v. Leland, 30 N. Y. 309; Etheridge v. Ladd, 44 Barb. (N. Y.) 69; Woodworth v. Bank of America, 19 Johns. (N. Y.) 391; s. c., 10 Am. Dec. 239; Anderson v. Drake, 14 Johns. (N. Y.) 114; s. c., 7 Am. Dec. 442; Mason v. Franklin, 3 Johns. (N. Y.) 202; Barnes v. Vaughn, 6 R. I. 259; Galpin v. Hard, 3 McC. (S. C.) 394; s. c., 15 Am. Dec. 640; Burrows v. Hannegan, 1 McL. C. C. 309. How Made, to Whom, When, and Where.

The making and dating of a promissory note at a particular place does not make it payable there, nor does it supersede the necessity for presentment and demand at the residence or place of business of the maker, if by due diligence it could be ascertained. Oxnard v. Varnum, 111 Pa. St. 193; s. c., 56 Am. Rep. 255.

In Louisiana. -- If the holder know before maturity that the maker resides in a parish other than that of the date of the note, he should make a demand at the maker's domicile, the latter having no fixed place of business. Otherwise where it does not appear that he had such knowledge, and there is nothing to put upon Farley v. Hewson, 10 La. An. inquiry.

5. Wiseman v. Chiappella, 64 U. S. (23 How.) 368; bk. 16, L. Ed. 466.

the indorser, who has a city and country residence, is well present. ed 1

b2. Of Deceased Maker.—A demand at the domicile of the deceased maker, made of his widow, who answers that the note cannot be paid at present, there being no evidence that an administra-

tor, though appointed, has qualified.2

b. Of Co-Maker.—A note signed by two jointly and severally. and made at their dwelling-house in the town of D., was presented to both at the barn-yard of one of them, and no objection was made by either as to the place where payment was thus demanded. The court held that the demand was sufficient.3 And where the acceptors of a bill of exchange were partners, and had failed and closed their place of business and had no other office or place of business, a demand at the dwelling-house of one of the acceptors was held sufficient.4

b. Of Third Party.—To be binding upon the indorsers, the demand must be made upon the proper parties; and a demand upon one other than the proper party duly authorized, his agent or at-

torney, will not be sufficient.5

(c) At Place of Business.—In case no place of payment is named, demand must be made at the usual place of business of the maker. 6 Where the maker is not at home, and his usual place of business is known, demand must be made there and notice given.⁷

1. Stewart v. Eden, 2 Cai. (N. Y.) 121.

2. Simon v. Reynaud, 10 La. An. 506. 3. Baldwin v. Farnsworth, 10 Me. (1

Fairf.) 414.

4. Miltenberger v. Spaulding, 33 Mo.

5. Thus where a note being drawn payable at the house of R. Y., the notary did not inquire for the maker, or ask whether he had left funds to pay it, but demanded payment of R. Y. at his house, held, that the demand was not sufficient, as against the indorsers. Mechanics, Bank v. Lynn, 2 Cr. C. C. 217.

6. Demand at the Usual Place of Business of the Maker, "though he be absent, is sufficient; or at his residence; or to him in person. And where such note is made by a partnership, a demand of one of the partners in person, or a demand at the usual place of business of the partnership, is sufficient." Gates v. Beecher, 60 N.

Y. 522, Where the maker or acceptor has a well-known place of business, it may well be doubted if presentment at his resi-dence during business hours would be sufficient. See I Dan. Neg. Inst. sec. 636.

In case of joint makers, not partners, demand must be made upon each. Gates v. Beecher, 60 N. Y. 522; s. c., 19 Am.

Rep. 207. See also Lanusse v. Massicot, Rep. 207. See also Lanusse v. Massicot, 3 Mart. (La.) 261; Cox v. National Bank ("Clardy v. Nat. Bank"), 100 U. S. (10 Otto) 713; bk. 25, L. Ed. 739; McGruder v. Bank of Washington, 22 U. S. (9 Wheat.) 598; bk. 6, L. Ed. 170; Mitchell v. Baring, 10 Barn. & Cr. 11.

7. See Kirkpatrick v. McCullough, 3 Humbh (Tann.) 171; s. C. 20 Am. Dec.

Humph. (Tenn.) 171; s. c., 39 Am. Dec. 158; Taylor v. Snyder, 3 Den. (N. Y.) 145; s. c., 45 Am. Dec. 457; Fields v. Mallett, 3 Hawks (N. C.), 465; West v. Brown, 6 Ohio St. 542; King v. Holmes,

11 Pa. St. 456.

Demand of Payment made at Common Office of Several Persons .- Demand of payment of a promissory note, made at an office in Cincinnati, where the maker received business calls, and directed them to be made (he having no other place of business in the city), is sufficient, although the same office was the place of business of other persons. West v. Brown, 6 Ohio St. 542.

Demand at Physician's Office. - Where the maker of a sealed note was a physician, having a shop and dwelling house in different parts of the town; and when the note became due the indorser informed the holder that the maker was fifty miles out of town, and would pay on his return, held, that under such circum-

But in an action on a note, payable at the holder's place of business, demand there is unnecessary to authorize a recovery against the maker.1

(d) At Former Place of Business.—If the maker of a promissory note leaves the State, abandoning simultaneously both his residence and his place of business there, it is sufficient to charge one who indorsed the note to the plaintiff after the maker absconded, to make a demand at the maker's last place of business. without inquiring at his last residence, or of the indorser, for the maker's present residence.² But such a demand will not be sufficient where a note was made by a firm which subsequently became insolvent, and all the members left the State except one, who still remained in the place.3

Where a bill contains no place of payment, and one of the partners accepting it dies before it is due, presentment at the business place of the survivor is sufficient, and demand need not be made

of the personal representatives of the deceased.4

(e) Wherever Holders May Be.—A promissory note, whether

stances an application at the shop was all that the law required. Fields v. Mallett,

3 Hawks (N. C.), 465.

MakerNon-Resident .- Demand of Indorser at Store in Place where made.— Where the maker of a note dated at Troy, N. Y., resided in Florida before the making of a note, and continued to reside there until after its maturity, which facts were well known to the indorsee, held, that a demand upon the indorser at his store in Troy, and notice to him of nonpayment were not sufficient to charge him as the indorser. Taylor v. Snyder, 3 Den. (N.Y.) 145; s.c., 45 Am. Dec. 457, A Demand by a Notary in the Street,

upon an Acceptor of a Bill Payable Generally, is not a sufficient demand. It should be made at his place of business. But if the notary, on his way to that place, meets the acceptor, informing him of where he is going, and for what, and the acceptor offers that if he would go there he will give a check on a broker, this amounts to a waiver of demand at the place of business, and the refusal of payment. King v. Holmes, 11 Pa. St. 456.

What Not Sufficient Demand at Place of Business. - The facts that the note was discounted by the bank at which it was made payable; that the notary, at the request of the bank, presented the note at the storehouse of the maker, and de-manded payment of his clerk; and that the maker had no balance to his credit in the bank on the day the note became payable, held not enough to enable jury to infer a demand. Bank of United States v. Smith, 2 Cr. C. C. 319.

1. Barrow v. Thibodaux, 3 La. An. 131; Brander v. Cobb, 2 La. An. 396.

2. Grafton Bank v. Cox, 79 Mass. (13 Gray) 503; Wheeler v. Field, 46 Mass.

(6 Metc.) 290. Compare Sanford v. Norton, 17 Vt. 285.

3. Bankrupt Firm—One Partner Still Remaining.—The holder of the promissory note of a firm presented it for payment at their last place of business, in Boston, which was then occupied by strangers, and was there told that the firm had failed, and that the partners had gone out of town, without leaving any funds: and no further inquiry was made by the holder in relation to them, although in fact one of the firm lived in Boston, and his name was in the directory. Held, in an action against the indorser, that this was not a sufficient demand of payment. Granite Bank v. Ayers, 33 Mass. (16 Pick.) 392; s. c., 28 Am. Dec.

Failure to Inquire for Present Place of Residence. - Where the makers of a promissory note had failed, and their place of business was occupied by a general assignee of all their property for the benefit of creditors, as an office for the transaction of the business of the estate, and the assignee's sign was placed upon the door, held, that a presentment and demand on the premises were not sufficient to charge the indorsers, in the absence of any evidence that inquiry was made to ascertain the residence of either of the makers. Benedict v. Caffe, 5 Duer (N. Y.), 226.

4. Cayuga Co. Bank v. Hunt, 2 Hill

(N. Y.), 635.

negotiable or not, which does not specify any place of payment in terms, is in general, as against the maker and sureties pavable wherever the lawful holder may be. The rule is the same in the case of a note payable to a bank or any other corpora-

(f) Where Payable.—Where a bill or note is made payable at a particular place, presentment for payment at that place is suffi-

And a personal demand is not necessary where all the parties to a note have agreed that it should be made at a specified place. and it was so made.4

- (g) In Case of Corporation Warrant.—The holder of a corporation warrant or order, not properly executed in accordance with the corporation articles, in order to bind the indorsers can ordinarily, look only to the treasurer's office for demand and payment.⁵
- (h) When Payable at Bank Agency.—Where a note is made payable at the agency of a banking company at a particular place.
- 1. Bank of Newbury v. Richards, 35 Vt. 281.

2. Bank of Newbury v. Richards, 35 Vt. 281.

3. Eason v. Isbell, 42 Ala. 456; Montgomery v. Elliott, 6 Ala. 701; Evans v. St. John, 9 Port. (Ala.) 186; Evans v. Gordon, 8 Port. (Ala.) 346; Sumner v. Ford, 3 Ark. 389; Wild v. Van Valkenburgh, 7 Cal. 166; Armstrong v. Caldwell, 2 Ill. (1 Scam.) 546; Butterfield v. Kinzie 2 Ill. (1 Scam.) 445; S. C. 2 Am. Kinzie, 2 Ill. (1 Scam.) 445; s. c., 3 Am. Dec. 657; Tuckerman v. Hartwell, 3 Me. Dec. 657; Tuckerman v. Hartwell, 3 Me. (3 Greenl.) 147; s. c., 14 Am, Dec. 225; Smith v. Philbrick, 76 Mass. (10 Gray) 252; s. c., 69 Am. Dec. 315; Washington v. Planters' Bank, 2 Miss. (1 How.) 230; s. c., 28 Am. Dec. 333; Cook v. Martin, 13 Miss. (5 Smed. & M.) 379; McKee v. Boswell, 33 Mo. 567; Lawrence v. Dobyns, 30 Mo. 196; Smith v. Little, 10 N. H. 526; Anderson v. Drake, 14 Johns. (N. Y.) 114; s. c., 7 Am. Dec. 442; Nichols v. Goldsmith, 7 Wend. (N. Y.) 160; Fitler v. Beckley, 2 Watts & S. (Pa.) 458; Armistead v. 7 Wend. (N. 1.) 100, Filter v. Bocacy, 2 Watts & S. (Pa.) 458; Armistead v. Armistead, 10 Leigh (Va.), 512; Cox v. National Bank of N. Y. ("Clardy v. Nat. National Bank of N. 1. (Clarity v. Nat. Bank") 100 U. S. (10 Otto) 704; bk. 25, L. Ed. 739; Wiseman v. Chiappella, 64 U. S. (23 How.) 368; bk. 16, L. Ed. 466. Compare Bank of W. & B. v. Cooper, 1 Harr. (Del.) 10; Struthers v. Kendall, 41 Pa. St. 214; s. c., 80 Am. Dec. 474; Pierce υ. Struthers, 27 Pa. St. 249; Ocoee Bank

υ. Hughes, 2 Coldw. (Tenn.) 52.

The Holder of a Bill of Exchange is only bound to present the bill at the place designated for payment. Eason v. Isbell. 42 Ala. 456.

Where a Bill of Exchange is Addressed to the Drawees at a Certain Place (e.g., New York City), and it is accepted by them, it becomes payable, when due, at the place designated by the address as that of acceptance. Cox v. National Bank of N. Y. ("Clardy v. Nat. Bank"), 100 U. S. (10 Otto) 704; bk. 25, L. Ed. 739; Wiseman v.Chiappella, 64 U.S. (23 How.) 368; bk. 16, L. Ed. 466. But where a bill addressed to the drawees at the place of their residence is accepted, payable at a different town, this is a material variation, and a presentment at the other town will not charge the drawers. Niagara, etc., Bank v. Fairman, etc., Co., 31 Barb. (N.

The Presentment of a Promissory Note at the Place of its Date is sufficient, in the absence of proof that the holder at its maturity knew that the maker resided elsewhere. Smith v. Philbrick, 76 Mass.

(10 Gray) 252; s. c., 69 Am. Dec. 315. 4. Pearson v. Bank of Metropolis, 26 U. S. (1 Pet.) 89; bk. 7, L. Ed. 65. See State Bank v. Hurd, 12 Mass. 172; Meyer v. Hibsher, 47 N. Y. 265.

5. Merrick v. Burlington & W. P. R.

Co., II Iowa, 74.

Presentment for Payment of a Company's Note at their actual office is sufficient, although such office was kept in a State where, by their corporation articles, they were not allowed to keep it. Merrick v. Burlington & W. P. R. Co., 11 Iowa,

a demand at that place is sufficient to charge an indorser, although the agency was removed some weeks before.1

(i) Place Shown by Parol.—Parol evidence may be received of an agreement by all the parties to a promissory note that payment shall be made at a particular place so agreed upon, and will bind the indorser.2

(1) When Payable in Property.—Where a note is payable in portable articles, but the place of payment thereof not fixed, it is pavable and demand should be made at the creditor's residence or

place of business.3

(k) Personal.—A personal demand at a different place than where the note is payable, if no objection is made, is sufficient.4 And a demand by the holder of a note payable generally may be made upon the maker in the street, the maker having no place of business, and raising no objection to the place where the demand is made: and the actual exhibition of the note is unnecessary, if the holder then has it with him, and is not requested to produce it.5

(3) How Made.—(a) Of Bank Officer After Business Hours.—A demand made by or of the officer of a bank after banking hours for the payment of a note or bill is valid, and will bind indorsers. 6

1. Spann v. Baltzell, I Fla. 301; s. c.,

46 Am. Dec. 346.

Notes Countersigned by a Cashier at a Branch Bank must be presented there for payment. Bank of Utica v. Magher, 18 Johns. (N. Y.) 341.

2. Meyer v. Hibsher, 47 N. Y. 265.

3. Lobdell v. Hopkins, 5 Cow. (N. Y.) 516; Rice v. Churchill, 2 Den. (N. Y.) 145. See Oakey v. Beauvais, 11 La. 487; Foden v. Sharp, 4 Johns. (N. Y.) 183, n.; Cox v. National Bank of N. Y. ("Clardy v. Mathematics") Nat. Bank"), 100 U. S. (10 Otto) 704; bk. Nat. Bank 3, 100 U. 5. (10 Otto) 704; Dr. 25, L. Ed. 739; Mitchell v. Baring, 10 Barn. & Cr. 11; Story on Notes, sec. 49; Chit. on Bills (13th Am. Ed.), 175.

In Lobdell v. Hopkins, supra, the court say: "Mr. Chipman in his valuable treatise says: 'If the note be payable

in specific articles, on demand, and no place of payment be designated, the debtor's place of residence is the place of payment, and the payment must be there demanded.' (Chip. Tr. 49, and vide Id. 28, 29.) This case is analogous to that of a due-bill without time or place, given by a merchant for goods, or a mechanic for work. Surely the goods must bedemanded of the merchant at his store, or of the mechanic at his shop, before suit can be sustained. The instrument in question is payable by a farmer in farm produce. Certainly there should have been a demand at the debtor's farm."

Delivery of Property where no Place is Specified. - On contracts for the delivery of property, where no place is expressed, the usual residence of the obligor is the place of performance; and where no place is named, and the property is to be delivered on request, a special request at the obligor's residence must be averred. Wilmouth v. Patton, 2 Bibb (Ky.), 280. Where one contracts to deliver specific articles on demand he should be always ready at his dwelling-house or place of business. If he be absent, a demand of his wife has been held sufficient. Mason

v. Briggs, 16 Mass. 453.
When Payable in Merchandise or manufactured goods, a note should be demanded at the store of the merchant or shop of the manufacturer. Lobdell v. Hopkins, 5 Cow. (N. Y.) 516.

Note Payable in Farm Produce should be demanded at the farm of the debtor. Lobdell v. Hopkins, 5 Cow. (N. Y.) 516.

Note Payable in Lumber. - The place of payment not being mentioned in a note payable in lumber, it is payable at the maker's lumber yard. Rice v. Churchill,

2 Den. (N. Y.) 145. 4. Herring v. Sanger, 3 Johns. Cas.

(N. Y.) 71.

5. King v. Crowell, 61 Me. 244; s. c.,

14 Am. Rep. 560.
6. Flint v. Rogers, 15 Me. 67; Swan v. Hodges, 3 Head (Tenn.), 251; Bank of United States v. Carneal, 27 U. S. (2 Pet.)

549; bk. 7, L. Ed. 315.

Presentment by Bank Officer.—Where the Bank was the holder of a note which was payable there, and on the day that it became due, after the usual banking

(b) By Mail.—A legal demand may be made of the maker of a note or the drawer of a bill by mail. Thus a letter sent to the house of the maker of a promissory note, informing him that the note was in the bank a few rods distant, and requesting him to pay it, although the note was not sent to the house of the maker, and he was not at home when the letter was delivered, is sufficient as between the maker and holder: but a notice sent the maker of a note, through the post-office, where his residence is known, that his note is overdue and unpaid, is not a sufficient demand to charge

(c) Not Definite.—A demand must be definite and certain, and without condition. Thus where a party presenting a bill of exchange to the drawee consented to wait until he should have time to look over his accounts, and agreed to present it again, it was held that he could not protest it without a new demand.3

(d) By Going to Address of Drawer.—Demand at the home of the maker of a note or the drawee of a bill of exchange is sufficient where made of the party in person; but it would seem that where the party is not found, and there is no inquiry for or attempt is made to discover his domicile, the demand of payment at his late residence will not be sufficient.4

Going several times to the office of the acceptors of a bill. in order to demand payment for the same, and finding the doors closed, and no person there to answer the demand, is a sufficient demand. Further inquiry for them was not required by the custom of merchants.5

hours were over, notice was given by the officers of the bank of its non-payment, it was held that there was proof of due demand. Bank of United States v. Carneal, 27 U. S. (2 Pet.) 549; bk. 7, L. Ed. 513.

Presentment to Bank Officer.—The pre-

sentment of a draft payable at a particular bank to the cashier, on the day it falls due, but after business hours, who refuses to pay because the acceptor had provided no funds, is sufficient. Flint v. Rogers, 15 Me. 67.

The presentment of a note to an officer of the bank, out of business hours, is not a sufficient demand to charge the indorsers. Swan v. Hodges, 3 Head (Tenn.),

Tredick v. Wendell, I N. H. 80.
 Stuckert v. Anderson, 3 Whart.

(Pa.) 116.

Where Parties Live in the Same Town. -Where the parties to a negotiable note live in the same town, a demand on the maker cannot be made and notice given to the indorser through the post-office. Davis v. Gowen, 19 Me. 447. 3. Case v. Burt, 15 Mich. 82.

4. In a Suit Against the Indorser of a business and afterwards at the dwelling of

Bill of Exchange, it appeared in evidence that a person went to the place of address of the drawee as shown by the bill. for the purpose of collecting the draft, but the drawee could not be found at that time. There was no evidence that any inquiry or any attempt to discover the domicile of the drawee was made. Held, that the demand of payment was not sufficient. Puig v. Carter, 20 La. An.

5. Wiseman v. Chiappella, 64 U. S. (23 How.) 368; bk. 16, L. Ed. 466.

Demand by Notary.—A notary certified in his notarial protest of a bill of exchange, that the bill was handed to him on the day it was due; that he went several times to the office of the acceptors of it in order to demand payment; that at each time he found the doors closed, and no person there to answer any demand. Held, that this was sufficient performance of his duty to make a demand. Goading v. Britain, I Stew. & P. (Ala.) 282; Wiseman v. Chiappella, 64 U. S. (23 How.) 368; bk. 16, L. Ed. 466.

Where the notary called at the place of

The absence from his home of the drawee of a bill payable after date, when the holder of a bill or his agent calls with it for acceptance, is not a refusal to accept. But such absence when the bill

is due is a refusal to pay, and authorizes a protest.1

(e) By Legal Process.—The institution of a suit on a note payable on demand is a sufficient demand.² And the institution of a suit on a note, and the service of a summons, are a "demand in writing," sufficient to charge the party for whose benefit it was given, and who is held to pay, after a written demand has been made.3

(f) By Having Note in Bank.—Where a note is payable at a certain bank, it is sufficient to charge the indorser that the note is there at maturity, to be delivered up if paid, without a special demand.4

When a note is deposited with a bank for collection when due. it is a sufficient demand if the teller of the bank presenting the note, inquires of the bookkeeper whether a deposit has been made to pay the note and is informed that there are no funds to pay it.5

Where a bill of exchange is lost among a pile of papers in the

the maker on the last day of grace, but could not find him at either, so that the payment of the note could not be demanded, held sufficient. Greatrake v.

1. Bank of Washington v. Triplett, 26 U. S. (1 Pet.) 25; bk. 7, L. Ed.

37. 2. Ziel v. Dukes, 12 Cal. 479; Hall v. Jones, 32 Ill. 38; Woodward v. Drennan. 3 Brev. (S. C.) 189.

A note dated in June and payable on the "first of March" will be held payable on demand, and the bringing the suit is sufficient demand. Collins v.

Trotter, 81 Mo. 275.
3. Pendexter v. Carleton, 16 N. H.

An Action may be Brought without Previous Request where a party promises to pay on demand; yet in the case of indorsed paper, the writ of summons by which a suit thereon is commenced does not authorize the officer to whom it is addressed to receive the money or contemplate payment otherwise than by legal coercion; consequently it is not sufficient demand to make a notice which is merely consequential without avail anything. Branch Bank at Montgomery v. Gaffney, 9 Ala. 153.

Where an Overdue Note is Indorsed, the institution of suit against the maker at the first term after the indorsement is a sufficient demand, and if the indorser knows of it within a reasonable time it is sufficient notice. Grav v. Bell, 3 Rich. (S. C.) 71.

When it is Not a Sufficient Demand.— The return of non est inventus by a constable against the maker of a promissory note, the same day on which it is issued, is not sufficient to charge an indorser under the statute of Alabama, which requires the holder of a promissory note for a sum not exceeding \$50 to sue the maker within 30 days after it becomes due, and use due diligence to recover the amount of him in order to charge the indorser. Cavanaugh v. Tatum, 4 Stew. & P. (Ala.) 204.

4. Allen v. Smith, 4 Harr. (Del.) 234; Headley v. Bliss, 9 Ga. 305; Folger v. Chase, 35 Mass. (18 Pick.) 63; Gillett v. Averill, 5 Den. (N. Y.) 85.

5. Browning v. Andrews, 3 McL. C. C. 576. So held when the teller acted as clerk of the notary who protested the cota. Browning v. Andrews.

Browning v. Andrews, 3 McL.

C. C. 576.

Delivery to Notary After Banking Hours for Protest.—On the day when the note became due, the bank being the holder thereof, and it being payable there, after the usual banking hours were over it was delivered to a notary by the officers of the bank, and they informed him at the time that there were no funds there for the payment of the note. This was held to be a sufficient demand of payment. Bank of the United States v. Carneal, 27 U. S. (2 Pet.) 549; bk. 7, L. Ed. 513.

bank at which it was payable, it is not present in the bank so as to constitute a presentment or demand against the acceptors.1

(g) By Presenting One of a Set.—Either of a set of bills of exchange may be presented for acceptance, and if not accepted a right of action presently arises, upon due notice, against all the antecedent parties to a bill without any other of the set being presented 2

(h) By Receiving Refusal to Pay.—It is sufficient to constitute a demand and refusal to pay a note, that the maker, on the day it becomes due, calls on the holder at his store, where the note is. and informs him that he cannot and shall not pay it, and desires him to give notice to the indorser, though the note is not pro-

duced.3

1. Chicopee Bank v. Seventh Nat. Bank of Phila., 75 U. S. (8 Wall.) 641;

bk. 19, L. Ed. 422.
Bill in Bank, but Lost.—Although a bill payable at a particular bank is, in point of fact, in the bank, but the bank is wholly ignorant of the fact, as where a bill was sent in a letter and the postman laid the letter upon the cashier's desk, but it slipped through a crack and was not seen, the fact that the bill was thus really in the bank does not constitute a presentment. Chicopee Bank v. Philadelphia Bank, 75 U. S. (8 Wall.) 641; bk. 19, L.

Ed. 422.

2. Kenworthy v. Hopkins, I Johns.
Cas. (N. Y.) 107; Walsh v. Blatchley, 6
Wis. 422; s. c., 70 Am. Dec. 469; Bank
of Pittsburgh v. Neal, 63 U. S. (22 How.)

96; bk. 16, L. Ed. 323.
Fixing Liability of Indorser.—Where one of a set of bills of exchange is protested for non-payment after having been accepted, it is sufficient to charge the indorser if the protest of the accepted bill and one of the set, which has neither been accepted nor protested, is presented to him and payment demanded. Ken-worthy v. Hopkins, I Johns. Cas. (N. Y.) 107; Walsh v. Blatchley, 6 Wis. 422; s. .., 70 Am. Dec. 469.

3. Gilbert v. Dennis (3 Metc.), 44 Mass.

495; s. c., 38 Am. Dec. 329.
Refusal to Pay.—In Gilbert v. Dennis, supra, the court say: "On the last day of grace the promisor went to the store of the holder, where the note was, and stated that he was unable to pay and should not pay the note, and wished the plaintiff to notify the indorser. The court are of the opinion that this was a sufficient demand and refusal to constitute a dishonor of the note. There are many cases in which it is held that it is not necessary to produce and exhibit the

note. As where a note is in terms, or by the tacit or express consent of the parties. pavable at the bank, it is sufficient that the note is there ready to be given up on payment should the promisor come to pay it. Whitwell v. Johnson, 17 Mass. 449; State Bank v. Hurd, 12 Mass. 172; Saunderson v. Judge, 2 H. Bl. 509. the promisor does not go back to the bank and pay the note, it is dishonored; and it would be but an idle ceremony to take the note from the files and make a demand when there is no one on whom to make it. And should the promisor come and declare his inability to pay, his intention not to pay, and leave without payment, it is surely not less a dishonor The default than if he had staved away. of the promisor, in such cases, is his not paying the note at the bank; and the default of the promisor, in whatever it consists, constitutes the dishonor of the note, upon which the indorser, if duly notified, may be legally charged. Even under the law of tender, which is extremely strict, it is held that when the party to whom a tender is to be made declares that he will not accept it, an actual production and offer of the money, or other thing to be tendered, is unnecessary. In the present case the plaintiff held the note, the promisor knew it, knew it was due, and instead of waiting for the holder to come to him he went to the holder, declared by his conduct that he knew the note was due and payable, and that the holder had the note ready to be given up, and expected and had a right to expect payment of him as promisor; and in anticipation of a presentment and express demand, he declared that he could not pay the note, and departed without paying it. It does not appear that the holder did not request him to make payment; and the circumstances are such as to

(i) Rule as to Showing Note.—It is not merely seeing a bill or knowing of its existence that constitutes a legal presentment to the drawee: it must be presented to him for acceptance; 1 and although the person making a demand should in general have the note with him and present it for payment, yet there is no rule requiring that a bill of exchange should be actually shown to the drawee in order to be a valid and binding acceptance, if he is enabled, by seeing the bill or otherwise, to give an intelligent answer.3 And where notes are left in a bank for collection, a demand of payment upon a maker in the same town is good, although the person making the demand has not the note with him at the time, such being the usage of the bank, and known to the maker.4

warrant the inference that he did. The declaration of the promisor that he could not pay, implies that he considered them as looking to him for payment, which is all that was necessary, and that he anticipated a more formal offer of the note and demand of payment, by a declaration which rendered it unnecessary.

1. Smith v. Gibbs, 10 Miss. (2 Smed. & M.) 479; Draper v. Clemens, 4 Mo. 52; Mitchell v. Degrand, I Mason C. C.

2. Whitwell v. Johnson, 17 Mass. 449; s. c., 9 Am. Dec. 165; Freeman v. Boyn-

ton, 7 Mass. 483.

Foreign Bill Should be Exhibited .--When demand of payment is made upon the drawee of a foreign bill of exchange, the bill itself must be exhibited. Musson v. Lake, 45 U.S. (4 How.) 262; bk. 11, L. Ed. 967.

In Louisiana, the omission to present the bill to the acceptor will justify the refusal to pay it, although payment be demanded. Musson v. Lake, 45 U.S. (4 How.) 262; bk. 11, L. Ed. 967.

According to the Law-merchant, when demand of payment is made upon the drawee or acceptor of a foreign bill of exchange the bill itself must be exhibited: in order (1) that he may judge of the genuineness of the bill; (2) of the right of the holder to receive the contents; and (3) that he may obtain immediate possession of the bill upon paying the amount. Musson v. Lake, 45 U. S. (4 How.) 262; bk. 11, L. Ed. 967; Story Bills, sec. 361, citing Hansard v. Robinson, 7 Barn. & Cr. 90, and disapproving Nott v. Beard, 16 La. 308.

3. Posey v. Decatur Bank, 12 Ala. 802; Union Bank v. Jones, 4 La. An. 220; Union Bank v. Morgan, 2 La. An. 418; Fall River Bank v. Willard, 46 Mass. (5 Metc.) 216: Fisher v. Beckwith, 10 Vt. 31: s. c., 46 Am. Dec. 174.

Acceptance Without Sight. - Where the holder of an indorsed bill of exchange. which is not accepted by the drawee, merely informs the drawee that he (the holder) has the bill, but does not actually present it to him for acceptance, and the drawee thereupon tells him that the bill will not be accepted nor paid, the indorser is not thereby discharged, though no notice is given to him of the drawee's declarations. Fall River Bank v. Will-

ard, 46 Mass. (5 Metc.) 216.

Where a Note Held by a Bank, Payable at its Office, was in the cashier's hands at the time of demand of him by the notary, it need not appear that the latter had the note in his possession when he presented Otherwise had the place of payment been elsewhere, and the bank not the holder. Union Bank v. Jones, 4 La. An. 220; Union Bank v. Morgan, 2 La. Au. 418.

Demand by Written Statement .-- A statement in writing, describing a bill of exchange by its date, amount, and the character each party on the bill bears in relation to it, and when and where payable, with the addition that the holder looks to the estate of a particular person for payment, is, if presented to the personal representatives of the estate, a sufficient presentation, without producing the original bill. Posey v. Decatur Bank, 12 Ala. 802.

4. Maine Bank v. Smith, 18 Me. 99. Mere Indorsement in Blank of a Nonnegotiable Note is not conclusive evidence of transfer of title; and demand of payment by assignee without showing the note or stating his interest is not suffi-cient notice of the assignment. Meghan v. Mills, 9 Johns: (N. Y.) 64.

(i) Presenting Check to be Certified.—Presenting a check at the bank to be certified is not equivalent to demand of payment for the purpose of charging the drawer. The bank is not bound to certify, and the instrument only requires payment.1

(k) According to Law.—To charge the indorser of a note held by a bank, the presentment and notice must be conformable to the general law, or the substitutes for them must conform strictly

to the usage of the bank.2

(1) In Appointed Manner.—Where the maker appoints a mode

of making demand it will bind the indorser.3

(m) Effect of Usage.—A usage of a bank known to the maker of a note as to the mode of demand upon him will bind an indorser not conusant of it.4

Bradford v. Fox, 39 Barb. (N. Y.)
 s. c., 16 Abb. (N. Y.) Pr. 51.
 Boston Bank v. Hodges, 26 Mass.

(o Pick.) 420.

In the course of the opinion the court say: "But it is said that the note being due on the oth of May, a demand and refusal to pay on any part of that day, with immediate notice to the indorser, will give a right to an action against the latter. This is true where there is an actual demand upon the maker according to the general rule of law. But the bank has substituted a usage of its own, according to which a note is not considered dishonored until the bank is closed on the last day of grace. This constructive de-mand, which they have acquired the privilege of making, instead of the more formal and troublesome mode which the law imposes upon the rest of the community, must be made according to the rules of their own adoption if they would avail themselves of their privilege; they must not, as they did in the present case, enforce their custom as to the mode of demand, and depart from it as to the time."

3. North Bank v. Abbott, 30 Mass. (13 Pick.) 465, 467, 470; s. c., 25 Am. Dec. 334; State Bank v. Hurd, 12 Mass.

Sending Notice Instead of Presenting Note. - Where it is the custom of banks, instead of presenting the note to the promisor, to send a notice to him to come to the bank and pay it, and that is known to the promisor, he shall be held to assent to it, and such notice is held to be equivalent to actual presentment. North Bank v. Abbott, 30 Mass. (13 Pick.) 470; s. c., 25 Am. Dec. 334; Jones v. Fales, 4 Mass. 245.

So where it is agreed between the holder and the promisor that notice may be left at a particular place, not his own place of business or residence, leaving the usual notice at such place is a sufficient presentment. North Bank v. Abbott, 30 Mass. (13 Pick.) 470; s. c., 25 Am. Dec. 334; Whitwell v. Johnson, 17 Mass. 440.

In such cases it has been held that an averment of presentment and demand generally is satisfied by evidence of such special demand. North Bank v. Abbott, 30 Mass. (13 Pick.) 470; s. c., 25 Am. Dec. 334; Stewart v. Eden, 2 Cai. (N. Y.). 121; s. c., 2 Am. Dec. 222; Hardy v.

Woodroofe, 2 Stark. 319.
Note Payable at a Particular Place.— The general principle is that where a note is payable at a place certain no personal demand of the maker is nepersonal definant of the lands of the cessary. Woodbridge v. Brigham, 12 Mass. 405; s. c., 12 Mass. 556; 7 Am. Dec. 85; Berkshire Bank v. Jones, 6 Mass. 524; s. c., 4 Am. Dec. 175; Callaghan v. Aylett, 2 Campb. 549; Sanderson v. Bowes, 14 East, 509; Hardy v. Woodroofe, 2 Stark, 319; Smith v. Bellamy, 2 Stark. 224; Ambrose v. Hopwood, 2 Taunt. 61. And where a place of payment is specified, no presentment or demand elsewhere is necessary. Rowe v. Young, 2 Brod. & Bing. 242; Price v. Mitchell, 4 Campb. 200; Roche v. Campbell, 3 Campb. 247; Dickenson v. Bowes, 16 East, 110; Gammon v. Schmoll, 1 Marsh. 80; s. c., 5 Taunt. 344; Callaghan v. Aylett, 3 Taunt. 397; Ambrose v. Hopwood, 2 Taunt. 61; Bayley on

Bills (5th Ed.), 219.
4. Bank v. Norwood, 1 Harr. & J. (Md.) 423; Central Bank v. Davis, 36 Mass. (19 Pick.) 373; North Bank v. Ab-bott, 30 Mass. (13 Pick.) 465; s. c., 25 Am. Dec. 334; City Bank v. Cutter, 20 Mass. (3 Pick.) 414; Whitwell v. Johnson, 17 Mass. 449; s. c., 9 Am. Dec. 165;

(n) Form of Words.—In presenting a check for payment to the bank upon which it is drawn, no particular form of expression is necessary to make a legal demand and refusal. It is sufficient if it clearly appears that the bank after demand declines to honor the check; and refusing to pass the check to the credit of the holder is a dishonor of it.

(a) After Default.—Where the maker of a promissory note is in readiness to pay the same at the time and place designated for payment, and the maker is in default, the latter may show a subsequent demand and refusal; but the demand must be for the precise sum due at maturity, and the fact must be pleaded. If the demand is so made for the principal and interest since accrued, it will not operate as a demand and refusal after tender.2

(b) Generally.—Such a demand as is obligatory upon the maker of a note is a sufficient demand in reference to the liability of an indorser thereof.3 The conditions as to demand and notice are the same, whether the note was indorsed after or before due.4

(4) Upon Whom.—(a) Any One.—Demand on note payable in lumber at a mill-yard may be made there at any reasonable hour, and of any one present if the debtor is not there, or publicly if no one is there.5

(b) Agent.—The acceptor of a bill of exchange may appoint an agent to pay it, or to refuse payment, and a presentment of the bill to such agent is a sufficient presentment to charge the drawer and indorsers. And where the drawees of a bill of exchange

Widgery v. Munroe, 6 Mass. 449; Jones w. Fales, 4 Mass. 245.

1. Gregg v. George, 16 Kan. 546. See Wolfe v. Whiteman, 4 Harr. (Del.) 246.

2. Mahan v. Waters, 60 Mo. 167.

3. Bank of Portland v. Brown, 22 Me.

295. 4. Bemis v. McKenzie, 13 Fla. 553. 5. Rice v. Churchill, 2 Den. (N. Y.)

Note Payable in Lumber. - In Rice v. Churchill, supra, the note was payable in lumber, and the court say: "The defendant owned a saw-mill, and his lumber was kept at the mill-yard; that was, therefore, the place at which the note was payable. It was like the note of a merchant payable in goods, or of a mechanic payable in his work, in which cases the law implies that the store of the former or the shop of the latter is the place of payment agreed upon by the parties. Barker v. Jones, 8 N. H. 413; Lobdell v. Hopkins, 5 Cow. (N. Y.) 516; Vance v. Bloomer, 20 Wend. (N. Y.) 196; Chit. Cont. 28-30, 49. A personal demand of the defendant at his mill-yard would undoubtedly have been sufficient. And even had it been made elsewhere, that would have been enough, unless the defendant met the demand by an offer to make the payment at his mill-yard. If this was proffered on such demand being made, the holder of the note would be bound to repair to that place to receive the lumber. Higgins v. Emmons, 5 Conn. 76; s. c., 13 Am. Dec. 41; Scott v. Crane, 1 Conn. 255. But a personal demand was not necessary in this case. The lumber was payable at the defendant's mill-yard, and the creditor must go to that place to receive it. He was not. however, bound to go there more than once, nor remain until the defendant was found at the same place. One who enters into such an engagement as this must at all reasonable hours be at the place of payment, and prepared to perform his contract. If the debtor is not there, a demand may be made of any one in charge for him; and if no such person can be found, a public demand at that place at a reasonable time will suffice. Higgins v. Emmons, 5 Conn. 76; s. c., 13 Am. Dec. 41; Mason v. Briggs, 16 Mass. 453; Chit. Cont. 28–30.

6. Phillips v. Poindexter, 18 Ala. 579. Compare Brown v. Turner, 15 Ala. 822.

absent themselves from their place of business, and make no provision for its payment, a presentment there to their bookkeeper is a sufficient presentment to charge the drawers.1

(c) Widow.—Demand on the widow of a deceased maker no letters having yet been granted, is presumptively sufficient to

charge the indorser.2

(d) Partners.—Demand of payment on one of the firm of

makers is sufficient to charge the indorser.3

(e) Joint Makers.—A demand upon one of the several makers of à joint and several promissory note in some States is held to be sufficient to charge an indorser. While in others, and perhaps in the majority it is held that presentment to only one of the makers of a joint note is not sufficient to charge an indorser: 5 but that, except in the case of a partnership note, demand must be made upon all the several makers at maturity.6

1. Decatur Branch Bank v. Hodges, 17 Ala. 42: Gardner v. Bank of Tennesse, I Swan (Tenn.), 420.

2. Bank of Washington v. Reynolds, 2

Cr. C. C. 289.

3. Crowley v. Barry, 4 Gill (Md.). 194; Hunter v. Hempstead, 1 Mo. 67; s. c., 13 Am. Dec. 468; Gates v. Beecher, 60 N. Y. 518; s. c., 2 Cent. L. J. 547; 14 Am. L. Reg. (N. S.) 440; 19 Am. Rep. 207; Greatrake v. Brown, 2 Cr. C. C. 541.

A Note Given by Copartners .- At the maturity of a promissory note given by a copartnership, in which no place of payment was named, and the firm had been dissolved by bankruptcy, it was held that a demand of one of the former copartners in person was sufficient to charge partners in person was sufficient to charge the indorser. Gates v. Beecher, 60 N. Y. 518; s. c., 19 Am. Rep. 207; 2 Cent. L. J. 547; 14 Am. L. Reg. (N. S.) 440. See s. c., 3 T. & C. (N. Y.) 404.

4. Harris v. Clark, 10 Ohio, 5. Compare Shed v. Brett, 18 Mass. (I Pick.) 401; s. c., 11 Am. Dec. 209; Tayloe v. Davidson, 2 Cr. C. C. 434.

Notes as Collateral.—Duty of Holder.—Where upon taking as collateral poles.

Where upon taking as collateral notes indorsed by makers of a joint and several principal note, the holder gives a receipt stating that there is to be "no release from the joint and several note; all are to be held," the holder assumes no obligation to demand payment, notify indorser, or bring suit on the collateral notes; but is only bound not to act in intentional bad faith, nor to hinder the pledgers in enforcing payment. City Savings Bank v. Hopson, 53 Conn. 563; s. c., 2 New Eng. Rep. 556.

A, B, & C, by a contract made jointly

with D on March 29, 1875, agreed for

the consideration stated to transfer to D. on or after October 15, 1875, certain shares of stock sufficient to amount to \$500 at the market price of said stock, when the transfer should be demanded. A demand for the transfer was made upon one of said joint contractors on July II, 1878. Held, that the joint contractors not being partners, and the contract not being a negotiable instrument, the demand upon one was sufficient. Rhind v. Hyndman, 54 Md. 527; s. c., 39 Am. Rep. 402.
5. Bank of Red Oak v. Orvis, 40 Iowa,

5. Bank of Red Oak v. Orvis, 40 Iowa, 332; Blake v. McMillen, 22 Iowa, 358; Arnold v. Dresser, 90 Mass. (8 Allen) 435; Shutts v. Fingar, 100 N. Y. 539; Gates v. Beecher, 60 N. Y. 518; s. c., 19 Am. Rep. 207; 2 Cent. L. J. 574; 14 Am. L. Reg. (N. S.) 440; Britt v. Lawson, 15 Hun (N. Y.), 123.

Demand on Joint Makers.—Where there is in the polyer of

are joint makers of a promissory note, evidence of presentation and demand upon all must be given to bind the indorser. Bank of Red Oak v. Orvis, 40

Gates v. Beecher, 60 N. Y. 539;
Gates v. Beecher, 60 N. Y. 518; s. c.,
19 Am. Rep. 207; 2 Cent. L. J. 547; 14
Am. L. Reg. (N. S.) 440.

The Rule that if the Makers of a Joint and Several Note are Not Partners, a demand in order to charge the indorser must be made of each maker, applies where one maker is the principal debtor and the others sureties; unless the rela-tion of the makers to each other appears on the face of the note, or the indorser is proved to have had knowledge of it. Britt v. Lawson, 15 Hun (N. Y.),

(f) Bank Officer.—Where a note is payable at a bank, a demand there of one apparently in charge of its affairs as president, cashier, or agent, if the maker is not present, is sufficient; the holder is under no obligation to present it elsewhere, nor personally to the maker.1

(g) Of Corporation.—g'. Itself.—A bill drawn or a note made by a corporation may probably be presented to the corporation

itself for acceptance or payment.2

g², Agent.—A demand made on an agent of a corporation duly authorized in the premises is sufficient, and will charge indorsers.3

(h) Assignee.—A demand of payment upon the assignee of an insolvent firm, for the benefit of their creditors, of a note made by the firm, is not a sufficient demand to hold the indorser.4

(5) What Demandable.—A depositor of current funds has a right to draw current funds, though after the deposit they had depreciated; otherwise as to a deposit of depreciated paper.5

If a draft does not specify the kind of money in which it is payable, it is payable in legal-tender notes; and evidence cannot he introduced that it was understood and agreed that it should be paid in either gold or silver, nor can a mercantile usage make it payable in gold or silver.6

1. Barker v. Fullerton, 11 La. An. 25; Union Bank of La. v. Morgan, 2 La. An. 418; New Orleans & C. R. Co. v.

McKelvey, 2 La. An. 359.

As to Presentment to Agent, see also Phillips v. Poindexter, 18 Ala. 579; Decatur Branch Bank v. Hodges, 17 Ala. 42; Brown v. Turner, 15 Ala. 832; Gardner v. Bank of Tennessee, 1 Swan (Tenn.), 420. Vide supra (4), (b); and in-

fra, (g), g^2 . 2. Presentment of Note or Bill to a Company.—Thus a bill of exchange addressed to the building committee of the City Hotel in Memphis, and accepted by the City Hotel Company, was presented to the company for payment at maturity, and protested for non-payment. Notice was given to the indorser. Held, that there could not be a series of acceptors of the same bill of exchange, and that the bill was properly presented for acceptance to the hotel company, and also for payment, and the indorser chargeable on due notice of the protest. Rice v. Ragland, 10 Humph. (Tenn.) 545; s. c., 53 Am. Dec. 736.

3. Commercial Bank v. St. Croix Manf. Co., 23 Me. 280; Casco Bank v. Mussey, 19 Me. 20; Varner v. Nobleborough, 2 Me. (2 Greenl.) 125; s. c., 11

Am. Dec. 48.

Bill Drawn by Manufacturing Company on its Treasurer .- If an incorporated manufacturing company by their agent draw a bill upon their treasurer, and indorse the same, a demand upon him and his refusal to make a payment have the effects against the company in order to charge them as indorsers of both demand and notice. Commercial Bank v. St. and notice. Commercial B Croix Manf. Co., 23 Me. 280.

An Order Drawn on a Town Treasurer by Selectmen must be presented to the treasurer for payment before an action can be maintained on it; but perhaps it is not necessary to give notice of nonpayment, etc., to the selectmen. Varner v. Nobleborough, 2 Me. (2 Greenl.) 125; s. c., 11 Am. Dec. 48.

Note of Standing Committee of a Parish. -It is sufficient to charge the indorser of a note, signed by the standing committee of a parish, to prove a demand on the committee and notice of such demand on the indorser. Casco Bank v. Mussey, 19 Me. 20. A demand on the treasurer is unnecessary, the parish being under obligation to pay within the time limited Id. by their notes.

4. Armstrong v. Thruston, 11 Md. 148.

5. Willetts v. Paine, 43 Ill. 432.
6. Langenberger v. Kroeger, 48 Cal.
147; s. c., 17 Am. Rep. 418.
A Demand of Payment in Gold Coin,

whether by a notary or the holder, is not sufficient to charge the drawer. Langenberger v. Kroeger, 48 Cal. 147.

A draft made payable in "current funds" cannot be paid in depreciated bank currency, and therefore a demand of payment in bank notes which are current at a certain bank is sufficient.1

- (6) Generally.—A protest is not necessary, by the law-merchant to fix the liabilities of the parties to an inland bill. A demand of acceptance or payment and notice of refusal is sufficient. But to recover damages on such a bill it must be protested, and that fact averred in the declaration.2
- 4. Incidents Attending the Demand.—An acceptor supra protest, for the honor of the first indorser, may require, as a condition of payment, that the holder shall indorse the bill to him. 3 Upon payment of a promissory note, the maker is entitled to have the note given up to him; 4 but where the holder of a note accepts a draft or check in payment, he is not bound to give up the note before payment of the draft or check.⁵ A bill or note when presented for payment must be paid in coin, or current bank funds. Thus it has been said that a banker upon whom a certified check is drawn cannot, when it is presented, set off the indebtedness of the holder against the check.6
- 5. Waiver.—a. WHAT CONSTITUTES.—(1) Waiver of Protest, etc. -Waiver of protest includes waiver of demand and notice of refusal; and a waiver of demand of payment at the maturity of a

the absence of evidence to the contrary, the presumption is that a notary de-mands payment of a draft in the currency in which it appears on its face to be made payable.

1. Marc v. Kupfer, 34 Ill. 286. On Note Payable in Ready-made Clothing, the payee has no right to demand a garment which has been made for a customer at a stipulated price. Bloomer, 20 Wend. (N. Y.) 196.

Knott v. Venable, 42 Ala. 186.
 Freeman v. Perot, 2 Wash. C. C.

485.

4. Stone v. Clough, 41 N. H. 290.

5. Smith v. Harper, 5 Cal. 329. Indorser Paying Bill—Rights of.—Ordinarily, the indorser on paying the draft is entitled to its possession, that he may have his remedy against the acceptor; but where the acceptor has by payment discharged all his liability thereon, there can be no such remedy, and the rule does not apply. So held where the State paid a canal commissioner's draft, without paying certain interest to a bank that had discounted the draft for the payee, and surrendered it to the State, and permitted it to be stamped "paid," though the payee was liable to pay an assignee the interest. Streever v. Bank of Ft. Edward, 34 N. Y. 413.

6. Browne v. Leckie, 43 Ill. 497.
7. Baker v. Scott, 29 Kan. 139; s. c.,
44 Am. Rep. 628; Wolford v. Andrews,
29 Minn. 250; s. c., 43 Am. Rep. 201;
First Nat. Bank of Lancaster v. Hartman (Pa.), I Cent. Rep. 130.

Waiver of "Protest and Notice" on

any bill or note waives demand. Baker v. Scott, 29 Kan. 139; s. c., 44 Am. Rep.

628; Wolford v. Andrews, 29 Minn. 250; s. c., 43 Am. Rep. 201. The Signification of the Word "Protest" has been extended by general usage so as to include all acts which are by law necessary to charge an indorser. Hence the phrase "protest waived," when applied to a promissory note, means that both demand and notice are waived. Carpenter v. Reynolds, 42 Miss. 807.

Where there was no evidence that protest was necessary to hold the indorser, the word "protest" in a waiver by the indorser means notice of demand and re-Johnson v. Parsons, 140 Mass. fusal.

173. In the absence of evidence that a protest of a promissory note is necessary to hold an indorser, a waiver of protest by him may be found to mean a waiver of notice of demand on the maker, and of his refusal to pay. Johnson v. Parsons, 140 Mass, 173.

note is also a waiver of notice of non-payment. A waiver of protest and notice by an indorser, made at the place of payment at the moment of maturity, will dispense with proof of other

demand.2

(2) Any Language Calculated to Induce Omission of.—A waiver by the indorser of negotiable paper, of demand upon the maker, and of notice of non-payment, may be by implication from his acts. as well as by express words. 3 Any language calculated to induce the holder not to make demand or protest is sufficient to constitute a waiver thereof.4

1. Dye v. Scott, 35 Ohio St. 194; s. c.,

35 Am. Rep. 604; 9 Cent. L. J. 439. 2. O'Leary v. Martin, 21 La. An. 389. Waiver of Protest and Notice on Day when Instrument Matures .- Where the indorser, on the day the note came due, indorsed thereon a written waiver of "notice of protest for non-payment in this case;" and on the same day demand was made at the banking-house, where answer was made that the drawees had no funds there,—held, that he could not complain, in a suit against him by indorsees, that no sufficient demand had been made; and that it was not error in the court to instruct the jury that, under the facts of the case, there was a sub-stantial demand made, and that the plaintiffs were entitled to recover. Scull v. Mason, 43 Pa. St. 99.

3. Sheldon v. Horton, 43 N. Y. 93;

 S. Sieldon & Holton, 43 N. 1. 93,
 S. C., 3 Am. Rep. 669.
 Seldner v. Mount Jackson Nat.
 Bank, 66 Md. 488; s. c.. 8 Atl. R. 262; 6
 Cent. Rep. 478. See Hayes v. Werner,
 Conn. 246; Cheshire v. Taylor, 29 Iowa, 492; Emery υ. Hobson, 62 Me. 578; s. c., 16 Am. Rep. 513; Fuller υ. McDonald, 8 Me. (8 Greenl.) 213; s. c., 23 Am. Dec. 499; Corner v. Pratt, 138 Mass. 446; Woodman v. Thurston, 62 Mass. (8 Cush.) 157; Barker v. Parker, 23 Mass. (6 Pick.) 80; Parsons v. Dickinson, 23 Mich. 56; Whitney v. Abbott, 5 N. H. 378; Hudson v. Wolcott, 39 Ohio Ohio St. 526; Moyer's App., 87 Pa. St. 129; Yeager v. Farwell, 80 U.S. (13 Wall.) 6; bk. 20, L. Ed. 476; Sigerson v. Mathews, 61 U.S. (20 How.) 496; bk. 15, L. Ed. 989; Union Bank v. Hyde, 19 U. S. (6 Wheat.) 572; bk. 5, L. Ed.

Where the Party Requested the Holder not to Protest the Note, as it would be paid at maturity, held to be a waiver of demand and notice. Seldner v. Mount Jackson Nat. Bank, 66 Md. 488; s. c., 6 Cent.

Rep. 478; 8 Atl. Rep. 262. And where, on the last day of grace, the indorser wrote to the holder of the note that the maker was unable to pay the note, and added, "but we hold ourselves responsible for its payment, and shall see it done at an early day;" held, that such letter was a waiver of demand and notice. Yeager v. Farwell, 80 U. S. (13 Wall.) 6;

bk. 20, L. Ed. 476.

Totidem Verbis Not Necessary.—The supreme court of Maryland say in the recent case of Seldner v. Mount Jackson Nat. Bank, supra, that "it is not necessary that the waiver should be expressed in totidem verbis; it matters not what particular language is used, provided it plainly appears that the indorser meant to dispense with the demand and notice. Emery v. Hobson, 62 Me. 578; Fuller v. McDonald, 8 Me. 213; s. c., 23 Am. Dec. 499; Woodman v. Thurston, 62 Mass. (8 Cush.) 157. It has been held in many cases that any language calculated to induce the holder not to make a demand or protest is sufficient. Boyd v. Bank of Toledo, 32 Ohio St. 526; Moyer's App., 87 Pa. St. 129.

In Sigerson v. Mathews, 61 U. S. (20 How.) 496; bk. 15. L. Ed. 989, where the party told the holder not to protest the note, as it should be paid at maturity, this was held to be a waiver of demand

and notice.

So in Whitney v. Abbott, 5 N. H. 378, where the indorser, being informed that the maker had failed, told the holder there would be no trouble about it, and that he would pay it.

And again, in Barker v. Parker, 23 Mass. (6 Pick.) 80, where, in response to

inquiry by the holder, the indorser told him that it would be of no use to call upon the maker, it was held that demand and notice were waived.

A Statement by the Indorser to the

holder that he expects to have to pay the note, coupled with a request to con-

(3) Injunction.—Where the collection of indorsed notes had been enjoined by bill on the part of the maker and indorser before maturity, and the holder is excused from demand and notice as to such indorser, it would be idle to demand what he was forbidden by such injunction to receive.1

(4) Promise to Pay After Dishonor.—An oral promise by the indorser of a promissory note to pay the same, made, without being misled, after maturity of the note, and with knowledge that there had been no demand for payment on the maker, or notice of non-

tinue trying to collect it of the maker. will be deemed a waiver of the indorser's defence of want of due notice. Parsons

v. Dickinson, 23 Mich. 56.

Where, in response to inquiry by the holder, the indorser told him it would be no use to call upon the maker, held, demand and notice were waived. Seldner v. Mount Jackson Nat. Bank, 66 Md. 488; s. c., 6 Cent. Rep. 478; 8 Atl. R. 262.

Ignorance of Effect of Request for De-lay.—An indorser's liability is not affected by his ignorance of the facts that his request, made after maturity, to delay suit on the note, is a waiver of proper demand, and notice that no consideration is necessary to support the waiver. Cheshire v. Taylor, 29 Iowa,

Waiver of Demand by Extension of Time. -The holder of a promissory note, just previous to its maturity, sought an interview with the indorser, showed him the note, stated that "the maker wanted it to remain another year," and asked him if he was willing. The indorser replied that he was willing to let it remain; that it was a good note. *Held*, (I) that these circumstances implied a waiver of demand and notice at maturity, and their omission did not discharge the indorser. (2) That under these circumstances, the waiver was complete, independently of the question whether an agreement between the maker and holder for an extension for one year on the note was or In such cases the liawas not made. bility of the indorser becomes by the waiver absolute on the maturity of the note, and no subsequent demand and notice, at the expiration of the year of extension or at any time are necessary. Sheldon v. Horton, 43 N. Y. 93; s. c., 3 Am. Rep. 669.

Waiver by Telegram.—An indorser, on

the day of the note's maturity, telegraphed to the holder to wait until the maker could be seen by the indorser. The indorser afterwards promised to pay.

Held, that a finding of a waiver of demand and notice was justified. Corner

v. Pratt, 138 Mass. 446.
A telegram sent by a partner to the collecting bank, to pay the note and save protest, and draw on him, in reply to an inquiry made by such bank of the firm. is sufficient waiver of demand. Seldner v. Mount Jackson Nat. Bank, 66 Md. 488; s. c., 6 Cent. Rep. 478; 8 Atl. R. 262.

On Demand Note .- While a negotiable note payable on demand is by statute dishonored at the end of four months if not paid, yet where such note is on annual or semi-annual interest, it will be presumed in the absence of evidence to the contrary that the indorser made his indorsement with no expectation that demand of payment would be made at the end of four months, and therefore with a waiver of such demand. Haves v. Werner, 45 Conn. 246.

Transfer of Past-due Note-Evidence of Waiver .- On a transfer by indorsement of a past-due note, a waiver of demand and notice may be shown by evidence that both indorser and indorsee were informed by the maker that he was not then able to pay it, but thought he might in thirty days. Hudson v. Wolcott, 39 Ohio St. 618.

Parol Evidence to Explain Equivocal Waiver.—Where an indorser agreed in writing that if his notes should not be protested, he would consider himself bound in the same manner as if legally protested this was held to be equivocal; and parol evidence was admissible to show that, by the understanding of both parties, this writing dispensed with demand and notice. Union Bank v. Hyde, 19 U. S. (6 Wheat.) 572; bk. 5, L. Ed. 333.

1. Williams v. Bartlett, 4 Lea (Tenn.),

620; s. c., 10 Cent. L. J. 377.
Where Injunction was Served Upon a Bank a half hour after it was opened for business, by which its operations were suspended, it was held that the holder of each check received after bankpayment given to him as indorser, and of all other material facts. is a waiver of the want of demand and notice and renders him liable on the note.1

(5) Guaranty of Payment.—Where payee on transfer guaranties to pay, if not collected of maker by due course of law, and also waives notice of demand, demand as well as notice is waived.2.

(6) Taking Security.—The taking of security by the indorser at

ing hours of the day before was excused from presentment. Lovett v. Cornwell, from presentment.

6 Wend. (N. Y.) 369.

1. Matthews v. Allen, 82 Mass. (16 Gray) 594; s. c., 77 Am. Dec. 430. See Hazard v. White, 26 Ark. 155; Hayes v. Hazard v. White, 20 Art. 155, Hayes werner, 45 Conn. 246; Harrison v. Bailey, 99 Mass. 620; Ethridge v. Bond, 3 T. & C. (N. Y.) 262; Fell v. Dial, 14 S. C. 247; Ford v. Dallam, 3 Coldw. (Tenn.) 67. Pugh v. McCormick, 81 U. S. (14 Wall.) 361; bk. 20, L. Ed. 789; Sigerson v. Mathews, 61 U.S. (20 How.)496; bk. 15, L. Mathews, 01 U.S. (20 How.)490; bk. 15, L. Ed. 989; Reynolds v. Douglass, 37 U.S. (12 Pet.) 497; bk. 9, L. Ed. 1171; Thornton v. Wynn, 25 U.S. (12 Wheat.) 183; bk. 6, L. Ed. 595; Donaldson v. Means, 4 U.S. (4 Dall.) 109; bk. 1, L. Ed. 762.

An Unconditional Promise by the In-

dorser of a bill to pay it, or an acknowledgment of his liability, and knowledge of his discharge, by the laches of the holder, will amount to an implied waiver of due notice of a demand of the drawer, acceptor, or maker. Pugh v. McCormick, 81 U. S. (14 Wall.) 361; bk. 20, L. Ed. 780; Sigerson v. Mathews, 61 U.S. (20 How.) 496; bk. 15, L. Ed. 989; Thornton v. Wynn, 25 U. S. (12 Wheat) 183; bk. 6, L. Ed. 762; Donaldson v. Means, 4 U. S. (4 Dall.) 109; bk. 1, L. Ed. 762. But in order to make the indorser of a bill liable to the holder, after a failure to make demand and to give not tice, there must be an acknowledgmenof the debt, and a promise to pay it, with a knowledge that he is discharged from payment for want of notice. Ford v. Dallam, 3 Coldw. (Tenn.) 67. And when such an indorser afterwards promised to pay the note, not knowing at the time that demand had not been made, but with no feason to suppose that it had, and in a state of indifference on the subject, held, that if not in itself a waiver of such demand, it was strong evidence of an intention at the time of the indorsement to waive demand, and went strongly to fortify the presumption arising on the face of the note. Hayes v. Werner, 45 Conn.

Promise to See Note Paid. —A party to

a note entitled to notice may waive the notice by a promise to see it paid, or an acknowledgment that it must be paid, or a promise that "he will set the matter to rights," or by a qualified promise, having knowledge of the laches of the holder. Reynolds v. Douglass, 37 U. S. (12 Pet.)

497; bk. 9, L. Ed. 1171.

A promissory note made by M. payable to the order of B. was indorsed by B., and not being paid at maturity was protested, B. having notice of protest. then agreed with the holders that if they would take a note in the same form and so extend the time of payment, he would see that it should be paid at maturity. At that time M. was insolvent. *Held*, that he was not entitled to notice of nonpayment of the new note in order to Ethridge v. Bond, 3 T. & charge him. C. (N. Y.) 262.

Promise to Pay Note. - An unconditional promise by the indorser of a promissory note, made with full knowledge of the facts by which he is released at law, to pay the same, operates as an implied waiver of demand and notice, and a promise to pay, after maturity, is at least presumptive evidence of demand and notice. Hazard v. White, 26 Ark. 155.
In an action by the indorsee against

the indorser, evidence that after the note fell due the defendant promised the plaintiff to pay it is admissible with other evidence as tending to show a waiver of demand and notice. Harrison v. Bailey,

99 Mass. 620.

Part Payment of Over due Note in Merchandise. - Where the indorser of an unpaid over-due note arranged with the holder to furnish a steam-boiler in part payment thereof, and also promised to pay every cent of the money, held, a waiver of demand and notice. The question for the jury in such case is, not what the indorser intended by his words, but whether what he said amounted to an admission of his liability. Fell v. Dial,

14 S. C. 247.2. City Savings Bank v. Hopson, 53 Conn. 453; Backus v. Shepherd, II Wend. (N. Y.) 629.

the time of indorsement is not in itself a waiver of demand and notice, but it is evidence thereof and goes to fortify the presumption arising on the face of the note.1

(7) Presumption as to Knowledge of Facts to Discharge.—Where the note is of a corporation, and the indorser is its treasurer, it will be presumed that he had knowledge that no demand had been

made or notice given.2

b. WHAT WILL NOT CONSTITUTE.—(1) Fraud, When.—Where a bona fide indorsee of a negotiable note, after becoming such indorsee, acquires knowledge of a fraud practised by the pavee upon the maker in obtaining the note, which fraud, however, could not be made a defence by the maker against such indorsee, the subse quent indorsement of the note by him, without communicating such knowledge to his indorsee, does not excuse demand and notice in order to charge the indorser.3

(2) Taking Security, When.—The indorser of a promissory note by taking security from the maker does not waive demand upon

the maker and notice of non-payment.4

1. Hayes v. Werner, 45 Conn. 246.
2. Matthews v. Allen, \$2 Mass. (16 Gray) 594; s. c., 77 Am. Dec. 430.
3. Perkins v. White, 36 Ohio St. 530;

3. Perkins v. White, 36 Ohio St. 530; s. c., 12 Cent. L. J. 263.

4. Whitier v. Collins (R. I.), I New Eng. Rep. 135. See Holland v. Turner, 10 Conn. 308; Haskell v. Boardman, 90 Mass. (8 Allen) 38; Creamer v. Perry, 34 Mass. (17 Pick.) 332; s. c., 27 Am. Dec. 297; Moses v. Ela, 43 N. H. 557; Woodman v. Eastman, 10 N. H. 359; Seacord v. Miller, 13 N. Y. 55; Denny v. Palmer, 5 Ired. (N. C.) L. 610; Kramer v. Sandford 4 Watts & S. (Pa.) 228 s. c. v. Sandford, 4 Watts & S. (Pa.) 328; s. c., 39 Am. Dec. 192; Wilson v. Senier, 14 Wis. 380.

Rights and Liabilities of Indorsers Who Are Secured .- In Whittier v. Collins, supra, after referring to the authorities above cited, the court say: "We think the weight of authority is with these We also think that they are cor-The general rule of an rect in principle. indorser's liability is so well understood in commercial circles that no exception should be engrafted upon it which is not required by reason or necessity. Indorsements of negotiable paper have become such a necessary part of business affairs that the rules relating to them should be as simple and as stable as possible. If they should be hedged about with unreasonable or unnecessary exceptions the plain man would become bewildered, and the law, instead of showing a straight path of conduct, would entangle him in a thicket of unexpected liabilities.

Why should the receipt of security make an exception to the rule that an indorser is entitled to notice of non-payment? In said to the maker, "I will hold this to indemnify me in case I become liable to pay your note." Why should it be said that he thereby becomes liable to pay it? This would change his contract and character from that of an indorser to that of surety or joint maker. If he has re-ceived funds for the express purpose of paying the note, or if he has taken the whole of the maker's property for security, reasons for holding him liable have been stated; but those reasons do not apply in a case like the one before us. The indorser's liability at the outset was contingent; to guard against the contingent liability he took security; we do not see how the liability thereby became absolute. It is said that the reason for the rule requiring notice to the indorsers is to enable them to proceed at once to collect from the maker and thus secure themselves; that if the indorser is secured he can lose nothing, and the reason for the rule failing, the rule itself does not apply. But this does not follow. An indorser receiving no notice of non-payment may think the note is paid; or may be wrongfully informed that it is paid, and surrender the security, only to learn later, if this were the doctrine, that he has waived notice and is still liable without his security. Again, the security he supposed to be good may be worthless. Moreover, if the fact that. (3) Request Not to Press Note.—If, after the time for demand and notice has passed, the indorser of a promissory note merely requests the holder not to press the note against the maker, he does not thereby waive demand and notice.¹

the indorser would eventually lose nothing is to affect his liability, the solvency of the maker, from whom the indorser could eventually recover, might be shown with equal reason, as a ground to hold the indorser liable. The liability of the indorser is not dependent upon his ultimate loss or reimbursement, but upon the rule of mercantile law, and hence it does not depend upon the fact of security or no security."

Where Indorser is Secured that no presentment is required, is maintained by some writers and authorities. See Mead v. Small, 2 Me. (2 Greenl.) 207; s. c., II Am. Dec. 62; Develing v. Ferris, IS Story Prom. Notes (7th Ed.) 113; Story Prom. Notes (7th Ed.) sec. 281.

Judge Story says, bec. cit., that "The receiving of security by the indorser before or at the time of the maturity of the note is an indemnity or payment thereof. In such a case, if the security or indemnity be a full security or indemnity for the amount of the note, it is plain that the indorser can receive no damage from the want of a due presentment." A similar statement is made in 3 Kent Com. (12th Ed.) 113, and the same cases are cited as authority in both books.

Rhode Island Doctrine.-This doctrine is criticised, the cases reviewed, and a contrary opinion reached by the supreme court of Rhode Island in the recent case of Whittier v. Collins, supra. The court say in referring to the doctrine as laid down by Story and Kent as above given:
"It will be seen, however, upon examination, that the cases can hardly be regarded as authority for the statements of the distinguished writers. The doctrine seems to have had its origin in Corney v. Da Costa, I Esp. 302, a decision at nisi prius. An insolvent had made a composition with his creditors, but, to avoid the expense of a conveyance to the trustees, it was agreed that he should give his notes, indorsed by the defendant, the latter taking a transfer of the debtor's property, to the amount of the composition. Presumably the transfer covered the entire property of the debtor, although this is not stated, but the decision seems to rest upon the fact of a primary undertaking and liability on the part of the defendant, by reason of his agreement with the creditors. rather than upon his liability as a secured indorser. Indeed, he is not referred to as an indorser by the court. He seems to have been treated as a joint maker in fact, though an indorser in form. The case, therefore, is far from supporting the proposition which is quoted above, tel v. Tureaud's Estate, 6 Mart. (La.) N. S. 118, is a case of similar character. earliest and most frequently quoted case in the country is that of Bond v. Farnham. 5 Mass. 170; s. c., 4 Am. Dec. 47, which was a typical case of another class. point decided was that when an indorser takes for his indemnity all of the maker's property, thereby putting it out of his power to pay the note, he stands in the shoes of the maker, upon whom a demand would be fruitless, and a waiver of notice is consequently implied. It is to be noted. in this case that the waiver is emphatically stated to depend upon the transfer of the whole of the maker's estate, and not simply upon the fact that he received security. To exactly the same point are Duvall v. Farmers' Bank of Maryland, 9 Gill & J. (Md.) 31; Perry v. Green, 10 N. J. L. (4 Harr.) 61; s. c., 38 Am. Dec. 536; Mechanics' Bank of New York v. Griswold, 7 Wend. (N. Y.) 165; Watkins v. Crouch, 5 Leigh (Va.), 522. In Andrews v. Boyd, 44 Mass. (3 Metc.) 434, the indorser was held liable upon an express agreement. In Prentiss v. Danielson, 5 Conn. 175, it was held that indemnity given for other notes did not apply to the one in suit, and hence the indorser was not liable. In Holman v. Whiting, 19 Ala. 703, it was determined that the indorser was not indemnified and not liable. Lewis v. Kramer, 3 Md. 265, held that ' receiving a sum less than the amount of the note will not necessarily operate as a waiver,' but that it might be recovered by the holder against the indorser as money had and received to the holder's use, pro tanto, in discharge of the note. While there are numerous dicta in these cases to the effect that any taking of a security is a waiver of demand and notice, the cases themselves do not decide nor even support the proposition.

1. Whittier v. Collins (R. I.), I New Eng. Rep. 135.

(4) Stipulation to Waive Notice.—Stipulation by indorser to waive notice of demand of payment does not dispense with demand 1

(5) Promise to Pay After Dishonor with Knowledge of Facts.— A promise by an indorser to pay an overdue note must be made with full knowledge of any defect in the demand and notice, in order to amount to a waiver of such defect.2

(6) Instances.—The indorsement of a promissory note in blank, and an oral promise by the indorser to pay at maturity, is not a waiver of demand and notice.3 Neither would the fact that, before maturity, the indorser aided in collecting interest from the maker.4

An omission for a long series of years by an executor to demand, when due, interest payable, by the terms of a note, in semi-annual instalments, held in equity not to raise a presumption of a waiver.5

- c. WHEN MADE.—An indorser's right to demand and notice of non-payment may be waived before maturity, and such waiver, although without consideration, is binding.6 And a waiver of demand and notice is as effectual after as before the maturity of the note.7
- d. BINDS WHOM.—Where defendant indorsed and delivered to plaintiff notes made payable to their order, in the body of which it was specified that the "drawer and indorser jointly and severally

1. Backus v. Shipherd, II Wend. (N.Y.)

Waiver of Notice. - A stipulation by the indorser of a note to waive notice of demand and payment, does not dispense with the demand itself. Backus v. Ship-Judge Nelson says: "The first question raised in the case, I believe, has not been decided by this court; but as a general proposition, we have no hesitation in saying that a stipulation by the indorser of a note to waive notice of demand upon the maker, does not, according to the lawmerchant, dispense with the demand it-They are distinct acts, and each a condition precedent to the right of recov-ery by the holder. The indorser in waiving notice may rely upon an assurance or conviction that the note will be paid by the maker, is demanded when due. Berk-

2. First National Bank of Groton v. Crittenden, 2 T. & C. (N. Y.) 119.

When New Promise Not Binding.—A drawer's promise to pay an overdue check, without knowing the fact that it has not been duly presented to the bank for payment, is not binding upon him. Kelley v. Brown, 71 Mass. (5 Gray) 108. And a promise by the indorser to pay a note, made without knowledge of want of

demand and notice, is not binding. Crain

v. Colwell, 8 Johns. (N. Y.) 384.

A promise by A to pay the bill to B is not binding unless it appears that at the time of making such promise he knew that he had not been regularly charged; and the burden of proof is upon B to show that A had such knowledge. Hunt v. Wadleigh, 26 Me. 271; s. c., 45 Am. Dec. 108.

3. Isham v. McClure, 58 Iowa, 515.

4. Isham v. McClure, 58 Iowa, 515. 5. Rathbone v. Lyman, 8 R. I. 155

6. Coddington v. Davis, 3 Den. (N.Y.)

16; aff'md 1 N. Y. 186.
7. Rindge v. Kimball, 124 Mass. 209. Waiver After Dishonor .- An indorser may waive demand and notice, or proof of them, after dishonor as well as before. Where an indorser, learning from the maker that he could not pay, wrote on the last day of grace, to the holder, stating that maker could not pay, but that the indorser held himself responsible, held that he was liable on the ground of waiver, notwithstanding several days were required for transmission of the letter, and meantime, and independent of the letter, the holder had omitted to give timely notice of demand and non-payment. Yeager v. Farwell, 80 U.S. (13 Wall.) 6; bk. 20, L. Ed. 476.

waive presentment for payment, protest, and notice of protest and non-payment of this note." such waiver is operative against an indorser, and binds defendant as much as any other indorser.1

e. BENEFITS WHOM.—If the indorser of a note files with a trustee of the mortgage given to secure it a written waiver of demand and notice, the waiver inures to the benefit of the holder.2

f. Effect.—Satisfactory proof of waiver of demand, notice, and protest of a note is equivalent to a compliance with the require-

g. How MADE.—A waiver may be made orally or in writing.4

h. How Proved.—Since a waiver may be oral, consequently oral testimony is admissible to prove that the indorser, as between himself and the indorsee, at the time of indorsing a note in blank, waived demand and notice.5

1, Bryant v. Lord, 19 Minn. 397.

2. Riker v. A. & W. Sprague Manuf. Co., 14 R. I. 402.

8. Pugh v. McCormick, 81 U. S. (14 Wall.) 361; bk. 20, L. Ed. 789.
Excuse of Waiver.—Waiver of demand of payment and notice of non-payment contained on the face of a promissory note does not change the relative rights of parties thereto. Core v. Wilson, 40

4. Oral Waiver .- Waiver of "protest" by an indorser before maturity may be oral, and dispenses with demand and notice. Annville Nat. Bank v. Kettering, 106 Pa. St. 531; s. c , 51 Am. Rep. 536.

In Maine.—As the provisions of Maine laws of 1868, ch. 1, 152, requiring waivers of demand and notice by indorsers of note and, bills to be in writing, and signed, is in express terms made prospective; it cannot affect the rights of parties under antecedent agreements. Thomas Mayo, 56 Me. 40.

5. Dye v. Scott, 35 Ohio St. 194; s. c.,

Verbal Waiver.—In Dye v. Scott, supra, the court say: "There are authorities which hold that the contract which the law implies or presumes in such cases is as conclusive and certain as if written out in full, and that parol evidence is not admissible to vary or contradict it. reason given for requiring such strictness, in substance, is that the indorsement adds to the value of the instrument by giving it currency in commercial transactions; and that its value would be impaired, and circulation restricted, by admitting oral testimony to vary or contradict the terms of the contract which the law presumes or implies from the indorsement, even as between indorser and indorsee. See Dale v. Gear, 38 Conn. 15; s. c., 9 Am. Rep. 353; Bartlett v. Lee, 33 Ga. 491; Barnard v. Gaslin, 23 Minn. 192; Bank of United States v. Dunn, 31 U. S. (6 Pet.) 51; bk. 8, L. Ed. 316. While we sanction the doctrine that upholds the credit and negotiability of commercial paper in the hands of any bona fide holder for value, we do not, in order to accomplish this, see the necessity of carrying the doctrine quite so far as it is carried in the cases above cited. The only purpose for which oral testimony was introduced on the trial was to prove that the indorser, as between himself and his immediate indorsee, waived the usual demand and notice at the maturity of the note; and it is unnecessary for us to go further in this case than to hold, as we do, that oral testimony was admissible for that purpose. This holding is fully sustained by authorities."

In Daniels on Negotiable Instruments, sec. 1093, it is said: "It is conceded on all sides that a verbal waiver is as effectual as a written one; and the weight of authority sustains the proposition that a parol promise to pay the note absolutely, made by the indorser at the time he indorses it, or a promise to pay if the maker does not, or a verbal agreement between the parties that payment should not be demanded until after maturity, is admissible to prove a waiver of demand and notice." In vol. i., p. 584 of Marsons on Notes and Bills it is said: "Indeed, the law seems quite clearly settled that a parol promise to pay, made by the indorser to the indorsee, at the time of, or subsequent to, the indorsement; an agreement to extend the time of payment; a request made by the indorser for forbearance; . . . all have respectively been considered as a waiver of demand and

- i. By Whom.—A waiver may be made by the maker, and where such maker is a partnership, after dissolution of the partnership. and after notice thereof, a partner may waive demand and notice of non-payment of a note indorsed by, and discounted for the firm.1
- i. A QUESTION FOR WHOM.—Whether the circumstances of any particular case are to be treated as a waiver of demand and notice is always a question of law for the court.2
- 6. Notice. -a. NECESSITY.—Notice of non-acceptance and nonpayment is required to be given in order to fix the liability of indorsers and drawer; 3 and if the prevalence of a war and consequent suspension of mail service and commercial intercourse prevents the service of notice of protest on maturity of the note. the holder must give the indorser notice of dishonor within a reason-

notice." See also Lane v. Steward, 20 Me. 98; Fuller v. McDonald, 8 Me. (8 Greenl.) 213; s. c., 23 Am. Dec. 499; Boyd v. Cleveland, 21 Mass. (4 Pick.) 525; Barclay v. Weaver, 19 Pa. St. 396; s. c., 57 Am. Dec. 661; Edw. on B. & N. 634; Story on Prom. N. sec. 148.

1. Seldner v. Mount Jackson Nat.

Bank, 66 Md. 488.

2. Orear v. McDonald, 9 Gill (Md.),

350; s. c., 52 Am. Dec. 703.

Question for Court .- If the facts on which the question arises are admitted, or are undeniable, then the question becomes exclusively a matter of law to be pronounced by the court; but if the facts are controverted, or the proof is equivocal or contradictory, then it becomes a mixed question of law and fact, in which case the court hypothetically instruct the jury as to the law. Orear v. McDonald, 9 Gill (Md.), 350; s. c., 52 Am. Dec.

3. Field v. New Orleans D. N. Co., 21 La. An. 24; Rice v. Wesson, 52 Mass. (11 Metc.) 400; Glasgow v. Copeland, 8 Mo. 268; Purcell v. Allemong, 22 Gratt. (Va.) 739; Mitchell v. Degrand, I Mason

C. C. 176.

Inability to Present Check. - If the holder of a check is not able to present the check by reason of the removal of the bank and the condition of the country, he should give notice of the fact to the drawer, or he is not liable. Purcell v. Allemong, 22 Gratt. (Va.) 739.

Of Note Payable on Demand. — To

charge an indorser of a note payable on demand, the indorsee must give him notice of non-payment upon the first demand on the maker, although such demand was made at an earlier day than was necessary in order to render the indorser liable on his indorsement, and although the indorsee gives the indorser notice of non-payment upon the second demand on the maker, which would have been made in season to charge the indorser if no previous demand had been made. Rice v. Wesson, 51 Mass. (11

Metc.) 400.

Of Bill Payable on Demand.—When, upon a bill payable so many days after sight, the holder presents the bill for acceptance, and elects to consider what passes on such presentment as a nonacceptance, he is bound by such election as to all the other parties to the bill. He must give due notice to them of the dishonor accordingly, otherwise they will be discharged; and a subsequent acceptance by the drawee, on the next day, will not be sufficient to charge the drawer, in case no such notice is given, and the drawee fails before the day of payment. Mitchell v. Degrand, I Mason C. C. 176.

To Fix Liability of Stockholder.-A stockholder in a corporation is not, as such merely, and irrespective of any personal management of its affairs, chargeable with notice of the dishonor of a note held by the company, so as to excuse service of notice upon him as an indorser of the note. Field v. New Orleans Delta

N. Co., 21 La. An. 24. Under Georgia Code—Note Payable at a Bank.—Under the provision of section 2739 of the Georgia Code, the indorsers of a bill or note, not to be negotiated at a chartered bank, are not entitled to notice of non-payment or non-acceptance, to charge them as indorsers. Gilbert v. Seymour, 44 Ga. 63. Compare Frank v. Longstreet, 44 Ga. 178.

able time after the close of the war and the resumption of commercial intercourse.1

b. By Whom.—Demand should be made by the holder or his duly authorized agent; but the bank at which a note is made payable, or that has the note for collection, and a notary having it as agent for the owner, for the purpose of making demand and protest, are to be regarded as "holders" within the meaning of the rule prescribing the manner in which notice is to be given to indorsers upon non-payment.2

c. Sufficiency.—(1) As to Time.—Notice of non-acceptance or non-payment of a bill, or the non-payment of a note, must be given in a reasonable time, in order to charge the drawer or in-

dorser.3

(2) As to Form.—Notice of payment need not be in writing; a verbal notice is sufficient; 4 and a notice of protest of a note.

1. James v. Wade, 21 La. An. 548. 2. Manchester Bank v. Fellows, 28 N.

H. (8 Fost.) 302.

3. Dodge v. Bank of Kentucky, 2 A. K. Marsh. (Ky.) 616; Hager v. Boswell, K. Marsh. (Ky.) 616; Hager v. Boswell, 4 J. J. Marsh. (Ky.) 61; Philips v. Mc-Curdy, 1 Harr. & J. (Md.) 187; Ribble v. Jefferson, 10 N. J. L. (5 Halst.) 139; Bryden v. Bryden, 11 Johns. (N. Y.) 187; Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 304; s. c., 13 Wend. (N. Y.) 333; 27 Am. Dec. 182; London v. Howard, 2 Hayw. (N. C.) 332; Bank of North America v. McKnight, 1 Vestes (Pa.) 147; ica v. McKnight, I Yeates (Pa.), 147; Scarborough v. Harris, I Bay (S. C.), 177; Scarporougn v. Fiarris, 1 Day (S. C.), 177; s. c., I Am. Dec. 609; Stott v. Alexander, I Wash. (Va.) 331; United States v. Barker, 25 U. S. (12 Wheat.) 559; bk. 6, L. Ed. 728; Warder v. Carson, 2 U. S. (2 Dall.) 233; bk. I, L. Ed. 361; Mallory v. Kirwan, 2 U. S. (2 Dall.) 192; bk. I, J. Kiwali, 2 U. S. (2 Dali.) 192, bk. 1. L. Ed. 344; Steinmetz v. Currey, 1 U. S. (1 Dall.) 235; bk. 1. L. Ed. 111; United States v. Barker, 1 Paine C. C. 156; Den-niston v. Imbrie, 3 Wash. C. C. 396.

Notice of Non-payment of Note. - A note payable in Boston was protested there for non-payment. The indorsers residing in the State of Maine, a notice of its dishonor to the first indorser was transmitted to the second, who forwarded the same properly directed by the earliest mail of the next day. Held to be a seasonable notice, each indorser being entitled to one day to notify his preceding

indorser. Allen v. Avery, 47 Me. 287.

A Delay of Two Months, to give notice of protest for non-payment, is not unreasonable. United States v. Barker, I Paine C. C. 156.

Foreign Bill of Exchange. -- Where a bill drawn in this country on Europe has

been dishonored, notice must be sent by the first ship bound to any port of the United States; and it is not sufficient to send it by first ship for the port where the drawer and indorser reside. Fleming v. McClure, 1 Brev. (S. C.) 428; s. c., 2 Am. Dec. 671.

Notice on Last Day of Grace .- A notice served upon an indorser of a note, upon the last day of grace, after previous demand upon and refusal by the maker on the same day, is not premature. King v. Crowell, 61 Me. 244; s. c., 14 Am.

Rep. 560. 4. Gates v. Beecher, 60 N. Y. 518; s. 4. Gates v. Beecher, oo N. Y. 518; s. c., 19 Am. Rep. 207; 2 Cent. L. J. 547; 14 Am. L. Reg. 440; Cuyler v. Stevens, 4 Wend. (N. Y.) 566; Crosse v. Smith, 1 Maule & S. 545; Chitt. Bills, 285.

Requisites of Notice.—The notice of

dishonor to an indorser is only to be required to be such as will reasonably apprise him of the particular paper on which he is to be charged. Therefore in the absence of evidence to show that the indorser was misled, or that there was any other note to which it might apply, or notice which gave the maker's name, the date and amount of the note, the date when, the place where, and the person of whom demand was made, and the refusal to pay, was held sufficient, although it did not expressly state the time when the note came due. Gates v. Beecher, 60 N. Y. 518; s. c., 19 Am. Rep. 207; 2 Cent. L. J. 547; 14 Am. L. Reg. 440. But a notice to the indorsers that the note "had not been paid, and that they would be held responsible for the payment thereof," with no notice of demand on the maker, is not sufficient to charge them. Armstrong v. Thurston, 11 Md. 148.

partly printed and partly written, is sufficient, if it contain an accurate description of the note, although the official signature of

the notary be printed.1

(3) As to Manner.—Notice of demand and non-payment, to charge an indorser, should be served upon him personally, or left at his residence or place of business; he will not be bound by a notice left at a house where he is employed as clerk unless he actually receives it.2

(4) As to Person.—To be binding, the notice of demand and non-payment must be served on the proper person,3 and at a

proper place,4 and in due time.

(5) By Mail.—Notice of demand and non-payment, properly made by mail, is sufficient. But where there is no mail commu-

Becoming Special Bail, Sufficient Notice When -Where an indorser of a note became special bail for the maker in a previous suit against the maker for the note. held, that the indorser had sufficient notice of non-payment by the maker. Mc-Kinney v. Crawford, 8 Serg. & W. (Pa.)

1. Spalding v. Krutz, I Dill. C. C. 414. A Notary's Certificate of the protest of a note, in the usual form, contains all the information which is necessary to give an indorser, and sending him a copy of such certificate should, in the absence of any evidence by him, be deemed a sufficient notice. Gates v. Beecher, 60 N. Y. 518; s. c., 19 Am. Rep. 207; 2 Cent. L. J. 547; 14 Am. L. Reg. 440.

2. Bank of West Tennessee v. Davis,

5 Heisk. (Tenn.) 436. Sufficiency of a Notary's Certificate of Presentment of a draft for payment determined, in a case where the drawer was shown to have two places of business in Brooks v. Higby, II the same city.

Hun (N. Y.), 235.

3. Notice of Non-Payment where Indors er has Assigned for the Benefit of his Creditors .- Where an indorser of a promissory note assigns all his property for the benefit of his creditors before maturity, notice of the demand of payment and non-payment at maturity should be given to the indorser. House v. Vinton Co. Nat. Bank, 43 Ohio State, 346. s. c., I West, Rep. 155. Notice to the assignee is not sufficient. Id.

4. Partnership Note—Demand of Partner Away from Place of Business.—The

rule that service of notice of protest upon one member of a firm of indorsers is sufficient to bind the firm, does not extend so far as to warrant a notary in serving notice of protest on a partner living elsewhere, while he omits to notify a party residing in the town where the demand of payment is made. Hume v. Watt, 5 Kan. 34.

In what cases notice to one member of a firm who are indorsers of a bill or note will charge all of the firm. O'Leary v. Martin, 21 La. An. 389; Slocomb v. De

Lizardi, 21 La. An. 356.

5. Where Indorser Resides in Same City.-An indorser residing at the same place where the note is payable and dishonored is bound by a notice placed in the local post-office, provided he actually received it on the same day or succeeding day. If the place of business of an indorser is within the city where the note is payable and dishonored, but his residence is outside the city limits, notice of protest should be left at his place of business; though even then a notice sent through the post-office to his residence is sufficient if it is actually received by him, or by those having charge of his business house, on the same day or the next. Spalding v. Krutz. I Dill. C. C. 414. Compare Shelburne Falls National Bank v. Townsley, 102 Mass. 177; s. c., 3 Am. Rep. 445.

Where Indorser Resides Out of City.-Notice of the non-payment of such note, addressed to the indorser at his place of residence out of the city, and put into the post-office by nine o'clock A.M. on the next day after its dishonor, is sufficient, although the mail for the indorser's place of residence was, by the regulations of the post-office, closed daily at five o'clock A.M. West v. Brown, 6 Ohio St.

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nication between the place where the notice is deposited and where the indorser lives, the notice will not be sufficient.1

d. DILIGENCE.—Due diligence is always necessary to charge an indorser: and what is due diligence is a question for the court, to be determined from the particular circumstances of each case.2

e. WHERE SENT.—A notice of demand and non-payment should he sent to the usual address of the indorser; but the holder of a promissory note has a right to assume that the indorser of the note continues to live in the place where he resided at the time of the indorsement, and to act accordingly in taking the necessary steps to charge him, unless he has notice that the indorser has changed his residence.3

f. USAGE.—A demand and notice given according to the established custom of the place is sufficient. To constitute a usage of banks as to demand and notice of non-payment of negotiable paper, it must apply to a place rather than to a particular bank. It must be the rule of all the banks of the place, or it cannot con-

sistently be called a usage.4

g. DATE.—Any incorrect date affixed to a notice does not affect its validity. Thus a notice of protest for non-payment of a promissory note, personally delivered on the proper day, is not vitiated by being post-dated by mistake a day later, the mistake being one which could not have misled the indorser.5

- h. Effect.—The effect of giving notice of non-payment of a note or bill is to fix the liability of the indorser, and any subsequent agreement between the holder and indorser for forbearance or the extension of the time of payment will not discharge the liability fixed by such notice.6
- 1. See James v. Wade, 21 La. An. 548; Billgerry v. Branch, 19 Gratt. (Va.) 393. The fact that the holder went through the form of depositing notice in the post-office at the time when there was no mail communication will not save the right of action. James v. Wade, 21 La. An. 548.

Virginia Doctrine. - Notice of demand and refusal to pay was put into the postoffice at New Orleans in 1863, directed to the indorsers at Petersburg, Virginia. There was then no mail communication between the two cities. Held, that the notice was insufficient. Billgerry v.

Branch, 19 Gratt. (Va.) 393.

2. What Not Due Diligence-A Notarypublic was held not to have used due diligence to give an indorser notice of protest of a note payable in St. Louis, although, upon failing to find his address by consulting the bank offices, the city directory, and another indorser, he mailed in the city post office a notice to him,-a third indorser, residing in East

St. Louis, being accessible to inquiry, Gilchrist v. Donnell, 53 Mo. 591.

3. Ward v. Perrin, 54 Barb. (N. Y.) 89. Compare Peters v. Hobbs, 25 Ark. 67. 4. Adams v. Otterback, 56 U. S. (15 How.) 539; bk. 14, L. Ed. 805.

Custom of Merchants-South Carolina Doctrine.-The custom of merchants recognized by law in South Carolina, in relation to protests and notices of nonacceptance and non-payment of bills of exchange, is the same as exists in England; and evidence to establish a different usage in the State is inadmissible. Fleming v. McClure, I Brev. (S. C.) 428; s. c., 2 Am. Dec. 671.
5. Lennig v. Tobey, 4 Clark (Pa.),

275; s. c., Bright. (Pa.) 482.
6. Thus where the indorsee of a note, payable April 2, demanded payment of the maker on that day, and gave due notice to the indorser, after which the indorser, in consideration of forbearance to sue the maker, agreed in writing on the back of the note to be holden as in-

i. PROOF.—Proof of notice, either personal or by mail, may be made by the certificate of the notary who gave it. The notarial certificate is presumptive evidence of the truth of its contents? and this presumption will not be destroyed by the evidence of the notary that he might have directed the notice to a particular street, where the indorser did not reside.3

i. Ouestion of Law or Fact.—What is reasonable notice is a

question of law; whether given, of fact.4
7. Action.—a. MAINTAINABLE, WHERE.—Where a notice or demand is required, notice must be given or demand made before an action can be maintained. Thus, no action can be maintained on a certificate of deposit until demand is made, unless there be a conversion thereof or loss by negligence on the part of the depositary.6 Where a demand of payment is made by the holder of a note within banking hours, and payment is refused or neglected to be made. the holder is entitled to maintain his action for such dishonor.7

b. TIME WHEN BROUGHT.—An action on a promissory note will not lie until the last day of grace has expired. But an action may be maintained upon a note against the maker, where the writ

dorser until April 5, held, that the indorser's liability on the first indorsement being fixed, the second indorsement did not discharge that liability. Smith v. Hawkins. 6 Conn. 444.

1. See Dunn v. Devlin, 2 Daly (N. Y.).

2. Proving Demand or Notice. - Where there is no affidavit accompanying an answer by an indorser of a promissory note denying notice of presentment and non-payment, as provided by New York Laws of 1853, ch. 271, the notarial certificate is presumptive evidence of the truth of its contents. Dunn v. Devlin, 2 Daly (N. Y.), 122.
3. Dunn v. Devlin, 2 Daly (N. Y.),

4. Ferris v. Saxton, 4 N. J. L. (1

5. Smiley v. Fry, 100 N. Y. 262; Munger v. Albany City Nat. Bank, 85 N. Y. 580; Howell v. Adams, 68 N. Y. 314, aff'g s. c., 1 T. & C. (N. Y.) 425.

Action on Certificate of Deposit.—A

bank issuing a certificate of deposit, payable on its return, properly indorsed, is liable thereon to a bona fide holder to whom it was transferred seven years after its issue, notwithstanding payment thereof to the original holder. The certhereof to the original holder. The certificate is not dishonored until presented. National Bank of Fort Edward v. Washington Co. Nat. Bank, 5 Hun (N.Y.), 605.

6. Smiley v. Fry, 100 N. Y. 262.
7. Bank of United States v. Carneal,

27. U. S. (2 Pet.) 543; bk. 7, L. Ed.

513.
Diligence in Suing Maker.—The liability of an indorser on a promissory note falling due in 1862 or 1863 was fixed by bringing suit in 1865, at the second term of the court, after the courts were opened by the proclamation of provisional gov-ernor Hamilton, and by showing good reason for not bringing the suit the term before. Nor was it affected by the fact that the holder could have fixed it at an earlier day by demand, protest, and notice. McGary v. McKenzie, 38 Tex. tice. 216.

Action Against a Bank Teller. -An action may be maintained by the owner of a note against the teller of a bank for writing on the face thereof the words "payment stopped," in pencil, as an answer to a demand of payment on the day it became due. The rights of the parties to the note are in no way affected thereby. McKinley v. American Exchage Bank, 7 Robt. (N. Y.) 663.

8. Hogan v. Cuyler, 8 Cow. (N. Y.)

203; Thomas v. Shoemaker, 6 Watts & S. (Pa.) 179; Bevan v. Eldridge, 2 Miles (Pa.), 353; Smith v. Bythewood, I Rice (S. C.), 245; s. c., 33 Am. Dec. 3. Contra, Coleman v. Ewing, 4 Humph. (Tenn.) 241.

A Note Payable on Demand may be sued the day it is made, without grace. Smith v. Bythewood, I Rice (S. C.), 245; s. c., 33 Am. Dec. 3.

is made after sunset on the last day of grace, and is delivered to an officer on the next day, although there is no demand of payment before the writ is made.1

c. SUFFICIENCY OF DECLARATION.—The declaration, if in other respects sufficient, will be sufficient after verdict, although the allegation as to the date on which the note fell due is erroneous.

d. EXCUSE FOR NOT BRINGING.—An action must be brought with due diligence, unless there be a sufficient excuse for not bringing it. The request of the assignor to the holder not to sue the maker of a promissory note not governed by the law-merchant, without any consideration for the delay, is a reasonable and valid excuse for not bringing such suit.3

e. Defeated by Negligence.—Where the plaintiff has been guilty of gross negligence in bringing his action, the right to maintain it, as between the holder and indorser, will be defeated.4

f. EVIDENCE—(I) Admissibility.—It is a well-established rule of law that parol evidence of an oral contemporaneous agreement cannot be admitted to contradict a valid written instrument; because all previous conversations and verbal agreements are merged in the written agreement, and cannot be shown except for the purpose of constructing the terms of the written agreement.⁵ For

1. Butler v. Kimball, 5 Metc. (Mass.) 94. Premature Action.—But in Estes v. Tower, 102 Mass. 65; s. c., 3 Am. Rep. 430, which was an action on a promissory note entitled to grace, and not in terms made pavable at any specified place, the writ was made after sunset on the last day of grace, and real estate immediately attached thereon at fifteen minutes past six o'clock, without any previous demand and refusal of payment. It was held that the action was prematurely brought.

Commencement of Action. - In Hogan v. Cuyler, 8 Cow. (N.Y.), 203, the court say: "It is perfectly well settled that the issuing of the capias ad respondendum is, for all essential purposes, the commence-ment of a suit, and that the plaintiff's cause of action must exist at that time." Boyce v. Morgan, 3 Cai. (N. Y.) 133; Sowry v. Lawrence, 1 Cai. (N. Y.) 69, 72; Waring v. Yates, 10 Johns. (N. Y.) 119; Carpenter v. Butterfield, 3 Johns. Cas. (N. Y.) 145; Cheetham v. Lewis, 3 Johns. (N. Y.) 42; Bird v. Caritat, 2 Johns. (N. Y.) 42; Bird v. Caritat, 2 Johns. (N. Y.) 42; Bird v. Caritat, 2 Johns. (N. Y.) 346; s c, 3 Am. Dec. 433.

Same - Massachusetts Doctrine. - But the Supreme Judicial Court of Massachusetts say in Estes v. Tower, 102 Mass. 65, s. c., 3 Am. Rep. 439, that the making of the writ was no more to be deemed the commencement of the action than if the plaintiff, instead of keeping it in his own hands, had delivered it to an officer that night with instructions not to serve it until the next day, or had sent it to the officer, but it had not yet

reached him. Emerson v. White, 76 Mass. (10 Gray) 351; Seaver v. Lincoln, 38 Mass. (21 Pick.) 267; Swift v. Crocker, 38 Mass. (21 Pick.) 241.

2. Thus where the last day of grace fell on the 20th of the month and, in action on the note against indorsers, it was alleged that "when the said note became due and payable, according to the tenor and effect thereof, to wit, on the twentyeighth, etc., the said promissory note was duly presented," the declaration was held good after verdict. Wells v. Woodley, 6 Miss. (5 How.) 484.
3. Lowther v. Share, 44 Ind. 390.
4. In a suit by the assignee against the

assignor, on a note signed under the Kentucky statute, the assignee, holding the obligation fourteen months without suit, was guilty of gross negligence, and, not accounting for this delay, was not entitled to recourse against the assignor. M'Kinney v. M'Connel, I Bibb

(Ky.). 239. 5. Beckley v. Munson, 22 Conn. 299; Mann v. Smyser, 76 Ill. 365; Harlow v. Boswell, 15 Ill. 56; Cincinnati, U. & Ft. W. R. Co. v. Pearce, 28 Ind. 502; Mann. v. Independent School Dist., 52 Iowa, 130; Pilmer v. Branch of State Bank, 16 Iowa, 321; Jack v. Naber, 15 Iowa, 450; Stevens v. Haskell, 70 Me. 202; McFar-land v. Boston & L. R. R. Corp., 115 Mass. 103; Stackpole v. Arnold, 11 Mass. 30; s. c., 6 Am. Dec. 150; Peers v. Davis, 29 Mo. 184; Hill v. Syracuse, B. & N. Y. R. R. Co., 73 N. Y. 351; s. c., 29 Am.

this reason a parol agreement as to time of demand between maker and indorser is inadmissible.¹

(2) Sufficiency.—The general rules as to the sufficiency of evidence apply. Thus the uncontradicted testimony of a bank clerk. that a notice of protest had never been received by the bank, is sufficient to support a referee's finding to that effect, even though it is not shown whence the clerk derived his knowledge, or that his duties were such as to make him necessarily acquainted with the fact.2 But where the only evidence relied upon to establish due demand of payment of a promissory note payable at a bank was the protest of the notary, which did not state where the note had been presented for payment, the evidence was held to be insufficient to fix the liability of the indorser.3 The fact that the maker has successfully resisted a suit by the indorser upon the note is sufficient evidence of payment.⁴ And indorsing a bill payable at a day certain in a letter to the drawee, before maturity, and notice by the drawee to the holder that the bill is not accepted, is sufficient evidence of a presentment for acceptance and refusal.5

Rep. 163; Van Bokkelen v. Taylor, 62 N. Y. 105; Baker v. Higgins, 21 N. Y. 397; Bogert v. Cauman, Anth. N. P. (N. Y.) 170; Sayre v. Peck., I Barb. (N. Y.) 464; Hull v. Adams, I Hill (N. Y.), 601; Bayard v. Malcolm, I Johns. (N. Y.) 467; Stevens v. Cooper. I Johns. Ch. (N. Y.) 425; s. c., 7 Am. Dec. 499; Parkhurst v. Van Cortlandt, I Johns. Ch. (N. Y.) 274; Jarvis v. Palmer, 11 Paige Ch. (N. Y.) 650; Crosier v. Acer. 7 Paige Ch. (N. Y.) 137; Lowber v. Le Roy, 2 Sandf. (N. Y.) 202; Hagey v. Hill, 75 Pa. St. 108; s. c., 15 Am. Rep. 583; Ellmaker v. Franklin Fire Ins. Co., 5 Pa. St. 183; Reed v. Jones, 8 Wis. 393; Van Ness v. City of Washington. 29 U. S. (4 Pet.) 232; bk. 7, L. Ed. 842; Dunlop v. Monroe, 11 U. S. (7 Cr.) 242; bk. 3, L. Ed. 329; O'Harra v. Hall, 4 U. S. (4 Dall.) 340; bk. I, L. Ed. 858; Smallwood v. Worthington. 2 Cr. C. C. 431; Goss v. Nugent, 5 B. & Ad. 64; Coker v. Guy, 2 B. & P. 565; Adams v. Wordley, I M. & W. 374; Preston v. Merceau, 2 W. Bl. 1249.

Parol Evidence to Vary or Contradict Written Contract.—Parol evidence is care-

Parol Evidence to Vary or Contradict Written Contract.—Parol evidence is generally inadmissible to vary or contradict the plain statements of the written instrument, and especially so where it is under seal (Stackpole v. Arnold, 11 Mass. 28; Austin v. Sawyer, 9 Cow. (N. Y.) 41; Webb v. Rice, 6 Hill (N. Y.), 220; Evans v. Wells, 22 Wend. (N. Y.) 339; Kellogg v. Richards, 14 Wend. (N. Y.) 116; Powell v. Mason & B. Mfg. Co., 3 Mason C. C. 358), because independently of the Statute of Frauds such evidence is contrary to the maxims of the common law. Frink v. Green, 5 Barb. (N. Y.) 456; Brewster

v. Silence, 8 N. Y. 213; Egleston v. Knickerbacker. 6 Barb (N. Y.) 464. See Parkhurst v. Van Cortlandt, I Johns. Ch. (N. Y.) 283. In equity the same rule prevails as at law except in cases of fraud. mistake, surprise, or accident. Cramer v. Benton. 60 Barb. 225; s. c., 4 Lans. (N. Y.) 294; Cook v. Eaton, 16 Barb. (N. Y.) 446; Taylor v. Baldwin, 10 Barb. (N. Y.) 486; Russell v. Kinney, 2 Leg. Obs. 234; Wilson v. Deen, 7 Week. Dig. 493. See Movan v. Hays, I Johns. Ch. (N. Y.) 339, n.; Best v. Stow, 2 Sandf. Ch. (N. Y.) 298; Quinn v. Roath, 37 Conn. 16; Blanchard v. Moore, 4 J. J. Marsh. (Ky.) 471; Bradbury v. White, 4 Me. (4 Greenl.) 391; Rogers v. Saunders, 16 Me. 92; Peterson v. Grover, 20 Me. 363; Chambers v. Livermore, 15 Mich. 381; Margraff v. Muir, 57 N. Y. 155; White v. Williams, 48 Barb. (N. Y.) 222; Morganthau v. White, I Sweeney (N. Y.), 395; Ryno v. Darby, 20 N. J. Eq. (5 C. E. Gr.) 231; Conover v. Wardell, 20 N. J. Eq. (5 C. E. Gr.) 266; Channess v. Crutchfield, 2 Ired. (N. C.) Eq. 148; Harrison v. Howard, I Ired. (N. C.) Eq. 407; Lawrence v. Staigg, 8 R. I. 256; Perry v. Pearson, I Humph. (Tenn.) 431; Goodell v. Field, 15 Vt. 448.

1. Sice v. Cunningham, I Cow. (N. Y.)

2. Union National Bank v. Sixth National Bank, 1 Lans. (N. Y.) 13.

3. People's Bank v. Brooke, 31 Md. 7.

4. Bissell v. Bozman, 2 Dev. (N. C.) Eq. 160.

5. Carmichael v. Pennsylvania Bank, 5 Miss. (4 How.) 567.

DEMESNE.—Own: one's own.

In old European law, land which a man held originally of him-

self, as distinguished from that held of a superior lord.

In old English law, lands wherein a man had a proper dominion or ownership, as distinguished from the lands which another held of him in service.1

DEMIJOHN.—A glass vessel with a large body and small neck. enclosed in wicker-work.2

DEMI-MARK.—A sum of money tendered and paid into court in certain cases in the trial of a writ of right by the grand assize.3 The amount tendered was six shillings and eightpence.⁴ It is unknown in American practice.5

1. Burr. Law Dict.; Co. Litt. 17 a. An estate in fee-simple "is a man's demesne, since it belongs to him and his heirs forever." "Where a man claims an estate in fee-simple in possession in a corporeal hereditament, the precise technical expression is as follows: that he is 'seized in his demesne as of fee' (in dominico suo ut de feodo); the words in dominico, or 'in his demesne,' signifying

that he is seized as owner of the land itself, and not merely of the seignory or services, and the words 'as of fee' importing that he is seized of an estate of inheritance in fee-simple, and also (in reference to the original meaning of the term fee) that he is not the absolute or

allodial owner, but holds (feudally) of a superior lord." I Steph. Com. 22; 2 Bl.

2. U. S. v. Ninety Demijohns of Rum, 8 Fed. Rep. 485. In this case the libel alleged that ninety demijohns of Spanish rum, or aguadiente, were brought into the port of Key West on the 26th day of March, 1879, on a Spanish schooner, consigned in the manifest "to order;" that it was imported into the United States in large bottles, to wit, demijohns, and the same were not packed in packages of one dozen bottles in each package, as required by section 2504, Schedule D, of the Revised Statutes of the United States, whereby it became forfeited to the United States, and the collector of customs of said port had seized it as so forfeited. No person appearing to claim any portion of the property seized, the district court proceeded to hear the cause ex parte, and on such hearing dismissed the libel. Whereupon an appeal was taken in behalf of the United States to the circuit court. That court, however, affirmed the judgment, Woods, C. J., saying: "As I construe the statute on which the libel is based, no violation of the law whatever is charged. That statute declares, 'And wines, brandy, and

other spirituous liquors imported in bottles shall be packed in packages containing not less than one dozen bottles in each package, and all such bottles shall pay an additional duty of three cents for each bottle.' The only way in which this provision of the law can be made applicable to the facts charged in the libel is by assuming that a demijohn containing over four gallons is a bottle, within the meaning of the law. That is not what is understood by a bottle in common parlance, nor, in my judgment, what the statute means by it. A demijohn is a glass vessel with a large body and small neck, enclosed in wicker-work. That the statute does not include four-gallon demijohns under the term 'bottles' is clear. because, if not impossible, it would be exceedingly inconvenient and cumbersome to pack not less than one dozen such demijohns in one package, as the statute requires to be done. There is no provision of the statute forbidding the importation of liquor in demijohns. Having provided for the duty upon wines imported in casks and bottles, and spirituous liquors imported in bottles, the statute imposes as a duty on 'brandy and other spirits manufactured or distilled from grain or other materials, and not otherwise provided for, two dollars per proof gallon.' This would clearly include spirits imported in demijohns. My conclusion is, therefore, that the importation of rum in four-gallon demijohns, and the failure of the importer to pack his four-gallon demijohns in packages of not less than one dozen in each package, was not a violation of the provisions of Schedule D, \(\xi_2504, \) of the Revised Stat-utes, and the libel does not set up any ground of forfeiture, and on that account was properly dismissed."

3. Bouvier's Law Dict., sub. "Title;" Co. Litt. 2946; Booth Real Act. 98.

3 Bl. Com. Appendix 5.
 Thus where in New York a demand-

DEMISE.—(See also COVENANTS; DAMAGES; LEASES; WAR-RANTY.)—A technical word, used to express a lease for a term of years; from the Latin word *demisi*, which formerly was the operative word of conveyance therein. The word

ant brought a writ of right, and counted on the seizin of the wife's ancestor, and her own seizin within twenty-five years. etc., the tenant in his plea put himself upon the grand assize, prayed recogni-tion, etc., whether the tenant or the demandants had the greater right to hold; and then added a prayer that it might be inquired of by the grand assize whether the ancestor was seized, etc., within twenty five years, etc., as the demandants had alleged. Upon special demurrer, assigning for cause that the prayer to inquire of the seizin of the ancestor was included in the mise, and joinder in demurrer, the court gave judgment for the demandants, Savage, C.J., saying: "The plea is bad. This mode of pleading arose from the tender of the demi-mark, which was a sum of 6s. 8d., paid for the privilege of pleading that the demandant or his ancestor was not seized in the time of the king mentioned in the writ, and the demandant, though seized in another king's reign, might perhaps fail through this error, the same as if never seized at The time of seizin in another reign did not come in question upon the mise which tried the question of mere right. The tenant, therefore, to entitle him to this inquiry as to the particular king's reign, must pay the demi-mark. Booth, 98." Ten Ten Eyck v. Waterbury, 7 Cow.

Again, where the demandant brought a writ of right for the recovery of certain premises situate in the county of Oneida. and counted that she was seized in her demesne as of fee within twenty-five years by taking the esplees, etc. (that is, the products which the ground or land yields), and the defendants pleaded, by putting themselves upon the grand assize, to determine which has the better right, thus joining the mise; then they tendered two dollars to the use of the people, that it might be inquired by the grand assize whether the demandant was seized, etc., on demurrer, leave was given to the defendants to amend, the court, Savage, C. J., saying: "The first plea is bad. The tender of the demi-mark has no application to our practice, as was shown in Ten Eyck v. Waterbury, 7 Cow. (N. Y.) 51. Our records ought not to be incumbered with such absurdities. The defendants might with equal propriety have claimed a trial by battle, and tendered their champion: both were once the practice in England, but never in this State. There is indeed this difference: the trial by battle has been abolished by statute; the demi-mark has not been so abolished, because it is totally inapplicable under our form of government. In this case it has no fitness or propriety; even in England it is not proper, unless the count alleges a seizin in the reign of some particular king, when the seizin was in fact in another king's reign." Bradstreet v. Supervisors of Oneida Co., 13 Wend. (N. Y.) 546.

1. "The words of conveyance appropriate in a lease are 'demise, lease, and to farm let." These words are technical words, well understood, and are the most proper that can be used in making a lease. The technical meaning of demise is a lease for a term of years." Voorhees and Wife v. Presbyterian Church of Amsterdam, 5 How. Pr. (N. Y.) 58, 71.

When used in a lease it imports a

When used in a lease it imports a covenant on the part of the lessor of good right and title to make the lease, and for quiet. enjoyment. Crouch v. Fowle, 9 N. H. 219; s. c., 32 Am. Dec. 350, and note.

So it was said by Tindal, C. I.: "A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words, having a known legal operation in the creation of an estate; so that after they have had their primary operation in creating the estate, the law gives them a secondary force by implying an agreement on the part of the grantor to protect and preserve the estate, so by those words already created; as, if a man by deed demise land for years, a covenant lies upon the word 'demise,' which imports or makes a covenant in law for quiet enjoyment; or, if he grant land by feoffment, covenant will lie upon the word dedi." Williams v. Burrell, I Man. Gr. & Sct. 402, 429.

Again, in an action of covenant on a lease, in which the lessor did "demise, grant, and to farm let unto the plaintiff," the plaintiff declared on a covenant by the lessor that he should quietly possess during the term, with a breach that the lessor had not when he made the lease, and never had either then or now, any authority to demise, and that the plaintiff therefore had never been able to obtain

possession, being kept out by the rightful owners of the premises. On demurrer that the indenture contained no covenants, the court held that the word 'demise' implies a covenant of power in the lessor to give the lease, Savage, C. J., saying: "The effect of the word" demise is considered in Holder v. Taylor. Hob. 12. . . This case is cited by Sergeant Williams [1 Saund, 322 a, note (2)], who says that an action of covenant lies against the lessor on the implied covenant in law upon the word 'demise;' but it is not necessary, in order to support this action, that the lessee should be actually evicted, for the word 'demise' implies a power to lease. Therefore, when a man demises lands to which he has not any title, an action of covenant will lie against him, although the lessee never entered; for he is not bound to commit a trespass." Grannis v. Clark, 8 Cow. (N. Y.) 36. See also Barney v. Keith, 4 Wend. (N. Y.) 502; Young v. Hargrave's Adm., 7 Ohio. 394; Stott et al. v. Rutherford, 92 U. S. 107; Hart v. Windsor, 12 M. & W. 68; Lanigan v. Kille, 97 Pa. St. 120; Ware v. Lithgow, 71 Me. 62.

But although a covenant for quiet enjoyment is implied from the word "demise" in a lease, this implication will not be raised where it is expressly stipulated in the lease that nothing therein contained shall be construed to imply a covenant for quiet enjoyment. Maeder v. City of Carondelet, 26 Mo. 112.

Thus where a tenant of land under a lease, which provided that his lessors might terminate it by selling the land and giving notice to him of the sale, executed an under-lease thereof, by which he did "lease. demise, and let" the premises, and which contained a provision that "the lessees may make all necessary alterations for carrying on their business, but for no other purpose, and in case the land is sold the lessees may carry away their improvements, otherwise said improvements to be left on the premises at the expiration of the lease as the property of the lessor:" on a purchaser of the land from the original lessors evicting the under-tenant, it was held that this was not a breach of any implied covenant of quiet enjoyment in the under-lease, because, said Morton, J., "it seems clear that the parties to this lease contemplated a possible sale of the premises by the original lessors, under the right reserved in their lease, and a consequent termination of the tenancy. Provision is made that in such event the lessees shall be compensated by having the right to carry away their improvements, which other-

wise would be the property of the lessor. Neither party could have understood that the lessor intended to warrant the quiet enjoyment of the leased premises till the end of the term. It would be against the intention of the parties, manifested in the lease, to imply a covenant which amounts to a warranty against an eviction by a purchaser of the land from the owners, who under the terms of the original lease have duly terminated the tenancy." O'Connor v. Daily, 109 Mass.

So the implied covenant on the part of the lessor of good right and title to make the lease may be restrained by express . covenants relating to possession: as where a lessor demised a certain tract of land with a covenant to permit the lessee. his heirs and assigns, quietly and peaceably to possess and enjoy the premises during the term, it was held that this express covenant was restrictive, and that no covenant of a right to demise or for quiet enjoyment could be implied; Parker. C. J., saying: "Express covenants relating to possession may furnish quite as strong reasons against implying a covenant of title from the general language of the deed, as express covenants relating to the title itself. There could be no reason for a covenant that the party would not himself, nor should any person claiming under him, interrupt the possession of the lessee, if he had in a prior part of the deed covenanted that he had a good title to make the lease, and that the lessee might quietly enjoy it against all persons. And the case in Coke (4 Coke, 80) shows that a covenant of this character has been held to be restrictive. . . . And here it is not denied that the covenant that the lessor and his successor in office shall and will permit the lessee, and his heirs and assigns, quietly to enjoy the premises during the term would be wholly unnecessary, if he had before covenanted that he had a good title to make the lease, and that it is a covenant imposing a less obligation upon the lessor. It is of the same character, although somewhat more restricted in its operation, as that in the case in Coke. It must, therefore, be held to express the contract which these parties actually entered into, and to restrain any covenant which might otherwise be implied from the term 'demise' in the lease." Crouch v. Fowle, 9 N. H. 219, s. c., 32 Am. Dec. 350.

So an express covenant for quiet enjoyment as regards the lessor, or those claiming under him, will limit the implied covenant for quiet enjoyment generally contained in the word "demise." Tooker v. Grotenkemper, I Cin. Sup. Ct. Rep. (Ohio) 88. See Line v. Stephenson, 4 Bing. N. C. 678.

The words "grant or demise" used in the assignment of a lease do not create an implied covenant against the assignors; for, said Scott, J., in a Missouricase, "although the words 'grant or demise' will in a lease create an implied covenant against the lessor, yet it is nowhere said that the same words will in an assignment create an implied covenant against the assignor. The object and intent of the parties in making an assignment is to put the assignee in the place of the lessee, and when that is done the assignor ceases to have any further concern with the contract, unless he has bound himself by express covenants."

Blair & Gautt v. Rankin, 11 Mo. 440.

Nor in a lease of a house or of land is there any implied warranty, from the use of the word "demise," that it is or shall be reasonably fit for habitation, occupation, or cultivation; in short, that it is fit for the purpose for which it is let. Hart v. Windsor, 12 M. & W. 68.

So in a Massachusetts case it was held that in a sealed lease of a house for a private residence there is no implied covenant that it is reasonably fit for habitation, Metcalf, J., saying: "This question has been discussed in numerous recent cases in England. But it is unnecessary to refer to more than one of them, viz., Hart v. Windsor, 12 M. & W. 68, decided by the court of exchequer in 1844. In that case Mr. Baron Parke, after reviewing all the previous cases, clearly states the law on this point and the grounds of it. And as his views are perfectly satisfactory to us, we shall merely quote the following passages from his opinion: 'It is clear that from the word "demise," in a lease under seal, the law implies a covenant, in a lease not under seal a contract, for title to the estate merely; that is, for quiet enjoyment against the lessor, and all that come in under him by title, and against all others claiming by title paramount during the term, and the word "let" or any equivalent words, which constitute a lease, have no doubt the same effect, but no more. Shep. Touch. 165. There is no authority for saying that these words imply a contract for any particular state of the property at the time of the demise; and there are many which clearly show that there is no implied contract that the property shall continue fit for the purpose for which it was demised; as the tenant can neither maintain an action,

nor is he exonerated from the payment of rent, if the house demised is blown down, or destroyed by fire,—Monk v. Cooper, 2 Stra. 763; Belfour v. Weston. I T. R. 310; and Ainsley v. Rutter, there cited:-or gained upon by the sea-Tavener's Case, Dyer, 56, a;—or the occupation rendered impracticable by the king's enemies, - Paradine v. Jane, Alevn, 26:-or where a wharf demised was swept away by the Thames, -Carter v. Cummins, cited in 1 Ch. Cas, 84. In all of these cases the estate of the lessor continues, and that is all the lessor impliedly warrants. It appears, therefore, to us to be clear, upon the old authorities, that there is no implied warranty on a lease of a house or of land that it is, or shall be, fit for habitation or cultivation.' We are all of opinion, for these reasons, that there is no contract, still less a condition implied by law on the demise of real property only, that it is fit for the purpose for which it is let. The principles of the common law do not warrant such a position; and though in the case of a dwelling-house, taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes-for building upon, or for cultivation; and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties, in every case, to protect their interests themselves by proper stipulations, and if they really mean a lease to be void, by reason of any unfitness in the subject for the purpose intended, they should express that meaning." The decision in the foregoing case has been recognized by the English court of common pleas in Surplice v. Farnsworth, 7 Man. & Gr. 576; by the supreme court of New York in Cleves v. Willoughby, 7 Hill (N. Y.), 83; and is referred to as the settled law in Addison on Contracts, 412; Archb. Land. & Ten. 67, 158; and in 1 Platt on Leases, 613. Foster v. Peyser, 9 Cush. (Mass.) 242.

In an Alabama case it has been held that the use of the word "demise" in a lease does not necessarily imply that the instrument in which it is used is sealed. Thus Ormond, J., said: "Upon an inspection of the instrument in this case, it appears that although in the body of the paper they have used terms of doubtful import, they have not expressed their intention to make it a sealed instrument, and therefore it cannot operate as such. The terms 'indenture' and 'covenant, though usually found in deeds, have not a technical meaning. An instrument may be indented, whether under seal or not,

"demise" is also frequently used as a euphemism for decease or death.1

DEMOLISH.—To pull or throw down; utterly to destroy; to reduce to naught.2

DEMONSTRATIVE. (See also LEGACIES.)—A term used in law to describe a class of legacies, the payment of which the testator directs to be made out of some particular fund designated by him 3

and the practice has in fact become ob- does an act which destroys or defeats the solete. A covenant is a contract, and is a writing obligatory, or parol promise, according as it is sealed or not. The same remarks apply to the terms 'demise' and to 'farm let.' They are generally found in leases, but may be expressed by other terms, and are therefore not technical. Nor does it add anything to the obligation of a contract of lease that it is under seal. The use of these terms, therefore, in the declaration, does not necessarily imply that the instrument in which they were alleged to be was sealed; that is only effected by the use of the terms 'deed' or 'writing obligatory;' and even when these technical terms are used it is customary to add, in conformity with the precedents, 'sealed with his seal.' No such allegation being found in this declaration, the legal effect ascribed to the instrument by the pleader is, that it was a parol contract, and such in fact it Magee v. Fisher et al., 8 Ala. 320.

Where a lessee, holding under a lease in which the use of the word "demise" implies a covenant for quiet enjoyment during the term, is ousted by a paramount title, on an action against the lessor the measure of damages in the United States is the consideration paid by the lessee. Lanigan v. Kille, 97 Pa. St. 120.

In England, on the contrary, the measure of damages is the value of the property at the time of the eviction. Rolph v. Crouch, L. R. 3 Exch. 44. For a full discussion of this subject see Rawle on Covenants for Title, chap. ix. p. 220, and cases cited in 5th Ed.

The use of the word "demise" in a lease does not imply any covenant on the

part of the lessor to put the lessee in possession; for, said Tilghman, C. J., "if a lease be made by the words 'grant or demise,' it amounts to a covenant by the lessor that he will make satisfaction to the lessee if he is lawfully evicted. 5 Co. 17. So covenant lies on the word 'demise,' if the lessor had no power to demise, although the lessee neither entered nor was evicted. Hob. 12. So also covenant lies against the lessor if he

effect of his grant (as if he grant the use of a way and afterwards stops it). I Saund. 322. But a covenant by the word 'demise' is not broken by the eviction of the lessee, unless it be an eviction by good title. Nokes v. James, Cro. Eliz. 674; 4 Co. 80, 6. Now in the present instance there was no defect in the title conveyed by the lessor to the lessee. Hugg was the tenant of the defendant, and held over unlawfully. It was in the power of the plaintiff to recover the possession by virtue of his lease, and in fact he did recover it. He had therefore no cause of action against the defendant."
Cozens v. Stevenson, 5 S. & R. (Pa.) 421.
1. Brown's Law Dict., sub voce.

2 Under the English statutes against demolishing houses, it has been held that if one object of a mob attacking a house is to injure a person in it, yet if another and even inferior object is to demolish the house, the offence is committed in consequence of this inferior intent. R. v. Butt, 6 C. & P. 329; Reg. v. Howell, 9 C. & P. 437.

But the jury must be satisfied that the person committing the outrage had an in-Price, 5 C. & P. 510; R. v. Thomas, 4 C. & P. 237.

To consume a house by fire is to demolish it. R. v. Howell, 9 C. & P. 437; R.

v. Harris, C. & M. 661.

3. Thus: "A demonstrative legacy is the bequest of a certain sum of money, with the direction that it shall be paid out of a particular fund." By Sharswood, J., in Armstrong's Appeal, 63 Pa. St.

312.
"A demonstrative legacy is a bequest of a sum of money payable out of a particular fund or thing. It is a pecuniary legacy, given generally, but with a demonstration of a particular fund as the source of its payment." By Welch, J., in Glass v. Dunn, 17 Ohio St. 413.

"It is also said that legacies are divid-These are deed into two other classes. monstrative legacies and general legacies. The former consists of bequests payable

DEMURRAGE.—(See also ADMIRALTY; BILLS OF LADING. CHARTER-PARTY: MARITIME LIEN: SHIPPING.)

I. Definition, 542.

2. Express Contracts for Demurrage, 542.

3. Words and Phrases Construed. 544.

4. Usage, 545.
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Implied Contract, 546.
 Failure to Load in Turn, 546.
 Substituted Mode of Discharge,

9. Commencement of Lay-days, 547.

10. Amount of Damages, 548.

11. Procedure, 549.

1. Definition.—Demurrage is an extended freight or reward to the vessel in compensation for earnings which she is compelled to lose improperly.1

2. Express Contracts for Demurrage.—As between the parties to the contract, the rule is that when the time is expressly ascertained and limited, the shipper or charterer will be liable for any default that may occur in its performance, although it be not attributable to any fault or omission on his part. But the rule is

out of a particular fund named or demonstrated in the will itself." By Peters, J.,

in Harper v. Bibb, 47 Ala. 547.
"A demonstrative legacy is where the thing or money is not specified or distinguished from all others of the same kind, but a particular fund is pointed out for its payment." By Walker, C. J., in Gilmer's Legatees v. Gilmer's Executors, 42 Ala. 9

"A demonstrative legacy is in the nature of a general legacy, with a certain fund pointed out for its payment." By Robinson, J., in Kunkel v Macgill. 56 Md. 120.

1. Sprague v. West, Abb, Ad. (D. C.)

548.

In the United States courts every improper detention of a vessel, however occurring, whether it be for time lost in making the necessary repairs occasioned by a collision or as the result of a breach of contract, express or implied, is considered as demurrage, and damages may be recovered in an action brought eo nomine. The Apollon. 9 Wheat. (U. S.) 378; Williamson v. Barrett, 13 How. (U. S.) 101; Sprague v. West, Abb. Ad. R. (D. C.) 548; The M. S. Bacon v. E. & W. Trans. Co., 3 Fed. Rep. 344.

In England, the word "demurrage" has a more restricted legal meaning, and is perhaps confined to liquidated damages arising from the breach of an express contract. The Law of Merchant Ship-

ping (Foard), 400, 402, 537.

In the United States courts damages may be recovered under a claim for demurrage whether they be liquidated or unliquidated, or whether they be the result of the breach of an express or an implied contract. Am. Law Reg. (N. S.) vol. xxiii. 154.

2. Randall v. Lynch, 2 Camp, 352; Williams v. Theobald, 15 Fed. Rep. 468.

Proof that delay was not occasioned by the fault of the shipper is no excuse if he has by his contract stipulated that the work should be done. Parties must abide by the risk of their express contracts, and answer for defaults which they have not guarded against by appropriate exceptions. Holyoke v. Depew, 2 Ben. (D. C.) 340.
Apparent hardship is no mitigation.

Leer v. Yates, 3 Taunt. 257.

The shipper or charterer is responsible for all the various vicissitudes which. without fault on the part of the vessel, interfere with the accomplishment of the contract.

Frost, prohibition of a foreign government, custom-house regulations, unlawful seizure, and crowded state of the docks are causes, accidents, or misfortunes which must ordinarily fall on the charterer. Barrett v. Dutton, 4 Camp. 333; Barker v. Hodgson, 3 M. & S. 267; Hill v. Ide, 4 Camp. 327; Berry v. Evans, 4 Camp. 131. But if the obligation be concurrent and dependent, and neither is ready and able to perform his own part of the contract, neither has any remedy in damages against the other. The loss must remain where it falls. Ford v. Copesworth, L. R. 4 Q. B. 127; The Spartan, 25 Fed. Rep. 53.

The liability of the parties may of course be changed by special terms inserted in the contract. Ogelsby v. The Yglesias, 27 L. J. Q. B. 356; Peterson v. Lotinger, 20 L. T. 267.

A provision in the charter-party ex-

empting the charterer from liability "unless by default of the charterer"

otherwise if it be shown that the vessel, her owners, or their agents were the wilful or even innocent cause of the delay in question. When the bill of lading contains a stipulation for demurrage, either expressly or by reference to the charter-party, accentance of the goods is evidence of an agreement on the part of the consignee to pay both freight and demurrage.2 A consignee accepting goods under a bill of lading wherein there is an express promise to pay demurrage is bound by its terms, and can only be excused by default on the part of the vessel, her owners, or agents.3 When no express contract for demurrage exists, courts of common law have, ordinarily, held that the consignee or his assignee is not liable for demurrage even after the receipt of the goods.4 But when the consignee is the freighter, he will be held

will relieve him from liability for delay if it occur from causes over which he had no control. The Mary E. Tabor, I Ben. (D. C.) 105; Thatcher v. Boston Gas Light Co., 2 Low. (C. C.) 361. 1. Seegur v. Duthie, 1 Asp. 3; Barrett

v. Dutton, 4 Camp. 333.

A refusal on the part of the master to deliver in the proper manner exonerates the freighter. Benson v. Blunt, I Q. B.

When no specific time for discharge or manner of effecting the same is stipulated for, demurrage cannot be recovered if the manner of unloading be that customarily employed at the port of discharge. The Elida, 31 Fed. Rep. 420.

Under a bill of lading stipulating for demurrage after a certain time, none will be payable for days lost by the fault or negligence of the master or his subordinates. Hall v. Eastwick, I Low. (C. C.)

A vessel is not entitled to demurrage for time lost in waiting to avail herself of a consignee's special facilities for unloading. McLaughlin v. Albany & Rensselaer I. & S. Co., 8 Fed. Rep. 447. Nor for time lost in consequence of the seizure and detention of the vessel by the local authorities, if the seizure be occasioned by the wrongful act of her mas-Elwell v. Skiddy, 15 N. Y. Sup.

Ct. 73
2. Young v. Moeller, 5 E. & B. 755;
Scaife v. Tobin, 3 B. & A. 523.
Delivery of the bill of lading is a delivery of the bill of lading and creates a privity between the parties. The Schooner Mary Ann, Olcott R. 498; Conard v. Insurance Co., 1 Peters (U. S.), 446; Griffith v. Ingledew, 6 S. & R. (Penn.) 429. But in order to charge a consignee, as such, or the indorsee of a bill of lading, with any other obligation than the payment of freight, plain words must be used. Chappell v. Comfort, 31 L. J. C. P. 58; Grey v. Carr, L. R. 6 Q. B. 522; Russell v. Nieman, 33 L. T. C. P. 358. If the words used in the bill of lading

be "paying for said goods as per char-ter-party," there will be no express contract for demurrage as against the consignee. 112 Sticks of Timber, 8 Ben. (D. C.) 214; Gronn v. Woodruff, 19 Fed. Rep. 144. But the rule is otherwise if the words used be "freight and other conditions as per charter-party." conditions as per charter-party. Strater v. Kidd, 4 Asp. 34; Smith v. Sieveking, 4 E. & B. 945; Wegener v. Smith, 24 L. J. C. P. 25.

The liability to pay demurrage or dam-

ages for detention under a bill of lading is presumably upon the person who made the contract, that is, generally upon the shipper. Cawthron v. Trickett, 33 L. J. C. P. 182. But delivery of the bill of lading or a delivery of the cargo creates a privity between the parties. Scotson v. Peg, 30 L. J. Exch. 225; The Schooner

Mary Ann, Olcott, 498.
3. Carriage by Sea. Carver, 636, 637. But if it be intended to make shippers or consignees, who are strangers to the contract or charter-party under which the vessel itself is hired, liable for not discharging, and to compel them to pay demurrage in accordance with its terms, there must be a clear and unambiguous reference to these terms in the bill of lading. Wegener v. Smith, 24 L. J. C. P. 25; Grey v. Carr, L. R. 6 Q. B. 523; Porteus v. Watney. 3 Q. B. D. 534; Chappell v. Comfort, 31 L. J. C. P. 58.

Whether a consignee qua consignee could be held liable under such circumstances for demurrage incurred before sailing, is doubtful. Smith v. Sieveking,

24 L. J. Q. B. 257.

4. Gage v. Morse, 12 Allen (Mass.),
410; Young v. Moeller, 5 E. & B. 755. The passage of the Bills of Lading Act liable for unnecessary detention occurring at the port of dis-

charge, even though no express contract exists therefor.1

3. Words and Phrases Construed.—Instead of contracting for the performance of the work in a certain number of days, words and phrases are sometimes substituted, the meanings of which are matters of judicial construction.² If the contract require that the

changed the English law in this regard.

Fowler v. Koop, 4 Q. B. D. 299.
Delivery of the cargo is a sufficient consideration to bind the promise to pay demurrage, even though the receiver be only acting as an agent. Benson v. Hippins, 4 Bing. 455; Scotson v. Peg,

30 L. J. Exch. 225.

The consignee and indorsee of the bill of lading, who is the owner of the goods and bill of lading, and who accepts the goods under the bill of lading, is bound by its terms. If he accepts the goods under the bill of lading he is presumed to pay the stipulated demurrage. He cannot by his sub-contracts with others shift his responsibility to those who do not act directly under the bill of lading. Neilson v. Jessup, 30 Fed. Rep. 138.

The vessel is not bound to look beyond the owner and holder of the bill of lading because he has a right to control the delivery and acceptance of the goods under it. The Thames, 14 Wall. (U. S.) 98, 107. The duty of the holder of the bill of

lading is either to refuse acceptance, or to find some other person who, as vendee of the goods and assignee of the bill of lading, becomes his substitute. Neilson v. Jessup, 30 Fed. Rep. 138; Fowler v. Knoop, 4 Q. B. Div. 299.

When there are several bills of lading which relatet o various parts of the cargo, and in the hands of various holders, the

effect of a provision which gives a fixed time for the discharge is sometimes diffi-cult to determine. See Carver on Car-

riage by Sea, 640. 641, 642.

1. Sprague v. West, Abb. Add. (D. C.)
548; Donaldson v. McDowell, Holmes W. Trans. Co., 3 Fed. Rep. 344; The Hyperion, 7 Am. Law Rev. 457. Or if he be the owner of the goods, though the freight be paid by the shipper. Crawford v. Mellor, I Fed. Rep. 638. But in the absence of any provision for demurrage the obligation of the consignee, qua consignee, is that of customary and reasonable diligence, and no liability can be imposed upon him without proof of negligence on his part. Henley v. Ice Co., 14 Blatch. (C. C.) 522.

2. The word "direct" in a charter-

party means that the vessel shall take a

direct course to the port of destination, without deviation or unreasonable delay.

The Onrust, 6 Blatch. (C. C.) 533.
"Dispatch" means without delay; it does not mean with due diligence. charterer who stipulates for dispatch in discharging, takes all the risk of being able to effect such a discharge, and if he is obliged to detain the ship unduly, he must pay demurrage. Sleeper v. Puing, 17 Blatch. (C. C.) 36.

A covenant to load with "usual dis-

patch" excludes every delay on the part of the shipper, beyond the ordinary time for bringing the cargo to the place of loading. Kaeron v. Pearson, 7 H. & N.

"Ouick dispatch in discharging" excludes all delays save the time employed in unloading and delivering cargo, unless occasioned by natural causes beyond the v. Wallace, 3 Cliff. (C. C.) 123.
"Customary dispatch" includes usages

of the port, such as working hours, the order in which vessels must come to the wharf, and the observance of holidays; but it does not include any delay which is purely voluntary on the part of the merchant, although such delay be usual in his trade. Lindsay v. Cusimano, 10 Fed. Rep. 303; s. c., 12 Fed. Rep. 503.

An agreement for "dispatch in dis-

charging" or for quick dispatch, super-sedes any custom of the port. Thatcher v. The Boston Gas Light Co., 2 Low, (D. C.) 361; Keen v. Audenried, 5 Ben. (D. C.) 535; David v. Wallace, 3 Cliff

(C. C.), 123.
"Running days" means every day the ship could run. Cochran v. Ritberg, 3

Esp. 121. "Working days" excludes Sundays and legal holidays, but it does not exclude days on which the usual work is prevented by bad weather. Brown v. Johnson, 10 M. & W. 331; Thiis v. Byers, 12 Q. B. D. 244.

If work is to be done at a certain "rate per day," working days are meant. Hooper v. McCarthy, 2 B. & P. & R.

Rainy days" means only those days on which the rain falls in such a manner as to interfere with the execution of the loading or discharging be done "with the usual dispatch of the port" or "in the usual and customary time," this is in effect giving a fixed time for the work, viz., such a time as would under ordi-

nary conditions be usually occupied at that port.1

4. Usage.—When there is no special contract, the usage of the port in respect to the reception and delivery of cargo is frequently a matter of material consideration.² Evidence is admissible to explain words or phrases to which a peculiar sense may be ascribed. whether derived from the custom of the port, the custom of merchants, or the usages of a particular trade.

5. Delay in Discharging Cargo.—In the absence of express qualification, the undertaking of the charterer to supply a cargo is absolute.4 But if the cargo is expressly understood to be provided from a particular place, and the charter has been made in view of

work with safety and convenience. Balfour v. Wilkins, 5 Saw. (D. C.) 429.

If the word "days" simply is used,

running days are meant, unless there be ranning days are meant, diffess there be some special usage to the contrary. Brown v. Johnson, 10 M. & W. 331; Niemann α. Morse, 29 L. J. Q. B. 206.

1. The charterer is ordinarily respon-

sible for delays beyond the period so calculated. Kearon v. Pearson, 31 L. J. Ex. 1; Ashcroft v. The Crabb Orchard Co., L. R. 9 Q. B. 540. But see Rodgers v. Forrester, 2 Camp. 483; Postlethwaite

v. Freeland, 5 Asp. 595.

If by the terms of the contract the cargo is to be unloaded at the average rate of not less than 100 tons per day, the period in which the discharge is to be completed is as definitely fixed as if the specific number of days had been written therein. Williams v/ Theobald, 15 Fed. Rep. 472; Sanguenette v. P. S. Nav. Co., L. R. 2 Q. B. Div. 238.

2. Bliven v. N. E. Screw Company, 23 How. (U. S.) 431.

Proof of usage is admitted either to

interpret the meaning of the language of the contract, or to ascertain its nature and effect, in the absence of express stipulation, if the meaning be equivocal or obscure. The Reeside, 2 Sum. (C. C.) 569 a.

But usage cannot prevail over or nullify the express provisions of a contract. Bliven v. N. E. Screw Company, 23 How.

(U. S.) 431.

Nor is proof of usage admissible to vary the language employed by the parties, when the meaning is expressed in plain and unambiguous terms. Reeside, 2 Sum. (C. C.) 569.

To render a usage or custom of trade valid and binding, it must be known, uniform, certain, reasonable, and not contrary to law. Lindsay v. Cusimano, 23 Fed. Rep. 504.

No custom of the port will be permitted to override an express stipulation limiting the time of discharge. Fish v. 150 Tons of Brown Stone, 20 Fed. Rep. 202.

3. Leideman v. Schultz, 14 C. B. 38;
Robertson v. Jackson, 2 C. B. 412.

When it does not appear that parties to a contract have agreed upon the meaning of the particular word in it, the custom of trade will determine it. Bullock v.

Finley, 28 Fed. Rep. 514.

If a usage is general, both parties are presumed to know it and to contract in reference to it; if it is special, and confined to a particular business, or has reference to a particular port only, there is no such presumption. Isaackson v.

Williams, 26 Fed. Rep. 642.

As respects a special custom in a particular trade or between particular ports. even if there is a presumption that the parties in the business contract in reference to the custom, such a presumption is at best but a prima facie one, liable to be rebutted by proof that it was unknown to the party against whom it is set up, and on that being proved no weight ought to be given to it. Isaackson v. Williams, 26 Fed. Rep. 651.

4. The undertaking of the charterer being that the cargo shall be ready at the place at which the loading is agreed to be done. Postlethwaite v. Freeland, 5 A.

C. 620.

Any difficulty that may arise in bringing the cargo to the port of shipment is outside of the charter-party, and cannot be a matter of excuse in estimating whether the proper dispatch has been used, unless it be covered by an express stipulation. Adams v. Royal Mail Steam Packet Company, 28 L. J. C. P. 33; Kearon v. Pearson, 31 L. J. Ex. 1; Elliott v. Lord, 48 L T. 542; Fenwick v. Smaltz, L. R. 3 C. P. 313. circumstances by which, as the parties knew, the procuring of a cargo from that place may be delayed, the charterer cannot be assumed to have undertaken that the cargo should be ready.¹

6. Implied Contract.—When the time for loading or discharging is not fixed beforehand, either definitely or by reference to any ordinary practice or dispatch, the law implies a contract that both merchant and ship-owner shall use reasonable dispatch in performing their respective undertakings.² There can be no recovery against the consignee for delays occasioned without fault on his part.³ And the same is true of the consignor.⁴ But the ship-owner has a lien upon the cargo for demurrage, although there be no stipulation therefor in the bill of lading.⁵

7. Failure to Load in Turn.—It sometimes happens, as the result of an express agreement to that effect, or more frequently in accordance with custom, that vessels engaged in the carriage of a certain class of cargoes are required to load or unload in turns. The rule in cases of this character is, that if the ship is ready at

1. And if in such a case no arrangement has been made as to the time in which the loading is to be done, the charterer will be allowed reasonable time for getting the cargo, having regard to all the known sources of delay. Harris v. Dressman, 23 L. J. Ex. 210.

But the mere fact of an inability to procure cargo because of its being impossible, is not generally regarded as sufficient excuse in the absence of any stipulation. Carver on Carriage by Sea,

sec. 255-6.

If, however, A agrees to have a vessel loaded for B at the wharf of a railroad company, where it is customary to load vessels in turn, and this is done, causing some delay however, A is not answerable for demurrage, if it be shown that he has no personal control over the loading, and that this was understood at the time that the contract was entered into. The Schmidt, 27 Fed. Rep. 671.

2. Ford v. Cotesworth, L. R. 2 Q. B.

127.

The expressions "reasonable dispatch" and "reasonable time," as commonly used, are ambiguous, unless we know the state of circumstances to which they refer. If reasonable dispatch is to be estimated by reference to circumstances which ordinarily exist, the time to be occupied is sufficiently definite to admit of its being calculated beforehand. But inasmuch as the circumstances which actually exist at the time of performance regulate and control the time consumed, the true view of the meaning of "reasonable dispatch" is that amount of dispatch which is by law required as being reasonable.

able to expect of the parties, under the actual circumstances existing at the time of performance. Carver on Carriage by Sea, 612.

The legal implication is that the cargo is to be discharged in a reasonable time, having regard to all the circumstances proper to be considered. The William Marshall, 29 Fed. Rep. 328; The M. S. Bacon v. E. & W. Trans. Co., 3 Fed. Rep. 344.

Rep. 344.

3. The Glover, I Brown's Ad. R. (D. C.) 166; Worden v. Bemis, 32 Conn. 268; Fish v. 150 Tons of Brown Stone, 20

Fed. Rep. 203.

The duty of the consignee is to use due diligence in procuring a berth, and to discharge the vessel in accordance with the custom of the port. The L. L. Adams, 26 Fed. Rep. 655.

The burden of proof is on the vessel to show that the delay was occasioned by the fault of the consignee. Fish v. 150 Tons of Brown Stone, 20 Fed. Rep. 201; Paquette v. A Cargo of Lumber, 23 Fed.

Rep. 301.

If the cargo be discharged in the customary time, the consignee is not liable for demurrage, even though it be shown that it was possible to have effected the discharge more rapidly by continuous work. Gron v. Woodruff, 19 Fed. Rep. 143. But the obligations of the consignee are enlarged when he is the owner of the cargo. Crawford v. Miller, 1 Fed. Rep. 638.

4. The Schmidt, 27 Fed. Rep. 671; Wall v. 95,000 Feet of Lumber, 26 Fed.

Rep. 716.
5. Hungood v. 1310 Tons of Coal, 21

the proper place and does not get her turn, the merchant is liable for the detention caused thereby.1

8. Substituted Mode of Discharge.—The consignee cannot force upon the vessel a substituted mode of discharge, involving increased

cost, expense, or delay.2

9. Commencement of Lay Days.—The lay days allowed by contract for discharging are to be reckoned from the time of the vessel's arrival at the usual place of discharge, and not at the entrance to the port.3

1. Carver on Carriage by Sea, 620.

But if the ship loses her turn because she is not ready at the time when her turn comes, the merchant is not liable. unless it be shown that the vessel's failare to be ready was the result of some fault on his part. Taylor v. Clay, 16 L. J. Q. B. 44.

If the ship miss her turn by the fault of the charterer, and is subjected to further detention by bad weather, the charterer must pay for the entire time thus lost. Jones v. Adamson, I Ex. D. 60; Jameson

v. Laurie, 6 Bro. Parl. C. 474.

If the detention be occasioned by the arrival of an undue number of vessels, which resulted from their being dispatched at about the same time, the vespatched at about the same time, the vessel must be compensated. Cain v. Church, 29 Fed. Rep. 328. But in the absence of fault the rule is otherwise. Cross v. Beard, 26 N. Y. 89; Henley v. Brooklyn Ice Co., 8 Ben. (D. C.) 471; 14 Blatch. (C. C.) 522; Finney v. G. T. R. Co., 14 Fed. Rep. 171.

And the contracting parties must be presumed to know that the vessel must await her turn at the port of destination.

await her turn at the port of destination, if such be the usual course of business. Finney v. G. T. R. Co., 14 Fed. Rep.

2. The Dictator, 30 Fed. Rep. 637. Damages can be recovered for delay

in unloading upon vessels when the cargo could have been discharged more quickly into cars. Peters v. Hiller, 27 Fed. Rep.

If the substituted mode of discharge be wholly for the benefit of the consignee, and a detriment to the vessel, and if it be made without the receipt of any consideration, an agreement to acquiesce in the substituted mode of discharge will not be inferred from the circumstance that no objection was interposed by the vessel. The Dictator, 30 Fed. Rep. 637.

But if the vessel agrees to take the chances of finding sufficient water at the dock, and on arrival it was discovered that there was not sufficient water at the dock, and that delivery could not be then made, the vessel is not entitled to demurrage for the time lost by the necessity of proceeding to another dock, or for expenses in consequence of the delay. 100 Tons of Coal, 14 Fed. Rep. 878.

The vessel is not entitled to demurrage for time lost in waiting to avail herself of the consignee's special facilities for willoading. McLaughlin v. Albany & Renss. Iron & S. Co., 8 Fed. Rep. 447.

3. Cronstadt v. Witthoff, 15 Fed. Rep. 265; Kill v. Anderson, 10 M. & W. 498;

McIntosh v. Sinclair, 11 Ir. R. C. L. 456.

And this is true though part of the cargo be taken out for the purpose of lightening the vessel after she had entered the port and before her arrival at the quay, which, by the custom of the port, was the usual place of delivery. Bereton v. Chapman, 7 Bing. 559.

But it is competent for the consignee to show a custom in the case of particular ships to commence lay days from the time of moving. Norden St. Co. v. Dempsey, 1 L. R. C. P. Div. 654.

Though the general rule would not admit of demurrage in the absence of custom until the vessel had actually entered the dock. Tapscott v. Balfour, 42 L. J. C. P.

The parties may, of course, vary this by express stipulation in the charter-party or bill of lading. McIntosh v. Sinclair,

11 Ir. R. C. L. 456.

As soon as the period arrives at which the owner of the cargo is bound to accept part delivery the voyage is at an end; and when by usage of the port a cargo is to be discharged within the port in two separate parcels at two different places, both places taken together constitute the usual place of discharge, and the lay days commence to run from arrival at the McIntosh v. Sinclair, 11 Ir. R. C. first.

L. 456.

If by the terms of the contract it is from the time that the vessel is ready to discharge cargo," and written notice given to the charterer or his agent, the absence of written notice will not avail the chart-

10. Amount of Damages.—If the ship be detained beyond the days of demurrage allowed by the charter-party, the stipulated demurrage is, prima facie, the measure of compensation; but it is competent for the owner or the freighter to show that this would be more or less than a fair compensation for the detention.¹ In cases of collision there is no settled rule as to the measure of allowance for delay:2 but a fair market value may be charged for the time that the vessel is detained, and in the absence of a market value, the value to the owner in the business in which she was engaged at the time of the collision.4 The general rule is, that the compensation allowed as damages in collision cases includes a reasonable allowance for demurrage for unavoidable detention during repairs.5

The loss of the service of the vessel must be shown; but a coasting steamer during the busy season may be presumed to have lost employment. When a vessel is sunk, and full damages,

as for a total loss, are awarded, demurrage is not allowed.8

erer if he has no agent on hand at the port of discharge to receive such notice. Halton v. Bilaunzaran, 26 Fed. Rep.

1. Moorsom v. Bell, 2 Camp. 616. But see The Hermann, 4 Blatchf. (C. C.) 442; The Silica v. The Lord Warden, 30 Fed.

Rep. 845.

If there be no lay days stipulated for, the damages should be limited to compensation for the time that the vessel was actually detained by the fault of the merchant beyond a reasonable time. Clindaniel v. Tuckerman, 17 Barb. (N. Y.) 184; Worden v. Bemis, 32 Conn. 268; Morse v. Risant, 2 Keyes (N. Y.), 16. And such damages are measured day by day. Essotyne v. Elmore, 7 Bin. (C.

In an action for delay in discharging the plaintiff's ship, by which the plaintiff lost profits which he would have derived from the passage-money of emigrants, it was held that the defendant could not reduce the damages by showing that the plaintiff derived a benefit from this failure, from the fact that the emigrants embarked on other ships of which he was part owner. Jebson v. E. & W. India Dock Co., L. R. 10 C. P. 300.

Wharfage and watchmen's fees being included in the meaning of the term "demurrage" as employed in the charterparty, should not be allowed as additional items of damage when the charter rates of demurrage are adopted. The C. P. Raymond, 28 Fed. Rep. 765.

2. The Rhode Island, 2 Blatchf. (C. C.) 114; Blanchard v. Ely, 21 Wend. (N. Y.)

3. The Stormless, I Low. (D. C.) 153.

4. The Mayflower, 1 Brown Ad. R. 380: Williamson v. Barrett, 13 How. (U. S.) 101; The Aleppo, 7 Ben. (D. C.) 128.

5. Williamson v. Barrett, 13 How (U. S.) 120.

5. Williamson v. Barrett, 13 How (U. S.) 101; The Baltimore, 8 Wall. (U. S.) 377; The Granite State, 3 Wall. (U. S.) 310; The Ocean Queen, 5 Blatchf. (C. C.) 493; The Thomas Riley, 3 Ben. (D. C.)

Compensation allowed to a whaler, Swift v. Brownell, I Holmes (C. C.), 467. And to a yacht for the price that she could have been let for. Walter w. Pharo, I Lowell (D. C.), 437. And to a pilot-boat. The Transit, 4 Ben. (D. C.) 138; The Cayuga, 2 Ben. (D. C.) 125. But only for the value of her use as a vessel, exclusive of services. The Transit, 4 Ben. (D. C.) 138; The Emilie, 2 Ben. (D. C.)

The owners of the injured vessel may recover a fair value for her use, notwithstanding her place was supplied by a spare boat. The Favorita, 8 Blatchf. (C. C.) 543; The Cayuga, 7 Blatchf. (C. C.) 385; The Sunnyside, 1 Brown's Ad. 415. or the charge for the expense of a substituted boat. The Favorita, 8 Blatchf. (C. C.) 543; The Cayuga, 7 Blatchf. (C. C.) 385. Or a per diem allowance. The W. H. Clark, 5 Biss. (C. C.) 310; Williamson v. Barrett, 13 How. (U. S.) 101; The R. L. Mabey, 4 Blatchf. (C. C.) 440.

6. The Baltic, 3 Ben. (D. C.) 197; Williamson ν , Barrett, 13 How. (U. S.) 101; 7. The Stormless, 1 Low. (D. C.) 153. 8. The Columbus, 3 W. R. & C. 158; The Empress Eugenie, Lush. 138; The

Inflexible, Swab. 32.

But when a vessel is sunk by collision, in shallow water, and can be easily raised

11. Procedure.—The ship-owner has a lien upon the cargo for demurrage, enforceable in admiralty, although the bill of lading contains no demurrage clause, which, like all maritime liens, may be enforced by proceedings in rem. The consignee is liable in personam, without any express contract, for any unreasonable detention occurring by reason of his own default.2 But the consignee is not liable for delays occurring without his fault, if there be no express contract to that effect.3

The freighter is liable in personam for any unnecessary detention in loading or unloading, although there be no express contract therefor.4 The subject-matter being within the jurisdiction of the admiralty, the injured party may elect whether to proceed in personam in the admiralty court, the State court, or, if the parties to the controversy give jurisdiction, in the circuit court of the United States.5

DEMURRER.

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- I. IN PLEADING.—Definition.—An allegation that, admitting the facts of the preceding pleading to be true as stated by the party making it, he has yet shown no cause why the party demurring should be compelled by the court to proceed further. 6 A declaration that the party demurring will go no further, because the other has shown nothing against him.

and repaired, at much less expense than she is worth, the owner cannot abandon her and recover as for a total loss, against the colliding vessel. He can recover only the cost of raising and repairing within a reasonable time, and cannot add the increased expense that arises through unreasonable delay. The Thomas P. Wray, 28 Fed. Rep. 526.

And the abandonment, if made at all, is made at the owner's own risk; he cannot subsequently raise the vessel and repair her, and claim an amount for the delay which will exceed the value of the vessel as a total loss. The Venus, 17 Fed. Rep. 925.

1. Hawgood v. 1310 Tons of Coal, 21 Fed. Rep. 681.

2. Fulton v. Blake, 5 Biss. (C. C.) 371; The M. S. Bacon v. E. & W. Trans. Co., 3 Fed. Rep. 344.
3. The Glover, Brown's Ad. 166.

4. Sprague v. West, Abb. Ad. R.

548.

5. When there is a remedy both in personam and in rem, a person who has resorted to one of these remedies may, if he does not thereby get full satisfaction, resort to the other; but if a person has resorted to one of these remedies, and has recovered full compensation, and such compensation has been paid, no further proceeding can be taken. The Orient,

40 L. J. Adm. 29.
Authorities for Demurrage.—For further information consult Abbott's Na-tional Digest, United States Digest, Federal Reporter Digest, Pritchard's Admiral-ty Digest, Foard on Merchant Shipping,

Carver on Carriage by Sea, Parsons on Shipping and Admiralty, The Am. Law Reg. (N. S.) vol. xxiii. 154. 6. Bouv. Law Dict.

7. 5 Mod. 232; Co. Litt. 71, b.

- A. Demurrer in Equity.—I. DEFINITION.—An allegation of a defendant, which, admitting the matters of fact alleged by the hill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer: or that for some reason apparent on the face of the bill, or on account of the omission of some matter which ought to be contained therein, or for want of some circumstances which ought to be attendant thereon, the defendant ought not to be compelled to answer to the whole bill or to some certain part thereof.1
- 2. GENERAL NATURE OF DEMURRER.—The object of demurring in equity is not only to save time and money by defeating the complainant on some legal ground, without the delay and expense of a trial, but to protect defendant from giving discovery.2 demurrer may be either to the whole bill or to a part only of the bill.3 The defendant may therefore demur as to a part, plead as to another part, and answer as to the rest of the bill. The modes of defence must be consistent with each other, however, since if there is a demurrer to the whole bill, an answer to a part thereof is inconsistent, and the demurrer will be overruled. So if there is a demurrer to a part of a bill, there cannot be a plea or answer to the same part without overruling the demurrer. 5 A demurrer cannot be good as to a part which it covers, and bad as to the rest.6 If it is too extensive, the court may give leave to defendant to amend by narrowing its terms. Several causes may be assigned for demurrer: if one be good and the other bad, the demurrer will be sustained, since the defendant might at the argument, ore tenus, assign new causes of demurrer; therefore one good cause is sufficient.8 Separate and distinct parts of a bill may be demurred to separately for distinct causes. In such case one demurrer may be overruled and another allowed.9 Where several defendants join in one demurrer, it may be allowed as to some,

1. Bouv. Law Dict.; Mitf. Eq. Pl. 107.
2. Langdell's Eq. Pl. (2d Ed.) § 94.
3. Story's Eq. Pl. (9th Ed.) § 442.
4. Cooper's Eq. Pl. 112; Mitf. Eq. Pl. 209, 210; Tidd v. Clare, 2 Dick. 712; Portarington v. Soulby, 6 Sim. 356; Davise v. Davise v. Davise v. Parise v. P

Davies v. Davies, 2 Keen, 538.

5. Story's Eq. Pl. (9th Ed.) § 442; Cooper's Eq. Pl. 113; Jones v. Stafford, 3 P. Wms. 80; Dormer v. Fortescue, 2 Atk. 282; Clark v. Phelps, 6 Johns. Ch. (N. Y.) 214. This doctrine abolished by English chancery order No. 37, 1841; and rule 37, Equity rules, U. S. S. C.,

6. Story's Eq. Pl. (9th Ed.) § 443; Cooper's Eq. Pl. 112, 113; Metcalf v. Hervey, I Ves. 248; Verplanck v. Caines, I Johns. Ch. (N. Y.) 57; Higinbotham v. Burnett, 5 Johns. Ch. (N. Y.) 186; Knight v. Mosely, Ambler, 176; Jones v. Frost, 3 Mod. 1; Wynne v. Jackson, McCl. & Y.

35; Atty.-Genl. v. Brown, I Swanst. 304; Kuypers v. Church, 6 Paige (N. Y.), 570; Mayor of Londonderry v. Levy, 8 Vesey, 403; Baker v. Mellish, 11 Vesey, 70; Todd v. Gee, 17 Vesey, 280; Phœnix Ins. Co. v. Day, 4 Lea (Tenn.), 247.
7. Cooper's Eq. Pl. 112, 113, 115; Mitf. Eq. Pl. 214, 275; Baker v. Mellish, 11 Ves. 70; Dell v. Hale, 2 Y. & Col. Ch.

Where a demurrer is too extensive, it must be overruled, but the matter pertaining alone to the relief to which the complainant is not entitled, will be struck out. Lindsley v. Personette, 35 N. J.

8. Cooper's Eq. Pl. 112, 113; Story's Eq. Pl. (9th Ed.) § 443; Jones v. Frost,

Jac. 466.

9. Story's Eq. Pl. (9th Ed.) § 444; Cooper's Eq. Pl. 113; Mitf. Eq. Pl. 214,

and disallowed as to others; the defence being good as to one, perhaps, but inapplicable to another. Whenever any ground of defence is apparent on the bill, either from the matter contained therein, or from defect in its frame, or in the case made by it, a demurrer is the proper defence.² The causes of a demurrer must be upon some matter in the bill, or upon the omission of some matter which ought to be therein or attendant thereon, and not upon any foreign matter alleged by the defendant.³ A demurrer cannot state facts which do not appear with certainty upon the face of the bill. Where the facts relied on for defence by the defendant are not expressly charged in the bill, it is not generally safe to demur, unless the whole right against the defendant is founded on that charge. A demurrer necessarily admits the truth of the facts stated in the bill, so far as they are relevant and well pleaded, but not the conclusions of law drawn therefrom, as alleged in the bill.6 If a demurrer extends to any particular discovery, the matter sought to be discovered is taken to be as stated; if the relief only is demurred to, the whole case made by the bill is considered as true. A demurrer is always preceded by a protestation against the truth of the matters contained in the bill, a practice borrowed from the common law, and probably intended to avoid any conclusion in another suit. Whenever the ground of objec-

Vesey, 403, 404.

2. Story's Eq. Pl. (6th Ed.) § 446; Mitf. Eq. Pl. 107. See Tappan v. Evans, 11 N. H. 311; Harris v. Thomas, 1 Hen. K. H. 311, Harris v. Hodnas, I Hell.
K. M. (Va.) 18; Alderson v. Biggars, 4
Hen. & M. (Va.) 472; Brill v. Stiles, 35
Ill. 305; Barry v. Abbott, 100 Mass. 396.
Story's Eq. Pl. (9th Ed.) § 447; Miff.
Eq. Pl. 107, 108; Waters v. Perkins, 65

4. Story's Eq. Pl. (9thEd.) § 448; Cooper's Eq. Pl. 111; Edsell v. Buchanan, 2 Vesey Jr. 83; Davies v. Williams, r Sim. 5; Brooks v. Gibbons, 4 Paige (N. Y.), 374; Brownsword v. Edwards, 2 Vesey, 245; Cawthorn v. Chalié, 2 Sim. & Stu. 129; Kuypers v. Church, 6 Paige (N. Y.), 570. See also Hodle v. Healey, r Ves. & B. 536: Foster v. Hodgson, ro Vesey, 180; 536; Foster v. Hodgson, 19 Vesey, 180; Barron v. Martin, 19 Vesey, 327; Delorain v. Browne, 3 Bro. Ch. 633; Hoare v. Peck, 6 Sim. 51; Hovenden v. Annes-ley. 2 Sch. & Lefr. 637.

5. Story's Eq. Pl. (9th Ed.) § 450; Fletcher v. Tollet, 5 Vesey Jr. 3; 1 Mont.

Eq. Pl. 94; Hicks v. Raincock, I Cox,

40; Braband v. Hoskins, 3 Price, 31.
6. Story's Eq. Pl. (9th Ed.) § 452;
Daniel's Ch. (5th Am. Ed.) *544;
Cooper's Eq. Pl. 111; Mitf. Eq. Pl.
211, 212; Williams v. Stewart, 3 Mer.
472; Ford v. Peering, I Vesey Jr. 77;

1. Story's Eq. Pl. (oth Ed.) § 445; East India Co. v. Henchman, 1 Vesey Daniel Ch. *542; Cooper's Eq. Pl. 113; Jr. 291; Penfold v. Nunn, 5 Sim. 405; Mayor of Londonderry v. Levy, 8 Earle v. Holt, 5 Hare. 180; Baker v. Jr. 291; Penfold v. Nunn, 5 Sim. 405; Earle v. Holt, 5 Hare, 180; Baker v. Booker, 6 Price, 381. See also Nesbitt v. Berridge, 9 Jur. N. S. 1044; Mills v. Brown, 2 Scam. 549; Goble v. Anderson s. How (Miss.) 265; Green v. Rob. son, 5 How. (Miss.) 365; Green v. Robinson, 5 How. (Miss.) 80; Green v. Robinson, 5 How. (Miss.) 80; Smith v. Allen, I Saxt. (N. J.) 43; Wales v. Bank, Harr. Ch. (Mich.) 308; Griffing v. Gibb, 2 Black. (U. S.) 519; Roby v. Cossitt, 78 Ill. 638; Craft v. Thompson, 51 N. H. 536; Swan v. Castleman, 4 Baxt. (Tenn.) 257.

A demurrer does not admit that the construction of a written instrument set forth in the bill is the true one; or that a parol understanding, stated in the bill as varying a written instrument, is competent and admissible in evidence. Lea v. Robeson, 12 Gray (Mass.), 280; Dillon v. Barnard, I Holmes (C. C.), 386. Nor a charge of fraud, unless the facts are specifically set forth. Flewellen v. Crane, 58 Ala. 627.

If the allegations are upon information a demurrer does not admit the truth of the information. Walton v. Westwood, 73 Ill. 125 See also Tompson v. Bank, 106 Mass. 128; Pearson v. Tower, 55 N. H. 215; Partee v. Hortrecht, 54 Miss. 66; Stow v. Russell, 36 Ill. 18.

7. Story's Eq. Pl. (9th Ed.) § 452, Daniel's Ch. *585.

tion or defence is apparent on the face of the bill, from matter contained in it or from defect in its frame, a demurrer is the proper mode of taking it. If the plaintiff's case as stated will not entitle him to a decree, the defendant should demur, although the objection would be equally fatal at the hearing.2 If the bill is defective in substance, it is advisable to demur, and thereby save unnecessary expense. An objection to defect in matter of form must ordinarily be taken by demurrer. Demurrers are either general, when no particular cause is assigned, except the usual formulary, that there is no equity in the bill, or special when the particular defects or objections are pointed out.⁴ A general demurrer is sufficient (though it is customary to state special causes) when the bill is defective in substance. If the objection is to defects in the form of the bill, a special demurrer is required.⁵ The rules of courts of equity require a demurrer to contain the causes thereof, set down with reasonable certainty and directness. 6 Demurrers are always in bar of the suit, praying a dismissal of it.7 Where, however, the suit is dismissed upon a hearing upon the merits, unless the dismissal is without prejudice. it is a bar to another bill; while a dismissal for defect of form or structure, not going to the merits, is no bar to a subsequent suit for the same subject-matter.8 The bill is the only pleading which can be demurred to, a demurrer being inapplicable to a plea or answer.9

3. FRAME OF DEMURRER.—After the protestation and statement of the causes on which the demurrer is founded, if it does not go to the whole bill, the particular parts designed to be covered must be clearly indicated, otherwise the court must look over the whole bill to pick them out. 10 This must be done by a positive definition of the parts of the bill, which the defendant seeks to avoid answering; not by way of exception, as by demurring to all except certain parts.¹¹ The demurrer must be

1. Story's Eq. Pl. (9th Ed.) § 453; Cooper's Eq. Pl. 118; Billing v. Flight, 1 Mad. 230.

Mad. 230.

2. Hovenden v. Annesley, 2 Sch. & Lefr. 638; Barker v. Dacie, 6 Vesey Jr. 686. See Huntington v. Saunders, 14 Fed. Rep. 907; Dwight v. Smith, 20 Blatchf. (C. C.) 210; Edson v. Girwan, 29 Hun (N. Y.), 422.

3. Story's Eq. Pl. (9th Ed.) § 453.

4. Story's Eq. Pl. (9th Ed.) § 455; Barton's Suit in Eq. 107, 108

ton's Suit in Eq. 107, 108.

The usual formulary is: "And for causes of demurrer say, that the complainant's said bill of complaint, in case the same were true, which these defendants do in nowise admit, contains not any matter of equity whereon this court can ground any decree, or give the com-plainant any relief or assistance, as against them, these defendants."

5. Stewart v. Flint, 57 Vt. 216.

6. Story's Eq. Pl. (9th Ed.) § 455; Bar ton's Suit in Eq. 108, note 1; Mitf. Eq. Pl. 213, 214.

7. Roberdean v. Rous, I Atk. 544;

Jones v. Strafford, 3 P. Wms. 80.

8. Story's Eq. Pl. (9th Ed.) § 456;
Holmes v. Remsen, 7 Johns. Ch. (N. Y.)
286; Mitf. Eq. Pl. 216.

9. Story's Eq. Pl. (9th Ed.) § 456; Mitf. Eq. Pl. 301; Cooper's Eq. Pl. 231; Travers v. Ross, 14 N. J. Eq. 254; Winters v. Claitor, 54 Miss. 341.

10. Story's Eq. Pl. (9th Ed.) § 457; Mitf.

Eq. Pl. 213, 214; Chetwynd v. Lindon, 2 Vesey, 450; Salkeld v. Science, 2 Vesey.

vesey, 450; Salkeid v. Science, 2 Vesey, 107; Barton's Suit in Eq. 108, 110; Devonsher v. Newenham, 2 Sch. & Lefr. 205. See also Hicks v. Raincock, 1 Cox, 40.

11. Story's Eq. Pl. (9th Ed.) § 457; Mitf. Eq. Pl. 214, note h; Robinson v. Thompson, 2 Ves. & B. 118; Weatherhead v. Blackburn, 2 Ves. & R. 211. head v. Blackburn, 2 Ves. & B. 121.

framed with reference to the nature of the bill: a demurrer to a bill for discovery only, that the plaintiff is not entitled to any such relief prayed, without mentioning discovery, is bad. Before the demurrer is argued the plaintiff may amend his bill on payment of costs; after the argument and allowance of the demurrer, however, the bill is out of court and cannot be regularly amended; instead of deciding on the demurrer, the court has sometimes given the plaintiff leave to amend his bill, paying the costs of the de-This has frequently been done in case of a demurrer for want of parties. If any part of a bill is left untouched by a demurrer, the whole may be amended in spite of the allowance of the demurrer, for the suit continues in court.2 After the overruling of a demurrer, on the ground that the facts do not sufficiently appear on the face of the bill, a plea may be put in stating the facts necessary to bring the case before the court; and after a plea overruled, a demurrer has been allowed bringing up in substance the same question.³ After the overruling of a demurrer, however, a second demurrer will not be allowed. Under rules of court a demurrer must be signed by counsel, but need not be sworn to, as it asserts no fact, relying merely upon matter in the bill. Consequently it is considered that defendant may on sight of the bill, by advice of counsel, be able to demur thereto; for this reason, when defendant is given time to demur, he is also required to plead to, or answer, some part of the bill.5 The modern practice is according to this rather strict rule with relaxation in special cases upon application, as in some cases an answer to any part of the bill may overrule the demurrer; as where the ground of the demurrer applies to the whole bill, the answer to any part is inconsistent with that.6

Where a bill is demurred to for causes assigned on the record, which are overruled, the defendant may assign other causes, ore tenus, at the argument. In such case, however, there must be a demurrer of record. A demurrer ore tenus must be for some cause, covering the whole extent of the demurrer, and can only be put in where the demurrer is to the whole bill. In framing a

1. Story's Eq. Pl. (9th Ed.) § 458, \alpha; Mills v. Campbell, 2 Y. & Coll. 389. 2. Story's Eq. Pl. (9th Ed.) 459; Mitf. Eq. Pl. 215, 216; Cooper's Eq. Pl. 115;

Baker v. Mellish, 11 Vesey, 72.
3. Story's Eq. Pl. (9th Ed.) § 460;

Mitf. Eq. Pl. 215, 216.

4. Story's Eq. Pl. (9th Ed) § 460; Mitf. Eq. Pl. 216, 217; Cooper's Eq. Pl. 115, 116; Mont. Eq. Pl. 112, 113; Baker v. Mellish, 11 Vesey, 70; Booth v. Stamper, 10 Ga. 113. See, as to filing demurrer after answer and replication filed, Sanderson v. Sanderson, 17 Fla. 820.

5. Story's Eq. Pl. (9th Ed.) § 461; Beames Ord. in Ch. 172; Hinde's Ch. Pr. 148; Mitf. Eq. Pl. 208; Cooper's Eq. Pl. 114; Wyatt's Pr. Reg. 165.

6. Story's Eq. Pl. (9th Ed.) § 463; Mitf. Eq. Pl. 210, 211.

7. Story's Eq. Pl. (9th Ed.) § 464; Cooper's Eq. Pl. 112; Cartwright v. Green, 8 Vesey, 409; Brinkerhoff v. Brown, 6 Johns. Ch. (N. Y.) 139. See

**Blown, o Johns, Ch. (N. 1.) 139. See Hastings v. Belden, 55 Vt. 273.

8. Story's Eq. Pl. (9th Ed.) § 464; Cooper's Eq. Pl. 112; Durdant v. Redman, I Vern. 78; Atty.-Genl. v. Brown, I Swanst. Ch. 288; Hook v. Dorman, I

Swanst. Ch. 258; Hook v. Dorman, I Sim. & Stu. 227. 9. Baker v. Mellish, II Vesey, 70; Shepherd v. Lloyd, 2 Y. & Jer. 490. See also Barrett v. Doughty, 25 N. J. Eq. 379; Somerby v. Buntin, II8 Mass.

demurrer to a part of a bill and answer to another, no part covered by one should be included in the other; and no matter should be included in the answer to which the demurrer, though not in form, properly applies in substance, since in such a case the demurrer is overruled by the answer.1

4. THE GROUNDS OF DEMURRER.—(a) To Original Bills.—(1) To the Relief.—Demurrers to the relief are either: To the jurisdiction; the person; or the matter of the bill, either in its sub-

stance or form.

Demurrers to the jurisdiction are either on the ground, (1) that the case made by the bill does not come within the description of cases in which a court of equity assumes the power of decision: in this case a demurrer will hold equally where the defect arises from the omission of some matter which ought to be contained in the bill, or of some circumstance which ought to be attendant thereon for the purpose of bringing the case properly within the jurisdiction; or, (2) because the subject-matter of the bill is within the cognizance of some other court, as a court of common law, 3 of probate or divorce, 4 of admiralty, 5 of bankruptcy, 6

1. Story's Eq. Pl. (9th Ed.) § 465; Ellice v. Goodson, 3 Myl. & Cr. 653; Crouch v. Hickin, 1 Keen, 389; Dawson v. Sadler, 1 Sim. & Stu. 537; Cresy v.

2. Sadier, 1 Silli. 3 Std. 537; Cresy v. Bevan, 13 Sim. 354.

2. Dan. Ch. Pr. (5th Am. Ed.) *549; Ld. Red. 108; Story's Eq. Pl. (9th Ed.) \$\frac{8}{5}\, 466, 467; Stephenson v. Davis, 56 Me. 73; Miff. Eq. Pl. 110; Blount v. Garen, 3 Hayw. (Tenn.) 88; Livingston v. Livingston, 4 Johns. Ch. (N. Y.)

Where the bill sets forth various claims, a general demurrer will be overruled if any of the claims be proper for the jurisany of the claims be proper for the jurisdiction. Castleman v. Veitch, 3 Rand. (Va.) 598; Kimberly v. Sells, 3 Johns. Ch. (N. Y.) 467; Graves v. Downey, 3 Mon. (Ky.) 353; Mortone v. Academies, 8 Sm. & M. 773. See also Dimmock v. Bixby, 20 Pick. (Mass.) 368; Boston, etc., Co. v. Railroad, 16 Pick. (Mass.) 512. The presumption is against the pleader. Columbine v. Chichester, 2 Phila. (Pa.) 28; Foss v. Harbottle, 2 Hare, 502; Hyde Park v. Durham, 85 Ill. 569.

Otherwise in Tennessee. Lincoln v. Purcell, 2 Head (Tenn.), 143; Gray v. Hays, 7 Humph. (Tenn.) 590; Hobbs v. Railroad, 9 Heisk. (Tenn.) 773. See also French v. Dickey, 3 Tenn. Ch. 302; Smiley v. Jones, 3 Tenn. Ch. 312.

A demurrer for want of equity will not lie to a bill that is not deficient in substance, although for some technical reason-as lapse of time, or want of jurisdiction in the court—the relief sought for

cannot be attained in that suit. Nicholas v. Murray, 5 Sawy, C. C. 320.

As to demurrers on the ground of an adequate remedy at law, see Red Jacket Tribe v. Hoff, 33 N. J. Eq. 441; Naudain v. Ormes, 3 MacArthur (D. C.). 1; Gaines

v. Ormes, 3 MacArthur (D. C.), 1; Gaines
v. Miller, 111 U. S. 395; Denner v.
Chicago, etc., R. Co., 57 Wis. 218.
3. Dan. Ch. (5th Am. Ed.)*551; Cooper
Eq. Pl. 124; Kemp v. Tucker, L. R. 8 Ch.
App. 369; Lynch v. Willard, 6 Johns. Ch.
(N.Y.) 342; May v. Goodwin, 27 Ga. 352;
Reed v. Bank, 1 Paige (N. Y.), 215; Bosley v. McKim, 7 Har. & J. (Md.) 468;
Reed v. Clarke A Mon. (Ky.) 10; Bank Reed v. Clarke, 4 Mon. (Ky.) 19; Bank v. Lee, 11 Conn. 112; Coombs v. Warren, v. Lee, 11 Conn. 112; Coombs v. Warren, 17 Me. 404; Caldwell v. Knott, 10 Yerg. (Tenn.) 209; Hoare v. Contencin, 1 Bro. C. C. 27; Hammond v. Messenger, 9 Sim. 327; Bottorf v. Conner, 1 Blackf. (Ind.) 287; Pierpont v. Fowle, 2 Wood. & M. (U. S.) 23; Smith v. Morehead, 6 Jones Eq. (N. Car.) 360; Parry v. Owen, 3 Atk.740; Maw v. Pearson, 28 Beav. 196. 4. Dan. Ch. (5th Am. Ed.) *553; Hunt v. Hunt, 4 DeG. F. & J. 221; Williams v. Bailey, L. R. 2 Eq. 731; Brown v. Brown, L. R. 7 Eq. 185; Wilson v. Wilson, 1 H. of L. Cas. 538; Evans v. Carrington, 1 J. & H. 598.

501, 7 11. 06 L. Cas. 336, Evalue 7. Cas. 136, Evalue 7. Cas. 137, Evalue 7. Cas. 137,

See also, as to jurisdiction, 12 & 13 Vict. c. 106; 17 & 18 Vict. c. 119; 24 &

25 Vict. c. 134.

of some statutory jurisdiction. or of some other court of equity.2

An objection to the personal disability of the plaintiff may be taken where the incapacity appears on the face of the bill.3

objection extends to the whole bill.4

Demurrers to the matter of the bill as to its substance are, that the plaintiff has no interest in the subject; 5 that although the plaintiff has an interest, yet the defendant is not answerable to him, but to some other person; that the defendant has no interest;6 that the plaintiff is not entitled to the relief prayed;7 that the value of the subject-matter is beneath the dignity of the court:8 that the bill does not embrace the whole matter:9 that there is a want of proper parties; 10 that the bill is multifari-

1. Dan, Ch. (5th Am. Ed.) *553-*554; Parry v. Owen, 3 Atk. 740; Frey v. Demarest, 16 N. J. Eq. 236; Heming v. Swinerton, 2 Phila 79; Nichols v. Roe, 3 M. & K. 431; Railroad Co. v. Leishman, 12 Beav, 423. See also Harding v. Wickham, 2 J. & H. 676; Smith v. Whitmore, 10 Jur. N. S. 65; Wakefield v. Railroad Co., 3 DeG. J. & S. 11; Stevens v. Appleton, 4 Cliff. (C. C.) 265.

The want of jurisdiction must appear on the face of the complaint. Fisher v. Ins. Co., 67 How. Pr. (N. Y.) 191. See

also Harwell v. Lehman, 72 Ala. 344.

2. Dan. Ch. (5th Am. Ed.) *554, 555; Story's Eq. Pl. (9th Ed.) § 490; Ld. Red. 151; Mead v. Merritt, 2 Paige (N. Y.), 402. The general way of objecting to the jurisdiction is by plea. Ld. Red. 152; Earl of Derby v. Duke of Athol, I Vesey Sr. 204; Kilcrease v. Blythe, 6 Humph. (Tenn.) 378; Roberdean v. Rous, 1 Atk. 543; Bank v. Railroad Co., 28 Vt. 470; Fremont v. Mining Co., 1 McAll. C. C.

3. See, as to incapacities, Dan. Ch. (5th Am. Ed.) *45 et seq.; also Dan. Ch. *556; Harrison v. Rowan, 4 Wash. (C. C.) 203; Berry v. Rogers, 2 B. Mon. (Ky.) 308.

4. Dan. Ch. (5th Am. Ed.) *556; Gil-

bert v. Lewis, 1 De G. J. & S. 38.
5. Dan. Ch. (5th Am. Ed.) **314, 557; Ld. Red. 154; Atwill v. Ferrett, 2 Blatchf. C. C.) 39; Haskell v. Hilton, 30 Me.
410. See also King of Spain v. Machado,
4 Russ. 224; Cuff v. Plattett, 4 Russ.
242; Clarkson v. De Peyster, 3 Paige
(N. Y.), 336; Dias v. Bouchaud, 10 Paige
(N. Y.), 445.
6 Dan Ch (rth Am Ed.) ***214. 222.

6. Dan. Ch. (5th Am. Ed.) **314, 322,

7. Dan. Ch. (5th Am. Ed.) **325, 377, 378-557; Rollins v. Forbes, 10 Cal. 299. See Bleeker v. Bingham, 3 Paige (N. Y.), 246; Morton v. Academies, 8 Sm. & M. (Miss.) 773; Clark v. Davis, Harr. Ch.

(Mich.) 227; Dike v. Greene, 4 R. I. 285; Sprague v. Rhodes, 4 R. I. 301; also Calhoun v. Powell, 42 Ala. 645; Harding v. Egin, 2 Tenn. Ch. 39; s. c., 56 Ala. 303; Quin v. Leake, I Tenn. Ch. 67.

A demurrer to the whole bill does not lie merely because the prayer for relief is too broad. Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106. That plaintiff prays incidental relief is not ground for a demurrer. Miller v. Jamison, 9 C. E. Green (N. J.), 41; Payne v. Berry, 3 Tenn. Ch. Nor that the plaintiff does not seek the proper relief, or asks for inconsistent relief. Connor v. Board of Education, 10 Minn. 439. A demurrer to a complaint, as not stating a cause of action, will be overruled if from facts alleged it appears that some relief should be awarded. The court need not specify what relief. Brewster v. Hatch, 10 Abb. N. Cas. (N. Y.) 400.

8. Dan. Ch. (5th Am. Ed.) **328-29, 558; Carr v. Inglehart, 3 Ohio St. 457.

As to jurisdiction limited to a certain amount, which the matter in dispute on the face of the bill does not exceed, see Smets v. Williams, 4 Paige (N. Y.), 364; McElwain v. Willis, 9 Wend. (N. Y.) 548; Schroeppel v. Redfield, 5 Paige (N. Y.), schroeppel v. Kedheld, 5 Paige (N. Y.), 245; Bradt v. Kirkpatrick, 7 Paige (N. Y.), 62; Van Tyne v. Bunce, 1 Edw. Ch. (N. Y.), 583; Moore v. Lyttle, 4 Johns. Ch. (N. Y.) 183; Fullerton v. Jackson, 5 Johns. Ch. (N. Y.), 276; Douw v. Sheldon, 2 Paige (N. Y.), 303; Vredenburgh v. Johnson, 1 Hopk. (N. Y.) 112; Mitchell v. Tighe f. Johns Ch. (N. Y.) Mitchell v. Tighe, 5 Johns. Ch. (N. Y.)

9. Dan. Ch. (5th Am. Ed.) **330, 558.
10. Dan. Ch. (5th Am. Ed.) *190 et seq.,
*558, 559; Ld. Red. 164 et seq.; Story's.
Eq. Pl. § 541; Farnham v. Clements, 51
Me. 426; Elmendorf v. Taylor, 10 Wheat.
(U. S.) 152; Crane v. Deming, 7 Conn. 387; Mitchell v. Lenox, 2 Paige (N. Y.),

ous; that the plaintiff's remedy is barred by length of time; the Statute of Frauds; that it appears by the bill that there is another suit depending for the same matter.4

A bill may be demurred to by reason of a deficiency in matters of form. because the plaintiff's place of abode is not

280: Robinson v. Smith, 3 Paige (N. Y.).

The demurrer should point out the proper parties to enable the plaintiff to amend. Ld. Red. 180; Atty.-Genl. v. Poole, 4 M. & C. 17; Story's Eq. Pl. (9th Ed.) § 543; Robinson v. Smith, 3 Paige (N.Y.), 222. It is no answer to a demurrer that the addition of the party would render the bill multifarious. Lumbsden v. Fraser, 1 M. & C. 589; Atty.-Genl. v. Merchant Tailors' Co., 1 M. & K. 189. Where a bill has equities, it should not be dismissed for defect of parties until the refusal of the plaintiff to bring them in. Eagle v. Beard, 33 Ark. 497. A demurrer for want of parties may be disregarded where the answer shows that all parties really interested are before the court. Craft v. Russell, 67 Ala. 9. Objections to a bill for want of parties cannot be raised by general demurrer. Hughes v.

raised by general demurrer. Hughes v. Hughes, 72 Ga. 173.

1. Dan. Ch. (5th Am. Ed.) ***333, 559; Story's Eq. Pl. (9th Ed.) § 530 et seq.; Grove v. Fresh, 9 Gill & J. (Md.) 285; Bryan v. Blythe, 4 Blackf. (Ind.) 249; Coe v. Turner, 5 Conn. 86; Mulock v. Mulock, 1 Edw. Ch. (N. Y.) 14; Thurman v. Shelton, 10 Yerg. (Tenn.) 383; Emans v. Emans, 1 McCarter (N. J.), 114.

As the demurrer goes to the whole hill it is not pressure to specify the

bill, it is not necessary to specify the parts which are multifarious. East India parts which are multiarrious. East India Co. v. Coles, 3 Swanst. 142; Dimmock v. Bixby, 20 Pick. (Mass.) 368; Gibbs v. Clagett, 2 Gill & J. (Md.) 14; Boyd v. Hoyt, 5 Paige (N. Y.), 65; White v. White, 5 Gill (Md.), 359.

Bill for infringement of several patents, with no allegation that the relates were

with no allegation that the patents were in fact or were capable of being used in making a single structure, or that the defendant had so used them. The demurrer showed that it was intended to be for misjoining causes of suit against the defendant, though much of it was taken from the form for misjoinder of parties. It alleged, however, that the bill was brought for several causes "distinct one from the other," and "not alleged to be conjointly infringed." Demurrer sustained. Hayes v. Dayton, 18 Blatchf. (C. C.) 420.

A demurrer for want of equity and multifariousness may be overruled if the bill, though multifarious, states a case for equitable relief, since the costs are in the control of the court. Storrs v. Wallace, 54 Mich. 112. One defendant cannot demur for multifariousness on the ground of joinder of another defendant. who does not object, Bermes v. Frick.

38 N. J. Eq. 88.
2. Dan. Ch. (5th Am. Ed.) **559, 560. By analogy to the Statutes of Limitation, length of time elapsed since the plaintiff's claim arose is a bar to the relief sought, and may be set up by demur-rer as well as by plea. The lapse must appear with certainty on the face of the bill. Deloraine v. Browne, 3 Brock. (C. C.) 633; Wisner v. Barnet, 4 Wash. (C. C.) 631; Dunlap v. Gibbs, 4 Yerg. (Tenn.) C.) 631; Dunlap v. Gibbs, 4 Yerg. (Tenn.) 94; Hoare v. Peck, 6 Sim. 51; Freake v. Cranfelt, 3 M. & C. 499; Tyson v. Pole, 3 Y. & C. 266; Humbert v. Trinity Church, 7 Paige (N. Y.), 195; Van Hook v. Whitlock, 26 Wend. (N. Y.) 43; Coster v. Murray, 5 Johns. Ch. (N. Y.) 522; Waller v. Demint, 1 Dana (Ky.), 92; McDowl v. Charles, 6 Johns. Ch. (N. Y.) 132; Jackson v. Hull at W. Yo. 661 132; Jackson v. Hull, 21 W. Va. 601. See also Green v. Tippah Co., 58 Miss. 337; Underhill v. Ins. Co., 67 Ala. 45; Furlong v. Riley, 103 Ill. 628; Wollensak v. Reiher, 115 U. S. 96.

3. Dan. Ch. (5th Am. Ed.) *561.

It is more usual to plead this statute, as the bill seldom discloses everything necessary for the defence. Field v. Hutchinson, I Beav. 600; Howard v. O'Keover, 3 Swanst. 421. See also Cozine v. Graham, 2 Paige (N. Y.), 177; Walker v. Locke, 5 Cush. (Mass.) 90; Slack v. Black, 109 Mass. 496; Ahrend v. Odiorne, 118 Mass. 261; Macey v. Childress, 2 Tenn. Ch. 438.

4. Dan. Ch. (5th Am. Ed.) *561.

It must appear, however, that the suit already depending will afford the plaintiff v. Rigby, 4 Brock. (C. C.) 60. See also Peareth v. Peareth, John. 58; Singleton v. Selwyn, 9 Jur. N. S. 1149.

As to ground of res adjudicata, see Waine v. Crocker, 10 W. R. 204; s. c., 3 De G. F. & J. 421; Knight v. Atkisson,

2 Tenn. Ch. 387. 5. Story's Eq. Pl. (9th Ed.) §§ 528, 529; Dan. Ch. (5th Am. Ed.) *562; Ld. Red. 206.

The facts showing irregularity of

stated: 1 because the facts essential to the plaintiff's right, and within his own knowledge, are not alleged positively; 2 because the hill is deficient in certainty; because the plaintiff does not by his bill offer to do equity where the rules of the court require that he should do so.4 or to waive penalties or forfeitures, where the plaintiff is in a situation to make such waiver; 5 because the bill is not signed by counsel; 6 or because there is no affidavit accompanying the bill in the cases where the rules of court require one.7

(2) Demurrers to the Discovery.—These are rare now, since the objection is almost always taken by answer, to which, however, the

same general rules apply.8

A demurrer to the discovery may be that the discovery may subject the defendant to pains and penalties, or to some forfeiture, or something in the nature of forfeiture; 9 that in conscience the defendant's right is equal to the plaintiff's; 10 that the discovery sought is immaterial to the relief prayed; 11 that it would be a breach of professional confidence; 12 that it relates only to the defendant's case; 13 that a third party has an interest in it and ought not to be prejudiced; 14 that it might be injurious to public interests.15 A demurrer to discovery is in fact a mere statement in writing that the defendant refuses to answer certain allegations or charges in the bill, for reasons pointed out by the demurrer, which appear on the face of the bill. 16

(b) Demurrers to Bills not Original.—A supplemental bill may be demurred to whenever it appears upon its face that the plaintiff has no right to file it, either from want of title or from mistake in pleading, 17 if it be brought upon matter arising before the filing of the original bill, amendment in such case being the proper course; 18 if it seeks to make a new and different case from the

original bill, upon new matter.19

practice must appear in the bill. Talmadge v. Lovett, 3 Edw. Ch. (N. Y.) 563.

1. Dan. Ch. (5th Am. Ed.) ***357, 562; Winnipiseogee Co. v. Young, 40 N. H. 42; Howe v. Harvey, 8 Paige (N.Y.), 73.

Where the plaintiff does not state his

occupation, a demurrer will not lie. Gove v. Pettis, 4 Sandf. Ch. (N. Y.) 403.
2. Dan. Ch. (5th Am. Ed.) **360, 562;

Smith v. Kay, 7 H. of L. Cas. 750. 8. Dan. Ch. (5th Am. Ed.) **368, 371,

372, 562. 4. Dan. Ch. (5th Am. Ed.) **385, 562. 5. Dan. Ch. (5th Am. Ed.) **386, 387,

6. Dan. Ch. (5th Am. Ed.) **312; Graham v. Elmore, Harr. Ch. (Mich.) 265. Contra in Gove v. Pettis, 4 Sandf. Ch. (N. Y.) 403.

7. Lansing v. Pine, 4 Paige (N.Y.), 639. 8. Dan. Ch. (5th Am. Ed.) **562, 708, et seq.

9. Dan. Ch. (5th Am. Ed.) **386, 563, et seg.; Story's Eq. Pl. (9th Ed.) § 575. No one is bound to answer so as to

subject himself to punishment of whatever nature. Brownsword v. Edwards, 2 Vesey Sr. 243; Harrison v. Southcote, 1 Atk. 528; Parkhurst v. Lowten, 2 Swanst. 214.

A defendant may demur to a bill charging him with a criminal offence. Denni-

son v. Yost, 61 Md. 139.

10. Dan. Ch. (5th Am. Ed.) **569, 570. 11. Dan. Ch. (5th Am. Ed.) ** 570, 571.

12. Dan. Ch. (5th Am. Ed.) *571 et seq.

Dan. Ch. (5th Am. Ed.) *579 et seq.
 Dan. Ch. (5th Am. Ed.) *579 et seq.
 Dan. Ch. (5th Am. Ed.) *581.
 Dan. Ch. (5th Am. Ed.) *581.
 Langdell's Eq. Pl. (2d Ed.) 108.
 Story's Eq. Pl. (5th Ed.) § 612; Mitf.

Eq. Pl. 201; Cooper's Eq. Pl. 75 et seq., 210 et sea.

18. Story's Eq. Pl. (9th Ed.) § 614; Cooper's Eq. Pl. 214; Mitf. Eq. Pl. 202, 203, 207; Usborne v. Baker, 2 Mad. 387;

Baldwin v. MacKown, 3 Atk. 817; Stafford v. Howlett, 1 Paige (N. Y.), 200; Colclough v. Evans, 4 Sim. 76.

19. Story's Eq. Pl. (9th Ed.) § 616;

A bill of revivor may be demurred to for want of privity; 1 for want of sufficient interest in the party seeking to revive, or for

some imperfection in the frame of the bill.3

A cross-bill, with some limitations, may be demurred to for the same causes as an original bill.⁴ A demurrer for want of equity. however, will not hold to a cross-bill, since the defendant being brought into court by the plaintiff in the original bill, may avail himself of the assistance of the court, without having to show an equitable ground for its jurisdiction.5

A cross-bill may be demurred to when it seeks other than equitable relief; 6 when it does not contain all proper allegations necessary to confer an equitable title to the relief sought: if it seeks to bring before the court matters and rights distinct from those in litigation in the original suit; 8 if it is filed contrary to the practice of the court, under circumstances in which a pure cross-

bill is not allowed.9

A bill of review may be demurred to if not founded upon some error upon the face of the bill, answer and pleadings in the case, and the facts embodied in the decree; 10 if not brought within the time prescribed for the bringing of writs of error; 11 on the ground that it is not brought according to the course of the court, or that it is not in its form and structure an appropriate bill of review. 12

B. Demurrer at Law.—I. GENERAL NATURE OF DEMURRER.—

If the declaration, plea, or other pleading of either of the parties be defective, the other party may demur to it, admitting the facts

Colclough v. Evans. 4 Sim. 76; Dias v. Merle, 4 Paige (N. Y.), 259. See also Crompton v. Wombwell, 4 Sim. 628.

An amended bill not repugnant to the original one, presenting the case more fully, with additional averments, is not demurrable. Sinn v. Carson, 32 Gratt. (Va.) 170.

Where a bill is demurrable, an amended bill, founded on facts occurring since the original bill was filed, is demurrable.

Ins. Co. v. Selma Bk., 63 Ala. 585.

1. Story's Eq. Pl. (9th Ed.) § 618.

2. Story's Eq. Pl. (9th Ed.) §§ 371, 620, 621; Cooper's Eq. Pl. 211, 212; Mitf. Eq. Pl. 202; Williams v. Cooke, 10 Vesey, 406; Horwood v. Schmedes, 12

Vesey, 400; Horwood v. Schmedes, 12 Vesey, 311. See also Troward v. Bingham, 4 Sim. 483.
3. Story's Eq. Pl. (9th Ed.) §§ 358, 622; Cooper's Eq. Pl. 213; Fallowes v. Williamson, 11 Ves. 306; Gould v. Barnes, 1 Dick. 133; 1 Mont. Eq. Pl. 309; Metcalfe v. Metcalfe, 1 Keen, 74; Pendleton v. Fev. 2 Poice (N. V. 2014) Phologo. v. Fay, 3 Paige (N. Y.), 304; Phelps v. Sproule, 4 Sim. 318; Griffith v. Ricketts, 3 Hare, 476; Harrison v. Ridley, 2 Eq.

4. Story's Eq. Pl. (9th Ed.) §§ 389-400,

466-554, 628.

It must be really a cross-bill, or is de-

murrable. Moss v. Navigation Co., L. R. 1 Ch. 108.

5. Story's Eq. Pl. (9th Ed.) §§ 398, 399, 628; Mitf. Eq. Pl. 203; Cooper's Eq. Pl. 81, 215; Doble v. Potman, Hardres, 160; Burgess v. Wheate, I W. Blacks, 123; Hilton v. Barrow, I Vesey Jr. 284.

6. Story's Eq. Pl. (9th Ed.) §§ 398, 629; Cooper's Eq. Pl. 86, 215; Calverly v.

529; Cooper's Eq. Pl. 86, 215; Calverly v. Williams, I Vesey Jr. 213.
7. Story's Eq. Pl. (9th Ed.) § 630; Cooper's Eq. Pl. 215; I Mont. Eq. Pl. 328; Mason v. Gardiner, 4 Bro. Ch. 436; Benfield v. Solomons, 9 Vesey, 84; West Va. Oil Co. v. Vinal, 14 W. Va. 637.
8. Story's Eq. Pl. (9th Ed.) § 631; Gallatian v. Cunningham, 8 Cow. (N. Y.) 361.
9. Story's Eq. Pl. (9th Ed.) § 8305, 632;

latian v. Cunningham, 8 Cow. (N.Y.) 361.
9. Story's Eq. Pl. (9th Ed.) §§ 395, 632;
Cooper's Eq. Pl. 87; White v. Buloid, 2
Paige (N. Y.), 164; Field v. Schieffelin,
7 Johns. Ch. (N. Y.) 250.
10. Story's Eq. Pl. (9th Ed.) §§ 405 et
seq., 634, a; Whiting v. U. S. Bank, 13
Peters (U. S.), 6.
11. Story's Eq. Pl. (9th Ed.) §§ 410,635;
Cooper's Eq. Pl. 91-93, 216; Smith v.
Clay, Ambler, 545.
12. Story's Eq. Pl. (9th Ed.) §§ 427, 638;
Miff. Eq. Pl. 94, note, 206; Cooper's Eq.
Pl. 217; Wortley v. Birkhead, 2 Vesey,
571; Cocker v. Bevis, 1 Ch. Cas. 61.

571; Cocker v. Bevis, I Ch. Cas. 61.

alleged, and leaving it to the court to say whether those facts are in substance or in form sufficient to maintain the plaintiff's action. or support the defendant's defence. If some of the counts in a declaration are good in law, and the rest defective, the defendant should demur only to the latter and plead to the former, as, on demurrer to the whole, judgment will be given for the plaintiff on the good counts.2 So in the case of several pleas demurred to, if one be good, judgment will be given for the defendant; 3 nor can a party plead and demur to the same count.4 A demurrer is either general, excepting to the sufficiency in general terms, without showing specifically the nature of the objection; or special, adding to this a specification of the particular ground of exception. A general demurrer is sufficient where the objection is on matter of substance; 5 a special demurrer is necessary where it turns on matter of form only; that is, where, notwithstanding such objection, enough appears to entitle the opposite party to indoment as far as relates to the merits of the cause. When objections, well founded, though formal, are stated specifically as causes of demurrer, the defect in the pleading being pointed out.

2. Tr. & H. Pr. (5th Ed.) § 578; Evans v. 2. Tr. & H. Pr. (5th Ed.) \$ 578; Evans v.
Tibbins, 2 Grant's Cas. (Pa.) 451; Whitney
v. Crosby, 3 Caines (N. Y.) 89; Gidney
v. Blake, 11 Johns. (N. Y.) 54; Martin v.
Williams, 13 Johns. (N. Y.) 264; Mumford v. Fitzhugh, 18 Johns. (N. Y.) 457;
People v. Bartow, 6 Cow. (N. Y.) 200;
Cochran v. Scott, 2 Wend. (N. Y.) 220;
Freeland v. McCullough, 1 Denio (N. Y.) Freeland v. McCullough, I Denio (N. Y.),

If a demurrer to the whole declaration is sustained, the defendant is entitled to judgment. If to some counts only, the plaintiff may stand on the counts admitted to be good. Riddell v. Douglass, 60

Md. 337.

Where a demurrer to an answer is good as to one defence and bad as to another, it should be sustained in part and overruled in part. Hollingshead v. Woodward, 35 Hun (N. Y.), 410. See San Miguel, etc., Commrs. v. Long. 8 Colo. 438; State v. Faurote, 104 Ind.

3. Tr. & H. Pr. (5th Ed.) § 578; Sevey v. Blacklin, 2 Mass. 541; Cuyler v. Rochester, 12 Wend. (N. Y.) 165; U. S. v. Girault, 11 How. (U. S.) 22.

 McFate v. Shallcross, 1 Phila. 75; Rickert v. Snyder, 5 Wend. (N. Y.) 104; Morey v. Ford, 32 Hun (N. Y.), 446. 5. Steph. on Pl. *140; Dole v. Weeks,

4 Mass. 451.

A general demurrer cannot be sustained to a declaration containing one good count. Reece v. Smith, 94 Ill. 362.

A general demurrer to a pleading of

1. Chit. Pl. 638; Tr. & H. Pr. § 578; several paragraphs will be overruled if Steph, on Pl. *140.

Woods, 67 Ind. 319. 6. Steph. on Pl. *140; Tr. & H. Pr. (5th Ed.) 579; Co. Litt. 72, a; Reg. Plac. 125, 126; Bac. Abr. Pleas, etc. (n. 5). As to when a special demurrer is required, see when a special demurrer is required, see Buckley v. Kenyon, 10 East, 139; Bowdell v. Parsons, 10 East, 359; Bolton v. Bishop of Carlisle, 2 H. Black. 259; Trower v. Chadwick, 3 Bing. (N. C.) 353; Parker v. Riley, 3 M. & W. 230; Heywood v. Collinge, 9 Ad. & El. 268; Dayrell v. Hoare, 12 Ad. & El. 356; Wilkins v. Boutcher, 4 Scott, N. R. 425; Proctor v. Sargent, 2 M. & G. 20; Stericker v. Barker, 9 M. & W. 321; Jordin v. Crump, 8 M. & W. 782; Hinton v. Dibdin, 2 G. & D. 36; Commonwealth v. Railroad Co., 53 Pa. St. 62.

A plea in abatement need never be

A plea in abatement need never be pecially demurred to. 2 Saund. 2 specially demurred to.

b. n. (k).

A special demurrer to a pleading that it is double is not sufficiently specific. Holmes v. Chicago, etc., R. Co., 94 Ill.

A demurrer "that the complaint does not state facts sufficient to constitute a complaint" is meaningless, and presents no question. Pine v. Huber Mfg. Co.,

83 Ind. 121.

A demurrer to an answer which states simply "that neither of the said paragraphs constitutes any defence to this action" is too general. Reed v. Higgins, 86 Ind. 143. See Goss v. Waller, 90 N. Car. 149; Thomas v. Goodwine, 88 Ind. 458.

the party taking them is entitled to the benefit of the exceptions. and the cause may be decided on them alone. Where the facts averred in the narrative would not, if admitted, entitle the plaintiff to judgment, the defendant should demur.² A declaration good in substance, but defective in form, should be demurred to. since the defect cannot be taken advantage of on the trial.3 The filing of two declarations in the same cause is ground for demurrer.4 The local rules of court generally provide as to the manner of filing and hearing of a demurrer. The grounds of demurrer at law are generally specified by statute in each State.5

2. Effect of a Demurrer.—A demurrer admits all such matters of fact as are sufficiently pleaded, or which, if informally pleaded, are not specially excepted to on that ground; but not inferences, arguments, or conclusions of law from them. A demurrer must not be a speaking one, i.e., set up grounds dehors the

declaration.8

On demurrer, the court will consider the whole record, and give judgment for the party who on the whole appears to be entitled to it.9 Thus, on demurrer to the replication, if the court think

1. 1 Saund. 161, n. 1; 1 Saund. 327, n. 3; Tr. & H. Pr. (5th Ed.) § 579; Lockington v. Smith, Pet. (C. C.) 466.

2. Hobensack v. Hallman, 17 Pa. St.

3. Smith v. Latour, 18 Pa. St. 243; Haldeman v. Martin, 10 Pa. St. 369.

4. Gould v. Crawford, 2 Pa. St. 80; Underwood v. Warner, 3 Phila. (Pa.) 414.

5. Misjoinder of parties defendant is not a ground for demurrer. Fish v. Hose, 59 How. Pr. (N. Y.) 238. See also Cox v. Bird, 65 Ind. 277.

Want of capacity of plaintiff to sue must appear affirmatively on the com-

plaint. Minneapolis Harvester Works v. Libby, 24 Minn. 327. See Dale v. Thomas, 67 Ind. 570.

As to demurrer for defect of parties generally, see Porter v. Fletcher, 25 Minn. 493; Arzbacher v. Mayer, 53 Wis. 380; Loukey v. Wells, 16 Nev. 271; Lunn v. Shermer, 93 N. Car. 164; Headrick v. Brattain, 83 Ind. 188.

Upon general demurrer of no cause of action, misjoinder of parties cannot be considered. Nevil v. Clifford, 55 Wis.

A demurrer for omission of parties must specify those omitted. Gardner v. Fisher, 87 Ind. 369. See Berney v. Drexel, 33 Hun (N. Y.), 419. See Irvine

v. Wood, 7 Colo. 477.

A joint demurrer by several defendants will be overruled if the petition states a cause of action against any of them. Dunn v. Gibson, 9 Neb. 513; Walker v. Popper, 2 Utah, 96; Sanders v. Farrell, 83 Ind. 28.

One defendant cannot demur to a complaint showing a cause of action against him, on the ground that it shows no

him, on the ground that it shows no cause of action against another defendant. Holzman v. Hibben, 100 Ind. 338.

6. Bac. Ab. Pleas, etc., (n. 3); Com. Dig. Pl. (Q. 5); Steph. Pl. *143; Nowlan v. Geddes, I East, 634; Gundry v. Feltham, I T. R. 334; Gas, etc., Co. v. Turner, 6 Bing. N. C. 324; Tyler v. Bland, I Dowl. N. S. 608; Tancred v. Allgood,

I Dowl. N. S. 608; Tancred v. Allgood,
4 H. & N. 438.
7. Com. Dig. Pl. (Q. 6); Steph. Pl.
*143; Tr. & H. Pr. (5th Ed.) §581; Duncan v. Thwaites,
3 B. & C. 584; Com. v. Allegheny,
20 Pa. St. 185; Ellmaker v.
Ins. Co., 6 W. & S. (Pa.) 439. See also Gould Pl., ch. ix.,
§ 29; Millard v. Baldwin,
3 Gray (Mass.),
484.
If the plea allege fraud in the plaintiff,
3 and such fraud would be a defence there.

and such fraud would be a defence, there can be no recovery on demurrer; but it is no admission of a fact not well is no admission of a fact not well pleaded. Postmaster-General v. Usick, 4 W. (C. C.) 347; Fisher v. Lewis, 1 Clark (Pa.), 422; Bank v. Buckner, 20 How. (U. S) 108; Greathouse v. Dunlap, 3 McLean (C. C.), 303.

8. Tr. & H. Pr. (5th Ed.) § 581; Dubois v. New York, etc., R. Co., 1 N. Y. Leg. Obs. 360; Wunning Co. Readwell 84

Obs. 362; Wyoming Co. v. Bardwell, 84. Pa. St. 104; Wingert v. Ins. Co., I W.

Pa. St. 104; Wingert v. 1118. Co., 7 ...
N. C. (Pa.) 72.
9. Com. Dig. Pl. (M. 1), (M. 2); Bac.
Abr. Pleas, etc. (A. N. 3); 1 Saund. 285,
n. (5); Steph. Pl. *144; Tr. & H. Pr. (5th
Ed.) § 582; Foster v. Jackson, Hob. 56;
Le Bret v. Papillon, 4 East, 502; Pearsall
v. Dwight, 2 Mass. 83; Murphy v. Rich

the replication bad, but perceive a substantial fault in the plea, judgment will be for the plaintiff, provided the declaration be good; but if the declaration also be bad in substance (and not in form merely),2 then judgment would be for the defendant.3 This rule, however, only applies to pleas in bar; judgment of respondeat ouster will be given on demurrer to a plea in abatement, without regard to any defect in the declaration. Though on the whole record the right may appear to be with the plaintiff, the court will not adjudge in favor of such right unless the plaintiff have himself put his action on that ground. If a demurrer to the declaration be too large, that is, be pointed to all the counts when only one is defective, judgment will be given for the plaintiff generally, notwithstanding the defective count. Where there are several issues both in law and of fact, the demurrer may be determined first, when if it goes to the whole cause of action, and is determined against the plaintiff, it is conclusive; it is considered better, however, to first try the issue of fact, in which case the damages are contingent, depending on the event of the demurrer; and afterwards to determine the question raised by the demurrer, which then becomes matter of substance, inasmuch as the right to withdraw the demurrer and plead over cannot be exercised after a ver-

3. JUDGMENT ON DEMURRER.—The judgment is interlocutory or final in the same manner and in the same cases as a judgment

ards, 5 W. & S. (Pa.) 279; Hall v. Hur-

ford, 2 Clark (Pa.), 291.

A demurrer, whenever interposed, reaches back through the whole record, and seizes hold of the first defective pleading. Clearweather v. Meredith, I Wall. (U. S.) 25.

If a plea to the whole declaration be bad as to one of the counts, there must be judgment for the plaintiff on demur-rer. Miller v. Merrill, 14 Johns. (N. Y.)

348.

A bad reply to a bad answer will be held good on demurrer. Ashley v. Foreman, 85 Ind. 55. See also Scott v. State,

89 Ind. 368.

A demurrer will not, however, be sustained to a pleading of the adverse party, to which a demurrer has already been Stearns v. Cope, 109 Ill. overruled.

1. Steph. Pl. *144; Anon., 2 Wils. 150; Thomas v. Heathorn, 2 Barn. & Cress. 477; Frost v. Hammatt, 11 Pick. (Mass.) 70; Barnett v. Barnett, 16 S. & R. (Pa.) 51; Com. v. Pittsburg, etc., R. Co., 58 Pa. St. 26.

Upon a demurrer to the answer, the court will examine the complaint, and if that is bad, will overrule the demurrer. Dorrell v. Hannah, 80 Ind. 497.

Pl. **145, 146; Allen v. Crofoot, 7 Cow. (N. Y.) 46; Tubbs v. Caswell, 8 Wend. (N. Y.) 129; Roberts v. Kelly, 2 Hall (N.

Y.), 307.

The fault in the prior pleadings must be one that is fatal on general demurrer, and not cured by a verdict. Jackson v. Rundlet, I W. & M. 382; Keay v. Good-

win, 16 Mass. 3.

3. Piggott's Case, 5 Rep. 29, a; Bates v. Cort, 2 Barn. & Cress. 474; Wyoming Co. v. Bardwell, 84 Pa. St. 104.

4. Steph. Pl. *144; Belasyse v. Hes-

ter, Lutw. 1592; Routh v. Weddell. Lutw. 1667; Hastrop v. Hastings, I Salk. 212; Rich v. Pilkington, Carth. 172; Clifford v.

Cony, I Mass. 495.
5. Steph. Pl. *145; Marsh v. Bulteel,
5 Barn. & Ad. 507; Head v. Baldry, 6 A.

6. Ferguson v. Mitchell, 2 C. M. & R. 687; Spyer v. Thelwall, 1 Tyr. & G. 191; Price v. Williams, 1 M. & W. 6; Wainright v. Johnson, 5 Dowl. 317; Teague v. Morse, 2 M. & W. 599; Webb v. Baker, 3 N. & P. 87; Boydell v. Jones, 7 Dowl. 210; Parrett Nav. Co. v. Stower, 8 Dowl. 210; Hind v. Gray, 1 M. & G. 201, note a; Dawson v. Wrench, 3 Exch.

7. Tr. & H. Pr. (5th Ed.) § 583; Mar-2. Tr. & H. Pr. (5th Ed.) § 582; Steph. seilles v. Keaton, 17 Pa. St. 238.

by default. After judgment the defendant cannot move in arrest for an exception which might have been taken at the argument. but may for a fault arising on the writ of inquiry or verdict.2 If a defendant plead several pleas to the same several counts of a declaration, and the plaintiff demur to some and take issue upon others, should the defendant succeed with any of the pleas, and that plea be an answer to the whole action, the plaintiff shall not have judgment upon the issues in fact if they be found for him; the judgment being nil capiat per breve. A judgment for the plaintiff, on a demurrer to a plea in bar, should be quod recuperet, not quod respondeat ouster, though the entry of the latter is an error favorable to the defendant. A judgment for the plaintiff on demurrer, in an action sounding in damages, is interlocutory, and damages must be assessed by a jury before final judgment.5

After demurrer it is usual to give the other party leave to amend, and it has been given even after argument, though before judgment, upon payment of costs.6 Under particular circumstances, a demurrer has been allowed to be withdrawn, on payment of costs, and plea filed de novo, even after argument: 7 but not in a case where the court are of opinion that the party demurring could not plead successfully.8 If there be issues in law and in fact, the latter being tried first, and contingent damages assessed as to the demurrer, the court will not allow an amendment. or the withdrawal of the demurrer, but will proceed to enter judgment on it. Where a demurrer is well founded, the opposite party should at once ask leave to amend, as he cannot rectify the mistake in his joinder in demurrer, 11 and as leave to amend is rarely given after judgment. The order sustaining a demurrer is in substance a judgment that the plaintiff take nothing by his writ, and that the defendant go without day. After a party has

1. Tyler v. Hand, 7 How. (U. S.) 537. 2. Commonwealth v. Davis, 4 Phila.

(Pa.) 95. 3. I Saund. 80, note I; Tr. & H. Pr. (5th Ed.) § 584; Clearwater v Meredith. I Wall. (U.S.) 26. But where three pleas and demurrers were filed to the same matters, contained in one count, without leave of court, the pleas on motion were stricken off. Underwood v. Warner, 3 Phila. (Pa.) 414. See also Lybrandt v. Eberly, 36 Pa. St. 348.

4. Bauer v. Roth, 4 Rawle (Pa.), 83. 5. Logan v. Jennings, 4 Rawle (Pa.),

6. Tr. & H. Pr. (5th Ed.) § 585; Craig v. Brown, Pet. (C. C.) 443. It has been refused to a plaintiff in a qui tam action. Evans v. Stevens, 4 T. R. 228. In an action against ball. Saxby v. Kirkus, Sayer, 117. In hard actions. I H. Black. 37. And after the plaintiff had lost a trial. Hard. 171; Phila. v. Wistar.

35 Pa. St. 427. See also, as to amendments, Bean v. Ayers, 69 Me. 122; Mayo

v. Keyser, 17.Fla. 744.
7. King v. Mayor of Stafford, 4 T. R. 690; Giddings v. Giddings, Sayer, 316; Hunt v. Puckmore, Barnes, 155; Alder v. Chip, 2 Burr. 756; Ayres v. Wilson, 1 Doug. 300; Barnfather v. Jordan, 2 Doug.

As to right of court to allow, a plea to be filed anew, after a demurrer to a plea in bar has been sustained, see Mayberry

v. Brackett, 72 Me. 102.

8. Broadwell v. Denman, 2 Halst. (N. J.) 275. See Fisher v. Gould, 81 N. Y. 228.

9. Robinson v. Rayley, 1 Burr. 316.
10. Young v. Parham, 1 Phila. (Pa.)
289; Stephens v. Myers, 12 Pa. St.

11. Steph. Pl. § 586; Gibson v. Todd, I Rawle (Pa.), 452; Wood v. Anderson, 25 Pa. St. 407.

once amended on a demurrer, the court will not permit him to amend again, on a second demurrer.1

The successful party in a judgment on demurrer is entit ed to costs, and may have execution for them.2

II IN PRACTICE. - A. Demurrer to Evidence. - Where the evidence in a cause is such that the counsel of the other party thinks it insufficient in law to maintain or overthrow the issue, as the case may be, he may demur to it. By so doing he admits the truth of all the facts alleged, withdraws the case from the jury, and submits the application of the law upon the facts to the court.3 It fell into disuse by reason of the liberality of the English judges in granting new trials.4 As the province of the jury to ascertain, the truth of facts and credibility of witnesses ought not to be taken away. 5 the demurrer must consequently admit the truth of all facts which the jury might find in favor of the other party, upon the evidence of whatever kind, in writing or parol. Where the evidence is written, and where, though parol, it is certain, the party who offers it must join in the demurrer, or waive the testimony; if the plaintiff refuses to join except on terms of which the court disapproves, his evidence is considered as withdrawn, and the jury must find a verdict for the defendant. Where the evidence is uncertain or circumstantial, the party who offers it may specify the facts to be admitted before he joins in the demurrer, and every fact must be admitted which the evidence conduces to prove.8 The party demurring must admit evidence conflicting with his own to be true. The judge should be liberal in admitting facts, and

1. 2 H. Bl. 561; 2 Arch. Pr. 231. See also Hitchcock v. Galvestony, 3 Woods (C. C.), 269.

2. Stat. 8 & 9 Wm. III. c. 11, § 2. The statute, however, does not include demurrers to pleas in abatement, costs being only given where the merits of the cause are determined on the demurrer; or actions where the plaintiff would not be entitled to damages, if he had a verdict. Bright, Costs, 100-2; Watmough v. Francis, 7 Pa. St. 206.

Trancis, 7 P.a. St. 200.
 3 Bl. Com. 372; Tr. & H. Pr. (5th Ed.) § 705. See Lee v. Virginia, etc., Co., 18 W. Va. 299; Fowler v. Balt., etc., R. Co., 18 W. Va. 579; Morris v. Indianapolis, etc., R. Co., 10 Ill. App. 389; Riddle v. Core, 21 W. Va. 530; Brown v. Atchison, etc., R. Co., 31 Kan. 1.
 4. See Tr. & H. Pr. (5th Ed.) § 705:

4. See Tr. & H. Pr. (5th Ed.) § 705; Crawford v. Jackson, I Rawle (Pa.), 427; U. S. Bank v. Smith, II Wheat. (U. S.) 172; Fowle v. Alexandria, II Wheat. (U. S.) 320; Commonwealth v. Parr, 5 W. & S. (Pa.) 345. 5. Tr. & H. Pr. (5th ed.) \$ 706; Cocks-

edge v. Fanshaw, I. Doug. 129. 6. Vaughan v. Eason, 4 Yeates (Pa.), 54; Dickey v. Schreider, 3 S. & R. (Pa.)

413; McKowen v. McDonald, 43 Pa. St.

7. Crawford v. Jackson, I Rawle (Pa.),

8. Tr. & H. Pr. (5th Ed.) § 706; Snowden v. Ins. Co., 3 Binn. (Pa.) 457; Duerhagen v. Ins. Co., 2 S. & R. (Pa.) 185; Smith v. Merchand, 7 S. & R. (Pa.) 260; Feay v. Decamp, 15 S. & R. (Pa.) 227; Caldwell v. Stileman, 1 Rawle (Pa.), 212; MacKinley v. McGregor, 3 Whart. (Pa.) 369; Davis v. Steiner, 14 Pa. St. 275; Tucker v. Bitting, 32 Pa. St. 428.

A demurrer to evidence must distinctly admit on the record every fact which there was any evidence tending to prove. Pickett v. Isgrigg, 10 Biss. (C. C.) 230; Indianapolis, etc., R. Co. v. McLin, 82 Ind. 435. It withdraws from consideration whatever in the evidence favors the demurrant, and allows all reasonable inferences against him. Ruff v. Ruff, 85 Ind. 431; Vigo Agricultural Society v. Brumfiel, 102 Ind. 146; Lake Shore, etc., R. Co. v. Foster, 104 Ind. 293. Not forced and violent inferences, however. Talkington v. Parish, 89 Ind. 202.

9. Morrison v. Berkey, 7 S. & R. (Pa.) 245; Young v. Black, 7 Cranch (U.S.), 565.

an error in so doing will be cause for a new trial. Where a party asks the court to direct the jury that the evidence of the other party is insufficient in law, the latter may compel him to demur to the evidence.2 The judgment of the court in banc on such a demurrer is, that the evidence is or is not sufficient to maintain the issue joined, it stands in the place of a verdict, and the defendant may take advantage of any defects in the declaration, by motion in arrest of judgment, or by writ of error.3

A demurrer to evidence waives all objections which are merely

formal.4

B. Demurrer to Interrogatories.—The reason which a witness tenders for not answering a particular question in interrogatories 5

DENIZATION.—(See also NATURALIZATION.)—The act of making any one a denizen; that is, an alien born who has been admitted to become a citizen. This in England was done by the king's letters patent, in which it differs from naturalization, which must be by act of Parliament. In South Carolina, this civil condition

evidence. Wolf v. Washer, 32 Kan. 533. 1. Crawford v. Jackson, I Rawle (Pa.),

The court will make every inference of fact in favor of the party offering the evidence, which it warrants. Maus v. Montgomery, 11 S. & R. (Pa.) 329. See also Morrison v. Berkey, 7 S. & R. (Pa.) 245; U. S. v. Williams, I Ware (U. S. Dist. Ct.), 175.

All intendments are against the party demurring. Nordyke, etc., Co. v. Van

Sant, 99 Ind. 188.

· 2. Tr. & H. Pr. (5th Ed.) § 707; Lee

2. Ir. & H. Pr. (5th Ed.) § 707; Lee v. Lee, 9 Pa. St. 169.
3. Bull. N. P. 313, 314; U. S. Bank v. Smith, 11 Wheat. (U. S.) 171. But see Cort v. Birbeck. 1 Doug. 208. See also Bish v. Van Cannon, 94 Ind. 263.
4. Tr. & H. Pr. (5th Ed.) § 707. See also Caldwell v. Stileman, 1 Rawle (Pa.),

212; Emerick v. Kroh, 14 Pa. St. 315.
5. Bouv. Law Dict.; 2 Swanst: Ch. 194. It is a demurrer only in the popular sense of the word. Gresley Eq. Ev. 61. The objection must be carefully stated, as the demurrer will be overruled if it covers too much. 2 Atk. 524; I Y. & J. 1/32.

6. A denizen is an alien born, but who has obtained ex donatione regis letters patent to make him an English subject,-a high and incommunicable branch of the royal prerogative. A denizen is in a kind of middle state between an alien and a natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may;

The court cannot weigh conflicting but cannot take by inheritance, for his parent, through whom he must claim, being an alien, had no inheritable blood, and therefore could convey none to his son. And upon a like defect of hereditary blood, the issue of a denizen, born before denization, cannot inherit to him, but his issue born after may. A denizen is not excused from paying the alien's duty, and some other mercantile burdens. And no denizen can be of the Privy Council, or either house of Parliament, or have any office of trust, etc.

Com. 374.
See Calvin's Case, 7 Co. 6, where it is said: "There is found in the law four kinds of 'ligeances.' . . . The second is ligeant' acquisita, or denization; and this in the books and records of the law appeareth to be threefold; I. Absolute, as the common denizations be, to them and their heirs, without any limitation and restraint. 2. Limited, as when the king doth grant letters of denization to an alien, and to the heirs males of his body, as it appeareth in 9 E. IV. fol. 7, 8, in Baggot's Case; or to an alien for term of his life, as was granted to J. Reynel, 11 H. VI. 3. It may be granted upon condition, whereof I have seen divers precedents. And this denization of an alien may be effected three manner of ways: by Parliament, as it was in 3 H. VI.5 5, in dower; by letters patent, as the usual manner is; and by conquest, as if the king and his subjects should conquer another kingdom or dominion: they are all denizens of the kingdom or dominion conquered."

Such denization is not retroactive, as is naturalization by an act of Parliament. Co. Litt. 8, u.

And so in New York it was held that the naturalization of a feme covert under the general acts of Congress had not a retroactive operation, so as to entitle her to dower in lands of which her husband was seized during coverture, but which he had aliened previous to her naturaliza-tion, Senator Verplanck saying: "Does the naturalization of the widow in 1820 operate retrospectively, so as to attach the right of dower to lands held by her husband at the marriage, and aliened after that period and before her naturalization? I concur with the supreme court, that on this branch of the case the widow cannot successfully claim her dower: but I have come to that conclusion by a course of reasoning very different from that of the chief justice. If this question rested wholly on English authorities, and if the effect of naturalization under our general laws was precisely the same with that under the special naturalization of parliament, the authority of Lord Coke (Coke Litt. 33, b), and the learned modern commentators and compilers Viner, Cruise, and Park, would be quite conclusive in favor of the retroactive effect of naturalization in regard to dower. Cruise - thus sums up the English doctrine: 'If an alien be naturalized by act of Parliament, she then becomes entitled to dower out of all the lands whereof her husband was seized during coverture. In the case where a woman is created a denizen, she becomes entitled to dower out of all the lands whereof her husband was seized at the time when she was created a denizen, but not out of lands whereof he was seized before, and which he had aliened.' I Cruise Dig. 146. I cannot agree with the chief justice that 'the act of Congress affords no great light to aid us in determining this point in the case.' On the contrary, it strikes me forcibly that the language of our acts of Congress on this subject point out a strong distinction between the legal operation of the rights of citizenship acquired under them, and that of the naturalization conferred by a British act of Parlia-In the acts of Parliament the operative words are the same with those used in the books: I believe in all cases -certainly in all the cases where I have been able to ascertain the facts, either the more general acts in the statutes at large or those cited in the re-ports. It is enacted that the party shall be 'naturalized,' or 'shall be deemed, adjudged, and taken to be a

natural-born subject,' as if born within the kingdom. Thus in a statute, 33 the kingdom. Thus in a statute, 33 Henry VIII., 'the children of Thomas Powers and others shall be reputed natural-born subjects." In the statute, 7 Anne, c. 5, 'All persons born out of the ligeance of her majesty, who shall qualify themselves (etc., as therein provided); shall be deemed, adjudged, and taken to be natural-born subjects of Ireland, to all intents, constructions, and purposes, as if they had been born within the said kingdom.' So in the statute 13 George II. c. 5, naturalizing foreign Protestants in America, it is enacted that they 'shall be deemed, adjudged, and taken to be his majesty's natural-born subjects, to all intents, purposes, and constructions as if they had been born within this kingdom.' So again, by George III. 25, certain foreign officers and soldiers, who had served in America, are naturalized in the same words, 'to be deemed and adjudged as if they had been born within the realm.' These seem to be the uniform operative words; and their legal effect, as stated by the authorities, is, 'that an alien is put in exactly the same state as if he had been born in the king's dominions'—2 Bl. Com. 374;—or, in the language of Lord Coke, 'is to all intents and purposes a natural-born sub-From the very words employed, then (unless there be some restrictive condition added), every such naturalization must relate back to the time of birth of the individual. The naturalized sub-ject is, in the eye of the English law, one native-born. The courts do not and cannot look behind the act of Parliament to prior disabilities. By the omnipotence of Parliament, the naturalized alien is to all intents a subject from his birth. This rule of interpretation, were such acts in England general, like ours, might frequently conflict with the vested rights of third persons. But as in England every such act is either special for the individual, or limited to some small class of persons, it is to be presumed that such a result is generally avoided, either by previous evidence of the special circumstances of the case, or else by express words in the statutes saving any such rights in others. The legal effect of 'denization' in England is not retroactive, as we have above seen. This is evidently not an arbitrary distinction, but grows out of the natural interpretation of the language used. There is nothing in the word 'denizen' that has any relation to any specified time, especially to the time of birth. 'Denization' is a new privilege conferred upon the alien,

has been created by statute.¹ The word "denizen" is also used in the common law to mean a natural-born subject.²

DENOMINATION.—(See also RELIGIOUS SOCIETIES.)—A class, society, collection, or sect.³

but not having, like the phrase naturalborn or native, any relation to the fact of birth or to its time, operates only from the date of its reception. Now the language of our acts of Congress of general naturalization differs from the English acts in precisely the same manner. must be controlled by the same rules of legal interpretation, and, of course, is governed by the same distinction. are called naturalization acts, but there are no words used putting the new citizen on the same footing as if he had been born in the United States. The operative words are, that on complying with certain conditions the applicant 'shall be admitted a citizen of the United States,' or 'admitted to citizenship,' or shall be admitted to become a citizen.' The words 'admitted,' 'become,' and 'shall be admitted to become.' involve a future signification; nor is there anything implied in the word 'citizen,' more than in that of 'denizen,' having relation back to the time of birth. cannot, therefore, but consider all the English authorities denying retrospective operation to acts of Parliament admitting to denization, as applying to and authorizing a similar interpretation of our acts of Congress 'admitting aliens, on complying with certain conditions, to become citizens.' Even independently of any authority bearing on this subject, the obvious interpretation of language leads me to the same conclusion, that the legal rights of the alien born admitted to American citizenship, like those of the British 'denizen,' bears date only from his political and not from his natural birth." Priest v. Cummings, 20 Wend. (N. Y.) 338, 352.

1. Thus, in holding that an act of denization is not retroactive, De Saussure, Ch., said: "With respect to the denizenship claimed by the nephew, Thomas How, I do not understand that there is any objection to the regularity of the proceedings in obtaining the certificate which evidences that right. He is therefore entitled to all the advantages which the laws of South Carolina give to denizens. Our State law, enacted on the 13th day of December, 1799, points out the course to be pursued by aliens desirous to become denizens; and declares that, on compliance with the terms of the law, they shall 'be deemed denizens, so

as to enable such persons to purchase and hold real estate within this State. and to be entitled to the protection of the laws of the State, as citizens are entitled Mr. Thomas How became a denizen on the 11th of October, 1822, about fifteen months after the death of his uncle, Dr. Robert Nesbit. It was argued that the certificate of denizenship had a retroactive operation, and enabled Thomas How to take under the devise of his uncle's will as a purchaser; for a devisee is in the language of the law a purchaser, and does not take by descent. On this point, however, the law is quite clear. Denizenship has no such operation. It acts wholly prospectively." Vaux v. Nesbit, 1 McCord's Chanc. (S. Car.) 352,

2. The word "denizen" is used in the common law in a double sense. It sometimes means a natural-born subject, and sometimes a person who, being an alien, has been denizenized by letters patent of the crown. Lessee of Levy v. McCartee, 6 Pet. (U. S.) 102, 117, note. And he that is born within the king's

And he that is born within the king's ligeance is called sometimes a "denizen," quasi deins née, born within, and thereupon in Latin called indigena, the king's liegeman; for ligens is ever taken for a natural-born subject. But many times, in acts of Parliament, denizen is taken for an alien born, that is, enfranchised or denizated by letters patent. Co. Litt. 129, a. See also Collingwood v. Pace, Bridgman's Judgments, 410, 432.

3. In holding that the act of the legislature of Virginia, approved March 8, 1873, incorporating the individuals composing the executive committee of publication, commonly called the "Presby-terian Committee of Publication," by the name and style of "The Trustees of the Presbyterian Committee of Publication, was not an evasion of, or in violation of, section 17 of article 5 of the constitution of Virginia, which provides that "the general assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law,"—Woods, J., said: Webster defines the word 'church' as follows: (1) 'A formally organized body of Christian believers worshipping together; (2) a body of Christian believers observing the same rites, and acknowl-

DENOUNCEMENT. (See also INOUEST OF OFFICE.)—A judicial proceeding known to the Mexican law, which in its substantive characteristics was equivalent to the inquest of office found at common law.1

DENTIST.—(See also Physicians and Surgeons.)—See note 2.

DENY.—To contradict: to declare a statement or position not to To withhold: to refuse to grant.³

DEPART.—To go from: to leave.4

edging the same ecclesiastical authority: (3) the collective body of Christians, or of those who acknowledge Christ as the Saviour of mankind.' He defines the word 'denomination' as follows: 'A class or collection of individuals called by the same name; a sect.' It is apparent that the third definition of the word 'church given by this lexicographer will include those mentioned in the first and second definitions, by whatever names they may be called, as well as all religious denominations which acknowledge Christ as the Saviour of mankind." Wilson v. as the Saviour of mankind." Perry, 1 S. E. Rep. 302.

1. Von Schmidt v. Huntington, 1 Cal.

55, 63; Merle v. Matthews, 26 Cal. 455.

2. The law requires of a dentist a reasonable degree of skill and care in his professional operations, and he will not be held answerable for injuries arising from his want of the highest attainments in his profession. Simonds v. Henry, 39 Me. 155. And a dentist using chloroform as an anæsthetic agent is only bound to look to natural and probable effects. Boyle v. Winslow, 5 Phila. (Pa.) 136.

3. Webster.

Under a Practice Act which requires that "the answer of the defendant shall contain . . a specific denial of each allegation of the complaint controverted, etc.," an answer "that the defendant has no knowledge or information in relation to the allegations, . . . and therefore denies the same," is insufficient. Gas Co. v. San Francisco, 9 Cal. 453. And under a similar act requiring the replication to deny the controverted allegations specifically, a mere averment that the plaintiff does not know whether a certain state of facts exists is insufficient. Watson v. Hawkins, 60 Mo. 550

Under an act punishing as blasphemy the wilful denying God, His creation, government, and final judging of the world, a defendant was indicted for committing the crime by publishing the following: "The Universalists believe in a god, which I do not; but believe that

their god, with all his moral attributes. -aside from nature itself,-is nothing more than a chimera of their own imagination." On a motion for arrest of judgment, Shaw, C. J., said: "There is no doubt that the language cited, if used in the connection and with the intent and purpose charged in the indictment, will amount to the offence contemplated in the statute; for although the form of the expression used by the defendant was a denial of his belief, if under this form a wilful denial of the existence of God. His creation, etc., was intended, the language is sufficient to constitute a denial, within the meaning of the statute. Whether they were used with such unlawful intent and purpose, was a question upon the whole indictment and all the circumstances: and after verdict, if no evidence was erroneously admitted or rejected, and no incorrect directions in matter of law were given, it is to be taken as proved, that the language was used in the sense. and under the circumstances, and with the intent and purpose laid in the indictment, so as to bring the act within the statute." But a mere denial of belief in the being of God would not bring one within the operation of the act, without regard to the occasion, intent, or purpose of mind with which it was done. Comm. v. Kneeland, 20 Pick. (Mass.) 206.

A penalty being imposed by by-law upon the selling of meat on Sunday, and it being further provided thereby that any offender who should deny, refuse, or neglect to pay the same should be liable to an action of debt for the same, it was not necessary, in order to support such an action, to prove a previous demand. Though the words "deny" and "refuse" imply a previous request, the word "neglect" does not. Butchers' Co. v. Bullock, 3 B. & P. 434.

4. Webster.

Under a Statute of Limitations which provides that if a person after a cause of action accrues against him "depart from the State, or abscond or conceal him-self," the time of his absence, etc., shall

DEPARTMENT-DEPARTURE-DEPEND.

DEPARTMENT .- "A part or division of the executive government, as the Department of State or of the Treasury."1

DEPARTURE.—In marine insurance, the same as DEVIATION. which see.2

In pleading, a departure takes place when, in a second or subsequent pleading, a party deserts the ground that he took in his last antecedent pleading, and resorts to another.3

DEPEND.—As used of a suit, to be begun, and remain undecided. A suit is depending from the return of the writ to the entry of judgment.4

not be computed as a part of the period of limitation, the words "depart from . the State" apply only to such an absence from the State as entirely suspends the power of the plaintiff to begin his action. Blodgett v. Utley, 4 Neb. 25. The same decision was made under a similar statute, the language of which was "departs from and resides out of the State;" and a temporary absence by one leaving his family and property within the State was held not to suspend the running of the statute. Garth v. Roberts, 20 Mo. 523; Venuci v. Cademartori, 50 Mo. 352.

If an English subject domiciled abroad return to England for a temporary purpose, and leave it sooner than he intended, to avoid an arrest, he departs the realm, so as to commit an act of bankruptcy within Stat. 13-Eliz. c. 7, s. 1. So if one who is a merchant in Ireland comes to England on business, and quits the country to avoid arrest by a creditor. The act comprehends all who leave the realm, other than foreigners, with intent to delay or defraud their creditors. Williams v. Nunn, I Taunt. 270; s. c., I

Camp. 152. The taking of a vessel in an unfinished state from Chelsea to Boston, the former being within the port of Boston, is not a departure from port within the meaning of a statute which provides for the dissolution of a lien on the vessel, unless a certificate shall be filed "within four days from the time such ship or vessel shall depart from the port at which she was when the debt was contracted. Young v. The Orpheus, 119 Mass. 179; and see The John Farron, 14 Blatchf. (C. C.) 29.

A warranty to depart on or before a certain day, in a policy of marine insurance, is a warranty to be out of port on or before that day. It thus differs from a warranty to sail. A ship that sailed before the day named, but was kept within the harbor by adverse winds until after that day, was held not to have com-

plied with a warranty to depart. Moir v. Royal Exchange Assur. Co., 3 Maule & S. 461; s. c., 6 Taunt. 241; Union Ins. Co. v. Tysen, 3 Hill (N. Y.), 126. So under the Embargo Act of 1808, to "depart from port" meant to go out of port, not merely to break ground, to set sail, to leave the port. The Sloop Active v. United States, 7 Cr. (U. S.) 100; s. c., I Paine (C. C.), 247.

1. Worcester, quoted in United States v. Germaine, 99 U. S. 508.

"The heads of departments," in art, 2. sec. 2. of the Constitution of the United States, are the same as the principal officers in each of the executive departments, mentioned in the same section.
The Commissioner of Pensions is not the head of a department, but the subordinate of the Secretary of the Interior, who is the head of a department. "The association of the words 'heads of departments' with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the depart-United States v. Germaine, 99 ments." U. S. 508.

A governor of the Almshouse is a head of a department within the meaning of a provision of a city charter prohibiting heads of departments from being interested in the purchase of any property belonging to the corporation. Roosevelt

v. Draper, 23 N. Y. 318.

The department of adjutant and inspector-general is not a "military department" within the meaning of a general order of the War Department, granting double rations to officers commanding military departments. v. United States, I Pet. (U. S.) 293.

2. Phœnix Ins. Co. v. Cochran, 51

Pa. St. 143.

3. Steph. on Pldg. 410; Co. Litt. 304, a;

2 Wms. Saund. 84, n.

4. A suit at law is not depending until the writ has been returned. This was **DEPENDENCY.**—A territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe. A building, within a curtilage, detached from, but subordinate to the house.

DEPENDENT.—Relying on for support.3

held in the construction of Stat. I Ed. VI. c. 7, which provided that no action, suit, bill or plaint "that shall depend between party and party, in any of the king's courts," should be discontinued by the demise of the king. Discontinuance of Process, etc., by the Death of the Queen, 7 Co. 30, a. But a bill in the Star Chamber was held to depend from the time that it was exhibited, within the meaning of an exception out of a general pardon. Littleton's Case, 5 Co. 47, a.

"An action or suit depending in court is not ended by a verdict of a jury being given and recorded in it; for the court, for divers reasons, when shown to exist, would be bound, according to every principle of both law and justice, to set it aside and grant a new trial. Until, then, a judgment shall be rendered on the verdict, or it shall be approved of by the court in some way, the action must be considered as still "depending." Kolb's Case, 4 Watts (Pa.), 154.

Where the parties to a suit agree that the evidence taken "in the ejectment depending in the county of I. of B. C. v. J. B." should be admitted to be read at the trial, that evidence was admissible, although the action in which it was taken was not depending, but had been determined before the date of the agreement, it appearing that it was the only ejectment that B. C. had ever brought against J. B. in the county of I. Chew v. Parker, 3 Rawle (Pa.), 283.

1. "The precise meaning of the word 'dependency,' as it is used by Congress in the law under consideration (Non-Importation Act of 1811), cannot be ascertained with any degree of certainty. It may, however, be safely concluded that it imports some civil and political relation which one country bears to another, as its superior, different from that of a mere possession. . . . Congress did not consider a dependency as synonymous with possession, but, on the contrary, the difference was so material as to induce Congress to sanction a trade with the former, which had been previously interdicted with both. As soon as this distinction is established, the mind of the legal man is irresistibly led to annex to the one the idea of possession, accompanied by title, in opposition to a mere naked possession, obtained either by force and against right, or rightfully acquired and wrongfully withheld from the legal sovereign; and this, the court is strongly inclined to think, is the true definition of a dependency—that is, a territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe. It is not a colony, because it is not settled by the citizens of the sovereign or mother state; but it is lawfully acquired or held, and the people are as much subjects of the State which has thus obtained it, as if they had been born in the principal State, and had emigrated to the dependent terri-tory." Washington, J., in United States v. The Nancy and The Caroline, 3 Wash. (C. C.) 281, where it was decided, in 1814, that Malta was not a dependency of Great Britain.

2. A building, used as a store, two or three rods distant from an inn, situated within its curtilage and between the inn and a shed used for the accommodation of travellers, is a "dependency" of the inn, within the meaning of an act permitting the sale of liquors only in licensed houses and their dependencies. building used for the common purposes of a tavern, situated within the curtilage of the dwelling house, is privileged by the license, as a dependency of the common inn or tavern house." By dependency the legislature intended a building detached from the house. Goff v. Fowler, 3 Pick. (Mass.) 300. But a small building on the ground of the owner of the house, at a distance of forty-five rods from the house, connected with it by a passage-way entirely on the owner's ground, but not within the curtilage, is not a dependency within this statute. Comm. v. Estabrook, 10 Pick. (Mass.)

3. Webster.

Under a regulation of a beneficial society, that benefits are to be paid to those dependent upon a deceased member, his administrator is not entitled to them for his creditors, "We think the true meaning of the word 'dependent,"

DEPONENT.—(See also DEPOSITION.)—A witness: one who gives information on oath or affirmation respecting some fact known to him, before a magistrate; one who deposes, that is, testifies, or makes oath in writing, to the truth of certain facts; one who gives testimony under oath, which is reduced to writing, or makes oath to a written statement.2

DEPOSIT.—(See also BAILMENT: BANKS AND CONTRACTS: MORTGAGES, EQUITABLE; SALES; TRUSTS.)

I. Definition, 570.

2. Divisions, 570.

I. Necessary, 570.

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1. Definition.—A deposit is a naked bailment of personal property to be kept for the depositor without reward, and to be returned when he requires it. It is a contract by which one of the contracting parties gives a thing to the other to keep, who is to do so gratuitously, and obliges himself to return it when he shall be requested.4 In the Spanish law a deposit is a contract by which one party gives to another, in whom he has confidence, personal property to keep for him.5

2. Divisions.—I. NECESSARY DEPOSITS are made upon some sudden emergency, and from some pressing necessity, as in case of fire, shipwreck, or other overwholming calamity. In this case the property is given to any party with whom the depositor meets, without any proper opportunity for reflection or choice, and is called miserabile depositum.6

in this connection, means some person or persons dependent for support in some way upon the deceased; and as the proof shows that there was no other person so dependent upon the deceased except the widow, the money must be paid to her." Ballou v. Gile, 50 Wis. 614. The same construction was put upon the word used as a noun in a similar regulation, and one engaged to be married to the deceased was held not to be a dependent of his, as the mere engagement imposed no obligation upon him, except to carry out his contract. American Legion of Honor 2 Perry, 140 Mass. 580

1. Bouv. Law Dict.; Bliss v. Sherman,

47 Me. 252. "Witness" is the more gen-

eral term, including "deponent."

2. Bouv. Law Dict. It is defined in Rapalje & L. Law Dict. to be "a person who makes an affidavit, as opposed to a declarant who makes a declaration, and a witness who makes an oral statement."

3. Jones on Bailm. 36, 117. 4. Insurance Co. v. Randell, 3 L. R. P. C. C. 101; Pothier's Traité de Dépôt, n. 1; Code Civil of France, No. 1915.

5. Moreau & Carlton's Partidas, 5th,

3, b. 1.
6. Whart. Law Dict.; Code of Louis.. No. 2935; Pothier's Traité de Dépôt, u. 175.

II. VOLUNTARY DEPOSITS are such as arise, without any ca-

lamity, from the mere consent or agreement of the parties.1

III. SIMPLE DEPOSITS are where there is but one party depositor, of whatever number of persons composed, having a common interest 2

IV. SEQUESTRATIONS are where the deposit is made by one or more persons, each of whom has a different and adverse interest in controversy touching the deposit.3

(a) Conventional Sequestration is made, without any judicial act.

by the mere agreement of the parties.4

(b) Fudicial Sequestration is made by order of a court in the

course of some judicial proceeding.5

V. IRREGULAR DEPOSITS arise where a party has a sum of money which he does not think safe in his own hands, and therefore confides it to another, who is to return it to him; not the same money, but a like sum, when it shall be demanded.6

VI. OUASI DEPOSITS are those arising when a party comes lawfully into possession of another's property by finding: it is called quasi because it does not arise ex contractu. The finder must use the same reasonable care of the property as any volun-

tary depositary ex contractu.7

VII. INVOLUNTARY DEPOSITS arise where lumber, floating in a river, is by a sudden flood or freshet lodged on the land of a stranger, and left there by the subsidence of the stream. So also where trees are blown by a tempest upon the land of a stranger; and also of goods lodged in the like manner by a whirlwind or tornado in a distant field of a stranger.8

3. Nature of the Transaction.—I. KIND OF PROPERTY.—The property which is subject of a deposit must be personal. Real property cannot be given in deposit. Debts, choses in action, and securities given for them, as bonds, notes, and the like, may be deposited.9

1. Dig. Lib. 16, t. 3, 2.

This distinction in the civil law was material in respect to the remedy, but the common law does not recognize this difference. Jones on Bailm. 48.

At common law, in a necessary deposit, the remedy is limited against the depositary to damages coextensive with

his wrong act. Jones on Bailm. 48. 2. Pothier's Traité de Depôt, n. 1.

3. Dig. Lib. 16. t. 3, 1, 6.

4. Code of Louisiana (1825), arts. 2941, 2948; Story on Bailm. sec. 41.

5. Pothier's Traité de Dépôt, n. 84, 85, 90 to 100; Burke v. Trevitt, I Mass.

Ć. C. 96.

These distinctions do not seem to be incorporated into the commercial law. Cases of judicial sequestration and deposit are liable to arise especially in counts of chancery and admiralty, for full investigation. Few cases have occurred where it has been necessary to apply these distinctions. Story on Bailm. §§ 41 to 46; Burke v. Trevitt, I Mass. C. C. 96. In all cases of sequestration the de-

positary is a mere stakeholder, and the deposit is to be delivered to him who is, adjudged finally to have the right to it. Add. on Cont. (1883), § 811; Lafarge v. Morgan, 11 Mart. (La.) 462; Code of Louisiana (1825), art. 2946; Code of France, b. 3, t. 11, Nos. 1920, 1921, 1949; Moreau & Carlton's Partidas, 5th, t. 3, 1. 1; Applegarth v. Calley, 10 M. & W.

6. Durnford v. Segher's Syndics, o Mart. (La.) 484; Jones on Bailm. 102; Story on Bailm. § 88; Bank v. Rush-more, 28 Ill. 463; Boyden v. Bank, 65 N. Car. 13.

7. Dougherty v. Posegate, 3 Iowa. 88;

I Bl. Com. 296; Story on Bailm. § 35. 8. Story on Bailm. (1878), § 83, a; Whart. Law Dict.

9. Story on Bailm. § 51; 1 Bell Com. p. 258 (5th Ed.); 1 Wait's Law & Pr. 309.

II. PARTIES WHO MAY CONTRACT.—The parties must be capable of entering into contracts. An infant and a married woman are each incompetent, the former without the consent of his guardian, the latter without that of her husband. Any person laboring under personal disabilities cannot bind himself as a depositor

or a depositary.1

III. REQUISITES OF THE CONTRACT.—(a) Delivery.—A delivery must be made from the depositor to the depositary, of the thing deposited, which the latter is to keep. This delivery may be made by the agent of the depositor to the agent of the depositary. or by the parties themselves. If the thing is already in the hands of the depositary; that is a sufficient delivery.2

(b) Intent.—The intent must be that the depositary shall keep the thing to be returned to the depositor, without compensation.3

(c) Consent.—There must be a consent of the parties, which may be expressly given, or it may be implied from circumstances.4

4. Rights and Obligations of the Parties.—I. DEPOSITOR.—The depositor has a right to the restoration of the thing deposited, and also the increase which belongs to it. If it be a female animal, and it has a young one while it was in deposit, that must be returned with the dam. If a part of the chattels be lost, the remainder must be returned.⁵ When the deposit is made by several codepositors, they must join in making the demand.6

II. DEPOSITARY.—The obligations of the depositary consist of two things: (a) To keep the chattel with reasonable care; (b) To

return it.

(a) To Keep the Chattel with Reasonable Care.—The depositary is bound to slight diligence in the care of the thing deposited, and is not answerable, except for gross neglect,8

The civil law confines bailment to corporeal property. But the title-deeds, or evidences of such debts and credits, may become the subject of bailment. 1. Story on Bailm. § 50; Pothier's Contrat de Dépôt, n. 4 et 5.

If an infant make a deposit, the deposi-

tary is bound to fulfil his contract, until the infant repudiates the contract or recalls the thing deposited. Code of Lou-

isiana (1825), art. 2906.

Under the French law, if a married woman became a depositary without the consent of her husband, the act is a nullity, and no contract of deposit arises. But the husband will be bound to restore the thing to the depositor if it is in his possession. Code of Louisiana (1825), art. 2907; Pothier on Oblig. § 49. the great changes in late legislation of the contract capacity of married women in the several States of the United States make it necessary to consult local statutes as to the law in this matter.

'2. Pothier's Contrat de Louage, n. 8;

2 Pars. on Cont. 90.

3. Pothier's Contrat de Dépôt, n. 9; 2

Kent Com. 560.

- 4. Story on Bailm. § 55; Lethbridge v. Phillips, 2 Stark. 544; 2 Pars. on Cont. 96; Rutgers v. Luest, 2 Johns. (N. Y.) 92; Code of Louisiana (1825), arts. 2903, 2904. Where servants and clerks are allowed to receive deposits, their acts bind their principals as depositaries. but it would be different if no consent has been given, either express or implied. Foster v. Bank, 17 Mass. 478.

 piled. roster v. Bank, 17 Mass. 478.
 I Bouv. Inst. § 1063.
 Story on Bailm. §§ 114, 116.
 Story on Bailm. § 61.
 Bank v. Smith, 62 Pa. St. 47;
 Beale v. Railroad Co., 12 W. R. 1115;
 Lafarge v. Morgan, 11 Mart. (La.) 462;
 Smith v. Bank, 99 Mass. 605; Foster v.
 Bank. 17 Mass. 478: Spooner v. Mat-Bank, 17 Mass. 478; Spooner v. Mattoon, 40 Vt. 300; Smith v. Railroad Co., 17 Fost. (N. H.) 86; Edson v. Weston, 7 Cow. (N. Y.) 278; De Haven v. Kensington Bank, 81 Pa. St. 95; Gulledge v. Howard, 23 Ark. 61; Green v. Birchard, 27 Ind. 483; Knowles v. Railroad Co., 38 Me. 55; Maury v. Coyle, 34 Md. 235

Slight diligence means reasonable care, which depends upon the nature, value, and quality of the thing, the circumstances connected with it, and sometimes upon the character and confidence and particular dealings of the parties. The degree of diligence is not changed by the fact that the depositary is a joint owner of the chattel with the depositor.

Bank v. Bank, 60 N. Y. 278; Wiser v. Chesley, 53 Miss. 547; Dunn v. Brauner, 13 La. Ann: 452; Griffith v. Zipperwick, 28 Ohio St. 388; Bank v. Graham, 79 Pa. St. 106.

1. Tompkins v. Saltmarsh, 14 S. & R.

(Pa) 275.

2. Jones on Bailm. 82, 83.

It is not, however, sufficient to exempt a gratuitous depositary from liability, that he keeps the goods in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. The term 'gross negligence,' in this connection, is not intended as a definition, but is useful as expressing the practicable difference between the degrees of negligence for which different classes of depositaries are responsible. Giblin v. McMullen, 2t L. T. N. S. 214.

But the failure of a depositary to exercise reasonable care, skill, and diligence is in law gross negligence. Beale v. Railroad Co., v. I. T. (N. S.) 184

Railroad Co., 11 L. T. (N. S.) 184.

A gave a picture to B, who wished to show it to C; B, without any previous information to C, sent the picture to C's house, where it accidentally received an injury. In a suit against C for the injury, it was held that he was not responsible for not keeping the picture safely. Lethbridge v. Phillips, 2 Stark. 544.

While gross negligence on the part of a gratuitous bailee is not fraud, it is in legal effect the same thing. Bank v. Graham, 100 U. S. 699; Wilson v. Railroad Co., 11 Gill & J. (Md.) 58; Goodman v. Harvey, 4 Ad. & El. 876; Jones v. Smith, 1 Hare; 71; In re Hall & Hinds, 2 Man. & G. 852.

The civil law did not exact of the depositary any greater diligence than that bestowed upon his own goods under like conditions and circumstances. Jones

on Bailm. 90, 93.

As the depositary assumes the trust gratuitously, he is bound to good faith, and is only answerable for fraud or gross neglect. In re Hall & Hinds, 2 Man. & G. 852; Coggs v. Bernard, 2 Ld. Raym. 915; Jones on Bailm. 44; Schermen v. Neurath, 54 Md. 491; Whitney v. Bank, 55 Vt. 154; Eldridge v. Hill, 97 U. S. 92; Caldwell v. Hall, 60 Miss. 330;

Fancil v. Seaton, 28 Gratt. (Va.) 601; Carrington v. Ficklin. 32 Gratt. (Va.) 670; Bronnenburg v. Charman, 80 Ind.

475. The question what is gross negligence is ordinarily a matter of fact for the decision of the jury, and not of law for the court. Bank v. Smith, 62 Pa. St. 47; Griffith v. Zipperwick, 28 Ohio St. 388; Doorman v. Jenkins, 2 Ad. & El. 256; Carrington v. Ficklin, 32 Gratt. (Va.) 670;

Bank v. Boyd, 44 Md. 47.

The circumstances must be considered. If the depositary receives the deposit as a favor to the depositor, it cannot be expected that he will take as great care of it as if he was a bailee for reward. must the value of the thing deposited be considered, as to its liability to accidental or other injuries. That might be negligence in the case of diamonds or a sum of gold, which would be due diligence in the case of an article of little worth. The rules governing the subject of diligence are founded in commonsense and common reason, and are genco. v. Heilman, 49 Pa. St. 60; Holbrook v. Railroad Co., 12 N. Y. 236; Spencer v. Railroad Co., 17 Wis. 503; Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99; Healey v. City Pass R. Co., 28 Ohio St. 23; Lake v. Millikin, 62 Me. 240.

Commonly speaking, negligence is the failure to use such care as the circumstances of the case require. Railroad Co. v. State, 29 Md. 420; Turnpike Co. v. Railroad Co., 54 Pa. St. 345; Railroad Co. v. Murphy, 46 Tex. 356; Barber v.

Essex, 27 Vt. 62.

The question of negligence is for the decision of the jury, except where the facts disclose such a state of things that the court would set aside an opposite verdict. Schermen v. Neurath, 54 Md. 491. The courts in certain circumstances direct the jury as to their verdict. Smith v. Bank, 99 Mass. 605; Giblin v. McMullen, L. R. 2 P. C. 317. Whenever the circumstances show that the depositary has exercised ordinary care, he has done his duty. Spooner v. Mattoon, 40 Vt. 300; Chase v. Maberry, 3 Harr. (Del.) 266; McKay v. Hamblin, 40 Miss. 472; Dougherty v. Posegate, 3 Iowa, 88; Whitney v.

Lee, 8 Met. (Mass.) 91; Green v. Holingsworth, 5 Dana (Ky.), 173; Bank v. Gordon, 5 La. Ann. 607; Turnpike Co. v. Railroad Co., 54 Pa. St. 345; Barber v. Essex. 27 Vt. 62: Railroad Co. v. Murphy, 46 Tex. 356; Railroad Co. v. State, 29 Md. 420; Hill v. Daniels, 15 La. Ann. 280.

National banks have the power to receive special deposits as incidental to their business, and when gratuitous, are mere depositaries without reward, and liable only for gross neglect. Patterson v. Bank, 80 N. Y. 82; Bank v. Bank, 60 N. Y. 278; Bank v. Graham, 79 Pa. St. 106; Bank v. Schley, 58 Ga. 369; Scott v. Bank, 72 Pa. St. 471. Compare Whitney v. Bank, 50 Vt. 338; Wiley v. Bank, 47 Vt. 546. These special deposits are different from general deposits. The former are bound to be returned in individuo to the depositor. In special de-posits the rule of a depositary's liability is applicable, and the bank's liability arises only for gross neglect. Smith v. Bank, 99 Mass. 605; Bank v. Graham, 79 Pa. St. 106; Bank v. Rex, 89 Pa. St. 308; Dearborn v. Bank, 61 Me. 369; Ray v. Bank, 10 Bush (Kv.), 344; Bank v. Smith, 62 Pa. St. 47; Scott v. Bank, 72 Pa. St. 471; Maury v. Coyle, 34 Md. 235; De Haven v. Kensington, 81 Pa. St. 95.

A special deposit of gold was made in a bank, and the money was placed with the bank's in the vault by itself. The cashier handled the money, and had charge of the key. He embezzled the deposit and other general deposits. Held, the bank had used due care, and was not guilty of gross negligence, and therefore not liable. Foster v. Bank, 17 Mass. 478. See also Whitney v. Lee, 8 Met. (Mass.) 91. But if the deposit is general and not special, the bank is liable absolutely if the money is stolen. Shoemaker v. Hinze, 53 Wis. 116. See Ewing v. French, t. Blackf. (Ind.) 354; Ruffmm v. Merry 2 Maso. (C. C.) 478.

Buffum v. Merry, 3 Mason (C. C.), 478. It has been said that the civil law rule prevails, and a depositary is not liable if he takes the same care of the goods as he takes of his own. I Wait's Law & Pr. 300; Jones on Bailm. 31, 32. 46. 47. This may be the rule when the depositor knows of the negligent manner in which the depositary cares for his own chattels, and is so held. Knowles v. Railroad Co., 38 Me. 55. But it cannot be considered as the general doctrine. Story on Bailm. sec. 64; Bank v. Graham, 79 Pa. St. 706; Giblin v. McMullen. 21 L. R. N. S. 214. But if the rule applies at all, it is not when the depositor is ignorant of the depositary's negligence, and want of com-

mon care in the managing and using his own property: for then the civil law rule should be modified: the depositary should then be held to ordinary diligence, and such care is ascertained without reference to the character of the depositary. The habits, employment, and character of the depositary should be taken into consideration, provided the depositor had no-The Williams, 6 C. Rob. 316. generally the depositary is liable only on account of loss from culpable negligence or fraud, and the civil law rule does not apply in this respect. Sodowsky v. Mc-Farland, 3 Dana (Ky.), 205.

The fact that the depositary keeps the goods given him the same as his own is not really the test. Bank v. Graham, 79 Pa. St. 106; Giblin v. McMullen, 21 L.

T. N. S. 214.

A promissory note was delivered to a depositary to take care of without reward. Held, that he was not bound to any active measures to obtain security, but was simply bound to keep the note carefully and securely, and receive the money due thereon when offered; that the owner could not recover of him for the loss thereof, without proof of frand or of gross negligence. Whitney v. Lee, 8 Metc. (Mass.) of.

A depositary must exercise the common diligence used by depositaries in general. He cannot exempt himself from the consequences of omitting such diligence, unless he deduce a more limited liability from all the circumstances of his own particular case. Jones on Bailm. 82, 83; Story on Bailm. sect. 79; Finucane v. Small, I Esp. 315. He may narrow or enlarge his general responsibility by special contract. Jones on Bailm. 47, 48. But a depositary cannot contract so as to absolve himself altogether from liability. Bank v. Smith, 62 Pa. St. 47; Maury v. Coyle, 34 Md. 235.

The question of degree of negligence is not accepted by all courts. Some hold that there cannot be different degrees of negligence after the manner of the civil law. The New World v. King, 16 How. (U. S.) 469; Briggs v. Taylor, 28 Vt. 180; Perkins v. Railroad Co., 24 N. Y. 196; Blythe v. Waterworks, 11 Exch. 761; Coggs v. Bernard, 2 Ld. Raym, 909; Jenkins v. Matlow, 1 Sneed (Tenn.), 248.

A special acceptance to keep safely is an undertaking to keep safely with reference to the degree of care which, under the circumstances, the law required of the depositary. Ross v. Hill, 2 C. B.

A party made a special deposit of gold coin in a bank, and the cashier embez-

rled it with the other property belonging to the bank. In the trial there was no evidence of gross negligence on the part of the bank, Held, the bank was not liable to the depositor. Foster v. Bank. 17 Mass. 479. Same doctrine: Carlyon 17 Mass. 479. Same doctrine: Carlyon v. Fitzhenry (Ariz.). 15 Pac. Rep. 273; Smith v. Bank, 99 Mass. 605; Eddy v. Livingston, 35 Mo. 487; Knowles v. Railroad Co., 38 Me. 55; Giblin v. Mc-Mullen, L. R. 2 P. C. 317; Moody v. Keener, 7 Port. (Ala.) 218; Curtis v. Leavitt, 15 N. Y. 9; Bank v. Lock, 4 Dev. (N. Car.) 529; Dawson v. Bank, 5 Pick. (Mass.) 283; Bank v. Chandler, 27 Ill. 525.

A depositary who sells the thing deposited is liable for conversion, McGreg-

or v. Ball, 4 La. Ann. 289.

An agreement that the depositary shall pay interest on the deposit makes the transaction of special deposit one of open account. Howard v. Raeber, 33 Cal. 399;

Hathaway v. Brady, 26 Cal. 581.

In ordinary case of deposits of money with banks, the transaction amounts to a mere loan or mutuum, or irregular deposit, and the bank is to restore an equivalent sum whenever demanded. Balbach v. Frelinghuysen, 15 Fed. Rep. 675; Keene v. Collier, 1 Met. (Ky.) 417; Aurentz v. Porter, 56 Pa. St. 115; Dustin v. Hodgen, 38 Ill. 352; McLain v. Wallace, 103 Ind. 562; Shoemaker v. Hinze, 53 Wis. 116; Robinson v. Gardner, 18 Gratt. (Va.) 509. To be a special deposit, circumstances must show it. In re Bank, I Paige (N. Y.), 247; Brahm v. Adkins, 77 Ill. 263; Keene v. Collier, I Met. (Ky.) 415.

By a subsequent contract, a special deosit may be turned into a general one. Howard v. Raeben, 33 Cal. 399; Chiles

v. Garrison, 32 Mo. 475.

In the French law, a necessary deposit differs from a common deposit only in this: Oral proof by witnesses is admitted, whatever may be the value of the necessary deposit; but in other cases no deposit beyond a limited value can be proved but by some writing. Pothier's Traité de Dépôt, n. 76.

In case of involuntary deposits, the law seems to be, that where goods of any person have been lodged upon another's land, the owner may, when he is not in fault, lawfully enter and take them away.

Miller v. Hawey, Latch. 13.

If the owner of the land improperly refuses, after a request, to permit the owner of the chattels to take them away, the former may be held in conversion for their value. Anthony v. Haneys, 8 Bing. 186; Read v. Smith, 1 Benton (N. B.), 194.

There is no duty cast upon an involuntary depositary with respect to goods sent him voluntarily by another, and which were unsolicited by the former. Howard v. Harris, 1 C. & E. 253.

General deposits in banks are classed irregular deposits. Story on Bailm. sec.

Quasi deposits are governed by the same rule as common deposits. Dough-

erty v. Posegate, 3 Iowa, 88. In Massachusetts, a finder of a pocketbook left by the owner on a table in a shop cannot be held against the right of the shopkeeper. McAvoy v. Medina, II Allen (Mass.), 548. But this doctrine does not seem to be the same in other States. A domestic servant in a hotel found a roll of bills in a public parlor. Held, that he is entitled to them as against the hotel-keeper. Hamaker v. Blanchard, 00 Pa. St. 377.

A servant found money in paper stock of his employer. *Held*, he could hold it against his employer. Bowen o. Sulli-

van. 62 Ind. 281.

The owner's agent gave an old safe to a party to sell, with the privilege of using The depositary found a roll of bills between the casing and the lining. Held, as against the owner of the safe; the depositary could keep the money. Durfee v. Jones, 11 R. I. 586.

Generally, the place of finding the property does not make any difference. The finder of lost goods, to be guilty of larceny, must at the time of finding have formed the intent of appropriating them to his own use. Griggs v. State, 58 Ala.

The circumstances surrounding the case must determine the question whether the owner can be found by reasonable diligence. Brooks v. State, 35 Ohio St. v. Cogdell, r Hill (N. Y.), 94; People v. Anderson, 14 Johns. (N. Y.) 294; R. v. Word, 3 Cox Cr. Cas. 453.

Kent says there are several cases in which a naked depositary is answerable besides the case of gross neglect. 1. When he makes a special acceptance to keep the goods safely. 2. When he spontaneously and officiously proposes to keep the goods of another. 3. When he is to receive a compensation for the de-

posit. 2 Kent's Com. 565.

As a general rule, the depositary has no right to use the chattel for his own profit. If he does, and the chattel is lost or injured thereby, he must make good the loss. But if the chattel be an animal, as a horse, which requires air or exercise, the depositary has an implied

(b) The Depositary Must Return the Thing Deposited.—The depositary is bound to restore not only the thing deposited, but any increase or profits which may have accrued from it. If an animal deposited brings forth young, the latter must also be restored to the owner. He must deliver it in a state in which he received it. with the profits and the increase, and if he fails in either of these respects he is liable.² The depositary must deliver to the owner. though he be an entire stranger to him.3

authority from the depositor to use it to a reasonable extent, and is under an implied contract to give it proper air and exercise. I Wait's L. & Pr. 311.

If the use of the chattel would be for

its benefit, the assent of the owner may be implied. Story on Bailm. § 90; Jones on Bailm. 81, 82; Mores v. Conham,

Owen, 123.

1. Story on Bailm. 99. 2. Game v. Harvie, Yelv. 50; Code of Louisiana, art. 2010.

3. Burton v. Baughan, 6 C. & P. 674. Whenever a depositary takes a chattel into his possession he is legally bound to return it, because, should he fail to restore self and damnify another, contrary to his promise. This is substantially in the following cases: Johnson v. Reynolds, 3 Kan. 257; Graves v. Ticknor, 6 N. H. 537; Dart v. Lowe, 5 Ind. 131; Colyar v. Taylor, 1 Coldw. (Tenn.) 372; Colledge v. Howard, 23 Ark. 61; Beards-lee v. Richardson, 11 Wend. (N. Y.) 25; Persch v. Quiggle, 57 Pa. St. 247; Bland v. Womack, 2 Murph. (N. Car.) 373; Jenkins v. Wotlow, 1 Sneed (Tenn.), 248; Bank v. Smith, Edm. Sel. Cas. (N. Y.) 351; Lloyd v. Barden, 3 Strob. (S. Car.) 343; Clark v. Gaylord, 24 Conn. 484.
It is sometimes held that a depositary

has a special property in the deposit, but Hoare, 3 Atk. 44; Story on Bailm. § 93.
But it was held that as the depositary

had a special property, he recovers only the value of his special property against the owner; but the value of the whole property as against a stranger, and the balance beyond the special property, he holds for the general owner. White v. Webb, 15 Conn. 302.

But if the depositary has no property whatever in the goods, yet his possession is sufficient ground for a suit against a tort-feasor. Poole v. Symonds, 1 N. H. 289; Thayer v. Hutchinson, 13 Vt. 504; Sutton v. Buck, 2 Taunt. 302; Burton v.

Hughes, 2 Bing. 173. In Massachusetts, if the deposit is taken from the depositary by a wrong-doer, he must bring trover and not replevin, be-

cause the last action requires property in the plaintiff. Waterman v. Robinson, 5 Mass. 302. Same doctrine, Templeman

v. Case, 10 Mod. 24.
In Waterman v. Robinson it was held that trover may be maintained by him who has the possession, but replevin cannot be maintained but by him who has an interest in the property, either general or special. The depositary has no interest in the goods, but merely the care and safe keeping. If his possession is violated, he may maintain trespass or trover; but he has no special property by which he can maintain replevin, in which the question is not of possession, but of property, although possession may be prima facie evidence of property, and hence a depositary cannot maintain replevin. See Harris v. Smith, 3 S. & R. (Pa.) 20; Dunham v. Wyckoff, 2 Wend. (N. Y.) 280; Fisher v. Cobb, 6 Vt. 623; Giles v. Grover, 6 Bligh, 277; Burton v. Hughes, 2 Bing. 173; Aughten v. Seppings, I Barn. & Ad. 241; Harrington v. King, 121 Mass. 269. Compare Ludden v. Leavitt, 9 Mass. 104; Warren v. Leland, o Mass. 265; Commonwealth v. Morse, 14 Mass. 217, which hold that as the depositary has only a mere naked possession, he cannot maintain any action for the goods against a party taking them from his possession.

But it seems that mere possession is a sufficient title against a wrong-doer or stranger, by which an action of trespass or trover may be brought. Moran v. Packet Co., 35 Me. 55; Faulkner v. Brown, 13 Wend. (N. Y.) 63; Hyde v. Noble, 13 N. H. 494; Nichols v. Bastard, 2 C. M. & R. 659.

A receiptor to whom a sheriff has intrusted for safe keeping property attached by him on a writ against a third person, may maintain trover against a wrongdoer. Thayer v. Hutchinson, 13 Vt. 504. Compare Dillenback v. Jerome, 7 Cow. (N. Y.) 294; Barker v. Miller, 6 Johns. (N. Y.) 196; Norton v. People, 8 Cow. (N. Y.) 137.

A mere deposit by a person who has himself no property in the goods does not give the depositary any right to replevy them; and it is very questionable, where a mere naked bailment for safe keeping, whether the depositary can maintain replevin. Harrison v. McIntosh, 10 Johns. (N. Y.) 380. But the person holding the mere naked possession of goods may deposit them and, by proper action in law, hold the depositary responsible for their return. Shaw v. Kaler, 106 Mass. 448; Parker v. Lombard, 100 Mass. 405.

A conventional depositary called upon to decide the rights and interests of different persons who call upon him for the same property, in order to protect himself, should compel the adverse parties to interplead. Rich v. Aldred, 6 Mod. 216; Isaac v. Clark, 2 Bulst. 306; Thorp v. Burling, 11 Johns. (N. Y.) 285; Biddle v. Bond, 6 B. & S. 225; Brownell v. Manchester, 1 Pick. (Mass.) 232; Harper v. Godsell, 39 L. J. Q. B. 185; Taylor v. Plumer, 3 Maule & S. 562; May v. Harvey, 13 East, 197.

A depositary can set up the title of another person than the bailor, when he should depend upon the right and title, and has the authority of that person. Thorne v. Tilbury, 3 Hurlst. & N. 534. But not if he knew of the right of the third person when he received the goods. Palmtag v. Doutrick, 59 Cal. 154: Dodge v. Meyer, 61 Cal. 405; Exparte Sadler, L. R. Ch. Div. 86.

A borrower of goods or chattels must return them before setting up a title in himself. Simpson v. Wrenn, 50 Ill. 222. If the lender is not the owner of the chattel, the borrower must, ordinarily, restore it to him, and has no right to set up the title of a mere stranger against him. Story on Bailm. sec. 266.

Where an owner gives a receipt for property to an officer who has seized it under process, he cannot set up title in himself until he has restored it to the officer. Brusley v. Hamilton, 15 Pick. (Mass.) 40.

A depositary may set up a seizure of the goods under an attachment against third persons. Stiles v. Davis, I Black. (U. S.) 101; Wareham Bank v. Burt, 5 Allen (Mass.), 113. He can also set up that the goods were forcibly taken from him without his fault. Watkins v. Roberts, 28 Ind. 167.

If a coroner find property on the person of one deceased, which belongs to another, it is the coroner's duty to deliver it to the true owner. He cannot set up title in the administrator. Smiley v. Allen, 13 Allen (Mass.), 465.

If a depositary gives a receipt to a third party, acknowledging that he received the property from him, it is equivalent to a conversion. Halbrook v. Wight, 24 Wend. (N. Y.) 160.

If a depositary receives money from a depositor in fraud of the latter's creditors, he cannot set up that fact in defence of an action by the depositor or his assignee, when the creditors have taken no steps to avoid the transaction. Brown v. Thayer, 12 Gray (Mass.), 1; Hendricks v. Mount, 2 South. (N. J.) 738; Clark v. Gavlord. 24 Conn. 484.

In some of the States personal property may be attached upon mesne process to satisfy the judgment. In such cases the officer generally gives the goods attached to some person to hold till demanded. State v. Fitzpatrick, 64 Mo. 185; Loyless v. Hodges, 44 Ga. 647; Foltz v. Stevens, 54 Ill. 180. In such cases the mere possession of the depositary is a sufficient ground for suit against a wrong-doer. Thayer v. Hutchinson, 13 Vt. 504.

The officer has a special property in the attached goods and can require their restitution to him from the bailee. Jenney v. Rodman, 16 Mass, 464.

When the officer is discharged from all liability over to any person, his right of action is gone, and the depositary is under no further obligations to the officer. Lyman v. Lyman, II Mass. 317. So long as the depositary continues liable on his receipt to the officer, the general owner cannot maintain an action against the depositary for the goods. Perley v. Brown, 18 N. H. 404.

In quasi deposits the finder of property for which a specific reward has been offered has a lien upon it for the payment of the amount of the reward. Wentworth v. Day, 3 Metc. (Mass.) 352; Cummings v. Gann, 52 Pa. St. 484. It is otherwise if the offer be merely "a liberal reward." Wilson v. Guyton, 8 Gill (Md.),

If a party finds property which another has thrown away as worthless, he may hold it against the original owner. McGoon v. Aukeny, 11 Ill. 558.

It has been held that a depositary may charge the owner for necessary expense and labor in the care of the chattel deposited. Story on Bailm. sec. 121, a. This is hardly the law, or it seems never to have been expressly adjudicated. Bartholomew v. Jackson, 20 Johns. (N. V.) 28; Parsons on Cont. (1883), *446, note v. No such right exists at common law. 2 Addison on Cont. (1883), § 815.

If one negligently receives goods not directed to him, he is as liable for default as a bailee with compensation. Newhall v. Paige, 10 Grav (Mass.), 366.

If a depositary lends the goods for his

5. Measure of Damages for Refusal to Return.—The rule for fixing the measure of damages for the refusal of the depositary to return

own gains, it is equivalent to a conversion. Persch v. Quiggle, 57 Pa. St. 247.

The finder of a chose in action, as a note or check and the like, is not entitled to receive payment on it. If paid, with notice of the holder's possession by finding, it can be collected again by the right-

ful owner. McLaughlin v. Waite, 5 Wend. (N. Y.) 404.

Place of delivery is also a question. But it seems to be settled in this country that the depositary is bound to deliver the goods where they are located, or at his own residence or place of business. Scott v. Crane, I Conn. 255; Slingerland v. Morse, 8 Johns. (N. Y.) 474; Higgins v. Emmons, 6 Conn. 76; Mason v. Briggs, 16 Mass. 453.

The demand may be made on the depositary for the return elsewhere than at the location of the goods, or at his residence or place of business. Higgins v. Emmons, 6 Conn. 76; Dunlap v. Hunting, 2 Denio (N. Y.), 643.

A deposit made to be restored at a future time can be demanded back at once, as the depositary has no interest in its custody, or any right adverse to the depositor. I Domat, b. I, t. 7, sec. I, art. 7; Code Civil of France, No. 1044; Lees v. Dwight, 10 La. Ann. 711; Code of Louisiana (1825), art. 2926.

It is doubtful whether this is the law in the United States, except as to Louisiana.

Winkley v. Foye, 33 N. H. 171.

The demand must be made at a reasonable time, and a reasonable time allowed for the redelivery. Pothier's Traité de

Dépôt, n. 59.

If the property is legally taken from the depositary by process of law, or if the deposit is recovered by paramount title by third party, the former is absolved from responsibility. Edson v. Weston, 7 Cow. (N. Y.) 278; Shelbury v. Scotsford, Yelv. 23; Biddle v. Bond, 34 Law. J. Q. B. 137; Wilson v. Anderton, I Barn. & Ad. 450; Sheridan v. New Quay Co., 4 C. B. N. S. 650; Mail Co. v. Mail Co., 10 C. B. N. S. 860; Cheesman v. Exall, 6 Erch att. Whittier v. Smith. v. Mark. 6 Exch. 341; Whittier v. Smith, 11 Mass. 211; The Idaho, 93 U.S. 575.

If the deposit is taken away by superior force, the depositary may make this a defence. Watkins v. Roberts, 28 Ind. 167.

A borrower cannot set up title in himself to justify his refusal to return. Simpson v. Wrenn, 50 Ill. 222; Nudd v. Montayne, 38 Wis. 511. When the depositor becomes a bankrupt. See Lain v. Gaither, 72 N. Car. 234.

As to the liability of the depositary who assumes general ownership without the depositor's knowledge, see McMahon v. Sloan, 12 Pa. St. 229; Crump v. Mitchell, 34 Miss. 449.

If a depositary sells the property, it is a conversion. Wheelock v. Wheelwright. 5 Mass. 103; Crump v. Mitchell, 34 Miss.

If an heir or administrator sells the deposit in ignorance of its bailment, he is liable for the price when he receives it. Code Civil of France, No. 1935; Code of

Louisiana (1825), art. 2918.

Under the common law in this case. it would be a conversion, and give the owner the value of the thing sold, or he could proceed against the vendee for restitution. 2 Saund. 466, William's note.

Generally, if goods are deposited by a servant, they should be restored to the master. But a return to the servant when there are no suspicions that he is not the rightful depositor will be lawful. ilton v. Nickerson, II Allen (Mass.),

When a deposit has been made by a guardian, trustee, or executor, if his trusts have terminated, the property should be delivered to the party entitled to its possession. Code of Louisiana (1825), arts. 2922, 2923; Pothier's Traité de Dépôt, n. 50. The property must be given back to the heirs, each according to his share; but if the thing cannot be divided, the heirs must arrange among themselves as to its distribution. Code Napoleon, Nos. 1937, 1939.

A depositary may sue one who has converted the property, though the former may not be responsible to the owner. Chamberlain v. West (Minn.), 33 N. W.

Rep. 114.

If a depositary fails to procure suitable means for the extinguishment of fires, he cannot be held liable for an accidental fire which destroyed the chattel deposited. Clark v. Eastern R. Co., 139 Mass.

Under the Montana Code, it would be correct to sue in replevin, trover, or trespass, as there is but one form of civil action. U. S. v. Williams, 6 Mon. T. 379 (Rev. St. Div. 1, sec. 1).

But in Maryland the forms of actions have been preserved and kept distinct.

Smith v. State, 66 Md. 215.

In Pennsylvania the action would be "action of trespass." Laws of 1887, No. 158, p. 271.

the goods seems to be the value of the thing deposited at the time when delivery ought to have been made, or at the taking or conversion, with interest.1

(a) When Does the Statute of Limitation Begin to Run?—The Statute of Limitation begins to run from the date of the demand and refusal, and not from the date of the wrongful act of the denositary.2

1. Ingram v. Rankin, 47 Wis. 406. The rule in this case would be the same as in other actions; that is, the value of the chattel when converted by the depositary, with interest. Gregg v. Fitz-push, 36 Tex. 127; Gerard v. Taggart, 5 S. & R. (Pa.) 19; Ball v. Douglass, 4 Munf. (Va.) 303; Clements v. Hawks, 117 Mass. 363; Camp v. Hamlin, 55 Ga. 259; Bozeman v. Rose, 40 Ala. 212; Wait v. Kellogg (Mich.), 30 N. W. Rep. wait v. Kenogg (Mrch.), 30 N. W. Kep. 80; Baals v. Stewart, 109 Ind. 371; Rider v. Kelley, 32 Vt. 268; Hale v. Trout, 35 Cal. 229; Bicknall v. Waterman, 5 R. I. 43; Dustan v. McAndrew, 44 N. Y. 72; Marshall v. Piles, 3 Bush (Ky.), 249; Pinkerton v. Railroad Co., 42 N. H. 424; Striesers v. Railroad Co., 42 N. H. 424; Springer v Berry. 47 Me.330; Grand Tower Mining Co. v. Phillips, 23 Wall. (U. S.) 471; Underhill v. Goff. 48 Ill. 198; West v. Pritchard, 19 Conn. 212; Knibs v. Jones, 44 Md. 306; Hutchings v. Ladd, 16 Mich. 44 Mt. 390; Futchings v. Laud, 16 Mtch. 494; Morehead v. Hyde, 38 Iowa, 382; Whitesell v. Forehand, 79 N. Car. 230; Farwell v. Price, 30 Mo. 587; Schmertz v. Dwyer, 53 Pa. St. 353; Hancock v. Gomez, 50 N. V. 668; Parsons v. Martin, II Gray (Mass.), 111; Bell v. Cunning-ham, 3 Pet. (U. S.) 69; Heineman v. Heard, 50 N. Y. 27; Kennedy v. White-well, 4 Pick. (Mass.) 466.

In the pleadings to recover from the depositary, it is sufficient to allege in the declaration or complaint that he agreed to safely and securely keep the goods entrusted to him. This averment is sufficient in all cases of bailment. Ross v.

Hill, 2 C. B. 877.

If goods are legally assigned by the depositor, and the depositary has notice, the latter must account to the assignee. The rule that a depositary should not attorn to a stranger does not apply in such a case; or, more properly speaking, the assignee is not a stranger. Roberts

v. Noyes, 76 Me. 590. An action was brought jointly against several parties to recover damages for the conversion of wheat stored in a warehouse. They filed separate answers, alleging that the wheat they took was theirs. No evidence was introduced on the trial that they cooperated in taking away the wheat. Held, that the plaintiff was properly nonsuited. Cooper v. Blair,

14 Oregon, 255.

An officer placed attached property in the hands of a depositary to keep. Held. the defendant in the attachment could not maintain replevin against the depositary, without first giving notice required by statute to the officer of such an action. Potter v. McKenney, 78 Me. 8o.

2. Wilkinson v. Verity, L. R. 6 C. P.

206.

No right of action accrues against the depositary unless he has wrongfully converted the goods or lost them by gross negligence, and not then until a demand is made upon him, and a refusal by him to redelivery. Stewart v. Frazier, 5 Ala. to redelivery. Stewart v. Frazier, 5 Ala.
114; Wilkinson v. Verity, L. R. 6 C. P.
206; Hosmer v. Clarke, 2 Greenl. (Me.)
308; Montgomery v. Evans, 8 Ga. 178;
McLain v. Huffman, 30 Ark. 428; West
v. Murph, 3 Hill (S. Car.), 284; Jackman
v. Partridge, 21 Vt. 558; Kellogg v.
Olson, 34 Minn. 103; Zuck v. Culp. 59
Cal. 142; Roulston v. Dunn, 87 N. Car. 191; Moor v. Commissioners, 87 N. Car. 209; Winkley v. Foye, 33 N. H. 171; Roulston v. McClelland, 2 E. D. Smith (N. Y.), 60; Cullen v. Barclay, 10 Ir. L. R. 224; Holbrook v. Wight, 24 Wend. (N. Y.) 169; Emerick v. Chesrown, 90

Ordinarily, a demand and a refusal is evidence of a conversion, unless there are circumstances modifying the case, and offering a just excuse for non-delivery. Brown v. Cook, 9 Johns. (N. Y.) 361; Magee v. Scott, 9 Cush. (Mass.) 148.

Under some circumstances a demand is not necessary before bringing action against the depositary. Derrick v. Baker, 9 Port. (Ala.) 362; Huntsman v. Fish, 36 Minn. 148; Bank v. Dunbar, 118 Ill. 625; Kellogg v. Olson, 34 Minn. 103.

În an irregular deposit, unless a legal excuse exists, a demand must be made before suit. Morse on Bank. 29; Johnson v. Bank. 1 Harr. (Del.) 117; Bank v. Bank, 1 Garr. (Del.) 117; Bank v. Bank, 10 Gill & J. (Md.) 422; Bank v. Bank, 39 Pa. St. 92; McEwen v. Davis, 39 Ind. 109; Downes v. Bank, 6 Hill (N. Y.), 297.

- 6. Deposit of Title Deeds.—(See also EQUITABLE MORTGAGES.)
 —Depositing a title-deed as security for debt was at one time much employed in England, and to some extent at present. equity this transaction is considered as an agreement to execute a mortgage which will be enforced against the depositor and all other person's claiming under him, except subsequent purchasers and incumbrancers for value without notice.1
- 7. Deposit of Earnest Money.—(See also CONTRACTS; SALES.)— Earnest-money is the sum paid by the buyer of goods in order to bind the seller to the terms of the agreement. 2 Earnest is a token or pledge passing between the parties by way of evidence or ratification of sale.³ It was used in the early stages of the English law as a means of binding the parties and completing the sale.4 Earnest is mentioned by the Statute of Frauds, which distinguishes. between "part payment" and "earnest," either of which will bind the bargain.⁵ Earnest is a kind of part payment.⁶ It signifies any money, or any valuable article, which the buyer gives to the seller, who accepts in token of good faith.

1. Jarvis v. Dutcher, 16 Wis. 307; Mandeville v. Welch, 5 Wheat. (U. S.) 277; Carey v. Rawson, 8 Mass. 159; Ex

parte Langstone, 17 Ves. 230.

In Pennsylvania, a written agreement must be deposited with the deed in order to have the transaction create an equitable mortgage. Luch's Appeal, 44 Pa. St. 519; Edward v. Trumbull, 50 Pa. St.

The deed must have been deposited with the express intention of providing a lien, in order that the possession may have that effect. Mandeville v. Welch, 5 Wheat. (U. S.) 277; Story on Eq. Jur.

If the intention is declared by writing, it cannot be controlled by parol evidence.
Baynard v. Woolley, 20 Beav. 583; Exparte Coombe, 17 Ves. 369.
This kind of equitable mortgage is

recognized in several of the States. Hall v. McDuff, 24 Me. 311; Hackett v. Reynolds, 4 R. I. 512; Stoddard v. Hart, 23 N. Y. 556; Rockwell v. Hobby, 2 Sandf. (N. Y.) 9; Wilson v. Lyon, 51 Ill. 166; Gale v. Morris, 29 N. J. Eq. 222; Mounoe v. Byars, 16 Ga. 469; Gothard v. Flynn, 25 Miss. 58; Hill v. Eldred, 49 Cal. 398; Williams v. Stratton, vo. 8 k. M. (Miss.) Williams v. Stratton, 10 S. & M. (Miss.) 418; Welsh v. Usher, 2 Hill (S. Car.), 166; Jarvis v. Dutcher, 16 Wis. 307. But this doctrine is not accepted in some of the States. Strauss' Appeal, 49 Pa. St. 353; Kauffelt v. Bower, 7 S. & R. (Pa.) 64; Van Meter v. McFaddin, 8 B. Mon. (Ky.) 438; Bicknell v. Bicknell, 31 Vt.

498; Meador v. Meador, 3 Heisk. (Tenn.) 562; Bank v. Caldwell, 4 Dill. (C. C.) 314; Probasco v. Johnson, 2 Disney (Ohio), 96. See, as to *Pennsylvania*, Luch's Appeal, 44 Pa. St. 522; Edwards v. Trumbull, 56 Pa. St. 512.

2. Whart. Law Dict.

3. Inst. 3, 24.

4. Glanville, b. 10, c. 14.

5. 29 Car. II. c. 3, sec. 17.
6. Pordage v. Cole, 1 Saund. (Williams' Ed.) 319, l.
7. Blakey v. Dinsdale, Cowp. 661 et seq.; Langfort v. Tiler, I Salk. 113; I Chit. Cont. (11th Am. Ed.) 519 et seq.; 2 Bl. Com. 447.

But earnest-money is not now much used. Instead of it, where there is neither a writing nor delivery of the goods, the buyer generally makes a "part payment," which makes the bargain binding. Pierce v. Gibson, 2 Ind. 408. Otherwise not.

Kirby v. Johnson, 22 Mo. 354.

The legal effect of earnest-money is toafford conclusive evidence that a bargain was consummated with mutual intention that it should be binding on both. Whether property has passed in such cases is to be tested, not by the fact that earnest was deposited, but by the true nature of the contract completed by this giving of the earnest-money. Benj. on Sales (1881, 3d Ed.), § 357, and cases cited; Groat v. Gile, 51 N. Y. 431; Nesbit v. Burry, 25 Pa. St. 208; Joyce v. Adams, 4 Seld. (N. Y.) 201; Jennings v. Flannagan, 5 Dana (Ky.), 217.

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1. Definition.—A deposition is evidence given by a witness under interrogatories oral or written, and usually written down by an official person. 1 It is a generic expression, embracing all written evidence verified by oath.² But in its more technical and appropriate sense it is limited to the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity.3

1. Stimpson v. Brooks, 3 Blatchf. (U.

S.) 456. 2. Stimpson v. Brooks, 3 Blatchf. (U.

3. State v. Dayton, 3 Zab. (N. J.) 49,

54; s. c., 53 Am. Dec. 270. Letters Rogstory.—An instrument sent in the name and by the authority of a judge or court to another, requesting the latter to cause to be examined, upon interrogatories filed in a cause depending before the former, a witness who is within the jurisdiction of the judge or court to whom such letters are addressed. Bouvier's Law Dict.

"There is a very broad distinction between the execution of a commission and the procuring testimony by the instru-

mentality of letters rogatory, or letters requisatory, as they are sometimes called. In the former case the rules of procedure are established by the court issuing the commission, and are entirely under its control. In the latter, the methods of procedure must, from the nature of the case, be altogether under the control of the foreign tribunal which is appealed to for assistance in the administration of justice. We cannot execute our own laws in a foreign country, nor can we prescribe conditions for the performance of a request which is based entirely upon the comity of nations, and which, if granted, is altogether ex gratia." Thayer, J., in Kuehling v. Leberman, 9 Phila. 163.

Stenographer's Notes. - A statute au-

2. By What Law Governed.—The statute of the State issuing the commission, and not that which prevails where the deposition is taken, regulates the manner of taking the evidence.1

Competency of Deposition as evidence is decided by the law in

force when it is offered.2

- 3. Bona Fides.—If it is shown that the purpose of a party in resorting to taking the deposition of a witness, and also examining him on the witness stand, was to oppress the adverse party by increasing costs, the court might impose the costs of the deposition on the party in fault; but such purpose would have to be shown to the satisfaction of the court.³
- 4. A Statutory Proceeding.—The manner of taking depositions is regulated by statute; and it is essential that the statutory requirements be substantially complied with.4

thorizing the minutes of the official stenographer to be used in settling a bill of exceptions does not give them the character of depositions. Edwards v.

Heuer, 46 Mich. 95.

Iowa Civil Code, § 3777, provides that the stenographer's notes of testimony, or any transcript thereof only certified by the reporter of the court, "shall be admissible, in any case in which they are material and competent to the issue therein, with the same force and effect as depositions, and subject to the same objections, so far as applicable." Plaintiff subpoenaed a witness, and learned that he was going to leave the State. thereupon entered notice on the noticebook in term-time, and three or four days before the trial, that he should use the stenographer's report of that witness' testimony given on a former trial of the Held, that he was entitled to use the testimony. The rule with reference to notice for taking depositions has no

application in such a case. Fleming v. Shenandoah, 32 N. W. Rep. (Iowa) 456.

1. Bostwick v. Lewis, 1 Day (Conn.), 33; McGeorge v. Walker, 31 N. W. Rep. (Mich.) 601; City Bank v. Young, 43 N. H: 457; Kuehling v. Leberman, 9 Phila. (Pa.) 160. Compare Coopwood v. Foster, 12 S. & M. (Miss.) 718; Allen v. Russell,

78 Ky. 105.

A commissioner appointed by the governor of one State to take depositions in another State is not a public officer of the State in which he acts, but an officer of the State under whose authority he is appointed. Lyman v. Hayden, 118 Mass.

A commissioner to take testimony acting in Pennsylvania under a commission from a court of equity in another State becomes pro re nata an officer of that court, and in the absence of any statutory provision or express contract, such court has the power to fix the amount of his When such court has compensation. fixed his compensation, he has no right to sue in the courts of this State upon a quantum meruit for a larger sum. Peters v. Rand, 108 Pa. St. 255.

A deposition taken outside of Indiana for use as evidence in that State is inadmissible if taken before any other person than an officer authorized by the Indiana statute to take depositions, even though the party objecting had waived dedimus and certificate of the official character of the officer, and had appeared at the taking, and offered no objection then to the official character of the officer. Thompson v. Wilson, 34 Ind. 94. Compare George v. Nichols, 32 Me. 179.
A deposition taken before a United

States commissioner is not admissible, unless taken according to the laws of the State issuing the commission. Crichton v. Smith, 34 Md. 42.

Common-law Actions.—The right to take testimony by depositions in common-law causes pending in the Federal courts, depends upon the statutes of the United States, and not the statutes of the States in which such courts are held; but when such right does exist under the United States statutes as to the mere mode of procuring the deposition, the parties may follow, at their election, either the provisions of the State law or of the act of Congress. McLennan v. Kansas City, etc., R. Co., 22 Fed. Rep.

2. Fielden v. Lahens, 2 Abb. App. Dec. (N. Y.) III; Oliver v. Moore, 12

Heisk. (Tenn.) 482; Mitchel v. Haggenmeyer, 51 Cal. 108.

3. Gulf, etc., R. Co. v. Evansich, 61 Tex. 3. See Rogers v. Rogers, 7 Wend. (N. Y.) 514.

4. Patterson v. Wabash, etc., R. Co., 54 Mich. 91; Toulman v. Swain, 47 Mich. 82; Edleman v. Byers, 75 Ill. 367; Greene County v. Bledsoe, 12 Ill. 267; Semmens v. Walters, 55 Wis. 675; Borders v. Barber, 81 Mo. 636; Bonney v. Cocke, 61 Iowa, 303; Grimes v. Martin, 10 Iowa, 347; Elgin v. Hill, 27 Cal. 372; Stone v. Stillwell, 23 Ark. 444; Cain v. Loeb, 26 La. Ann. 616; Houston, etc., R. Co. v. Larkin, 64 Tex. 454; Boykin v. Smith, 65 Ala. 294; Wilson v. Campbell, 33 Ala. 249; s. c., 70 Am. Dec. 586; Hutson v. Hutson, 9 Lea (Tenn.), 354; Read v. Patterson, 11 Lea (Tenn.), 430; Field v. Tenny, 47 N. H. 513; Scott v. Perkins, 28 Me. 22; Kidder v. Blaisdell, 45 Me. 461; Adams v. Flanagan, 36 Vt. 400; Rust v. Eckler, 41 N. Y. 488; McColl v. Sun M. Ins. Co., 50 N. Y. 733; Goodyear v. Vosburgh, 41 How. Pr. (N. Y.) 267.
(N. Y.) 378; Sheldon v. Wood, 2 Bosw. (N. Y.) 378; Sheldon v. Wood, 2 Bosw.

Strict Compliance.—Depositions are evidence only when all the requirements of the statute have been complied with, and the omission of anything named in the statute as to be done in perfecting them entirely destroys their competency against any party objecting to them. Simpson v. Carleton, I Allen (Mass.), 100; Simpson v. Dix, 131 Mass. 185; Johnson v. Perry, 54 Vt. 459; Dye v. Bailey, 2 Cal. 383; Mathews v. Dare, 20 Md. 248; William v. Bourks, 5 Md. 198; Collins v. Elliott, I H. & J. (Md.) I; Bascom v. Bascom, Wright (Ohio), 632; Jones v. Neale, I Hughes (U. S.), 268; Wilson S. M. Co. v. Jackson, I Hughes (U. S.), 205.

Caption need not specify the kind of action in reference to which it is taken, where a statute provides that it shall state "the cause in which the deposition is to be used." Scott v. Perkins, 28 Me. 22;

s. c., 48 Am. Dec. 470.

Where the fact that the witness was unable to procure sureties for his appearance at the trial was not shown by the oath of any one, and the deposition itself does not show that it was read over to the witness, and that he signed it after acknowledging it to be correct, and was not certified by the officer before whom it was taken, it is inadmissible against the defendant. People v. Mitchell, 64 Cal. 85.

Deposition, if objected to, cannot be read in evidence, when the deposition and the commission under which it was taken have not been returned in conformity to the statute. Avery v. Avery, 12 Tex. 54: S. C. 62 Am. Dec. 513.

12 Tex. 54; s. c., 62 Am. Dec. 513.
Clerical Errors, Omissions, etc.—Defects and irregularities in taking depositions,

and in the examination of witnesses thereon, will be disregarded if they are merely formal, and do not affect the rights of the parties. Semmens v. Walters, 55 Wis. 675; Hewlett v. Wood, 67 N. Y. 394; Forrest v. Kissam, 7 Hill, 463; Rust v. Eckler, 41 N. Y. 488; Kimball v. Davis, 19 Wend. (N. Y.) 437; In re Neill, 12 Phila. 160.

The trial court may, in its judicial discretion, order a deposition to be returned to the officer before whom it was taken, for the correction of clerical or formal errors made by him. Borders v. Barber.

81 Mo. 636.

Where a commission to take depositions was issued to Fred R., and was returned executed and certified to by F. A. R., held that, while the court could not, without more, presume that Fred R. and F. A. R. were identical, yet, as the commission must be presumed to have been sent to Fred R., and as it was executed, returned and certified by some one who might have been Fred R., and who stated in the body of his certificate that his name was Fred A. R., the identity of the commission sufficiently appeared, and the court properly refused to suppress the deposition on account of the discrepancy. Byington v. Moore, 62 Iowa, 470. pare Elmore v. Wells, I Hayw. (N. Car.)

The names of witnesses whose depositions are to be taken must be specified in the notice, and if depositions are taken of persons not named, they should be suppressed. Where the deposition designates the witness with but one Christian name, and the deposition or return shows that he has another, the variance is not ground for suppression; nor if the names, though differently spelled, are *idem sonans*; but if names are clearly different, the deposition should be rejected. Strayer v. Wilson, 54 Iowa, 565.

Where the parties to a cause stipulated in writing that the deposition of S. M. K. should be taken in behalf of the plaintiff before a certain notary public, but the notary took and returned the deposition of Sallie E. McK., held that the deposition was properly suppressed on motion of defendants. Glenn v. Gleason, 61 Iowa. 28; McCoy v. People, 71 Ill, 111. Compare Field v. Tenney, 47 N. H. 513.

A commission to take depositions of John McKay was returned with testimony given by John Macke. The testimony was admitted,—it not appearing but that the words McKay and Macke were idem sonans. Held, that there was no error in admitting the testimony. International, etc., R. Co, v. Kindred, 57 Tex. 491.

The examination of James Horan is not authorized by a notice that the deposition of Patrick Horan will be taken, and James Horan's deposition would be inadmissible. Patterson v. Wabash. etc., R. Co., 54 Mich. 91; Scholes v. Ackerland. 13 Ill. 650.

Where the plaintiff's name was stated as Robert G. instead of Rowland G., held that it was not a fatal defect.

dan v. Hazard, 10 Ala. 221.

A mistake in a Christian name is not fatal, where it can be corrected from the whole deposition. Kendall v. Limberg.

69 Ill. 355.
Where the notice stated the place for taking the deposition as the office of "Squire Moore," and the certificate showed that it was taken at the office of "Enos Moore." held that the deposition was inadmissible. McClintock v. Crick, 4 Iowa, 453.

Where the name of the officer was written "Stormer" in place of "Stermer," held not fatal. Greene Co. v. Bledsoe.

12 Ill. 267.

Where the Christian name of commissioner was omitted, held the not Kellum v. Smith, 39 Pa. fatal. St.

Lewis held to be the same as Louis. Marr v. Wetzel, 3 Colo. 2; Mann v.

Birchard, 40 Vt. 326.

A deposition was signed by Emily A. P. The notice gave the witness's name as Mrs. I. V. P. *Held* to be valid; the deponent being known to the notified party as the wife of I. V. P. Kent v.

Buck, 45 Vt. 18.

In a bastardy suit by Mary Hilger, it was proved that another person had carnal intercourse with her about the time of her conception, and his deposition was taken on her behalf to disprove the fact; but the interrogatories referred to the prosecutrix by the name of Mary Higler, and the witness denied the charge as to Mary Higler. Held, that the court erred in allowing such interrogatories and answers to be read, because Hilger is not Higler. McCoy v. People, 71 Ill. 111. See Breyfogle v. Beckley, 16 S. & R. (Pa.) 264.

A commission to take the testimony of Mary Ann Glaspell gave the name as Mary Ann Gaspell, but the interrogatories corrected the error, no one was misled, and the witness appeared and testified. Held, that her evidence when returned could not be objected to for the misnomer. Ellis v. Spaulding, 39 Mich.

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Where the caption gave the names as A. B. and C. D. Smith, held, that the

deposition was admissible. Adams v.

Flanagan, 36 Vt. 347.

A deposition under a citation and cantion as in suit of "A. S. v. M. J., Administratrix," in a case docketed as "A. S. v. J. J.'s Estate," held to be admissible, M. J. being the defendant in fact. Stephens v. Joyal, 45 Vt. 325.

A commission was issued to take the depositions of certain persons. were named in the commission as follows: James Willis, Henry Dunsmore, Ellin Duffield, Henry Gibson, Joseph Clark, Alexander Robson, and Mahalele Elliott. Under such commission the depositions of the following named persons were taken: William P. Smith, James Millis, Ellen Duffield, Harvey Gipson, Henry C. Dunsmore, Mahal Elliott, Alexander M. Robrtson, and Joseph C. Clark. On motion to reject the deposition the court said: "We understand the rule to be that the law recognizes but one Christian name, and therefore the motion was properly overruled as to William P. Smith, Henry C. Dunsmore, and Joseph C. Clark; and also as to Ellin Duffield. for there is no difference between such name and Ellen Duffield; the sound is But this is not true as to the same. James Millis and James Willis; or Henry Gibson and Harvey Gipson; or Mahalele Elliott and Mahal Elliott; or Alexander Robson and Alexander M. Robrtson. As to these persons the motion should have been sustained, material, and we cannot say it was." Strayer v. Wilson, 54 Iowa, 565. See Monteeth v. Caldwell, 7 Humph. (Tenn.) 13; Brooks v. McKean, Cooke (Tenn.), 162; Field v. Tenney, 47 N. H. 513.

It is too late to object upon trial that there is a discrepancy between the affidavit and the commission as to the Christian name of the witness. Denny v.

Horton, 11 Daly (N. Y.), 358.

A deposition is not excluded by a discrepancy as to the witness's name between the interrogatories and the deposition, if the opposite party knew what person was intended to be examined, and directed his cross-examination accordingly. Tompkins v. Williams, 19 Ga. ingly. Tompkins v. Williams, 19 Ga 569; Waldron v. St. Paul, 33 Minn. 87.

A deposition is incompetent evidence when the words "before me" in the caption, preceding the name of the magistrate before whom the deposition purported to be taken and sworn, were omitted. Powers v. Shepard, 21 N. H. 60; s. c., 53 Am. Dec. 168.

The word "touching" was omitted

from the notary's certificate where it should have occurred in the following clause: "Who was sworn to testify the whole truth of his knowledge touching the matter in controversy." Held, this was a mere clerical omission, and the absence of the word did not impair the certificate. Borders v. Barber, 81 Mo. 636; Sheldon v. Wood, 2 Bosw. (N. Y.) 267; Kidder v. Blaisdell, 45 Me. 461; Stone v. Stilwell, 23 Ark. 444.

The omission of the name of the county in which the witness resided and the suit was pending, held not a fatal defect. Owens v. Kinsley, 6 Jones (N. Car.), 38. Where an officer by whom a deposition

Where an officer by whom a deposition has been taken states in his certificate that the deponent, instead of the deposition, was reduced to writing, the mistake is a mere harmless clerical error. Payne

v. West, 99 Ind. 390.

Depositions were taken in obedience to a rule of court in the presence of the parties, and the witnesses were cross-examined. The justice of the peace certified "that the above witnesses were duly qualified and examined at the time and place stated in the caption before me." It was objected that they were not admissible, on the ground that the certificate was improper, inasmuch as it did not recite that they were reduced to writing, nor that they were subscribed in the presence of the justice by the parties. Held, that it is to be presumed that the depositions were properly reduced to writing and subscribed by the witnesses until the contrary was shown, and it was not error to admit them. Held, further, that not having made objection to the absence of the signature in the court below, no claim, by reason of such defect, could be made in this court. Winton v. Little, 94 Pa. St. 65.

If the residences of the witnesses are stated in the notice accompanying the interrogatories, though not in the caption to such interrogatories, it is a substantial compliance with the statute. Semmens

v. Walters, 55 Wis. 675.

Where the deposition fails to show on whose behalf the deponent is a witness, it suffices if this fact appears from the notice. Read v. Patterson, II Lea (Tenn.),

430.

Where a commission requires a deposition to be taken between particular hours of a particular day, and the certificate states that it was taken on that day pursuant to the commission, the deposition is admissible. Sandford v. Spence, 4 Ala. 237; Dearman v. Dearman, 5 Ala. 202.

Where the caption to the deposition of a witness showed that it was taken between the hours of 9 A.M. and 4 P.M., and

the notice designated between the hours of 8 A.M. and 6 P.M. of the same day, held, the variance was immaterial, in the absence of any pretence that the deposition was taken at an unreasonable hour within the time prescribed, or that the opposite party was hindered in making a cross-examination, had he desired to do so. Borders v. Barber, 81 Mo. 636.

In Kean v. Newell, t Mo. 754, the notice was to take the deposition between ten and six, whereas the certificate showed that it was taken between eight and six. *Held* bad, for the reason that the deposition may have been taken within hours outside of those prescribed

in the notice.

If it appear that the deposition was taken between the hours, although the day is not stated, it will be inferred that the deposition was taken on the day stated in the deposition. Luckie v. Carothers, 5 Ala. 290.

Regularly, a deponent should sign at the end of the deposition; but a deposition is not inadmissible because the deponent signed at the end of the commissioner's certificate. Read ν . Patterson, II Lea (Tenn.), 430.

The failure of the commissioner to sign the deposition is a fatal defect. Price v.

Emerson, 16 La. Ann. 95.

The failure of a commissioner to subscribe each sheet of a deposition, inclose the commission, interrogatories, and depositions in a packet, bind it with red tape and set his seal at the several meetings or crossings of the tape, as required by a chancery rule, is a mere irregularity, and in the absence of any suspicion that the deposition has been tampered with, or other wrong indulged in by the commissioner or parties, will not affect the decree. Chadwick v. Chadwick, 59 Mich.

It is sufficient if the official character of the commissioner appears from his signature at the end, though not stated in the body of the certificate. Read v. Patterson, 11 Lea (Tenn.), 430.

The omission of the signature of the clerk will not invalidate the deposition. Goodyear v. Vosburgh, 39 How. Pr. (N. Y.) 377; Steptoe v. Read, 19 Gratt.

(Va.) 1.

Where the deposition as returned shows affirmatively on the face of it that the witness was not sworn as required by the rules regulating the taking of the deposition, it is clearly irregular and defective, and will be suppressed on motion of the defendant. Cross v. Barnett, 61 Wis. 650; Baxter v. Payne, 1 Pin. (Wis.) 501; Bacon v. Bacon, 33 Wis. 151; Fabyan v.

Adams, 15 N. H. 371; Parsons v. Huff, 38 Me. 137; Lund v. Dawes, 41 Vt. 370.

The omission of a commissioner to show, in his formal certificate, that the witness was sworn, is no ground for suppressing the deposition, when the commissioner shows, in the preamble to the deposition, that the witness was by him cautioned and sworn to speak the truth. the whole truth, and nothing but the truth, in answer to the interrogatories. Broadnax v. Sullivan, 20 Ala, 320.

Where the commissioner certifies that the witness "being duly sworn by me to tell the truth and nothing but the truth, was examined," etc., there is no presumption that the proper oath was administered, and the deposition is inadmissible. Cross v. Barnett, 61 Wis. 650. Compare Ballance v. Underhill, 3 Scam. (Ill.) 453.

A deposition taken by a justice of the peace, and by him handed to the clerk of the court in which the suit is pending, is not subject to exception because he did not envelope and seal it, and indorse upon the seal his name and the style of Hutson v. Hutson, o Lea the cause.

(Tenn.), 354.

Where a deposition was properly inclosed and directed, and in due course reached the justice to whom it was to be addressed as required by stipulation, and there was no pretence that it had been tampered with, an objection that there was no evidence that the document had been directed and deposited in the postoffice by the commissioner who had taken it in compliance with the stipulation has no force, if prejudicial error in directing and mailing it is not affirmatively shown. Locke v. Tuttle, 41 Mich. 407.

A deposition was returned to court in a sealed envelope, but the answers were not annexed either to the commission or to the interrogatories. Held, that the deposition was not to be neglected simply because the answers were not so annexed. Downs v. Hawley, 112 Mass. 237.

Where an envelope containing a deposition is indorsed with the names of the plaintiff and defendant, and the name of the officer before whom the deposition was taken, and is addressed to the clerk of the district court where the case is pending, held a sufficient description of Whittaker v. Voorthe title and cause. hees (Kan.), 15 Pac. Rep. 874.

Where interrogatories show no venue as to place of execution, they are not admissible, on proper objection thereto, unless some good reason can be shown which renders them admissible, notwithstanding the defect. Cecil v. Gazan, 71 Ga. 631. Compare Gibson v. Gibson, 20 Pa. St. 9; Pursell v. Long, 7 Jones (N. Car.), 102.

When a deposition is taken in another State, and it does not purport to have been taken according to the laws of such State, it will not be presumed to have been so taken; but such laws are facts to be determined by the trial court from its own knowledge or from proper evidence.
Johnson v. Perry, 54 Vt. 459. See
Coopwood v. Foster, 12 S. & M. (Miss.)

The omission of the date in the final certificate will not invalidate the certificate, when another certificate appended to the certificate gives the date when it is sworn to and subscribed. Elgin v.

Hill, 27 Cal. 372.

Where the date fixed by the notice was "Monday, the 26th," and the deposition was taken on the 26th, held admissible, though the 26th day did not fall on Rand v. Dodge, 17 N. H. 343. Monday.

Where the name of the commissioner was substituted for that of the witness, held insufficient to exclude the deposition. Eastman v. Bennett, 6 Wis. 228.

If a commissioner misdescribes the name of the clerk who issues the commission, it is not a fatal defect. v. Limberg, 69 Ill. 355.

A mistake in the title of the court of which the commissioner was clerk, and in the name of such clerk, is fatal.

Jones v. Smith, 6 Iowa, 229.
Where, by mistake, the commission was addressed "to any judge, etc., of the State of Louisiana," instead of Alabama, where the commission was executed, held, that it did not invalidate the deposition. Morris v. White, 28 La. Ann. 855; Locke v. Tuttle, 41 Mich. 407; Hayward R. Co. v. Duncklee, 30 Vt. 29. Compare Bowyer v. Knapp, 15 W. Va. 277.

Where the case was wrongly entitled, but the counsel receiving the notice knew inferentially the name of the case, was informed of the names of the witnesses to be examined, and signified his intention to be present at the examination, held, that it was not a fatal defect. thews v. Dare, 20 Md. 248.

Where the clerk of court indorsed a deposition as "received" instead of "filed," held, that the deposition was admissible. Hobendobler v. Lyon, 12

Kan. 276.

Where a deposition was properly sealed, indorsed, etc., the enclosing of it in an envelope addressed to the clerk will not invalidate it. Evans v. Reynolds, 32 Ohio St. 163. See Van Sickle v. Gibson, 40 Mich. 170; Morgan v. Jones, 44 Conn. 225.

5. Who May Take-The Commissioner.-In the absence of statutory provisions, any one may act as commissioner who has attained to the age of citizenship, who is of sound mind, not disqualified by crime, and who stands indifferent between the parties in the cause in which the testimony is required. A commission

The omission of the subscription of the clerk of court, when the commission and usual attestation clause is in the handwriting of the clerk, will not render the Steptoe v. deposition inadmissible.

Read, 10 Gratt. (Va.) 1.

Where a statute required that the depwhere a status required that the beginning osition should be "carefully read to and subscribed by the witness," the omission of the word "carefully" in the certificate will not invalidate the deposition. Sheldon v. Wood, 2 Bosw. (N. Y.) 267. Kidder v. Blaisdell, 45 Me. 461; Stone

v. Stilwell, 23 Ark. 444.

1. Weeks' Dep. § 284.
The deposition need not show upon its face that the commissioner is not related to either party. Blair v. Bank of

Tenn., 11 Humph. (Tenn.) 84.

A magistrate by whom a deposition on the part of the defendant was taken, and which was objected to by the plaintiff, testified that he was a friend of the defendant, and that as such he had felt it to be his duty to aid him all in his power, by his advice, etc., in defending himself against the suit; that he was present with the defendant and his counsel at the taking of other depositions before another magistrate, and that he made suggestions to them; that the defendant said he should want him to take some depositions in the case, and he then told the defendant that he desired to avoid any conversation which would be unfavorable to a proper discharge of his duties; that he thereafter acted as magistrate impartially between the parties, and that the plaintiff had himself agreed to a commission authorizing him to take other depositions in the case, and had declared himself satisfied with his impartiality in taking the same. ther appeared that the deposition had been used at a previous trial without objection. Held, that this deposition was properly admitted in evidence, because the magistrate was not counsel or attorney within the statute, and there was no ground for presuming that the deposition was not taken impartially. Jones, 13 Pick. (Mass.) 441.

The fact that a notary before whom a deposition was taken has his office in a room occupied by the attorneys who represented the parties taking the deposition, is not of itself sufficient to war-

rant the exclusion of the deposition when offered to be read upon the trial. The practice of taking depositions in the office of an attorney interested in the cause is objectionable, yet there is no law to prohibit it. Singer Mfg. Co. v. McAllister, 35 N. W. Rep. (Neb.) 181.

A deposition was taken under a stipulation that the notary who should take it should certify that he was not of counselnor in any manner interested for either party. It was only certified that he did not act as counsel for either party. Held. that there was no error in refusing to exclude the deposition on the ground that the certificate did not go far enough. Edwards v. Heuer, 46 Mich. 95.

A person who has acted as the agent or attorney of the party in the same cause is not competent. Smith v. Smith, 2 Me. 408; Whicher v. Whicher, II N. H. 348; Williams v. Rawlins, 33 Ga. 117. Compare Wood v. Cole, 13 Pick. (Mass.)

A magistrate who is the law partner of one of the parties is incompetent. Dodd.

v. Northrop, 37 Conn. 216.
Where a deposition was taken by a justice of the peace who was the son-in-law of one of the parties in the action, but no fraud or partiality was alleged, it was held that the justice was not "interested in the event of the cause" within the meaning of the Massachusetts statute... and that the deposition was admissible. Chandler v. Brainard, 14 Pick. (Mass.) 285.

A justice of the peace, related within the sixth degree to one of the parties to a cause is disqualified to take a deposition therein, and is liable in trespass for committing a witness for refusing to testify in such case, Call v. Pike, 66 Me.

A deposition taken before the uncle of one of the parties is inadmissible. Bean v. Quimby, 5 N. H. 94. Also one taken before a brother-in-law. Bryant v. Ingraham, 16 Ala, 116.

Where no one else could be named, the wife of the witness was appointed commissioner. The Norway, 2 Ben. (U. S.)

It is an error, under the Texas statute, to admit a deposition taken by an officer who is surety on the bond for costs of the party offering it. Floyd v. Rice, 28 Tex. 341.

to take testimony in a foreign State may be issued by consent of parties, without naming the commissioner, and the person taking

the testimony may fill up the commission.1

6. The Commission.—(a) Non-resident Party.—The power of the court to award a commission without the consent of parties to take the testimony of a witness out of the State depends entirely on statute, and can only be exercised in the cases therein specified.²

A consul of the United States may take depositions without a commission; and it is questionable whether, when a commission is issued to him and proper no-tice given, the strict rules of taking depositions by commissioners should be applied. Semmens v. Walters, 55 Wis.

Under the Gen. Stats. c. 131, § 31, the superior court has power to make a rule, that, when a deposition is taken and certified by any person purporting to be an officer authorized by the commission to take the deposition, "if it shall be objected that the person so taking and certifying the same was not such officer, the burden of proof shall be on the party so objecting." McKinney v. Wilson. 122 Mass. 131.

Statutory Directions .- Where an officer is designated by statute to take foreign depositions, one taken before another person is inadmissible, although the parties consent. Thompson v. Wilson, 34

Ind. 94.

Commissioner Cannot Delegate His Pow--The authority to take the deposition, being personal, cannot be delegated. Cappean v. Middleton, I H. & J. (Md.) 154; Maryland Ins. Co. v. Bossiere, 9 Gill & J. (Md.) 121.

Unskilful or Unlearned Commissioner.-The court will not indulge in a grammatical or technical criticism of the language or terms employed, but will interpret a deposition taken by an unskilful draughtsman according to the obvious intent of the writer, so as not to defeat the intent of the witness. Parks v. Richardson, 4 B. Mon. (Ky.) 276. But if the commissioner is so unlearned as to be unable to write he cannot act. Osten v. Carey, 23 Ga. 4.

Fees.-Where the fees are not fixed by the statutes of the State from which he derives his authority, he is entitled to recover reasonable compensation from the person who employs him to take the deposition. Lyman v. Hayden, 118 Mass.

May Not Employ Counsel. - The appointment carries with it no implied authority to employ counsel, either to instruct the commissioner in his own du-

ties, or to look after the interests of a party to the controversy to which the depositions relate. Lyman v. Hayden, 118 Mass. 422.

Liability of Commissioner. - Where a party is injured by the improper performance of his duties, the commissioner is liable to the party so damaged. Cooper

v. Bakeman, 33 Me. 376.

Objection to Commissioner .- An objection to a magistrate taking a deposition must be regarded as waived, unless made at the caption, provided the objection was known to the party or his counsel. Edmunds v. Griffin, 41 N. H. 520.

A party is estopped to deny the authority of a commissioner to take a deposition, when he has filed cross-interrogatories after the commissioner has been appointed, which were annexed to the commission, and subsequently stipulated as to the manner in which the commission should be returned. Crowther v.

Rowland, 27 Cal. 376.

Presumption of Regularity.—The court will presume that the commissioner discharged his duty, by doing all those things in the execution of the commission which he is not bound specifically to certify as done. Williams v. Eldridge,

 Hill (N. Y.), 249.
 Carlyle v. Plumer, 11 Wis. 99; Oliver v. Bank, 11 Humph. (Tenn.) 74.
Compare Guice v. Parker, 46 Ala. 616;
McDonald v. Wells, 23 La. Ann. 189.
2. In re Attorney, 83 N. Y. 164.

Where a deposition purports to have been taken before, and to be certified by, an officer in another State, and the record does not set forth a commission or show that one was issued, such deposition cannot be used in evidence. Baker

v. Rickart, 52 Ind. 594.

In proceedings to disbar an attorney he can only be convicted on evidence good at common law, delivered, if he chooses, in his presence, by witnesses subject to cross-examination. Accordingly, held, that the granting of an order in such proceedings, against the objection of the attorney, directing that a commission issue, was error; and that the order was not validated by the insertion in it of a provision reserving "until the final hearing

The citation must be issued by a magistrate who is disinterested. One issued by a magistrate who was counsel for one of the parties

would be invalid.1

(b) Grounds for Taking—How Shown.—Either party to a cause has a right to obtain the commission and take the deposition of a witness to whom interrogatories and cross-interrogatories have been propounded and filed, when notice of the intention to take the deposition has been given.2

But the defendant should be first brought into court by service of process on him personally, or by attachment, or in some other

legal wav.3

of the matter" the question as to the "right to issue the commission, and the legality of the evidence taken thereunder." In re Attorney, 83 N. Y. 164.

1. St. Johnsbury v. Goodenough, 44

Vt. 662.

2. Burton v. Galveston, etc., R. Co., 61 Tex. 526; Pfister v. Superior Ct., 64

The provision of the N. Y. Rev. Stat. in regard to the reference of a disputed claim against the estate of a deceased person, which declares that "the same proceedings shall be had in all respects . , as if the reference had been made in an action," authorizes the issuing of a commission to take testimony out of the State. Paddock v, Kirkham, 102 N. Y.

An order denving a motion for commission to take testimony of foreign witness is appealable, because it affects a substantial right; but an order granting a commission is not appealable, because it cannot affect prejudicially a substantial right. Wallace v. Amer., etc., Co., 46 How. Pr. (N. Y.) 403.

Although a party may not be at liberty to retake the deposition of a witness, except by leave of court, yet the taking of the deposition of a witness by one party to a suit does not prevent the other party from taking his deposition also, and one party may introduce both depositions in evidence. Woodruff v. Garner, 39 Ind. 246.

It is not essential that the application should show the nature and materiality of the proposed testimony. Cadmus v.

Oakley, 2 Demarest (N. Y.), 298.

3. Oxford Iron Co. v. Quimby, 44
Ala, 487; Joy v. Aultman, etc., Co., II
Ill. App. 413; Morrow v. Hatfield, 6Humph. (Tenn.) 108; McCall v. Sun M.
Ins. Co., 50 N. Y. 733, Compare Blackburn v. Morton, 18 Ark. 384.
Where this is not done a subsequent

Where this is not done a subsequent voluntary appearance will not cure the irregularity. Oxford Iron Co. v. Quin-

chett, 44 Ala. 487.

Where the record shows that the defendant consented to the issuing of a commission, and admitted service of the plaintiff's interrogatories before the commission was issued, he cannot be heard to object that it issued irregularly and Cherry v. Baker, 17 without notice.

Where an order awarding a commission was made after judgment, and pending an appeal, held, that a commission could McCall v. Sun M. Ins. Co., not issue.

50 N. Y. 733.

Seal.—A commission to take testimony must be under seal. Mason, etc., Co.

v. Pugsley, 19 Hun (N. Y.), 282.

A paper issued by a court of record in the form of a commission to take testimony, but without a seal, is a nullity, and depositions taken under it are not admissible. Ford v. Williams, 24 N. Y. 359.

Wax need not be used; an impression

of the seal upon paper is sufficient. Meyers v. Russell, 52 Mo. 26. Where, after a deposition had been taken and returned in a case pending in the circuit court, it was found that by mistake the seal of the district court had been affixed to the commission, and a motion to suppress was made on that account, held, that, as the moving party could not have been prejudiced by the ruling, it was not reversible error for the court, in sustaining the motion, to order the clerk to attach the proper seal to the commission, and to return it, thus amended, together with the deposition, to the commissioner, with directions to him to require the witness to reappear before him, and, upon his reappearance, to read over to him the deposition, and to require him to subscribe and swear to the same again, and to certify the same back to the court. Byington v. Moore, 62 Iowa,

The counsel of the respective parties may waive the requirement that a commission must be under the seal of the court. Churchill v. Carter, 15 Hun (N.

Y.), 385.

(c) Residence of Witness.—Where interrogatories are prepared for a witness, his residence must be stated therein, if known. It is not necessary to make objection to the interrogatories on that

ground before the issuance of commission.1

The residence beyond the jurisdiction of the State of a witness may be proved as other facts in the case, and no formal, independent oath to that effect is necessary in order to lay a predicate for the introduction of his written testimonv.2

The notary who took the deposition attached to it a jurat and also a certifi-cate. The latter was immediately below the former, and on the same sheet of paper. No jurat was necessary. made no reference to a seal. The language of the certificate showed that it was designed to be under seal. Only one seal was attached to the paper, and that was on the right-hand margin, immediately above the certificate and below the jurat. Held, upon this state of facts, that the seal will be considered attached to the certificate. Osgood v. Sutherland, 31 N. W. Rep. (Minn.) 211.

Sealing.-Closing the flap of an envelope with gum is a sufficient sealing up. Morgan v. Jones, 44 Conn. 225; Van Sickle v. Gibson, 40 Mich. 170.

Non-Resident Party. - While a non-resident plaintiff has not an absolute right to have his testimony taken under a commission, he should be allowed to do so, in the sound discretion of the court, upon his making it satisfactorily to appear that by reason of permanent inability he is unable to attend the court in person. Goodman v. Wineland, 61 Md. 440.

Where the deposition of a person is taken, who subsequently becomes a party to the cause, such deposition is admissible. Lobdell v. Fowler, 33 Tex.

A party plaintiff, who is a non-resident of the county where the trial is held, need not appear personally to testify in the case; but his deposition may be taken as in the case of other non-resident witnesses. Sells v. Haggard, 32 N. W. Rep. (Neb.) 66.

A party to an action may take the deposition of his adversary, and may read it in evidence on the trial, although the party examined may be present at the Scott v. Indianapolis Wagon trial.

Works, 48 Ind. 75.

Where the plaintiff is a fugitive from justice, and consequently cannot safely come into the State, his deposition on his own behalf will not be allowed. Mc-Monagle v. Conkey, 14 Hun (N. Y.), 326.

Party to Suit.—A party to a suit is

under the same obligation to give his dep-

osition as any other person. Ex parte Priest, 86 Mo. 229.

Within the meaning of the West Virginia act, a party testifies in his own behalf when his deposition is used in a chancery cause, not at the time when it was actually taken; and though such witness was competent to testify when his deposition was taken, his evidence ought to be excluded if he was incompetent to testify when such deposition is proposed to be used in the cause. bright v. Seabright, 28 W. Va. 415.

Grounds for Taking-How Shown .-Where the facts making it necessary to statute to be set forth in an affidavit served upon the adverse party, it is enough if they are given in the notice to him that such deposition will be taken. But before a deposition can be put in evidence it must be shown to the court that some one of the statutory reasons exists for taking it; and the affidavit would be prima facie proof thereof, where the practice is to serve it. Patterson v. Wabash, etc., R. Co., 54 Mich. 91. 1. McWilliams v. McWilliams, 68 Ga.

459.
2. Post v. State, 10 Tex. App. 579; Kinney v. Berran, 6 Cush. (Mass.) 394; Donnell v. Walsh, 6 Bosw. (N. Y.) 621; Parker v. Willis, 1 Cranch (C. C.), 357.

Where it has been proved that the witness resides out of the State, and that inquiry has been made at his usual place of abode when in the State, leaving reasonable ground to infer that he was not then in the State, his deposition de bene esse is admissible. Bronner v. Frauenthal, 37 N. Y. 166. Compare Hawkins v. Brown, 3 Rob. (La.) 310; Weed v. Kellog, 6 McLean (U. S.), 44.

The notice need only show presumptively that the witness is a non-resident.

Toledo, etc., R. Co. v. Baddeley, 54 Ill. 19.
A deposition of a witness described therein as a resident of another State was taken in such State, on a commission issuing from a court in Massachusetts. At the trial it did not appear that the witness was then within Massachusetts. Held, that a sufficient foundation

Where a witness has no home or family, his deposition taken out of the jurisdiction, at a place where he was at work when last

heard of, may be read.1

(d) Subpana—Motion to Quash.—In a proceeding to take depositions on affidavit and notice, the subpoenas to the witnesses cannot be quashed by the court, although the affidavit may be insuf-

(e) Place of Taking.—The place of taking the deposition must appear.3

had been laid for the admission of the deposition. Todd v. Bishop, 136 Mass, 386.

Where it is shown that since the deposition was taken the witness has died or removed beyond the limits of the State, or has been prevented from attending court by reason of age or bodily infirmity, or through the act or agency of the defendant, or by the act or agency of any person whose purpose it was to deprive the defendant of the benefit of the testimony, the deposition is admissible. Post v. State, 10 Tex. App. 579.

"The only evidence given as a foundation for the introduction of the deposition in question was as follows: John M. Lane, constable, said: 'Saw a man in Elko on the evening of the fifth day of November, 1880, who said his name was A. W. Mercer. He went by the name of A. W. Mercer here. I heard him testify before the committing magistrate on the hearing upon this case. He had a ticket for Chicago; said he was going to Kankakee, Illinois. I saw him get on the cars going east on the evening of the sixth of November, 1880; have not seen him since.' There was then no proof that the witness was sick or dead, and we think there was nothing to show that he was out of the State, or that his personal attendance could not have been had in court. The cause was tried November 26, and he left Elko on the cars on the sixth of the same month. had time enough, and more, to go to Illinois and return, between the two dates mentioned. Besides, he may not have gone beyond the first station east of Elko. He may not have intended, in fact, to leave the State. So far as we know, no effort was made to find him or produce him in court. No subpœna was issued for him. There was absolutely no proof that he was out of the State, or that his personal attendance could not have been had in court." State v. Parker, 16 Nev. 79.

As a predicate in this case for the introduction of the absent witness Young's testimony, the State introduced J. A. Berry, a brother-in-law of the witness Young, who swore that H. M. Young

and family left here to go to Tennessee; that this witness got a letter from H. M. Young's wife some time ago, postmarked Tennessee; and by Wm. Sanders, the stepfather of H. M. Young, that H. M. Young left Bonham in December, 1884, and stated that he was going to Smith County, Tennessee; that he did not know whether he would stay or not; that he said he would come back if he didn't like the country; that his, witness's, wife received a letter from H. M. Young's wife sometime ago; that he did not know the contents of the letter: that the letter spoke of H. M. Young. It was objected that the testimony of these witnesses was hearsay; that the letters spoken of by them were not letters written by H. M. Young, and, if the letters even mentioned H. M. Young, that, being written by a third party, they were mere hearsay as to Young; and that, whilst it was competent to show the declarations of Young that he was going to Tennessee at the time he left, such declarations would not be sufficient to show that he had in fact gone to Tennessee, and that he resided there. *Held*, insufficient to show that the witness resided out of the State, but sufficient to show that he had removed beyond the limits of the State. Parker v. State, 18 Tex. App. 72.

Where a statute permits the deposition of witness who resides more than a certain distance from the place of trial, such distance is to be computed upon the way of usual travel from the residence of the witness to the place of trial. In re Foster, 44 Vt. 570. See infra, NOTICE, note "Allowance for Travel."

The deposition of a witness who lives more than seventy miles from the place where the court is held, though not under subpœna, may be read in evidence subject to proper exceptions taken before entering upon the trial; but the opposite party may show that he lives within seventy miles of the court, in which case the deposition cannot be read. Sparrow v. Blount, 90 N. Car. 514.

1. Gould v. Crawford, 2 Pa. St. 89. Pfister v. Superior Ct., 64 Cal. 400.
 Wannack v. Macon, 53 Ga. 162. (f) Time of Taking.—The deposition must be taken upon the

day named in the commission.1

(g) Notice.—Notice must be previously given to all persons known to be interested in the subject-matter to which the testimony is to relate.2 The order of court should specify the notice to be given to the adverse party. A deposition taken upon an order without such specification, where the opposite party has not had reasonable notice, if at common law, or the statutory notice when such exists, is not admissible as evidence.3

Depositions will not be suppressed because taken at a different place from the one named in the notice, if taken in the presence of both parties or their rep-Gartside Coal Co. v. Maxresentatives. well. 20 Fed. Rep. 187.

If the citation does not name the magistrate, it is fatally defective. Davis v.

Davis, 48 Vt. 502.

If the subpœna fails to specify the precise locality where the deposition will be taken, the witness will not be excused for non-attendance if he is not misled thereby. Keisher v. Ayres, 46 Cal. 82.

1. Herndon v. Givens, 16 Ala. 261; Collins v. Fowler, 4 Ala. 647; Veach v. Bailiff, 5 Harr. (Del.) 379.

Where the commission requires a deposition to be taken on the first day of November, and the commissioner certifies that it was taken on the second, the deposition is not admissible in evidence; nor does the testimony of a witness that he received the deposition on the first day aid the defect, as it merely shows the certificate untrue, without showing that the commission was followed. Collins v. Fowler, 4 Ala. 647.

Depositions taken on a legal holiday, upon notice to, but against the objection of the opposing counsel, cannot be used. Wilson v. Bayley, 42 N. J. 132.

Where the notice stated that the deposition would be taken between the hours of 9 o'clock A.M. and 6 o'clock P.M., and it was in fact completed and the witness was gone before II o'clock A.M., at which time the attorney for the opposite party was present to examine the witness, held, that it was receivable in evidence, no showing of bad faith or improper conduct being made, and it not appearing what the opposite party expected to prove by his cross examination. Scharfenburg v. Bishop, 35 Iowa,

2. I Greenl. Ev. (14th Ed.) § 321.

3. Ellis v. Jaszynsky, 5 Cal. 444; Garaett v. Yoe, 17 Ala. 74; Foster v. Smith, 2 Coldw. (Tenn.) 474; Briggs v. Green, 33 Vt. 565.

If the notice contains a clear statement of the day and hour of taking, the name of the city, town, or village, and the house, office or room, designated by number or other certain description where the deposition is to be taken, together with the names of the parties between whom the suit is pending, it will be sufficient. Bundy v. Hyde, 50 N. H. 116; Alexander v. Alexander, 5 Pa. St.

It is generally provided that the notice shall be in writing, and such provision must be strictly followed. Denning v. Foster, 42 N. H. 165; Cater v. McDaniel,

21 N. H. 231.

In the absence of statutory direction, or a rule of court that the notice shall be in writing, a verbal notice will be sufficient. Milton v. Rowland, 11 Ala. 732; Ormsby v. Granby, 48 Vt. 44. If no notice is given it will not invalidate the deposition if both parties appear and make no objection. State v. Bassett, 33

N. J. 26.
The notice need only show presumptively that the deponent is a non-resident. Toledo, etc., R. Co. v. Baddley, 54 Ill.

Where notice is entitled in two distinct cases between the same parties, held, that in the absence of any showing to the contrary, it will be presumed that the cases were upon the same matter, and that the irregularity has not affected any substantial rights. Laithe v. McDonald, 7 Kan. 254.

Time of Service.-Where the time is prescribed by statute or a rule of court it must be strictly observed. Travis v. Brown, 43 Pa. St. 75; Corgan v. Ander-

son, 30 Ill. 95.

Where the statute allows the time to be shortened within the discretion of the judge, an order shortening the time of notice must designate a definite time of notice. An order directing service of the notice "forthwith" is not sufficiently definite. Howell v. Howell, 66 Cal. 390.

Where the time allowed in giving notice of an examination of witnesses barely exceeds that prescribed by statute, the notice is not invalid, though the indulgence of the court may be needed in allowing a party taken by surprise to be required to meet it, especially if it had been left at such an hour that he could not promptly act upon it. Toulman v. Swain, 47 Mich. 82.

Computation of Time—Allowance for

Computation of Time—Allowance for Travel.—In all cases, in computing the time, the first day is to be excluded and the last included. Richardson v. Burlington, etc., R. Co., 8 Iowa, 260; Arnold v.

Nye, 23 Mich. 286.

Where a statute requires ten days' notice, it is necessary that the party to be notified should receive the notice ten days prior to the taking. It is not sufficient that notice was left for him ten days prior to such taking. Gooday v. Corlies, I Strobh. (S. Car.) 199.

Service on the 5th of the month of an application to be made on the 15th is sufficient. Arnold v. Nye, 23 Mich. 286.

Where a statute provides that notice of taking the testimony of a specified witness may be given to the opposite attorney, held proper that the time allowed under such notice be computed with reference to the distance of the attorney from the place of examination, when he is nearer than the party. Toulman v. Swain, 47 Mich. 82.

The courts will take notice of the facilities of travel in determining the time necessary. Hipes ν . Cochran, 13 Ind. 175; Manning ν . Gasharie, 27 Ind. 399;

Carlisle v. Tuttle, 30 Ala. 613.

Where it is impossible to travel the distance within the time allowed the rule will be held not to apply. Gerrish v.

Pike, 36 N. H. 510.

Where the statute provided that the notice shall be served so as to allow the adverse party sufficient time by the usual route of travel to attend, and one day for preparation, exclusive of Sundays and the day of service, held, that a notice served on the 24th to take depositions on the 28th of a month, a Sunday intervening, at a place requiring two days' travel to reach by the usual route, gives one day less than the statute requires. Cool v. Roche, 15 Neb. 24. See Richardson v. Burlington, etc., R. Co., 8 Iowa, 260.

The notice must allow sufficient time, irrespective of how short the distance may be. Faut v. Miller, 17 Gratt. (Va.) 187. See McGinnis v. Washington, etc., Assoc., 12 Gratt. (Va.) 602; Masters v. Warren, 40 Conn. 203; Collins v. Rich-

art, 14 Bush (Ky.), 621.

If depositions are taken at different places at such times that the adverse party or his attorney cannot attend at both, it is within the power of the court, when the depositions are offered in evidence, to suppress the depositions of those witnesses whom the adverse party has thereby been deprived of reasonable opportunity to cross-examine, although the notice required by the statute has been duly given to the adverse party. Cole v. Hall, 131 Mass. 88.

A notice to take depositions should allow the adverse party one day for preparation, and sufficient time, by the usual route of travel, to attend the taking of the depositions, excluding all Sundays and the day of the service of the notice. Therefore, where the notice was that the depositions would be taken on a certain day, commencing at eight o'clock in the morning, and, under the foregoing rule, the adverse party could reach the place where the depositions were to be taken only by using the day on which they were to be taken for travelling to such place, held, that the time given for taking the depositions was insufficient. and the depositions so taken, and taken in the absence of the adverse party, should be suppressed at his instance. Hartley v. Chidester, 36 Kan. 363.

The statute provided that a notice to take depositions should allow the adverse party one day for preparation, and sufficient time, by the usual route of travel, to attend the taking of the depositions, excluding all Sundays and the day of the service of the notice. The notice was that the depositions would be taken on a certain day, commencing at eight o'clock in the morning, and, under the foregoing rule, the adverse party could reach the place where the depositions were to be taken only by using the day on which they were to be taken for travelling to such place. Held, that the time given for taking the depositions was insufficient, and the depositions so taken, and taken in the absence of the adverse party, should be suppressed at his instance. Hartley v. Chidester, 13 Pac. Rep. (Kan.) 578.

Where it does not appear that any travel is necessary from the place where the party lives, or the place where notice is served to the place where the deposition is to be taken, it should not be suppressed for insufficiency of notice on account of want of allowance for time of travel. Adams v. Peck, 4 Iowa, 551. See Allen v. Perkins, 17 Pick. (Mass.)

36g.

Time of Taking.—A deposition may be taken at any time within the time designated in the notice. Cameron v. Clarke,

11 Ala. 259; Dill v. Camp. 22 Ala.

The notice stated that the deposition would be taken "on the 15th of the month, and if not on that day, on the 16th. and if not on that day, on the 17th, and if not on that day, on the 18th, of the same month. The deposition was taken on the 18th. Held, that it was sufficient. Thomas v. Davis, 7 B. Mon. (Ky.) 227. Compare Jordan v. Hazard, 10 Ala. 221; Humphries v. McCraw, 9 Ark. 91.

A deposition taken after the day on which the commission is returnable is inadmissible. Herndon v. Givens, 16

Ala. 261.

Reasonable Time. - What is reasonable notice depends upon the particular circumstances. Attwood v. Fricott, 17 Cal. 37; Trevelyan v. Lofft, I S E. Rep. (Va.) 901. See Phelps v. Hunt, 40 Conn. 97; Kimpton v. Glover, 41 Vt. 283; Stephens

v. Thompson, 28 Vt. 77.

Notice was given on June 7th that the deposition would be taken in London on July 4th following, and was served by posting a copy of the notice at the front door of the defendant's residence in Richmond, Va., he and all of his family being absent from home, and also by serving a copy on his counsel upon the same day, and by mailing a copy to him in England, which he received in due course of mail. Held sufficient notice. Trevelvan v. Lofft (Va.), I S. E. Rep.

Due Notice.-What, under a statute, is due notice to a party or his attorney to attend the taking of a deposition, is a matter addressed to the discretion of the presiding judge. Where there was ten days' notice of a taking in New Bedford, Mass., for a cause to be tried in Portland, Me., 166 miles distant, held to be sufficient. Harris v. Brown, 63 Me. 51.

Service of Notice. - Defendant's attorney received notice of the taking of depositions on the part of plaintiff, in Massachusetts, but, believing the notice insufficient, employed an attorney in Massachusetts, solely to protest against That attorney appeared, the taking. made known the limited character of his employment and the grounds of protest, but, being overruled, cross-examined the Held, that plaintiff was deponents. bound to take notice that the appearance was special and limited. Under the circumstances of the case, q.v., it was held that the notice was sufficient. The depositions of witnesses other than those named in the notice were taken at the same time and without notice other than a verbal one given to the attorney who appeared, by the magistrate who took the depositions. Held, that they were taken without legal notice. Marcy v. Merrifield, 52 Vt. 606.

The service may be on the attorney of record. Bailey v. Wright, 24 Ark. 73; Hunt v. Crane, 33 Miss. 669. Even after he has withdrawn from the case. Herrin

v. Libby, 36 Me. 350.

Where, under the statute, notice of taking a deposition may be left at the residence of the person to be served therewith if he is not to be found in the county, held, that any constructive service otherwise made is not good unless seasonably brought home to the proper person, even though, where notice was to be given to an attorney, it was served at his office upon his partner. Toulman v. Swain, 47 Mich. 82.

Where A. and B. were the attorneys of record, but H. and C. appeared and conducted the case, held, that service of notice upon H. and C. was good. King

v. Ritchie, 18 Wis. 582.

"Russell & Higbee" appeared in the action as plaintiff's attorneys, and signed the summons and the complaint. The complaint was verified by "Robert D. Russell," as one of the attorneys for plaintiff, thus showing upon its face that he was one of the firm of "Russell & Highee." The notice of taking depositions in the action was signed "Robert D. Russell, Attorney for the Plaintiff." Held, that although irregular, the fact that the notice was signed by one of plaintiff's attorneys individually, instead of the firm, was no ground for excluding the deposition. Osgood v. Sutherland (Minn.), 31 N. W. Rep. 211.

Where a rule of court provided that, if an attorney was employed and marked on the record, all notice should be served on him, except where a statute or "these rules" directed otherwise; and a prior and older rule required that notice of rule to take depositions should be in writing, and served on the adverse party-a service of notice of a rule upon the attorney of the plaintiff residing in the county is not good, and the depositions taken under the rule are not admissible. Flem-

ing v. Beck, 48 Pa. St. 309.

Service upon one co-defendant alone is insufficient. McConnel v. Stettinius, 2 Gilm. (Ill.) 707. Compare Spaulding v. Ludlow, etc., 36 Vt. 150; Ellis v. Lull, 45 N. H. 419.

A defective notice in regard to the taking of depositions served upon one of two defendants is cured by a proper and legal notice served upon his co-defendant, who is the attorney of record repre-

The notice must be unconditional. Any reservation, as a purpose to take the deposition conditionally, will render it insufficient.1

(h) Oath.—The witnesses must be duly sworn, and where the statute prescribes the form of oath to be administered, the statutory directions must be followed.2

senting both defendants. Newman v.

Dodson, 61 Tex. 01.

Suit was brought against joint parties. but summons was served on only one, who stipulated for taking a deposition. The other afterwards appeared, and on the trial the deposition was ruled out on. his objection that it was taken without his consent and without notice to him. Held, that the defendant who stipulated could not bring error on this ruling. French v. Canada S. R. Co., 42 Mich.

The notice may be served upon the agent of a foreign corporation, on whom process in the action might be served. Katzenstein v. Raleigh, etc., R. Co., 78

N. Car. 286.

Notice of the time and place of taking the testimony in a foreign commission given by the commissioners, if the interrogatories are not filed before the commission goes out, is sufficient; but such notice is not sufficient if it comes from the attorney of the party without consent or approbation of the commissioners. Parker v. Sedwick, 5 Md. 281.

Names of Witnesses should be given. Robertson v. Campbell, I Overt. (Tenn.)

Notice to Agent .- When requested, it is reasonable that notice should be given to the agent of the adverse party to attend the taking. Where a commission was issued to "any" magistrate to take the depositions of witnesses who were not named, and the party in whose favor the depositions were taken filed his interrogatories, but the adverse party, knowing that the other was going to attend the taking, declined putting crossinterrogatories, and requested that his agent (naming him) at the place of caption should have notice to attend, and such notice was not given, held, that the depositions were inadmissible. Bryant v. Com. Ins. Co., 9 Pick. (Mass.) 485.
1. Crittenden v. Woodruff, 11 Ark. 82.

2. Where the commissioner is required by statute to be sworn, unless proof is furnished to the contrary, it will be presumed that he took the oath. Wilmot v. Haws, 1 Kerr (N. Bruns.), 351.

Where the statute so requires, the oath must be administered publicly; but the court will presume that the oath was so administered when the commissioners certify that they administered the oath to the witnesses. Halleran v. Field, 23 Wend. (N. Y.) 38.

The witness should be sworn by the commissioner. Perry v. Thompson, 1 Harr. (N. J.) 72; Lincoln v. Battelle, 6 Wend. (N. Y.) 475.

Under a commission to take testimony, the depositions of witnesses will be received in evidence, although the oaths to witnesses were not administered by the commissioner, if it appears that they were prohibited from administering them, and they were in fact administered by the local authorities. Lincoln v. Battelle, 6 Wend. (N. Y.) 475.

The deposition of a witness who "is about to go out of the State" may be taken before the justice of the peace before whom the cause is pending. Burley v. Kitchell, I Spen. (N. J.) 305.

The certificate of commissioners, ap-

pointed to take the deposition of an absent witness, that such witness has taken the necessary oath, is prima facie evidence of that fact. Ulmer v. Austill, 9 Port. (Ala.) 157; Williams v. Richardson, 12 S. Car. 584; Armstrong v. Burrows, 6 Watts (Pa.), 266.

Where the statute prescribes a form of oath to be administered to a witness whose deposition is taken out of the State. that form must be observed, or the deposition will be suppressed. Cross v. Barnett, 61 Wis. 650; Bacon v. Bacon, 33 Wis. 147; Parsons v. Huff, 38 Me. 137; Call v. Perkins, 68 Me. 158; Fabyan v. Adams, 15 N. H. 371; Lund v. Dawes, 41 Vt. 370.

Where the deposition is taken out of the State it is within the discretion of the court to admit or reject it, notwithstanding the certificate of the magistrate before whom it was taken does not show that the oath was administered as prescribed by the statute. Stiles v. Allen, 5 Allen (Mass.), 320; Amherst Bank v. Root, 2 Metc. (Mass.) 522; Quinby v. Atkins, 9

Gray (Mass.), 370.

If the commissioner before whom a deposition is taken out of the State certifies merely that the witness was duly sworn before giving his evidence, it will be presumed that the oath was administered in the form and manner prescribed. But if, in addition, the commissioner gives in his return the form of the oath

(i) Affirmation. The certificate that the witness was conscientiously scrupulous of taking an oath is sufficient evidence of that fact to admit a deposition taken upon affirmation.1

(j) Examination of Witnesses. On the execution of a commis-

sion the parties have the right to appear by counsel.2

The commissioner must take all the testimony offered without regard to his opinion as to its relevancy.3

administered, no presumption arises that the oath was administered in the required form. Cross v. Barnett, 61 Wis. 650; Gulf Ins. Co. v. Stephens, 51 Ala. 121; N. J. Ex. Co. v. Nichols, 3 Vroom (N.J.), N. J. Ex. Co. v. Nichols, 3 vroim (N. J.), 166; Dennison v. Benner, 41 Me. 332; Glover v. Millings, 2 S. & P. (Ala.) 28; Ballard v. Perry, 28 Tex. 347; Williams v. Eldridge, 1 Hill (N. Y.), 249; Halleran v. Field, 23 Wend. (N. Y.) 38; N. J. Ex.

Co. v. Nichols, 33 N. J. 434. Where the statute required that the witness shall be sworn "to tell the truth, the whole truth, and nothing but the truth, etc.," a deposition is inadmissible where the certificate shows that the deponent was sworn generally to testify "the truth and the whole truth." ponent was sworn generally to testify "the truth and the whole truth." Simpson v. Carleton, I Allen (Mass.), 109. See Fabyan v. Adams, 15 N. H. 371; Parsons v. Huff, 38 Me. 137; Brighton v. Walker. 35 Me. 132; Lund v. Dawes, 41 Vt. 370; Whitney v. Wyncoop, 4 Abb. Pr. (N. Y.) 370; Cross v. Bennett, 61 Wis. 650; Bacon v. Bacon, 33 Wis. 151; Putnam v. Larrimore, Wright (Ohio), 747; Rainer v. Haynes. I Hemp. (U. S.) 680. Compare Ballance v. Underhill 2 Compare Ballance v. Underhill, 3 Scam. (Ill.) 453; Welborn v. Swain, 22 Ind. 194.

In the absence of any statutory form of oath, the oath administered in the State where the deposition is taken will be Bacon v. Bacon, 33 Wis. 147.

The witness may be sworn either before or after his evidence is reduced to writing. Tooker v. Thompson, 3 Mc-Lean (U. S.), 92; Wight v. Stiles, 29 Me. 164; Barron v. Pettes, 18 Vt. 385. Compare Stonebreaker v. Short, 8 Pa. St. 155; Armstrong v. Burrows, 6 Watts (Pa.). 266

Where the statute so requires, the commissioner must certify that the witness was first duly sworn, but the certificate of the fact may be made either at the end or at the commencement of the deposition. House v. Elliott, 6 Ohio St. 497; Doe v. King, 4 Miss. 125.

1. Elliot v. Hayman, 2 Cranch (C. C.),

The certificate of a magistrate that a deponent was "affirmed by me according to law" sufficiently shows that the depo-

nent declared that he had conscientious scruples against taking any oath, and that the magistrate on inquiry was satisfied of the truth of the declaration. Horne v. Haverhill, 113 Mass. 344.

2. Union Bank v. Torrey, 5 Duer (N.

Y.), 626.

If a witness during cross-examination consults aside with his counsel, against the objection of the opposite party, it will not render his testimony inadmissible. N. J. Ex. Co. v. Nichols, 33 N. J. 434. See Commercial Bank v. Union Bank, 11 N. Y. 203.

Where the interrogatories are settled and reduced to writing before the commission is issued, the presence of the attorney of either of the parties, even if he took no part in the proceedings, will render the deposition inadmissible. Hollister v. Hollister, 6 Pa. St. 449. See Walker v. Barron, 4 Minn. 253. Compare Farrow v. Com. Ins. Co., 18 Pick. (Mass.) 53; Kuehling v. Leberman, 9 Phila. 160.

Evidence that a person who, two years before, had acted as counsel for the defendant in another action relating to the same subject-matter, advised a witness, whose deposition was being taken, not to answer, is inadmissible to prove that the defendant tampered with the witness, in the absence of evidence that the relation. of counsel and client then existed. Abbott v. Pearson, 130 Mass. 191.

3. Howell's Estate, 14 Phila. 329.

A question in a deposition, which may in the course of the trial become relevant, should not, before trial, be suppressed for alleged irrelevancy. Covey v. Camp-

bell, 52 Ind. 157.

Where pertinent evidence is given in answer to last general interrogatory, to which the attention of the opposing counsel was not called by the other interrogatories, the whole deposition will not, for that reason, be suppressed; but the opposing counsel should, if he desires to crossexamine the witness as to such evidence, apply to the court for relief before trial. Commercial Bank v. Union Bank, 11 N.

The commissioner has no authority to propound any questions to witnesses but those which are sent out with the commission. Insurance Co. v. Bossiere, 9 Gill & J. (Md.) 121.

An amplification of a witness's answers attached to his deposition, in which he swears to its truth, will not be excluded on objection first made at the trial, although not signed by the witness or certified by the commissioner. Ratliff v. Thomson, 6t Miss. 71.

Where a deposition has been taken, the witness cannot be cross-examined in reference to it, unless it has been introduced in evidence previous to his being

duced in evidence previous to his being called, and even then he can only make an explanation in regard to it. Haines ν . Republic Ins. Co., 52 N. H. 467.

Refusal or Omission to answer Interrogatories.—Where the witness refuses to answer a material interrogatory the deposition should be rejected. Smith v. Griffith, 3 Hill (N. Y.), 333. Compare Palmer v. Great Western Ins. Co., 47

N. Y. Sup. Ct. 455.

The refusal or failure of a witness to answer a question addressed to him on examination before the commissioner, does not furnish adequate ground for suppressing the deposition, when it appears that the interrogatory is sufficiently answered in another part of the deposition, or that the answer would be immaterial at a trial of the cause on its merits. Goodrich v. Goodrich, 44 Ala. 670; Tedrowe v. Esher, 56 Ind. 443; Semmens v. Walters, 55 Wis. 675; Savage v. Birckhead, 20 Pick. (Mass.) 167.

The refusal of a deponent to answer an impertinent cross-interrogatory is not sufficient reason for rejecting the deposition. Akers v. Demond, 103 Mass. 318; Gibson v. Goldthwaite, 7 Ala. 281.

The court admitted certain depositions, taken after the time limited for taking depositions, by the plaintiff, the witnesses having refused to answer the cross-interrogatories of defendant, and refused to allow defendant further time to take depositions in rebuttal of the depositions of the plaintiff. *Held*, no error; it not appearing that the court failed to exercise a proper discretion in its orders. Grant v. Phœnix Ins. Co., 121 U. S. 105.

A deposition is not to be wholly rejected for the omission of the witness to answer a particular interrogatory fully, unless his answer is so imperfect or evasive as to induce the court to believe that he wilfully kept back material facts within his knowledge. Stratford v. Ames, 8 Allen (Mass.), 577.

If the deponent refuse to answer any questions, on cross-examination, the deposition will be inadmissible. Chase v.

Kenniston, 76 Me. 209.

Where a deponent, on objection by counsel, refuses to answer relevant and material questions put to him by opposite counsel, the deposition is not admissible in evidence. Chase v. Kenniston, 76 Me. 200.

Not Responsive Answers.—Where a witness, examined on deposition, instead of answering direct interrogatories as they are put, replies by introducing new and distinct facts, not inquired about, and which favor the party on whose behalf the questions are put, the opposite party, and not merely the party propounding direct questions, may object that the answers are not responsive. Greenman v. O'Connor, 25 Mich. 30; Hazleton v. Union Bank, 32 Wis. 34; Hendricks v. Wallis, 7 Iowa, 224; Fulton v. Goden, 28 N. J. Eq. 37; Lansing v. Coley, 13 Abb. Pr. (N. Y.) 272. Compare Hamilton v. People. 29 Mich. 185; Bigoney v. Stewart, 68 Pa. St. 318.

Testimony otherwise competent is not to be rejected because not responsive to the interrogatory. Fassin v. Hubbard, 55 N. Y. 466; St. Anthony, etc., Co. v.

Eastman, 20 Minn. 277, 459.

A witness who, in answer to a general interrogatory, which requires him to state "any other matter which would benefit either party to the suit," cannot refer to his former answer to some preceding question, and then amplify that answer by stating matters neither responsive to the question formerly put, nor to which he was directed by anything contained in such general interrogatory. Chinn v. Taylor, 64 Tex. 385.

Where the answer, when taken by itself, seems to be the expression of an opinion rather than the statement of a fact, it will not be rejected as evidence on that account, when it appears from the other answers that it is in truth the statement of a fact, and not the expression of an opinion. Robinson v. Litch-

field, 112 Mass. 28.

When the testimony of a witness is contained in a deposition, and the witness' answer to a proper cross-question clearly implies a full response, though not in express terms, the want of express terms will not oblige the court to exclude the direct examination. Powell v. Augusta, etc., R. Co. (Ga.), 3 S. E. Rep. 757.

All Interrogatories must be Answered.

The witness should answer each and every interrogatory. If he fails to do so the deposition is inadmissible. Kimball v. Davis, 19 Wend. (N. Y.) 437; Nicholson v. Desobry, 14 La. Ann. 81.

A deposition will not be suppressed

because the last interrogatory was not answered, where it appears that the opposite party could not be prejudiced by such omission. Semmens v. Walters,

55 Wis. 675.
Where specific answers appeared to all the cross-interrogatories except the general cross-interrogatory, and in a sentence by itself at the close appeared without specification the words and the deponent knoweth not, that this should be taken as an answer to the general cross-interrogatory, and was sufficient. Gates v. Beecher, 60 N. Y. 518.

But it may be shown that the commission was executed and the deposition signed by the witnesses in the presence of the counsel of both parties, and that no objection was made at the time by the counsel for the defendant that all the interrogatories were not answered, and on such facts appearing, the deposition will be received. Kimball v. Davis, 19 Wend. (N. Y.) 437; Stewart v. Ross, 2 Dall. (Pa.) 157.

If an interrogatory is not fully answered, but by answers to other interrogatories in the same connection what is equivalent to a full answer is given, it will be sufficient. Maduel v. Mousseau,

28 La. Ann. 691.

If the answer to an interrogatory to a party to an action shows that the interrogatory is immaterial and does the party no harm, he has no ground of exception to an order compelling him to answer. Todd v. Bishop, 136 Mass. 386.

Where it appeared, upon the introduction in evidence of a deposition, that the cross-interrogatories annexed to the commission had not been answered, but it clearly appeared that the material facts testified to in chief by the witness were already conclusively established, or were not disputed on the trial, held, that the reception of the deposition, under the circumstances, was error without prejudice. Wilson v. Reedy, 32 Minn. 243.

Evasive Answers.—If the answers be

evasive, irresponsive, or untruthful, or if the witness has not fully and fairly answered the cross-interrogatories. deposition will not be admissible. Terry v. McNeil, 58 Barb. (N. Y.) 241; Stratford v. Ames, 8 Allen (Mass.), 577; Robinson v. Boston, etc., R. Co., 7 Allen (Mass.), 393; Fulton v. Golden, 28 N. J. Eq. 37; McCarver v. Nealey, 1 Greene (Iowa,) 360. Compare Lurtz v. Maryman, 12 La. Ann. 357.

An answer by a party to interrogatories that he "cannot remember," if true, is as specific as it can be made, and it is not error to overrule a motion to make it more specific. Baals v. Stewart (Ind.). N. E. Rep. 403.

The omission of the deponent to answer the interrogatories fully does not necessarily preclude its admission in evidence. Todd v. Bishop, 136 Mass. 386.

Answers not Pertinent .- So much of the deposition of a witness as is not pertinent to the interrogatories propounded, should, when properly objected to, be stricken out. Lee v. Stowe, 57 Tex. 444. See Nones v. Northouse, 46 · Vt. 587; Marr v. Wetzel, 3 Colo. 2; Shepard v. Pratt. 16 Kan. 200; s. c., 15 Pick. (Mass.) 32.

If the answer is as full and minute as the interrogatory, naturally and fairly interpreted, calls for, it is sufficient. McMahon v. Davidson, 12 Minn. 357.

Hearsay.-A witness, testifying by deposition upon the vital point in question, whether a deed absolute in form was in fact a mortgage, testified in chief that the deed was signed on condition that the grantee would reconvey upon being repaid what he had been compelled to pay for the grantors, and on cross-examination stated that his only knowledge upon the subject was derived solely from the statements of the grantors before and after the deed was made. A motion to suppress was overruled, and exception taken, and no further objection was made to reading the deposition. Held, that this was error, and that it was not rendered harmless by the circumstance that legitimate evidence to prove the same point was put in. Rooker v. Rooker, 83 Ind. 226.

Where Witness does not Speak the Language.-If the witness is unacquainted with the language, the commissioner, in the absence of special instructions, may act as interpreter. Leetch v. Atlantic M. Ins. Co., 4 Daly (N. Y.), 518.

When it appears by the answers that the witness does not understand the English language, the court will presume, in the absence of proof to the contrary, that the commissioner understood the language of the witness. City Ins. Co. v. Carrugi, 41 Ga. 660.

Where the witness does not understand the language of the commissioner, and whose language the commissioner does not understand, the commissioner is to swear an interpreter. Amory v. Fellowes, 5 Mass. 219.

When the depositions are taken in a foreign language, they may be translated by a sworn interpreter when used in court. Cavasar v. Gonzales, 33 Tex. 133.

The questions appended to a commis-

sion sent to Bremen were in English; the commissioners returned the answers in German, annexed to a German translation of the questions; the commission was objected to, on the ground that the return should have been in English, or accompanied by an English translation, but the objection was overruled. Kuhtman v. Brown, 4 Rich. (S. Car.) 479.

Competency of Witness.—The commis-

Competency of Witness.—The commissioner cannot decide whether the witness be competent. Carpenter v, Dame, 10

Ind. 125.

An objection to the competency of a witness, on the ground of interest, when known at the time of filing cross-interrogatories, must be distinctly made before the witness is examined. Hair v. Little, 28 Ala. 236; Weil v. Silverstone, 6 Bush (Ky.), 698.

If, at the taking a deposition out of court, the adverse party interrogates the witness touching his interest in the suit, and he testifies that he has none, this is an election of the mode of proof, and the party will not be permitted to show such interest aliunde at the trial. King v. Upton. 4 Greenl. (Me.) 387.

Where the interest of a witness is disclosed during the direct examination, an objection to his competency must be taken before the cross-examination.

Brooks v. Crosby, 22 Cal. 42.

Objections as to competency may be passed upon by an appellate court. Stratham v. Ferguson, 25 Gratt. (Va.) 28; Fant v. Miller, 17 Gratt. (Va.) 187; Mohawk Bank v. Atwater. 2 Paige (N. Y.), 54.

name. Ferguson, 25 Gratt. (Va.) 25, 1 and name. Perguson, 25 Gratt. (Va.) 187; Mohawk Bank v. Atwater. 2 Paige (N. Y.), 54.

Death or Disability of Witness during Examination.—Where direct interrogatories have been fully answered, and an inevitable accident occurs, which, without the fault of either party, prevents a cross-examination, the deposition will not be suppressed; so also where a deposition is taken by consent, and the witness lives several months after direct-examination, during which time no cross-interrogatories are filed, and then dies, the deposition will not be suppressed. Gass v. Stinson, 3 Sumn. (C. C.) 98; s. c., 17 Myer's Fed. Dec. § 4044.

Where the opportunity to cross-examine the witness has been lost by the sickness or death of the witness, the deposition should be set aside. Hewlett v.

Wood, 67 N. Y. 394.

Where the testimony is substantially complete, a deposition duly signed and certified is not to be rejected because the cross-examination was unfinished in consequence of the sickness or death of the witness. Fuller v. Rice, 4 Gray (Mass.), 343.

Continuances.—Where neither party appears upon the day set, the commissioner may adjourn the time of taking, but must give reasonable notice to the parties. Pindar v. Barlow, 31 Vt. 529. Compare Parker v. Hayes, 23 N. J. Eq. 186

Where a notice to take depositions states that the depositions will be taken on a certain day, and that the taking thereof will be continued from day to day until the same are all taken, and the party taking the same commences to take depositions on the day specified in the notice, and continues taking from day to day until Saturday in the after-noon, and then adjourns the taking of the depositions till Monday, held, that the adjournment from Saturday till Monday is not an irregularity that will invalidate the depositions. Stainbrook v. Drawyer, 25 Kan. 383. See Phillipi v. Bowen, 2 Pa. St. 20; Andrews v. Iones, 10 Ala. 460.

A commission directing commissioners to take a deposition on a certain day, and continue from day to day until completed, does not authorize them to adjourn to a day beyond the next succeeding. Harding v. Merrick, 3 Ala. 60; Raymond v. Williams, 21 Ind. 217; Parker v. Hayes, 23 N. J. Eq. 186. Compare Jarbo v. Colvin, 4 Bush (Ky.), 70.

Where the notice is to take the deposition on a certain day, the officer cannot postpone to another day; but if the notice be to take on a day certain, and the deposition is then commenced, and it becomes impracticable to finish it that day, it may be finished the next. Read v. Patterson, II Lea (Tenn.), 430. Compare Brandon v. Mullenix, II Heisk. (Tenn.) 446.

A deposition taken on a day other than that named in the citation, unless it shows a legal continuance, is not admissible. Johnson v. Perry, 54 Vt. 459. So if taken at another place. Beach v. Workman, 20 N. H. 379; Wixon v.

Stephens, 17 Mich. 518.

Commissioners appointed to take a deposition can appoint only one day for the purpose; and if that is not sufficient, they may continue the examination from day to day. Ulmer v. Austill, 9 Port. (Ala.) 157.

But the record must show what was done on each day, and that there was good cause for the adjournment. Bracken v. March, 4 Mo. 74; Kisskadden v.

Grant, 1 Kan. 328.

Where the opportunity to cross-examine the witness has been lost by the sickness or death of the witness, the deposi-

Where the opportunity to cross-examine the witness has been lost through his misconduct, or through the fault or omission of the party on whose behalf he is examined, or other like cause, the deposition should be set aside.1

The answer should be taken down in the presence of the com-

The commissioner is the proper person to write out the answers. but if he is not a ready penman he may secure the assistance of a

disinterested person.3

If a deposition is written in the absence of the commissioner. and the defendant cross-examines the witness and does not object at the time, the deposition may be read.4 A deposition cannot be admitted which was written out by the witness before his examination 5

It is not competent for a party on whose behalf a deposition is taken, or his attorney, to write the answers.6

tion should be set aside. Hewlett v.

Wood, 67 N. Y. 394.
Attachment to Secure Appearance of Witness.-Where the statute so authorizes, an attachment will issue to secure the attendance of a witness. Re Jenckes, 6 R. I. 18. See Ex parte Munford, 57

Мо. 603.

Contempt .- A witness who is regularly before the commissioner, and refuses to testify, may be punished for contempt. Re Abeles, 12 Kan. 451; Ex parte Livingston, 12 Mo. App. 80; Ex parte Mc-Kee, 18 Mo. 599; Ex parte Munford, 57 Mo. 603; Bowen v. Thornton, 9 W.N.C. (Pa.) 575. Compare Ex parte Mallin-krodt, 20 Mo. 493.

It is a contempt of court to interrupt and violently break up the examination of a witness before an examiner by persisting in the claim to dictate, prompt, and control the answers of the witness. It is also a contempt to insult the examiner by the use of violent and abusive language to him after he has left the office and is upon the street. U.S. v. Anon., 21 Fed. Rep. 761.

1. Hewlett v. Wood, 67 N. Y. 394. 2. Summers v. McKim, 12 S. & R.

(Pa.) 105.

It is not ground for rejecting a deposition that the witness was furnished with the interrogatories and cross-interrogatories before his examination, unless the objecting parties show an actual injury.

Goodrich v. Goodrich, 44 Ala. 670;
Allen v. Seyfried, 43 Wis. 414.

3. Cushman v. Wooster, 45 N. H. 410;
Carmalt v. Post, 8 Watts (Pa.), 406;
Logan v. Steele, 3 Bibb (Ky.), 230.
Compare Austin v. Carey, 23 Ga. 4.

A Logan v. Steele, Ribb (Ky.)

4. Logan v. Steele, 3 Bibb (Ky.), 230.

A deposition written by the agent of a party or his wife, not in the justice's presence, though afterwards sworn to, is inadmissible. Grayson v, Bannon, 8 Watts (Pa.). 524.

5. McEntire v. Henderson, 1 Pa. St. 402; Foster v. Foster, 20 N. H. 208. If the answers of the witnesses have been prepared in writing by their counsel in advance of the examination, the depositions will be suppressed. North Carolina R.

will be suppressed. North Carolina R. Co. v. Drew, 3 Woods (U. S.), 691.

6. Snyder v. Snyder, 50 Ind. 492: Hurst v. Larpin, 21 Iowa, 484; Farmers' Bank v. Woods, 11 Pa. St. 99; Mosely v. Mosely, Cam. & N. (N. Car.) 521; Steele v. Dart, 6 Ala. 798. Compare Donoho v. Petil, 1 Miss. 440.

A deposition in the handwriting of the party taking it is inadmissible evidence, unless the opposite party was present and consented that it should be so taken. Steele v. Dart, 6 Ala. 798.

The exhibits attached to a deposition may be in the handwriting of an attorney of the party. Marvin v. Raigen, 12

Cush. (Mass.) 132.

Where one of the attorneys for the party examining the witness at his request wrote down the substance of the facts in answer to the several interrogatories, a motion to suppress may properly be denied, in the absence of any suggestion that the witness was imposed upon, or that the facts were misstated, unduly colored, or concealed. Commercial Bank v. Union Bank, II N. Y.

Depositions may be admitted, though in the handwriting of the attorney for one of the parties, if shown to have been so written with the consent of the oppos-

A witness may write his answers to the questions in a deposition himself.1

It is advisable to insert the questions, as they often aid in the interpretation of the answers; but it is not essential to its admissibility that a deposition should be thus taken. When the examination is on written interrogatories and cross-interrogatories, it must he restricted to them, unless by consent of the parties.3

A commissioner ought, in taking testimony, to refuse to take down unprofessional statements made by counsel, and scandalous

objections.4

(k) Amending Certificate.—There is no error in allowing an officer to amend his certificate of the taking of depositions so as to conform to the facts, after it is filed in court.5

(1) Reading Testimony to Witness.—Testimony taken out of court

ing counsel. Farmers' Bank v. Woods.

11 Pa. St. 99

In proceedings for the probate of a will, E., an attorney who appeared as proctor for a contestant, introduced in evidence the deposition of a witness taken on commission; the answers were very full and minute in details, tending to show undue influence. In proceedings to punish E. for alleged professional misconduct in procuring such testimony, it appeared that he prepared and caused to be written out all the answers to be given by the witness to the interrogatories and cross-interrogatories; that he was present when the testimony was taken, and himself read to the commissioner the answers he had prepared to the interrogatories, and left with the witness the answers so prepared to the cross-interrogatories which the latter read to the commissioner; that E. paid money to the witness both before and after the taking of the testimony, and he afterward wrote to the witness suggesting a destruction of their correspondence, and asking for a return of the memoranda so used at the taking of the deposition. Held, that practically the examination was merely an affidavit drawn by E., and in its true character not admissible before the surrogate; that the procuring its re-ception by disguising it in the form of a deposition was a fraud upon the surrogate; and that, therefore, without regard to the truth or falsity of the answers so given, E. was properly convicted of pro-fessional misconduct. In re Eldrige, 82 N. Y. 161.

While it is, perhaps, not a ground to entirely suppress a deposition that the party or counsel taking it has written the answers for adoption by the witness, it so discredits the evidence that it is not entitled to much weight; and this is so although the deposition is not used, but another is taken without that objection.

Dawson v. Paston, 28 Fed. Rep. 606.
1. Carlyle v. Plumer, 11 Wis. 99;
Wilson v. Smith, 5 Yerg. (Tenn.) 379; Shropshire v. Stevenson, 17 Ga. 622.

2. Read v. Patterson, II Lea (Tenn.).

Where the opposing party fails to require that each question be written down before it is answered, he cannot afterwards object that the deposition was taken in narrative form. Murphy, 60 Ind. 282. See Pralus v. Pacific, etc., Co., 35 Cal., 30.

3. Stagg v. Pomroy, 3 La. Ann. 16; Marr v. Wetzel, 3 Colo. 2.

4. Rea v. Rea, 53 Mich. 40. 5. Conger v. Cotton, 37 Ark. 286; Bewley v. Ottinger, 1 Heisk. (Tenn.) 354.

The commissioner has no power to amend his certificate after it is filed, but if he does so the court may ratify and render valid his act in so doing. v. Andrew. 43 Vt. 466.

A deposition, on being returned to the court, had not the word "commissioner" affixed to the name of the person taking It was returned to him, the word added, then sent back to the court, again filed, and notice of filing served on the other party. Held, that the deposition was properly admitted in evidence. lenkins v. Anderson (Pa.), 11 Atl. Rep.

In an action on an amended declaration the plaintiff may put in evidence a deposition taken and the answers to interrogatories filed, before the amendment. Weatherby v. Brown, 106 Mass. 338. See Doyle v. Wiley, 15 Ill. 576; Vincent v. Conklin, 1 E. D. Smith (N. Y.). 203; Pico v. Cuyas, 47 Cal. 174; Jemison v. Smith. 37 Ala. 185; Cooper v. Granberry, 33 Miss. 117.

before a commissioner should be read over to the witnesses for correction and authentication by their signatures; and this precaution should not be waived unless in cases of absolute necessity.1

(m) Signature of Witness.—The deposition should be subscribed by the witness, but it is usually a substantial compliance if it an-

pears in the body of the certificate that he was duly sworn.2

(n) Alterations,—An alteration by the magistrate, after a deposition is signed and sworn to, without the deponent's assent, and in a particular in any sense material, is fatal to the evidence.3

(o) Exhibits.—Any exhibits spoken of by a deponent should be referred to in the body of the deposition, and either annexed to

the deposition or so marked as to be identified.4

1. Looker v. Looker, 46 Mich, 68,

2. Morss v. Palmer, 15 Pa. St. 51; Rutherford v. Nelson, I Hayw. (N. Car.) 105; Barnett v. Watson, I Wash. (Va.) 372; Wiggins v. Pryor, 3 Port. (Ala.) 430; Morley v. Hamit, I A. K. Marsh. (Ky.) 590. Compare Lee v. Lee, I La. Ann. 318.

Where a deposition appears from inspection to have been signed by the deponent, it is not necessary that the magistrate taking it should state such fact in his certificate. Lewis v. Morse, 20 Conn. 211. Compare Thompson v. Haile, 12 Tex. 139.

In a cause begun in a State court, and subsequently removed to a Federal court, the deposition of a witness was taken previous to removal by a shorthand Before the shorthand notes were written out for reading to the witness and signature by him, according to the requirements of the State statute, the cause was removed. Then the witness refused to sign his deposition. that the Federal court had no jurisdiction over the taking of the deposition, and could not compel the witness to sign it. Arnold v. Kearney, 29, Fed. Rep. 820.

3. Winooski Turnpike Co. v. Ridley, 8 Vt.: 404.

An erasure or interlineation which is shown to have existed at the time the deposition was returned and opened by the clerk of the court will be presumed to have been made with the knowledge and consent of the witness at the time his testimony was taken. McElevy, 2 Grant (Pa.), 44. Wallace v.

Where it appears that an alteration has been made in the citation, it will not be presumed that such alteration was made after service of the citation. Davis v.

Davis, 48 Vt. 502.

4. Dailey v. Green, 15 Pa. St. 118; Brumskill v. James, 11 N. Y. 294; Crary

v. Carradine, 4 Ark. 216; Humphries v. Dawson, 38 Ala. 199; Huston v. Roots. 30 Ind. 461; Swisher v. Swisher, Wright (Ohio), 755.

If the defendant in an action, in answer to interrogatories filed by the plaintiff, has said that he purchased shares of stock of a firm doing an expensive business in another State, the plaintiff is entitled to put in evidence the deposition of a member of that firm to the effect that no such transaction is shown by the books of the firm, although copies of the books are not annexed to the deposition. Todd v. Bishop, 136 Mass. 386.

Failure to exhibit to commissioners in Delaware books which witness states are in Mississippi, no ground for suppressing interrogatories. Petersburg S. & I. Co. v. Manhattan Ins. Co., 66 Ga. 446.

A witness, testifying to the correctness of an account, may aid his memory by consulting the entries in books, when he himself made them, and had knowledge of their correctness when he made them; but he cannot testify to the correctness of an account, as made out from books in his custody and possession, when he did not himself make the entries, and has no knowledge of the matters of account except as derived from the books. Memphis, etc., R. Co. v. Maples, 63 Ala.

Witness cannot be required to attach merchant's books to interrogatories; transcript should be asked for. Petersburg. etc., Co. v. Manhattan Ins. Co., 66

Ga. 446. Where the originals have been lost, a copy may be supplied. Susquehan etc., R. Co. v. Quick, 61 Pa. St. 328. Susquehanna,

Where an original paper is in the hands of a third person residing out of the State, and he refuses to attach the same to his deposition when taken, and requested to do so, a sworn copy taken by another person present, who attaches such copy to his deposition, is admissible in evidence. Fisher v. Greene, 95 Ill. 94; Thorn v. Wilson, 27 Ind. 370. See Lyon v. Barrows, 13 Iowa, 428.

Promissory notes need not be attached to the interrogatories as exhibits. Mobley v. Leophart, 47 Ala. 257. Nor has the court any power to order a draft upon which an action is brought, to be delivered to defendants, for the purpose of being annexed to a commission, to be inspected by defendant's witnesses residing out of the State. Butler v. Lee, 19 How. Pr. (N. Y.) 383.

Where a witness, testifying by deposition, states that he has seen the note sued on, and has a copy of it, which he produces and makes a part of his deposition, his name appearing as attesting witness, he sufficiently identifies the note in suit, that he may say whether or not the alleged maker executed it, to his knowledge. Hazzard v. Vickery, 78 Ind.

65.

It is proper for a witness, whose deposition is taken, to identify a written instrument, and attach a copy of it to the deposition; and such part of the deposition should not be suppressed, for the absence of the original may be accounted for, and the copy rendered admissible. Gimbel v. Hufford, 46 Ind. 125.

Where exhibits are to be proved by two or more witnesses, they may be attached to one set of interrogatories, and referred to by appropriate description in the others; and, if so referred to, and properly identified by the witness, and certified by the commissioner, this is sufficient. Mobley v. Leophart, 51 Ala.

Where, upon a deposition taken out of the State, the deponent is inquired of respecting letters written by a party to the suit, and is requested to annex such letters or copies thereof to his deposition, he is not bound to do either. The most that can be required of a deponent in such a case is to furnish such extracts from letters received by him as relate to the subject of inquiry, upon being paid a reasonable charge for making such extracts. Amherst Bank ν . Conkey, 4 Met. (Mass.) 459.

Where a party in her deposition testifies particularly to a fact, the admission in evidence of letters referred to in the deposition, and made a part thereof, as explanatory of her testimony, is held, if error, to be immaterial. Semmens v.

Walters, 55 Wis. 675.

Letters produced by a deponent in answer to interrogatories, and annexed

to his deposition, are not thereby made competent evidence if otherwise incompetent, and not inspected by the party interrogating. Ashley v. Wolcott, 3

Grav (Mass.), 571.

Letters which are merely identified before the commissioner are not to be considered as having been "produced and
proved" within the meaning of the N.
Y. statutes as exhibits, and need not be
annexed to the commission. That such
letters have not been annexed to the
deposition is not a sufficient ground for
suppressing the commission. Kelly
v. Webber, 9 Abb. N. C. (N. Y.)
62.

On cross-examination of one of the plaintiffs, whose testimony was taken by commission, he was requested to annex copies of any correspondence with E. & He annexed extracts from and C. S. not the whole of the letters. trial plaintiffs read these extracts under objection and exception. Held, no error: that while defendants were entitled to the whole of the letters, their remedy was by motion in advance of the trial either to have the execution of the commission corrected by annexing the full letters or striking out the extracts, or to suppress the deposition; and not having taken that remedy they must be held to have assented to the mode in which the commission was executed. Wright v. Cabot, 89 N. Y. 570.

It is no objection to a deposition that the bill of items of the plaintiff's account annexed thereto, and sworn to by the deponent, is in the handwriting of the plaintiff's attorney; nor that such bill is described in the deposition as "marked A," when it is not so marked; there being no other account annexed. Marvin v. Raigan, 12 Cush. (Mass.) 132.

A paper pinned to a deposition, not

referred to in it, without evidence that it has been attached by the justice, is not an exhibit sufficiently identified to be admissible in evidence. Susquehanna, etc.,

missible in evidence. Susquehanna, etc., R. Co. v. Quick, 6r Pa. St. 328.

Where a certain paper which should have been annexed to a deposition is not produced, it does not of necessity invalidate the deposition. Lobdell v. Mar-

shall, 58 N. H. 342.

When an exhibit to a deposition is objected to when produced by the witness, and the objection noted in the deposition, but there is nothing in the records to show that the objection was renewed at the trial, or passed upon by the court below, it cannot be raised for the first time on appeal. Parrott v. Byers, 40 Cal. 614.

7. Evidence—Admissibility.—If the court is satisfied that the substance of the deposition is intact, that the paper has not been tampered with in any particular, to the detriment of the adverse party, it should be admitted.1

(a) Appearance of Witness.—A deposition taken de bene esse will not be allowed to be read when the witness is in a condition to be sworn, and the cause on which the deposition was taken de bene no

longer exists.2

When the deposition of a witness is taken, on the statutory ground that the defence, or a material part thereof, depends exclusively on his testimony, the deposition may be read in evidence on the trial, although the plaintiff makes the necessary affidavit requiring his personal attendance, if it is affirmatively shown to the court that the witness is incapable, both physically and mentally, of attending and testifying in person.3

1. Borders v. Barber, 81 Mo. 636; Hill v. Bell, Phill. (N. Car.) 122; Van Sickle v. Gibson. 40 Mich. 170; Nelson v. Woodruff, I Black. (U. S.) 156; Goff v. Goff, I Pick. (Mass.) 475.

In Dailey v. Green, 15 Pa. St. 118, the deposition, in violation of an express rule of court, was taken out of the prothonotary's office and carried out of the The court refused to suppress

A deposition was sent indorsed in an envelope to the counsel of the parties for whose use it was taken, and opened by him, but an affidavit was made by such counsel, alleging that he opened the envelope without knowing that it enclosed the deposition. Held, that the deposition was admissible at the discretion of the court. Burrall v. Andrews, 16 Pick. (Mass.) 551. See Goff v. Goff, 1 Pick. (Mass.) 475; Law v. Law, 4 Greenl. (Me.)

2. Emlaw v. Emlaw, 20 Mich. 11; Dunn v. Dunn, 11 Mich. 284; Thayer v. Gallup. 13 Wis. 603; Hammock v. McBride, 11 Ga. 183; Boetge v. Landa, 22 Tex. 105; Hayward v. Barron, 38 N. H. 366; Stiles v. Bradford, 4 Rawle (Pa.). 394. Compare Phoenix v. Baldwin, (Pa.), 394. Compare Phoenix v. Baldwin, 14 Wend. (N. Y.) 62; Bradley v. Geiselman, 17 Ill. 571; Frink v. Potter, 17 Ill. 408; Scott v. Indianapolis Wagon Works, 48 Ind. 75; Abshire v. Mather, 27 Ind. 381; Barton v. Trent, 3 Head (Tenn.),

A deposition cannot be read in an action at law if the witness at the time of the trial is in the place where the court is held, and is able to attend. Kellogg, 6 McLean (U. S.), 44.

Where a deposition is taken in a cause, and it is agreed by the parties that the deposition shall be read upon the trial. at all events, without reference to the presence or absence of the witness at the time of the trial, it is not error to admit the deposition in evidence, although the deponent had already been called, and examined and cross-examined orally in the cause. Estep v. Larsh, 21 Ind. 183.
3. Henry v. Northern Bank, 63 Ala.

527; In re Abeles, 12 Kan. 451; Post v. State, 10 Tex. App. 579; State v. Parker,

16 Nev. 79.
Proof must be produced of the inability of the witness to attend. The presumption of such inability arising from the advanced age of the witness is not sufficient. Jackson v. Rice, 3 Wend. (N. Y.)

180. See The Samuel, I Wheat. (U. S.)

9; Bowie v. Talbot, I Cranch C. C. 247;

Jones v. Greenolds, I Cranch C. C. 339;

Weed v. Kellogg, 6 McLean (U. S.), 44.

Under section 865, Rev. St. U. S., pro
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viding that "unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause," the admission of the deposition, taken de bene esse, of a witness who was shown to the court to be present in court, ready and able to testify if the case was called, before the reading of the deposition was begun, is error. Whitford v. Co. of Clark, 7 Sup. Ct. Rep. (U. S.) 306.

If the witness lives within a hundred miles, the party offering the deposition in evidence must prove that he used due diligence to procure the attendance of the witness. Park v. Willis, I Cranch C. C. 357; Penn v. Ingraham, 2 Wash. C. C. 487; Bannert v. Day, 3 Wash, C. C. 343; Pettibone v. Derringer, 4 Wash. C. C. 215; Read v. Bertrand 4 Wash. C. C. 558.

A deposition taken de bene esse will not he allowed to be read when the witness is in a condition to be sworn, and the cause on which the deposition was taken de bene no longer exists. Emlaw v. Emlaw, 20 Mich. II. See Gardner v. Ben-

nett, 38 N. Y. Sup. Ct. 197.

When the deposition of a witness who does not reside in the county of the trial. or in an adjoining county, has been taken by one party, the fact that the other party has the witness present, and has examined him during the trial, does not prevent the reading of the deposition if the witness be not present when it is offered, having been discharged by the party who procured his attendance. Shirts v. Irons, 37 Ind. 98.

And where the deposition of a resident is taken de bene esse and he leaves the State a few days before the sitting of the court, and is absent at the trial, such deposition may be read under the act of 1881, ch. 279-it being shown that he was out of the State and more than 75 miles from the place of trial. Barnhardt

v. Smith, 86 N. Car. 473.

No person can be compelled to attend for examination on the trial of a civil action except in the county of his residence; and hence the fact that a witness is temporarily in or passing through another county at the time and place of the trial therein, is no objection to the reading of his deposition previously taken for use at such trial. Waite v. Teeters, 36 Kan. 604. See Puryear v. Reese, 6 Coldw. (Tenn.) 21.

The deposition is admissible although the witness in the intermediate time may have been in the State. Johnson v.

Sargent, 42 Vt. 195.

A deposition taken pursuant to a stipulation that it should be read on the trial of the cause, subject to all objections on the grounds of irrelevancy, illegality, and incompetency, may be read in evidence, although the witness at the time of the trial is within the jurisdiction of the court. Chapman v. Kerr, 80 Mo. 158.

A deposition will be suppressed, on motion, if the witness is shown to be alive, and to reside within the county where the court is held. Memphis, etc., R. Co. v. Maples, 63 Ala. 601; Brewer v. Beckwith, 35 Miss. 467. Compare Ables v. Miller, 12 Tex. 109.

A party has the right to require that

testimony taken before the clerk under the act (15 Stat. 41) shall be read at the trial, notwithstanding the attendance of the witness so examined, and his examination in open court. But the court will not grant a new trial for error in exclud-ing such testimony where it related to a matter wholly immaterial. Wilson, 16 S. Car. 402. McLaurin v.

Where the deposition of a witness residing outside the State is taken, and he afterwards comes into the court during the trial, and remains at the place where it is held, his unexplained absence at the time it is proposed to introduce his evidence, although he is not subpoenaed by either party, will not authorize the party taking the deposition to read it: his absence not being shown to have occurred without their procurement or consent. Mobile L. Ins. Co. v. Walker, 58 Ala. 290. Compare Gelly v. Singleton, 3 Litt.

(Kv.) 250.

Sick Witness .- Where it is stated in the deposition of a witness that he is ill and unable to appear in court, the deposition is admissible, as the presumption is that the illness continued; furthermore, if, on appeal, the record shows that a physician's certificate, which is not set out, was also read to the court, it will be presumed that it sustained the ruling admitting the deposition. Hunsinger v. Hofer, 110 Ind. 390; Ails v. Sublit, 3 Bibb (Ky.), 204.

The deposition of a witness who was sick, and did not expect to be able to attend the next session of the court, was taken, but the case was not tried for a year afterwards, when the deposition was admitted without showing that the witness could not have been present in court. *Held*, error. Sax v. Davis (Iowa), 32 N. W. Rep. 403.

Where the evidence of a witness was taken by interrogatories while he resided out of the county of the trial, and he subsequently moved into that county, and was present as a witness at the trial. but stated that he had recently been sick, and that his sickness had weakened his mind and affected his recollection, and that his mind was not in a condition then to remember what really did happen, and that he was well and his memory was better when he swore to the interrogatories, such interrogatories were admissible in evidence, it appearing that the testimony so delivered was pointed, clear, and positive, while that delivered on the stand was doubtful, hesitating, and uncertain. Tift v. Jones, 74 Ga. 469. See Jack v. Woods, 29 Pa St. 375; Emig v. Diehl, 76 Pa. St. 359.

(b) Reading a Part of.—A portion of a deposition may be read.1 (c) Conflicting Depositions.—Before a witness can be impeached by a second deposition as regards evidence that he gave in a former deposition, he must be asked about it and given an opportunity to explain the discrepancy.2

Proof that a witness, who had been subpœnaed, and whose deposition had been taken twelve days before the trial. was infirm and generally unable to leave home about the time when his deposition was taken, raises a prima facie presumption that he was unable to attend court. and, in the absence of proof to the contrary, showing his ability to attend, warrants the admission of his deposition. Worthy v. Patterson, 20 Ala, 172.

A witness giving his deposition de bene esse, stated in it that he was unable from his age and health to attend at the court. Held, that this was sufficient to authorize his deposition to be read upon the trial of the cause in which it was taken. Pollard

υ. Lively, 2 Gratt. (Va.) 216.

Pregnant Women.-Evidence that a woman is in an advanced state of pregnancy, so as to render it unsafe for her to attend the trial, is sufficient evidence of sickness to justify the reading of her deposition taken conditionally. Clark v. Dibble, 16 Wend, (N. Y.) 601; Beitler v.

Study, 10 Pa. St. 418.
Witness About to Leave the State.-Where a witness is within reach of process, so that he might have been had at the trial, his deposition, taken on the ground that he was about to leave the State, which purpose was not carried into effect, is not admissible in evidence. Commercial Bank v. Whitehead, 4 Ala.

If a witness, whose deposition has been taken on the ground that he is about to leave the State, remain until the trial of the cause, his deposition cannot be read in evidence. But it is no objection to its admission that the witness did not leave until after one term had elapsed after his deposition was taken. So, where he diest before leaving the State, his deposition so taken is admissible. Goodwyn v. Lloyd. 8 Port. (Ala.) 237.

1: Where defendants had taken plaintiff's deposition, they were properly allowed, against plaintiff's objection, to read a part of it, without reading the whole, for the purpose of establishing an admission on the part of plaintiff. The plaintiff might have introduced the whole of it, if she had been so advised. Van Horn v.

Smith, 59 Iowa, 142.

When in the taking of a deposition of a witness the adverse party has appeared

and cross-examined, he is entitled to the benefit of the deposition, and may read such portions of it as he chooses, without being compelled to read the whole. Converse v. Meyer, 14 Neb. 190; Gel-latly v. Lowery, 6 Bosw. (N. Y.) 113. Compare Southwark Ins. Co. v. Knight.

Whart. (Pa.) 327.

When a deposition taken by one of the parties to a suit is not used by him. his opponent may introduce it in evidence; and if the witness has been examined as to different transactions, he may be allowed by the court to introduce only that part of the deposition relating to one or more of such transactions; but he should not be permitted to introduce a portion of his testimony on any given subject while declining to introduce all that the witness had said on that subject. Citizens' Bank v. Rhutasel, 67 Iowa,

Where a party reads the direct examination only, and refuses to read the cross-examination, held, that the part read should be struck out. Grant v.

Pendery, 15 Kan. 236.

2. Samuels v. Griffith, 13 Iowa, 103; State v. Shannehan, 22 Iowa, 435. See Stephens v. People, 19 N. Y. 549.

In an action against a railroad company for an injury caused by the explosion of an engine, two depositions by the same witness were before the court, and counsel for plaintiff proposed to read an answer to an interrogatory as to whether the engineer in charge of the exploded engine was competent, whereupon objection was interposed, on the ground that the witness in his other deposition had declared that he "knew nothing about the competency, carelessness, or skill of the engineer." Held, that the evidence should have been excluded. East Line, etc., R. Co. v. Scott (Tex.), 5 S. W. Rep. 501.

Interrogatories .- In an action of trespass plaintiff filed interrogatories, in which, after a statement of the case, the witnesses were asked to "state any fact within their knowledge that will assist the court in arriving at a correct and just conclusion of the case, as fully as if here inquired about." Held, that the answers thereto were properly excluded. St. Louis, etc., R. Co. v. Whitaker, 5 S.

W. Rep. (Tex.) 448.

(d) Submission of, to Jury.—Neither party has a right to have the inadmissible testimony in a deposition submitted to the jury. After the inadmissible portion of the deposition has been obliterated, the jury may properly be allowed to take the deposition with them when they make up their verdict.¹

(e) May be Used by Opposing Party.—The deposition taken at the instance of a party to an action, and not used by him, may he read in evidence by the opposite party against the objection

of the party at whose instance it was taken.2

1. Camp v. Averill, 54 Vt. 459; Stiles v. McKibben, 2 Ohio St. 588; Hansbrough v. Stinnett, 25 Gratt. (Va) 495.

Depositions are inadmissible of which parts are underscored by the party offering them, to attract especially the attention of the jury. Knight v. Coleman, 19

N. H. 118.

Where a part of a deposition which could not be separated from the balance without mutilation contained incompetent evidence which was ruled out, held, that the court might, in the exercise of its discretion, refuse to send it to the jury. Stiles v. McKibben, 2 Ohio St. 588.

If part of a deposition is incompetent, it cannot be passed to the jury without consent; but if the deposition is handed to the jury with the knowledge and without the objection of the other party, and the court, at his request, suggest to the jury that they should not regard that which has not been read, no exception can be taken afterward. Shute v. Robinson, 41 N. H. 308.

Both the interrogatories and crossinterrogatories may be considered by the jury. Clinton Nat. Bank v. Torry,

30 Iowa, 85.

It is not error to refuse to allow a deposition read upon the trial to be taken into the jury room, upon the request of only one of the jurors. Lafoon

v. Shearin, 95 N. Car. 391.

Where, at a trial by jury, certain depositions were objected to by one party, but were used by consent, upon condition that the judge should direct the jury what parts of them to disregard as inadmissible, and no such direction was in fact given, but the judge, before the jury retired, offered to give them further instructions on any point which either party might desire, yet none were desired; it was held that this silence of the party amounted to a waiver of any objection to the testimony. Burkley v. Woodsum, 7 Greenl. (Me.) 294.

2. Rucker v. Reid, 36 Kan. 468; Chase v. Springvale Mills, 75 Me. 156; Hatch v. Brown, 63 Me. 410; Linfield v. Old Colony R. Co., 10 Cush. (Mass.) 562; Henshaw v.

Clark, 2 Root (Conn.), 103; Sullivan v. Norris, 8 Bush (Ky.), 519; Weil v. Silverstone, 6 Bush (Ky.), 698; McClintock v. Curd, 32 Mo. 411; Echols v. Staunton, 3 W. Va. 574; Jordan v. Jordan, 3 Thomp. & C. (N. Y.) 269; Weber v. Kingsland, 8 Bosw. (N. Y.) 415; Gellatly v. Lowery, 6 Basw. (N. Y.) 113; O'Connor v. Amer. etc., Co., 56 Pa. St. Wheeler v. Smith, 13 Iowa, 564; Adams 234; Hazleton v. Union Bank. 32 Wis. 34; Calhoun v. Hays, 8 W. & S. (Pa.) 127; Juneau Bank v. McSpedon, 15 Wis. 696; Hale v. Gibbs. 43 Iowa, 380; v. Russell, 85 Ill. 284; Stewart v. Hood, 10 Ala. 600; Fountain v. Ware, 56 Ala. 558; Edgar v. McArn, 22 Ala. 796; Williams v. Kelsey, 6 Ga. 365; McArdle v. Bullock, 45 Ga. 89; Brandon v. Mullenix, 11 Heisk (Tenn.) 446. Compare Wait v. Brewster, 31 Vt. 516; Sexton v. Brock, 15 Ark. 345; Williams v. Kelly, 6 Ga. 375; McFarland v. Hunter, 8 Leigh (Va.), 489; Vaughn v. Garland, 11 Leigh (Va.), 251; Dana v. Underwood, 19 Pick. (Mass.) 104; Logan v. McGinnis, 12 Pa. St. 27.

Where both parties each take a deposition of the witness, either party may introduce both depositions. Woodruff

v. Garner, 39 Ind. 246.

Where a party uses a deposition taken by his opponent the latter may properly object to interrogatories propounded by himself. Hatch v. Brown, 63 Me. 410.

A deposition taken to impeach the character of a witness cannot be read by the adverse party, if the party taking it declines to read it, and also fails to assail the character of the witness intended to be impeached by the deposition. If the witness had been assailed and the party taking the deposition had declined to read it, then the adverse party would have the right to use the deposition for the purpose of sustaining his witness. Sullivan v. Norris. 8 Bush (Ky.), 521.

Where the plaintiff does not read a

Where the plaintiff does not read a deposition, and the defendant then reads it, the plaintiff cannot introduce evidence to impeach the witness. Jordan v. Jordan, 3 Thomp. & C. (N. Y.) 269; Fordan, 3 Thomp.

(f) Taken in Another Suit.—It is competent for a party to introduce in evidence the deposition of a witness who is dead (and in some States if the witness is living), taken in another suit in relation to the same subject-matter, and between the same parties in interest, although the parties were not nominally the same in both suits. The deposition of a party to a cause may be

ward v. Harris, 30 Barb. (N. Y.) 338; Barry v. Galvin, 37 How. Pr. (N. Y.) 310.

Where the opposing party reads a deposition taken by the other side, he adopts it as his own. Fountain v. Ware,

56 Ala. 558.

Where one party reads portions of a deposition for the purpose of contradicting the witness, the opposite side may read such portions as pertains to the same subject, and tends to explain, qualify, or limit what is so read. Whitman v. Morey, 63 N. H. 448.

When a deposition taken by one of the parties to a suit is not used by him, his opponent may introduce it in evidence; and if the witness has been examined as to different transactions, he may be allowed by the court to introduce only that part of the deposition relating to one or more of such transactions; but he should not be permitted to introduce a portion of his testimony on any given subject while declining to introduce all that the witness had said on that subject. Citizens' Bank v. Rhutasel, 67 Iowa, 316.

Publication.—Where parties join in a commission to take the examination of a witness, and the commission is returned into court, either party may move for publication, and neither can object to it. It is error, therefore, to refuse the plaintiff publication of testimony taken on behalf of the defendant until the defendant has manifested an intention not to use it, either by moving for a nonsuit, or by declining to introduce it when it came his turn to offer testimony. Petrie v. Columbia, etc., R. Co. (S. Car.) 2 S. E. Rep. 837.

2 S. E. Rep. 837.

1. Goodrich v. Hanson, 33 Ill. 498; Berney v. Mitchell, 34 N. J. 337; Weeks v. Lowerre, 8 Barb. (N. Y.) 532; Powell v. Waters, 17 Johns. (N. Y.) 176; Crary v. Sprague, 12 Wend. (N. Y.) 41. See Chase v. Springvale Mills, 75 Me. 156; Gove v. Lyford, 44 N. H. 525; Leviston v. French, 45 N. H. 21; Tappan v. Beardsley, 10 Wall. (U. S.) 427; Heth v. Young, 11 B. Mon. (Ky.) 278; Kerr v. Gibson, 8 Bush (Ky.), 129; Hallett v. O'Brien, I Ala. 585; Long v. Davis, 18 Ala. 801; Fulton v. Sellers, 4 Brew. (Pa.) 42; Winch v. James, 68 Pa. St. 297; Eckman v. Eckman, 68 Pa. St. 460; Weitz

v. May, 21 Pa. St. 274; Hale v. Silloway, 3 Allen (Mass.), 358; Wanner v. Sisson, 29 N. J. Eq. 141; Rowe v. Smith, 1 Call (Va.), 487; Finney v. St. Charles College, 13 Mo. 266; Parsons v. Parsons, 45 Mo. 265; Earl v. Hurd, 5 Blackf. (Ind.) 248; Austin v. Slade, 3 Vt. 68. Compare Dawson v. Smith, 3 Houst. (Del.) 335; Campeau v. Dubois, 39 Mich. 274.

If there are valid objections, which

If there are valid objections, which were not pertinent upon the former trial, the deposition is not admissible. Parsons v. Parsons, 45 Mo. 265; Emerson

v. Navarro, 31 Tex. 334.

Where two actions are pending, by the same plaintiff against different obligors, on the same bond, a deposition taken by the defendant in one cannot be used for the defendant in the other. Brown v. Johnson, 13 Gratt. (Va.) 644.

Where one of the parties to a suit was a party to a former suit, while the other claims title to the matter in controversy through the other party to the former suit, a deposition taken in the former suit upon sufficient notice is admissible in evidence without being filed in the latter, and without other notice being given of its intended use, provided no surprise is worked. Adams v. Raigner, 69 Mo. 363.

A deposition of a deceased or foreign witness, appended to an injunction bill, is not competent in the absence of proof that the suit in which such deposition was taken was between the same parties and related to the same subject-matter. Camden, etc., R. Co. v. Stewart, 21 N. I. Eq. 484.

N. J. Eq. 484.

Depositions—Agreement.—On the trial a whole deposition taken in another cause was offered in evidence, with an agreement of the parties indorsed that certain parts of it, if proper evidence, might be used in the trial of this cause. Held, that its exclusion was not error. Malone v. Stickney. 88 Ind. 504.

Malone v. Stickney, 88 Ind. 594.
A party cannot be permitted to use depositions on the trial of one cause which have been taken in another cause without having filed them in the cause in which he proposes to use them, or obtaining leave before the commencement of the trial to so use them. Searle v. Richardson, 67 Iowa, 170.

read in evidence against him in another cause as an admission. but it cannot be so read in the same cause in which it is taken.1

(g) Taken in Another Suit Between Other Parties.—A deposition taken in another and different cause is not competent evidence against one not a party to the suit in which it was taken, to prove any fact, except that it may be proper for the purpose of showing notice of the pendency of the proceeding in which it was used 2

A deposition taken in the principal suit cannot be used in an interpleading suit between the parties. Doane v.

Glenn, I Colo. 595.

A deposition admissible in the original suit is also admissible upon the hearing of a cross-bill filed after it was taken, under an order afterwards entered that all depositions taken in the original suit should be read in evidence in the crosssuit also, with the same effect, and subject to the same exceptions. Profitt (Va), I S. E. Rep. 67. Smith v.

Depositions taken on a rule to show cause why a judgment should be opened are competent evidence, on the trial of an issue directed by the court, to determine the validity of the judgment. Haupt v. Henninger, 37 Pa. St. 138.

Where, in order to contradict the deponent's evidence in a case on trial, a party reads an answer to an interrogatory given by the deponent in a deposition taken to be used upon a former trial, held, that the opposing party has the right to read such parts of the rest of the deposition as relate to the subject-matter of the interrogatory or qualify the answer. Webster v. Calden, 55 Me. 165.

A witness after giving his deposition

was made a defendant in the action by Held, that his an amended petition. own deposition might be read against him, but other depositions taken be-fore he was made a party could not be read against him. Kerr v. Gibson, 8

Bush (Ky.), 129.

Depositions once taken in a cause may be read in evidence on the trial, though by an amendment to the pleadings the issues have been changed subsequent to the time of the taking of the depositions, where the subject-matter of the action or defence between the parties remains the same. Anthony v Savage, 3 Utah, 277.

Depositions taken in a former case between the same parties cannot be read in a case pending unless some peculiar reasons make their introduction as evidence necessary. O'Hara v. Hunt, 19

On the trial of an action at law, depositions taken in a suit in chancery, between the same parties, are not proper evidence, unless the witnesses are dead, or otherwise not capable of attending Pleasants v. Clements, 2 the trial. Leigh (Va.), 474. 1. Priest v. Way, 87 Mo. 16.

2. Cookson v. Richardson, 69 Ill. 137. See Phipps v. Caldwell, I Heisk. (Tenn.) 349; Turnley v. Hanna, 82 Ala. 139.

Where the deponent is dead, a deposition to prove pedigree can be used in a later suit between other parties. ton's Succession, 35 La. Ann. 418.

A deposition taken in another suit, the parties not being the same, is not admissible as evidence against one who, not being a party to that suit, had no opportunity to cross-examine the witness. Turnley v. Hanna (Ala.), 2 So. Rep. 483;

Borders v. Barber, 81 Mo. 636.
R. sued H. and J., his partners, for the purpose of winding up the partnership. The deposition of J., which tended to show that at a certain date the firm had been dissolved, was taken and used in the action. Held, that the deposition was not admissible in a subsequent action by judgment creditors of the partnership seeking to set aside mortgages of the firm property, and to subject it to their claims, on the ground that the mortgages, which were made at the said date, were executed by H. and J. alone, and that R. was then a partner. Southern White Lead Co.v. Haas (Iowa), 33 N. W. Rep. 657.

A deposition in an appeal from the probate of a will is not admissible in an appeal from the probate of another will. although the parties are the same, and the two wills are executed by the same person. Sewall v. Robbins, 139 Mass.

Interrogatories taken in suit on note secured by deed not admissible in suit for land, if witness is alive and in jurisdiction; aliter, if not. Broach v. Kelly, 71 Ga. 698.

An action was brought against a bank and its cashier, but was dismissed as to the latter before the trial, at which the plaintiff offered in evidence a deposition of the cashier, taken in another suit

(h) Subsequent Trial of the Case.—Depositions that have been read at the trial of a cause, without objection, may be read at a

subsequent trial, unless some new fact creates an objection.1

(i) Use of Depositions after Death of the Deponent, in Suit brought by Administrator.—The rule in chancery is that if the testimony was competent when the deposition was taken and filed, it remains competent, and the subsequent death of the party does not affect its use on the trial. The administrator merely takes up the case as it stood when the intestate party died.2

(j) Objections.—Formal objections to a deposition should be taken and settled before trial. Objections as to the substance and

pertinency of the evidence only can be taken at the trial.3

between the bank and a third party. Held, that such deposition could not be admitted as original evidence in the last action, as the cashier was not a party thereto. His statements in the deposition would be admissible in the later suit only for the purpose of contradicting him, a proper foundation being first laid

for that purpose. Bartelott v. International Bank, 119 Ill. 260.

A witness had given his deposition in a former suit, and under stipulation of counsel the parties to another suit growing out of the same facts were at liberty to read it in evidence. Held, that this did not excuse him from deposing in the second suit. Neither did the fact that he had been examined at the trial of the former suit, and his examination had been written out at length and preserved, and the substance of the exami-nation embodied in a bill of exceptions filed in court. Ex parte Priest, 76 Mo.

1. Spence v. Smith, 18 N. H. 587; Pulaski v. Ward, 2 Rich. (S. Car.) 119.

2. Sheidley v. Aultman, 18 Fed. Rep. 666. See Beatey v. McCarkle, 11 Heisk. (Tenn.) 593; Taylor v. Mayhew, 11 Heisk. (Tenn.) 596.

The deposition of a defendant is not admissible where the plaintiff is an ex-

Quick v. Brooks, 29 Iowa, 484.

3. Winslow v. Newland, 45 Ill. 145; Lockwood v. Mills, 39 Ill. 602; Toledo, etc., R. Co. v. Baddeley, 54 Ill. 101; Morgan v. Corlies, 81 Ill. 72; Merchants', More, 89 Ill. 43; Stowell v. Moore, 89 Ill. 563; Hanks v. Van Garder, 59 Iowa, 179; Keeney v. Chilis, 4 Greene (Iowa), 416; Mumma v. McKee, 10 Iowa, 107; Horseman v. Todhunter, 12 Iowa, 230; Converse v. Meyer, 14 Neb. 190; Truman v. Scott, 72 Ind. 258; Robinius v. Lister, 30 Ind. 142; Crowell v. Western Reserve Bank. 3 Ohio St. 406; Holman v. Backus, 73 Mo. 49; State v.

Dunn, 60 Mo. 64; Glasgow v. Allen, 11 Mo. 34; Walsh v. Agnew, 12 Mo. 520; Adams v. McConnell, 27 Kan. 238; Kansas, etc., R. Co. v. Pointer, 9 Kan. 620; Edwards v. Heuer, 46 Mich. 95; Walker v. Steele, 9 Colo. 388; Claxton v. Adams, 1 McArthur (D. C.), 496; Barnum v. Barnum, 42 Md. 251; Sheeler v. Speer, 3 Binn. (Pa.) 130 Chambers v. Hunt. 22 N. J. 552; Akers v. Demond, 103 Mass. 318; Adams v. Adams (N. H.), 9 Atl. Rep. 100; Memphis, etc., R. Co. v. Maples. 63 Ala. 601; Hair v. Little, 28 Ala. 236; Irby v. Kit-Hair v. Little, 28 Ala. 236; Irby v. Kitchell, 42 Ala. 438; Thompson v Rawles, 33 Ala. 20; Kyle v. Bostick, 10 Ala. 580; Ratliff v. Thomson, 61 Miss. 71; Central R. Co. v. Rogers, 57 Ga. 336; Central R. Co. v. Gamble (Ga.), 3 S. E. Rep. 287; Marx v. Heidenheimer, 63 Tex. 304; Lee v. Stowe, 57 Tex. 444; Croft v. Rains, 10 Tex. 520; Gilkey v. Peeler, 22 Tex. 663; Woolsey v. Mains, 46 Tex. 67 Will v. Woolsey v. Mahon, 46 Tex. 62, Weil v. Silverstone. 6 Bush (Ky.), 698; Shea v. Wabry, I Lea (Tenn.), 319; Jones v. Lucas, I Rand. (Va.) 268; McCandlish v. Edloe. 3 Gratt. (Va.) 330; Woodley v. Hassell, 94 N. Car. 157; Kerchner v. Reilly, 72 N. Car. 171; Polleys v. Insurance Co., 14 Lar. 171; Polleys v. Insurance Co., 14 Me. 141; Rowe v. Godfrey, 16 Me. 128; Ward v. Whitney, 3 Sandf. (N. Y.) 399; Cope v. Sibley, 12 Barb. (N. Y.) 521; Sturm v. Atlantic Ins. Co., 63 N. Y. 77; Newton v. Porter, 69 N. Y. 133; Wright v. Cabot, 89 N. Y. 570; Doane v. Glenn, 21 Wall. (U. S.) 33; Shutte v. Thompson, 15 Wall. (II. S.) 151. 15 Wall. (U. S.) 151. Compare Whitney v. Haywood, 6 Cush. (Mass.) 82; Atlantic Ins. Co. v. Fitzpatrick, 2 Gray (Mass.), 279; Lord v. Moore, 37 Me. 208; Barton v. Trent. 3 Head (Tenn.), 167; Mifflin v. Bingham, 1 Dall. (Pa.) 272; Smith v. Williams, 38 Miss. 48; Nelson v. Iverson, 24 Ala. 9.

It is too late to raise formal objections in the superior court after it has been read before an auditor without objection. Gould v. Hawkes, I Allen (Mass.), 170.

Where a party is made by amendment. a defendant to a suit, he need not file his exceptions before trial to depositions taken before he was made a party. Kerr

7/ Gibson, 8 Bush (Ky.), 129.

A motion to suppress a deposition, or a portion thereof, for defects or causes which may be remedied on a re-examination of the witness, must be made before the trial is begun; but illegal evidence may be suppressed and excluded at any stage of the cause, when it does not appear that it could be rendered legal on a re-examination of the witness. Memphis, etc., R. Co, v. Maples, 63 Ala.

Where a motion is made on the day preceding the day of trial to suppress a deposition, and on the next day, but prior to the commencement of the trial, the motion is presented to the court for hearing, and the court refuses to entertain the same on the ground that it is made too late, held, error. Adams Ex. Co. v. McConnell. 27 Kan. 238. Compare Alverson v. Bell. 13 Iowa. 308: Pilmer v. Bank. 16 Iowa, 321; Doane v. Glenn, I Colo. 495; Kimball v. Cook, 6 Ill. 423.

Where a motion to suppress a deposition, made before the trial, was overruled, it is not necessary to renew at the trial the objections to its validity or admissibility. Cross v. Barnett, 61 Wis.

650

Where counsel for a party is present at the taking of a deposition and examines the witness, he cannot raise an objection to the deposition at the trial. Barnhardt

v. Smith, 86 N. Car. 473.

The object of notice in writing of the objections to the execution of interrogatories is that the other party may move to continue to have the interrogatories re-executed, if he deems them material; if he deems them immaterial, that he may try; in either case, that he may act advisedly and without surprise. The notice is put on the interrogatories in writing, that there may be no mistake, and that the court may be certified thereof. When, therefore, objection had been made to interrogatories, on the ground that no venue was shown, and they were rejected on that ground, on a second trial of the same case, at a subsequent term, the objection will not be overruled because notice thereof was not given in writing. Cecil v. Gazan, 71 Ga. 631.

Where a deposition is not excepted to before trial, the fact that the deposition was retaken by the same party, excepted to and exceptions sustained, will not exclude the first deposition. Susong v.

Ellis, 11 Heisk. (Tenn.) 80.

At the trial of a cause a deposition offered in evidence was objected to for the first time, on the ground that it was written by the attorney of the party offering it in his office in this State, and not in the State of Ohio, where it purported to have been taken, and proffered proof in support thereof. *Held*, that the objection thereto, under the Code, could not be made after the commencement of the Truman v. Scott, 72 Ind. 258.

It is too late after the trial has commenced to object to depositions on the ground that they were taken without notice. That objection should be made before trial by motion to suppress.

man v. Bachus, 73 Mo. 49.
Objections to interrogatories pounded to a witness whose deposition has been taken, on the ground that they are leading, cannot be raised for the first time during the trial. Such objections must be made in writing, and notice thereof given as prescribed by the statute. Marx v. Heidenheimer, 63 Tex. See post, note LEADING QUES-TIONS.

An objection to the reading of a deposition, on the ground that it has not been shown that the personal attendance of the witness could not be procured, to be availing must be made before the deposition is read. Converse v. Meyer, 14 Neb. 100.

Where there has been an opportunity to correct an imperfect execution of a commission, either by ordering a re-execution or quashing the return, no objections because of such imperfect execution will be heard on the trial. Wright v.

Cabot, 80 N. Y. 570.

Where the statute requires that a motion to quash a deposition for irregularity shall be made in writing, and be-fore the trial is begun, and unless the motion is so made, the objection to the deposition is waived. Woodley v. Hassell, 94 N. Car. 157; Pauska v. Daus, 31 Tex. 67.

The objection must be specific.

aker v. Sigler, 44 Iowa, 419.

When a motion to exclude testimony or to suppress a deposition is made in the court below, but does not appear to have been ruled on, the appellate court will deem the motion to have been waived. Hanks v. Van Garder, 59 Iowa, 179; Cameron v. Cameron, 15 Wis. 1; Fant v. Miller, 17 Gratt. (Va.) 187; Roberts v. Jones, 2 Litt. (Ky.) 88; Corn v. Sims, 3 Met. (Ky.) 352; Garvin v. Luttrell, 10 Humph. (Tenn.) 16.

If the ground of the objection is one not disclosed by the deposition, it may be raised at the trial. Robinius v. Lister, 30 Ind. 142.

Where objections were raised by the attorney of the party at the taking of the deposition, he appearing for that purpose only, and refusing to cross-examine witnesses, the deposition was rejected. Beasley v. Downey, 10 Ired. (N. Car.) 284; Harris v. Wall, 7 How. (U. S.) 693. When a rule taken upon the adverse

When a rule taken upon the adverse party to show cfiuse why certain depositions should not be read, has been made absolute, as shown by the minutes of the court, it is too late to urge objection to the service of the rule after the trial has begun and the evidence has been offered. Rule should have been taken to have the minutes corrected so as to conform to the facts. Baldy v. Brackenridge (La.), 2 So. Rep. 410.

Exceptions to depositions for incompetency and irrelevancy should be heard and decided usually during the progress of the trial. The court can properly refuse to hear them before the trial commences. Tays v. Carr (Kan.), 14 Pac.

Rep. 456.

In an action concerning the ownership of personal property, where it was admitted that A, was the original owner of the property, and that if he was still the owner, that the defendants were entitled to recover; but the plaintiffs claimed that A. transferred an interest in the property to B., who is one of the plaintiffs in the case, and then that A. and B. mortgaged the property to D., and that D. afterwards sold the property, under and by virtue of the chattel mortgage, to the plaintiffs, S. and B.: and the defendants claim that all the transactions had between A. and B. and between those two persons and D, and between D, and S, and B, were had for the purpose of hindering, delaying, and defrauding the creditors of A., and therefore that all such transactions were void as against such creditors; and it was admitted that if such transactions were fraudulent, as claimed by the defendants, then the defendants were entitled to recover in the action, the defendants, upon due notice to the plaintiffs, took the deposition of D., who resided in Kansas City, Missouri, beyond the jurisdiction of the court trying the case. Proper and competent questions were asked D, with regard to the transactions had between D. and the above-named persons, A., B., and S.; and D., instead of answering the questions directly, as he should have done, uniformly responded to each of such questions in substance as follows: "I decline to answer, because it might subject me to a criminal prosecution;

and he could not have been subject to any criminal prosecution, unless it was for attempting to defraud the creditors of A. in said transactions. This deposition was on file in the court several months. before the trial of the case, and no motion was made to strike out or suppress any portion thereof until after the trial had commenced, and until after the plaintiffs had introduced all their evidence. While the defendants were introducing their evidence on the trial, the defendants offered in evidence this deposition, but the plaintiffs objected, and the court struck out and suppressed all of the answers of the witness D., given as above stated, and also all the questions answered as above stated, and would not permit the same to go to the jury. These questions and answers were substantially all of the deposition. Held, that the court below did not err in striking out and suppressing such questions and answers. Simpson v. Barnes, 27 Kan, 567.

Leading Questions. -An objection to a question and answer on the ground that the question is leading in form, is an objection, not to the substance or relevancy of the testimony of the witness, but to the form and manner of obtaining it, and should be made at the time the question was propounded, but if not then made, or within proper time before the cause is called for trial, it will be held to have been waived. Crowell v. Western Reserve Bank, 3 Ohio St. 406. See Keeney v. Chilis, 4 Greene (Iowa). 416; Mumma v. McKee, 10 Iowa, 107; Glasgow v. Allen, 11 Mo. 34; Walsh v. Agnew, 12 Mo. 520; Rowe v. Godfrey, 16 Me. 128; Chambers v. Hunt, 22 N. J. 552; Sheeler v. Speer, 3 Binn. (Pa.) 130; Jones v. Lucas, I Rand. (Va.) 268; McCandlish v. Edloe, 3 Gratt. (Va.) 330; Kyle v. Bostick, 10 Ala. 589; Akers v. Demond, 103 Mass. 318; Marx v. Heidenheimer, 63 Tex. 304.

An objection to the competency of a deposition is to be determined by the law as it stands at the time of trial. Fielden v. Lahens, z Abb. App. Dec. (N.) III; Mitchel v. Haggenmeyer, 51 Cal. 108; Oliver v. Moore, 12 Heisk. (Tenn.) 482. Compare Allen v. Russell,

78 Ky. 105.

Objection to the admissibility of a deposition on the ground of the incompetency of the witness will not avail if the incompetency existed at the time the deposition was given, and the witness was then cross-examined without objection to his competency, or if he was in fact competent when the deposition was taken, and only became incompetent.

(k) Motion to Suppress.—It is a matter of discretion to admit or suppress depositions taken under a commission.1

afterwards. Smith v. Profitt (Va.), IS. E. Rep. 67.

The objection should be made when the commission is issued. Hill v. Can-

field, 63 Pa. St. 77.

A leading interrogatory, in a deposition taken when both parties are present, must be objected to at the time it is put to the witness, if at all. Woodman v. Coolbroth, 7 Greenl. (Me.) 181; Rowe v. Godfrey, 16 Me. 128; Brown v. Foss, 16 Me. 258; Sheeler v. Speer, 3 Binn. (Pa.) 130.

A deposition, taken on such leading interrogatories as, "Did you not see this?" or, "Did you not hear that?" ought not to be read. Craddock v. Crad-

dock, 3 Litt. (Ky.) 77.

A question in a deposition, which may in the course of the trial become relevant, should not before trial be suppressed for alleged irrelevancy. Covey

v. Campbell, 52 Ind. 157.

When the deposition of a witness, who does not reside in the county of the trial, or in an adjoining county, has been taken by one party, the fact that the other party has had the witness present and has examined him during the trial, does not prevent the reading of the deposition, if the witness be not present when it is offered, having been discharged by the party who procured his attendance. Shirts v. Irons, 37 Ind. 98.

Illegal Testimony.—It is not necessary to object to illegal evidence in order to cause its rejection. Polleys v. Insurance Co., 14 Me. 141; Memphis, etc., R. Co. v. Maples, 63 Ala. 601; Southwick v. Anderson, 3 Swan (Tenn.), 573.

The court should point out and exclude the inadmissible portions. Hamilton v. Scull, 25 Mo. 165. But is not bound to do so, and may exclude the whole deposition. Crutcher v. Memphis, etc., R. Co., 38 Ala, 579; Hiscox v. Hendree, 27 Ala. 216.

Hearsay Evidence. - Objections to depositions as containing hearsay evidence must be made before trial. Ector v. Welsh, 29 Ga. 443; Rooker v. Rooker,

83 Ind. 226,

To Witnesses.—Under a commission to take the depositions of "I. S. and other members of the bar in P.," the depositions of such other members of the bar may be taken, if no objection is taken before the commission issues. Richardson v. Forepaugh, 7 Gray (Mass.), 546.

Notice of Return.—The effect of a fail-

ure to give notice of the return of a depo-

sition is, not to render it inadmissible, but simply to leave the adverse party at liberty to make at the trial all objections to its introduction which he could have made upon a motion to suppress.

good v. Sutherland, 36 Minn. 243; Tancre v. Reynolds, 35 Minn. 476.

1. Semmens v. Walters, 55 Wis. 675.
Whether a deposition taken within the State is or is not admissible, is merely a question of law; and no discretionary power to admit or reject it is lodged in the court. Cooper v. Bakeman, 33

Me. 376.

While a claim against an administrator of an estate is pending in the probate court, the holder of the claim cannot take depositions to prove his claim, except with the written consent of Ex. and Adm. Act, § 95. administrator. And where the holder of the claim does in fact take depositions by giving notice to the administrator, under §§ 346, 347, and 352 of the Civil Code, but takes the same without the consent of the administrator, and in his absence, held, that such depositions are invalid; and that after the claim has been disallowed by the probate court and the case appealed to the district court, the district court may suppress such depositions, on motion of the administrator, without committing error. Case v. Huey, 26 Kan. 553.

Where the notice stated that the depositions of "A, B, C, and others," were to be taken, and "A, B, C" did not depose, but the evidence of other witnesses was taken, held, that the deposition should be excluded. McDugald v. Smith,

II Ired. (N. Car.) 576.
Where the plaintiff in an action gave notice of taking depositions, but died before the day named, and no one was substituted as plaintiff in his stead, but the depositions were taken, held, that, in the same action, after plaintiff's administrator had been substituted as plaintiff, the court should have sustained defendant's motion to strike from the files or suppress the deposition, as it was binding neither on the substituted plaintiff nor on the defendant. Kershman v. Swhela, 59 Iowa, 93, also 62 Iowa, 654. Compare Matson v. Melchor, 42 Mich. 477.

A notice to take the testimony of persons who were on a certain day "acting as tellers or cashiers, etc.," without stating their names, renders the deposition inadmissible. Pilmer v. Branch of State Bank, 16 Iowa, 321.

A testator bequeaths the one third of

his personal estate to his widow and the residue to three of his children, and what is claimed by the legatees to be a portion of the general estate consists of a specified sum of money and certain bonds, which the executor claims were transferred to him by the testator in his lifetime, and are therefore no part of the After the death of the widow a suit is brought by her administrator against the executor and legatees of said testator to compel the executor to settle his accounts, to charge him with said money and the proceeds of said bonds, and for distribution of said estate. this suit the deposition of the widow. taken de bene esse, is read, and portions of it relate to personal transactions and communications had in respect to said money and bonds between the executor and the testator. The deposition of the executor is also taken on his own behalf. Held, the deposition of the widow was itself incompetent evidence, and could not therefore lay the foundation for making the executor a competent witness to testify in his own behalf as to personal transactions or communications had with the deceased, nor could it make his wife a competent witness as to such transactions and communications. testimony of both the executor and his wife as to such matters was therefore incompetent. Kimmel v. Shroyer, 28 W. Va. 505.

It is a sufficient reason for suppressing portions of a deposition, that such portions only tend to prove matters set up in a special answer and cross-complaint, to which a demurrer has properly been Paine v. Lake Erie, etc., R. sustained.

Co., 31 Ind. 283.

Motion to Suppress: Insufficient Grounds for.-A motion to suppress a deposition taken on commission, on the grounds; First, that five clear days' notice was not given of the suing out of the commission; second, that the notice was not filed in the clerk's office on the day fixed for the commission to issue; and, third, that the commission was not issued until seven days after the day fixed in the notice. Held, properly over-Bonney v. Cocke, 61 Iowa. 303. ruled.

The fact that the officer who took the deposition of a witness occupied the same room with an attorney for one of the parties, or that he was himself an attorney for one of the parties in other cases, affords no ground for suppressing the deposition. Burton v. Galveston, etc.. R. Co., 61 Tex. 526.

Where notice is duly given of the filing of a deposition, and no motion is

made to suppress it, nor any objection to it filed, or served on the opposite attorneys, it is too late to question its regularity at the hearing. Palms v. Richardson, 51 Mich. 84.

The death of a party to a suit before it is brought up for hearing does not affect the validity of a deposition taken during his lifetime, nor exclude evidence of his own admissions. Matson v. Melchor, 42 Mich. 477. Compare Kershman v. Swhela, 59 Iowa, 93.

An exception to depositions which was general, and some part of each being competent, was properly overruled. Louisville & Nashville R. Co. v. Graves'

Assignee, 78 Ky. 74.

When a motion is made by plaintiff in the court below to suppress one part of a deposition on one ground, he cannot under cover of that motion be heard to argue in the appellate court that another part of the deposition was inadmissible, and should have been suppressed on another ground. Hanks v. Van Garder. 59 Iowa, 179; Monteeth v. Caldwell, 7

Humph. (Tenn.) 13,

A deposition was taken under a stipulation that the notary who should take it should certify that he was not of counsel nor in any manner interested for either party. It was only certified that he did not act as counsel for either party; but notice being given of its reception under the court rule, no objection was filed, nor any motion made to strike the deposition from the files. Held, that there was no error in refusing to exclude the deposition on the ground that the certificate did not go far enough. Ed-

wards v. Hever, 46 Mich. 95.
In the case of a deposition taken on oral interrogatories, upon notice, where the party in whose behalf cross-interrogatories are to be put is not repre-sented by attorney, but depends upon written interrogatories sent to the examining officer, the mere fact that some of the cross-interrogatories are somewhat evasively or not fully answered, by reason of the neglect of such officer to press vigorously for full and exact answers, is not sufficient ground for suppressing the deposition; but this rule will not prevent the striking out of an answer which is not responsive or is purely evasive. Trowbridge v. Sickler,

54 Wis. 306.

The plaintiff filed interrogatories to a witness, whose deposition was to be taken on a commission. The defendant objected to each and every interrogatory for form and substance, and waived the filing of cross-interrogatories. The plain-

(1) Objections to an Interrogatory, filed before the issuing of a commission, should specify the ground of the objection, in order that the adverse party may have an opportunity to vary the interrogatory.1

Where one, on the taking of a deposition, makes a general objection to a part of an interrogatory, he cannot on trial enlarge

his objection to include the whole.2

(m) Effect of Objection on Cross-interrogatories.—An objection to an interrogatory which is sustained does not of necessity extend to the cross-interrogatory.3

tiff then filed additional interrogatories, to which the defendant made the same objections, and also waived the filing of cross-interrogatories. The additional interrogatories were not answered. Held. that this fact did not entitle the defendant to have the deposition excluded. Dole

v. Wooldredge, 142 Mass. 161.

At the trial of an action for personal injuries, it appeared that when the interrogatories were filed in court for the taking of the deposition of a witness several interrogatories had been objected to by the defendant, by writing under each of them the words, "Objected to by the defendant." In reading the deposition to the jury the plaintiff's counsel omit-The defendted to read these words. ant's counsel was present, and made no objection to the answers being read; but at the close of the reading he called the attention of the judge to the fact that these words had been omitted, and contended that he was entitled, as of right, to have the deposition excluded. judge ruled that he would hear the counsel upon any objections he saw fit to insist upon, and would exclude any part which appeared to be incompetent; but the counsel refused to make any objec-Held, that the defendant had no ground of exception to the admission in evidence of the deposition. Valentine v. Middlesex R. Co., 137 Mass. 28. It is not a valid objection to a commis-

sion to examine witnesses, that it was applied for by attorney and not in person; nor that, after notice given of intention to apply for it, a proposition was made to accept the affidavit of the witness, which proposition was declined before the time for issuing the commission expired; nor that the commission was not issued by the referee to whom the whole case was referred; nor that it was issued by the deputy clerk, and not by the clerk. Brooks v. Brooks, 16 S.

Car. 621.

The fact that a deposition contains an oral statement of a fact which can properly be proved only by record, is not a good cause for the suppression of the deposition, containing proper proof of other material facts. Ramsey

v, Flannagan, 33 Ind. 305.

The plaintiffs sued jointly, and they jointly excepted to the depositions of A. and S., who had given their depositions on behalf of their wives, respectively. Held, if this evidence was competent against any one of the plaintiffs, it was competent as to all of them. Allen v. Russell, 78 Ky. 105.

In States holding that a strict compliance with the statutory requirements is necessary, a deposition must be rejected where there has not been such a compliance. Simpson v. Carleton, I Allen (Mass.), 109; Simpson v. Dix, 131 Mass. Mass., 131 Mass. 185; Whitney v. Sears, 16 Vt. 587; Johnson v. Perry, 54 Vt. 459; Mathews v. Dare, 20 Md. 248; Williams v. Banks, 5 Md. 198; Collins v. Elliott, I. H. & J. (Md.) 1; Dye v. Bailey, 2 Cal. 383; Bascom v. Bascom, Wright (Ohio), 633.

1. Allen v. Babcock, 15 Pick. (Mass.) 56; Hanks v. Van Garder, 59 Iowa, 179; Whitaker v. Sigler, 44 Iowa, 419; Stebbins v. Duncan, 108 U. S. 32; Taylor v.

Strickland, 37 Ala. 642.

An objection to a deposition on a specified ground is a waiver of all other grounds of objection. Agee v. Williams, 30 Ala. 636; Commercial Bank v. Union Bank, 11 N. Y. 203.

2. Baldwin v. Doubleday, 59 Vt. 7. Where an answer is in part proper

and in part inadmissible, a party objecting must limit his objection to the part which is inadmissible. Day v. Raguet,

14 Minn. 273.

3. Where an objection was taken to a direct interrogatory, and the answer to it, at the time of taking the deposition, and the objection being sustained by the court at the trial, the answer was ruled out; it was held that the answers to the crossinterrogatories, which did not on their face purport to be asked in consequence of the direct interrogatory, and were not

(n) Waiver.—If the party objecting appears and takes part in the examination of the witness, his objection will be deemed to be waived. 1 except as to the legal character of the evidence. 2 If a deposition is permitted to remain on file until the trial, all objections as to informality will be presumed to have been waived.

The use of a deposition upon a former trial, without objection. is considered as a waiver of all merely formal objections, whether

to the deposition itself, or to the caption.4

made dependent upon it, were admissible in evidence. Alsop v. Commercial Ins. Co., I Sumn. (U. S.) 451.

1. Weil v. Silverstone, 6 Bush (Ky.), 698; Ragan v. Cargill, 24 Miss. 540; Milton v. Rowland, 11 Ala. 732; Douge v. Pearce, 13 Ala. 127; Aicardi v. Strang, 38 Ala. 326; Boykin v. Collins, 20 Ala. 230; Shutte v. Thompson, 15 Wall. (U. S.) 151; Rich v. Lambert, 12 How. (U. S.) 354; Phillipi v. Bowen, 2 Pa. St. 20; State v. Bassett, 33 N. J. 26; Martin v. Brown, 8 Blackf. (Ind.) 443; Brown v. Raft, 1 Hardy (Ohio), 1; Barnhardt v. Smith, 86 N. Car. 473; Connersville v. Woodleigh, 7 Blackf. (Ind.) 102; Detwiler v. Green, I W. Va. 100; Tayon v. Ladew, 32 Mo. 205; Goodfellow v. Landis, 36 Mo. 168; Newton v. Brown, I Utah, 287; Willey v. Portsmouth, 35 N. H. 303; Crooker v. Appleton, 25 Me. 131; Jones v. Low, 9 Cal. 68; Nevan v. Roup, 8 Iowa, 207; Mumma v. McKee, 10 Iowa, 107; Cameron v. Cameron, 15 Wis. 1; Greene Co. v. Bledsoe, 12 Ill. 267; Kelton v. Montant, 2 R. I. 151; Quadras v. Webster, 11 La. Ann. 203; Caldwell v. McVickar, 9 Ark. 418.

The presence of the opposing attorney, who declines to take any part in the proceedings, will not amount to a waiver of any objection. Harris v. Wall, 7 How. (U. S.) 693; Beasley v. Downey, 10 Ired.

(N. Car.) 284.

An objection to the form of a certificate is not waived by the presence of the adverse party at the time the deposition was taken without their making the objection. Bacon v. Rogers, 8 Allen (Mass.), 146.

A dedimus will not be waived by the appearance of the opposite party. Seymour v. Farrell, 51 Mo. 95.

Before the trial, the plaintiff served notice, as required by statute, that the depositions of certain persons, one of whom was designated as "H. F. Ditto," would be taken in the State of Missouri. At the time and place indicated in the notice, the deposition of one Abraham F. Ditto was taken on the part of the plaintiff, counsel on the part of the defendant being present and cross-examin-

ing the witness. Held, that the deposition was admissible. Waldron v. St. Paul. 33 Minn. 87.

Where a justice of the peace before whom a deposition is taken, at the request of a party puts questions to the witness, such party cannot afterwards complain of a want of notice. Barne School Directors, 6 W. & S. (Pa.) 46. Barnet v.

2. Howard v. Folger, 15 Me. 447. 3. Kerchner v. Reilly, 72 N. Car. 171. Where a deposition, signed by the witness, with the usual certificate preceding the answers, stating that he "had answered after being duly sworn," but having no certificate at the foot of the answers that they were "answered, subscribed, and sworn to beliore" the commissioners, has lain in the office for more than three years, and during the trial the defendant objected to the executing of the commission because the return lacked those words, hald, that the court committed error in ruling out the deposition, that the defendant should have been required to either have waived the objection or submit to a general continuance of the case. Dayson v. Callaway, 18 Ga. 573.

4. Wendell v. Abbott, 45 N. H. 349;

Thomas v. Kinsey, 8 Ga. 421.

Of three successive suits on a bond, the first two were ended by nonsuit; but in 1829, pending the second suit, which was referred to arbitrators, the deposition of a witness was taken by the defendant, to be read de bene esse, and was used before the arbitrators without objec-On the trial of the third action in 1846, the deposition was offered in evidence, but the plaintiff objected to its being read, because no affidavit was made before the clerk of the court where the second action was pending, for a commission to take the deposition. Held, that after the lapse of so long a time the court would, if necessary, presume, under the circumstances of the case, that an affidavit had been taken and lost; and that, independent of such presumption, no objection having been made when the deposition was first used, and the witness being dead, the deposition was admissi-

If a deposition be improperly suppressed, the party waives the error by introducing another deposition of the same witness testi-

fying to the same facts.1

Where both parties appear and conduct the examination, and the depositions are subsequently placed on file, the party at whose instance they were taken cannot object to their being read by the opposite party, upon the ground of any irregularity or informality.2

8. Certificate.—The certificate should follow the statutory requirements, but it has been held that the certificate of the officer taking depositions, and attached thereto, will be sufficient if, when taken in connection with the caption which precedes the answers taken by the officer, it appears that the statute has been substantially complied with.3

The certificate ought to show on its face the county and State, or country, where the same is taken, as well as the State or coun-

try from which the officer derived his official character.4

Where the official character of the officer certifying to depositions and the venue of his office appear with reasonable certainty

ble. Perkins v. Hawkins, o Gratt. (Va.)

1. Sanders v. Johnson, 6 Blackf. (Ind.) 59. 2. Yeaton v. Fry, 5 Cranch (U.S.), 335; Andrews v. Graves, I Dill. (U. S.) 108.

The defendant had taken depositions solely to discredit one on the other side. The plaintiff, before the trial, told him he should object to them, because they had been off the files, contrary to a ru e of the court. The defendant answered that the same objection applied to the plaintiff's deposition, which was the fact. The plaintiff having afterwards read his de-position to the jury, was held to have thereby waived his objection against the others. Potter v. Leeds. 1 Pick. (Mass.)

3. Houston, etc., R. Co. u, Larkin, 64 Tex. 454; Carroll v. Welch. 26 Tex. 147; Thomas v. Wheeler, 47 Mo. 363, Cam-pare Bascom v. Bascom, Wright (Ohio), 632; Burnham v. Portes, 21 N. H. 510; Amory v. Fellows, 5 Mass. 210; Bolle v. Van Rooten, 5 Johne. (Nr. V.) 539; Powers v. Shepard, 25 N. H. 69; Dye v. Bailey, 2 Cal. 383; Williams v. Chad-bourne, 6 Cal. 559.

Where it does not appear that the party against whom the depositions were taken was present and cross examined the witnesses, all the requisites of the law must be complied with. Bascom v. Bascom, Wright (Ohio), 632.

A statement by the commissioner in the certificate that a party to the action had not appeared "in person or by attorn y," is sufficient. Hay v. McClan-

rahan, 58 Ind. 337.

The certificate of the officer before depositions have been taken should state that he is disinterested, and is not the attorney or counsel of either party to the suit. Where the certificate fails to state these facts, leave will be given to withdraw the depositions order that the certificate may be amended. Gartside Coal Co. v. Maxwell, 20 Fed.

It is sufficient that the officer executing a commission certify that the witness signed in his presence, to make full proof of the signature. The statement of two other witnesses to the same effect, appended to the return of the commission, should be regarded as surplusage. Pressler v.

Joffrion (La.), 2 Sq. Rep. 795.

Where a notice states that the deposition will be taken at the storehouse of M., in Bismarck, Daketa Tentitory, on the thirteenth day of April, between the hours of 8 A.M. and 6 B.M., and the certificals attached to the deposition states that it was taken at the stone of M. in Bismarck, Dakota Territory, on the thirteenth day of April, as specified in the notice attached, held, that "as specified in the notice" relates to the place, the day, and the hours of the day, as stated in the notice. Whittaker v. Voorhees, 15 Pac. Rep. (Kan.) 874.

A deposition is not made worthless by being certified by a deputy clerk, where the statute requires no signature but only the official seal and this can be affixed by deputy. Simons v. Morris, 53 Mich. 155.

4. Payne v. Briggs, 8 Neb. 75.

from his certificate and the caption read together, it is sufficient in that regard.1

A separate certificate is not necessary for each deposition, but several depositions may be included in one certificate if it is sufficiently formal.2

Depositions are not properly certified, unless the names of the witnesses examined either appear in the certificate, or appear in

the caption, and are referred to in the certificate.3

9. Caption.—A caption is not indispensable to the authenticity of a deposition, when the annexed certificate of the commissioner shows that it was taken in obedience to the commission, that the witness was duly sworn, his identity being affirmed, and that his answers were reduced to writing, as nearly as possible in his own words, and signed by him in the presence of the commissioner: and if the commissioner also certifies that he is "not of kin or counsel of and for the parties to the suit, or in any manner interested therein," this, though it may not be in the language of the statute, is a substantial compliance with its requisitions.4

1. Borders v. Barber, 81 Mo. 636; Sargent v. Collins, 3 Nev. 260; Reed v. Patterson, 11 Lea (Tenn.), 430; Hoover rauerson, 11 Lea (1enn.), 430; Hoover v. Rawlings, I Sneed (Tenn.), 287; Dean v. Tygert, I A. K. Marsh. (Ky.) 172; Adams v. Graves, 18 Pick. (Mass.) 355; State v. Kimball, 50 Me. 409; Hobbs v. Shumates, 11 Gratt. (Va.) 516; Monroe v. Woodruff, 17 Md. 159; Martin v. Coppock 4 Neb 172 pock, 4 Neb. 173.

By Commissioner for the State. - Where a deposition is taken by a commissioner of the State issuing the deposition, no certificate of his official character is necessary. Kendall v. Limberg, 69 Ill. 355; Brown v. Luehrs, 79 Ill. 575; Johnson v. Cocks, 12 Ark. 672; Den v. Lloyd, 31

By Person Named in Deposition. - When a commission to take testimony is addressed to a resident of another State by name, he becomes an officer of the court ad hoc, and no proof is required of his being a magistrate, or of his authority to administer oaths, or of his signature. Kendall v. Limberg, 69 Ill. 355; Breyfogle v. Beckley, 16 S. & R. (Pa.) 264; Adams v. Graves, 18 Pick. (Mass.) 355; Clement v. Duvgin v. Ma. Clement v. Durgin, 5 Me. 9; Bradford v. Cooper, 1 La. Ann. 325; Morrison v. White, 16 La. Ann. 100.

Judge or Magistrate. -And where a commission issues to any judge or magistrate of another State, the official certificate of the judge or magistrate is received as prima facie evidence of his authority. Clement v. Durgin, 5 Me. 9; Hoover v. Rawlings, I Sneed (Tenn.),

Notary Public-Justice of the Peace.-

Usually, if a commission to take depositions in another State is directed to a justice of the peace, or to a notary public, the statute requires that his official character should be certified under the seal of a court of record. Wheeler v. Shields, 2 Scam. (Ill.) 348; Jenkins v. Tobin, 31 Ark. 306; Morrison v. White, 16 La. Ann. 100. Compare Adams v. To La. Ann. 100. Compare Adams v. Graves, 18 Pick. (Mass.) 355; Allen v. Perkins, 17 Pick. (Mass.) 369; State v. Kimball, 50 Me. 409; Hobbs v. Shumates, 11 Gratt. (Va.) 516; Sargent v. Collins, 3 Nev. 260; Hayes v. Frey, 54 Wis. 505. Where depositions are taken de bene

esse, under § 860, Rev. St. U. S., before a notary, his certificate should state, among other things, (1) that he is not a party in interest; (2) that the depositions were reduced to writing in the deponent's presence; and (3) in what court it is to be used. Donahue v. Roberts, 19 Fed. Rep. 863.

2. Gulf City Ins. Co. v. Stephens, 51 Ala. 121. See Savage v. Birckhead, 20 Pick. (Mass.) 167.

3. Amick v. Holman, 71 Mo. 445.
4. Boykin v. Smith, 65 Ala. 294;
Thrasher v. Ingram, 32 Ala. 645; Cain v. Loeb, 26 La. Ann. 616; Imboden v. Richardson, 15 La. Ann. 534; Freeland v. Prince, 41 Me. 105; Scott v. Perkins, 28 Me. 22; Rand v. Dodge, 17 N. H. 343; Halleran v. Field, 23 Wend. (N. Y.)

Where depositions are taken de bene esse, under the act of Congress of May 9th, 1872, in a case in which there are several parties plaintiff and defendant, it is not necessary to state in the caption

10. Return.—Where it is duly executed and authenticated it should be enveloped and properly sealed, and returned with the commission to the court from which it issued. If statutory or rule of court directions exist, they must be followed.1

the names of all the parties to the suit. It is sufficient to give the style in the case thus: A. B. et al., plaintiffs, v. C. D. et al., defendants. Egbert v. Citizens' Ins. Co., 7 Fed. Rep. 47.

A deposition is inadmissible, the caption of which does not set forth that the deponent was sworn to testify the truth. etc., relating to the cause for which the deposition was taken. Simpson v. Carle-

ton, I Allen (Mass.), 109.

Where a statute required that the caption should show the description of the tribunal by which the cause was to be tried, the time and place of session, and the names of the parties, held, that a deposition was inadmissible where the caption merely stated that it was taken tobe used before referees, and did not state any other particulars to connect it with the cause in which it was offered. Plimpton v. Somerset, 42 Vt. 35. See Slaughter v. Rivenbank, 35 Tex. 68.

Where a deposition is required to be taken between particular hours of a particular day, and it appears to have been taken on such day, the prima facie presumption is that it was taken between such hours, although the caption does not show that fact. Dearman v. Dear-

man, 5 Ala. 202.

A caption sufficiently shows the reason for taking depositions under U. S. R. S., if it states where the depositions are taken, without giving the distance from the place of taking to the place of trial, if the distance is in fact, and is well known by all parties to be, more than 100 miles. Egbert v. Citizens' Ins. Co., 7 Fed Rep. 47.

1. Where the statute has been substantially complied with in the return, the deposition should not be excluded except upon the clearest, grounds of amounting to something more than a mere irregularity. Goodyear v. Vosburg, 41 How. Pr. (N. Y.) 421; McCleary v. Edwards, 27 Barb. (N. Y.) 239; Hall v. Barton, 25 Barb. (N. Y.) 274.

Where an officer by whom depositions are taken seals them up, marks the style of the case on the envelope, directs them to the clerk of the court in which the case is pending, and writes the usual indorsement across the seal, and the depositions are received by the clerk to whom they are addressed, through the mail, held, that the certificate to the depositions should be deemed sufficient, though it fails to state that the officer delivered the depositions to the court in which the cause was pending, or that he sealed them up and deposited them in the post-office. Egbert v. Citizens' Ins. Co., 7

Fed. Rep. 47.

A commission had been returned at the instance of the complainant, and after he had full opportunity to take his testimony. More than eight months thereafter, and after the case was ready for hearing, he applied to have the commission remanded to enable him to take further testimony. Held, that there was no error in refusing this application: there is no rule of equity practice that will justify the remanding of the commission under such circumstances. Davis v. Hall, 52 Md. 673.

Two stipulations to take depositions were entered into, in which the parties waived "any and all notices and prerequisite forms required by law or rule of court for taking of depositions." The depositions under both stipulations were taken by the same officer, were attached together, but there was only one certificate by the officer, which was annexed to all the depositions. It appearing therefrom that the depositions were taken in pursuance of the stipulations, upon the interrogatories and cross-interrogatories to which they were attached, and that in other respects the terms of the stipulation were substantially complied with. held, one certificate was sufficient.

v. Raguet, 14 Minn. 273.

In some States it is required that the return of the commission shall be indorsed on the commission itself, and not attached to it on a separate paper, but where there is no statutory provision requiring it, the return may be made on a separate paper attached. Proffatt

on Notaries, § 75.

Upon trial the deposition of one W. was rejected as evidence on the ground that the certificate of return of the commissioner was not upon the commission itself, but upon a sheet attached with other sheets containing the deposition to the commission. Held error; the provision of the statute which requires commissioners to attach all the depositions and exhibits to the commission upon which they shall indorse their return, refers to the entire papers thus required to

In a return to a commission issued to examine witnesses abroad the commissioners ought to certify that they examined the witness on oath upon the interrogatories annexed to the commission and that they caused such examination to be reduced to writing.

Signature of Commissioner.—The absence of the signature of

the commissioner is a fatal defect.2

- 11. Filing.—Where the statute so requires, the commission must be properly filed, before the depositions taken under it can be read in evidence.3
- 12. Lost.—After a commission to take interrogatories has been issued, executed, and returned, the interrogatories are office papers. and, if lost, a copy may be established instanter.4

be attached, and not to the particular paper designated as the commission. Pendell v. Coon, 20 N. Y. 134. See Cook v. Bell, 18 Mich. 387; Savage v. Birckhead, 20 Pick. (Mass.) 167. Compare Beatty v. Ambs, 11 Minn. 331.

Where an envelope containing a deposition is indorsed with the names of the plaintiff and defendant, and that of the officer before whom it was taken, and is addressed to the clerk of the district court where the case is pending, held, a sufficient description of the title and cause. Whittaker v. Voorhees (Kan.), 15

Pac. Rep. 874.

It is not to be presumed that commissioners examine the wrong witness, though failing to return expressly that the one examined is the one named in the commission. The return need not have a preamble or caption to the answers. Though the place of execution must appear, it is sufficient to give the county and State; and, if these can be ascertained from the return with due certainty by reasonable construction, it will Flournoy v. First Nat. Bank (Ga.), 2 S. E. Rep. 547.

Notice of Return. - The effect of a failure to give notice of the return of a deposition is not to render it inadmissible, but simply to leave the adverse party at liberty to make at the trial all objections to its introduction which he could have made upon a motion to suppress, good v. Sutherland (Minn.), 31 N. W. Rep. 211; Tancre v. Pullman (Minn.), 29 N. W. Rep. 171.

Delivery by Mail. - Where a deposition is received by the postmaster by due course of mail, and the time of the reception is evidenced by the official stamp, whereby it appears that the deposition has not been tampered with or violated, and it is delivered to the clerk of court by a mail-carrier, as shown by the clerk's certificate, there is a sufficient compliance

with statute September 26, 1883, which requires the postmaster at the office to which a deposition is transmitted by post to indorse upon the package the fact of its reception by due course of mail, and at once deliver the package to the clerk of the court. Killian v. Augusta, etc., R. Co. (Ga.), 3 S. E. Rep. 621.

1. Bailis v. Cochran, 2 Johns. (N. Y.)

See Scott v. Horn, 9 Pa. St. 407.
 Price v. Emerson, 16 La. Ann. 95.

A deposition may be returned to the commissioner for correction by signing his name as commissioner, instead of with his official title. Semmens v. Walters, 55 Wis. 675; Creamer v. Jackson, 4 Abb. Pr. (N. Y.) 413.

3. Jackson v. Hobby, 20 Johns. (N. Y.)

Where the defendant's only evidence was contained in certain depositions, which, however, were filed six months subsequent to the time fixed by a rule of the court in the case, and the depositions made out a prima facie defence, while some penalty should have been inflicted for disobedience to the rule, held, that in the absence of a showing of bad faith the court was not justified in suppressing the depositions on motion, and then denying defendant a continuance, and proceeding to the trial of the cause. Sweet v. Brown, 61 Lowa, 669.

Where the filing of a deposition was not entered in the appearance docket, but the deposition was read on the trial without objection on that account, and is certified on appeal, it cannot be discarded as being no part of the record. Byington v. Moore, 62 Iowa, 471. 4. Central R. Co. v. Wolf, 74 Ga. 664;

Low v. Peters, 36 Vt. 177.

Where a deposition is lost, a party is not bound to supply its place by another, but may give parol evidence of its contents. Burton v. Driggs, 20 Wall. (U. S.) 125; Aulger v. Smith, 34 Ill. 534.

- 13. Disbursements—Costs.—In the absence of evidence to show the existence at the place of executing a commission of a customary rate of charges for commissioner's services, or for like services, proof that the sum actually paid the commissioner is a reasonable sum for like work at the place of payment is sufficient to warrant the allowance of the item as a disbursement properly made to secure the execution of the commission.1
- 14. In Perpetuam.—If a deposition is taken in perpetuam, the forms of the law under which it is taken must be strictly pursued. or it cannot be read in evidence.2 But independently of statutory provisions, chancery has power to sustain bills filed for the purpose of preserving the evidence of witnesses in perpetuam rei memoriam touching any matter which cannot be immediately investigated in a court of law, or where the evidence of a material witness is likely to be lost by his death, or departure from the jurisdiction, or by any other cause, before the facts can be judicially investigated. The defendant in such cases is compelled to appear and answer, and the cause is brought to issue, and a commission for the examination of the witnesses is made out, executed, and returned in the same manner as in other cases; but no relief being prayed, the suit is never brought to a hearing; nor will the court ordinarily permit the publication of the depositions, except in support of a suit or action; nor then, unless the witnesses are dead, or otherwise incapable of attending to be examined.3 (See also BILL TO PER-

PETUATE TESTIMONY, Vol. II., p. 277.)

15. Griminal Cases.—Depositions can only be admitted in criminal cases under local statute, and in submission to the constitutional guarantees as to the personal examination of witnesses.4 (See also CRIMINAL PROCEDURE.)

Where copies of depositions are offered in evidence, it is not necessary to retake the depositions, nor to prove the death of the witnesses or their incapacity to testify, where the copy of the deposition was by consent substituted for the original, which was proved to have been destroyed by fire; and, being admitted to be a true copy, it was properly receivable in evidence. Stebbins v. Duncan, 108

U. S. 32.
1. The Frisia, 27 Fed. Rep. 480. Costs are not taxable for depositions taken for use upon an accounting before a master and in contempt proceedings as for depositions for the final hearing, notwithstanding they are referred to upon a motion for rehearing which results in a dismissal of the bill as upon a final hearing. Spill v. Celluloid Mfg. Co., 28 Fed. Rep. 870.

If a party takes the depositions of witnesses living at such a distance that he cannot compel their attendance, he is to be allowed therefor in the taxation of costs, notwithstanding the attendance of the witnesses at the trial is procured by the other side, and the use of the deposiv. Gould, 3 Story (U. S.), 516.
3. Greenl. Ev. (14th Ed.) § 325.

4. Whart. Cr. Ev. (9th Ed.) § 306.

Under statutes or by consent of the prosecuting officer, evidence may be taken for the defendant by ordinary deposition. Bish. Cr. Proc. (3d Ed.) § 1206. See People v. Restell, 3 Hill (N. Y.), 289.

With the consent of the prisoner, the State may examine witnesses by commission. State v. Bowen, 4 M'Cord (S. Car.), 254; People v. Restell, 3 Hill (N.

Y.), 289.

At common law depositions in criminal cases are unknown. It is only by virtue of statute that they can be taken and received in evidence; and hence, when a defendant seeks to avail himself of this

DEPOT.—A place where freight may be deposited to await transportation, or after transportation to await delivery to a consignee: usually, a building connected with a railroad; also, a building for the accommodation of passengers at a point where they are set down and taken up by a railroad. A place where military stores or supplies are kept, or troops assembled.2

mode of making proof, he must comply at least substantially with the requirements of the statute. Failing to do so, he fails to use the diligence in obtaining his testimony which the law exacts from Adams v. State, 19 Tex. App. 250;

Johnson v. State, 27 Tex. 758.

According to the provisions of the California Penal Code, the right to take the deposition of a witness on behalf of the people, in a criminal case, arises out of the fact that the witness is unable to procure sureties for his appearance on the trial; and that fact must be satisfactorily established by the examination on oath of the witness himself, or of some other per-When the fact has been judicially ascertained, the right to take the deposition of the witness may be put in motion. But the examination of the witness must be had in the presence of the defendant, or after due notice to him, and "must be conducted in the same manner as the examination of a witness before a committing magistrate is required by the Penal Code to be conducted." Taking the testimony of a witness on behalf of the people in a criminal case by deposition is an exception to the rule, which entitles the defendant in a criminal action to be confronted with the witnesses against him in the presence of the court; and every substantial requirement of the law which authorizes it must be observed, Any real departure from the course prescribed for the taking of the deposition renders the deposition itself objectionable. People v. Mitchell, 64 Cal. 85; People v. Morine, 54 Cal. 575; Williams v. Chadbourne, 6 Cal. 559; People v. Chung Ah Chue, 57 Cal. 567.

1. A depot is a place where passengers are received and left, and freight deposited; it is a place of deposit. ingly, a platform for the accommodation of passengers, to which was connected an old baggage car, which served as a shelter, at which mail trains stopped and other trains when flagged, at which there was no agent and no tickets were sold or freight way-billed, but to which tickets were sold at other stations, but freight not billed, is a "depot or station" within the meaning of an act providing that no railroad shall abandon any depot or station after it has been established a year, except by approval of the railroad commissioners. State v. N. H. & N. Co... 37 Conn. 153.

A place where a railroad is "accustomed to receive, deposit, and keep ready for transportation or delivery the merchan-dise carried by it" is a depot. Maghee v. C. & O. R. Co., 45 N. Y. 520. Proof that ordinary trains must run to

a certain point beyond a switch near a depot in order to switch off to a side-track on the depot grounds, is not sufficient to justify a court in setting aside a verdict on the ground that the track from the switch to said point was within the depotgrounds within the meaning of an exception to a statute requiring railroad companies to fence their tracks. "A depot." said the court, "is a place where passengers get on and off the cars, and where goods are loaded and unloaded; and all grounds necessary and convenient and actually used for these purposes are included in depot grounds." This is a question for the jury. Fowler v. Farmers' Loan & Tr. Co., 21 Wis. 77. And see Blair v. M. & P. du C. R. Co., 20 Wis.

The owner of a piece of ground agreed to convey it to a railroad company on condition that it should "be occupied for the west part of the depot and a part of the buildings usually erected thereon, The company erected on the ground a warehouse for the accommodation of the public in doing business with the road, and constructed there facilities for loading and unloading live-stock, coal, and lumber, and erected their passenger station and freight-depot building forty rods to the east. This was held to be a compliance with the condition. "The word 'depot' is not used here to mean a building; for a street intervened to prevent a union of the 'west part' of the usual building with an eastern part thereof. Besides, part of the usual buildings were to be erected thereon. Clearly, the words 'the depot' mean the entire grounds used by the company for its business purposes with the public at that station." P. F. W. & C. R. Co v. Rose, 24 Ohio St. 219.
2. Caldwell's Case, 19 Wall. (U. S.)

264. In this case it was held that, in a

DEPRECIATION.—Reduction of worth.¹

DEPRIVE .- To take from 2

DEPUTY.—(See also AGENCY; CORONER; MARSHAL; NOTARY; OFFICERS OF MUNICIPALITIES: SHERIFFS.)

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- 11. Other Deputies, 639.
- 1. **Definition.**—A deputy is one who, by appointment, exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable. He must be one whose acts are of equal force with those of the officer himself, must act in pursuance of law, perform official functions, and is required to take the oath of office before acting.4

contract to transport supplies for the government during war, the words posts, depots, or stations" refer to military posts, etc., and do not include railroad depots and stations.

1. Webster.

A testator gave to his widow his personal estate, including his farming implements and stock, for life, declaring that she should not be liable to account for any diminution or depreciation in the farming implements or stock, and after her decease he gave the residue to his children. Held, that the widow took an absolute interest in the farming implements and stock. Breton v. Mockett, L.

R. 9 Ch. Div. 95.
2. The word "deprive," in constitutional provisions that no one shall "be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land," is construed to mean the same as "take" in the provision that private property shall not be taken for public use without compensation. Sharpless v. Philadelphia, 21 Pa. St. 147; Grant v. Courter, 24 Barb. (N. Y.) 232.

Under a statute which provides that "if a woman is deprived of the provision made for her, by will or otherwise, in lieu of dower, she may be endowed anew, in like manner as if such provision had not been made," a woman is so deprived if all the property of the testator is taken or required for the payment of his debts. Thompson v. McGaw, 1 Metc. (Mass.) 66.

One who succeeds to certain property for life, having up to the time of his succession been entitled to an annuity out of the property, is deprived of that annuity within the meaning of a successiontax act which provides that an allowance shall be made in assessing the tax where the "successor, upon taking a succession, shall be bound to relinquish, or be deprived of any other property." Braybrooke v. Atty.-Genl., 9 H. L. Cas.

- 3. Martin v. Mackonochie, L. R. 3 Q. B. Div. 741.
- 4. Willis v. Melvin, 8 Jones L. (N. Car.) 62.

The office of deputy-sheriff and justice of the peace are incompatible, and the

2. What Officers Can Appoint Deputies.—In general, ministerial officers can appoint deputies, unless the office is to be exercised by the ministerial officer in person; 1 and parties acting at the instance of any one assuming the duties of a ministerial office are bound to know whether he is in fact such officer, and whether he in fact bears that authority.2

Deputies, however, are almost exclusively confined to the

offices of sheriff, marshal, constable, clerk, and coroner.

3. What Acts May be Performed by a Deputy.-In general, all ministerial duties which the principal himself has a right to perform may be discharged by a deputy; judicial duties cannot.3

4. Deputy Must Act in Principal's Name. -- Whatever official act is done by a deputy should be done in the name of his principal, and not in the name of the deputy. The authority given by law to a ministerial officer is given to the incumbent of the office. Authority is not given to the deputy, but to the principal, and is exercised by the principal either by himself or his deputy.4

acceptance of the latter will vacate the former. Wilson v. King, 3 Litt. (Ky.)

457; s. c., 14 Am. Dec. 84.

Deputy Differs from Assignee and Agent in that an assignee has an interest in the office itself, and does all things in his own name, for whom his grantor shall not answer, except in special cases; but a deputy has not any interest in the office, and is only the shadow of the officer in whose name he acts. And there is a distinction in doing an act by an agent and by a deputy. An agent can only bind his principal when he does the act in the name of the principal. But a deputy may do the act and sign his own name, and it binds his principal; for a deputy has, in law, the whole power of his principal.

Dic. Wharton Law

1. Bouv. Dic.

The legislature has the authority to provide that assessors may appoint deputies with other power to perform official acts in the names of their principals, and an assessment made by such deputies is valid. Meek v. McClure, 49 Cal. 624. 2. Schaw v. Dietrich, I Wilson (Ind.),

3. Abrams v. Ervin, 9 Iowa, 87; Lewis

v. Lewis, 9 Mo. 183.

But by the customs of Missouri while governed by the Spanish laws, the lieu tenant-governor had a right to authorize a deputy to discharge his judicial duties. McNair v. Hunt, 5 Mo. 300. See DEPUTY-SHERIFFS, CLERKS, etc., infra.

4. Talbot v. Hoosier, 12 Bush (Ky.), 408. In this case the acknowledgment of a deed was taken before a deputy county clerk, the certificate being in the

name of the clerk. The objection was made that the deed was irregularly executed, the acknowledgment being in the name of one person, when in fact it was taken by another, whose name did not. appear in the instrument. It was held, however, that the certificate made by the deputy in the principal's name was valid. And see Muller v. Boggs, 25 Cal. 175; Triplett v. Gill, 7 J. J. Marsh. (Ky.), 440; People v. Powers, 19 Abb. Pr. (N. Y.) 99.

But papers issued by a deputy-clerk in his own name have been held valid under a statute empowering him, in the ab sence of the clerk from the clerk's office. or from the court, to perform all things and with like effect the duties of the clerk. Calender v. Olcott, I Mich. 344. And in Jacobs v. Measures, 13 Gray (Mass.), 74, it was held that an assistant clerk, appointed by the court under legislative authority, may sign, in the absence of the clerk, writs required by the con-stitution to be signed by "the clerk of such court," although the constitution now requires "clerks of courts" to be elected by the people.

In Georgia it is held that process which is signed by a deputy-clerk of the superior court is as valid and sufficient in law as if signed by the principal clerk. Goodwyn v. Goodwyn, 11 Ga. 178. And in some States a deputy may take acknowledgments in his own name. Touchard v. Crow, 20 Cal. 150; Cook v. Knott. 28 Tex. 85; McCraven v. McGuire, 23 Miss. 100; McRaven v. McGuire, 9 Smed. & M. (Miss.) 34; Beaumont v. Yeatman, 8 Humph. (Tenn.) 542. And where, under an act providing for the ap-

5. Deputy-sheriff.—(a) Deputy-sheriff and Under-sheriff. -Deputy-sheriff and under-sheriff are generally used as synonymous terms; and while the sheriff is in the execution of his office. the under-sheriff has no more power than any other general deputv.1

appointments (b) APPOINTMENT—SALE OF OFFICE.—The and qualifications of deputy-sheriffs are now regulated statute in most of the States; 2 but according to the common

pointment of an assistant commissioner of the revenue in certain cases, and authorizing him to discharge "any of the duties of commissioner," the assistant duties of commissioner," the assistant need not act in the name of his principal in performing any of the duties of his Commonwealth v. Byrne, 20 office.

Gratt, (Va.) 165.

Deputy-sheriff Acting in his Own Name.-It is only by virtue of his official position that the return of a sheriff is conclusive, and of such the courts must take judicial notice. But the courts cannot know an under-sheriff, and the act and return of a deputy is a nullity unless done in the name and by the authority of the sheriff. Joyce v. Joyce, 5 Cal. 449; Rowley v. Howard, 23 Cal. 402; Jordan v. Terry, 33 Tex. 680; overruling Miller v. Alexander, 13 Tex. 497; Towns v. Harris, 13 Tex. 507; Ditch v. Edwards, I Scam. (Ill.) 127; s. c., 26 Am. Dec. 414; Village of Glencoe v. People, 78 Ill. 382; Arnold v. Scott, 39 Tex. 378. Where, however, the deputy is known

to the law, as evidenced by statutory provisions in respect to him, a return in his own name has been regarded as valid. Wheeler v. Wilkins, 19 Mich. 78; Allen v. Hazen, 26 Mich. 142; Eastman v. Curtis, 4 Vt. 616; De Villers v. Ford, 2 McCord (S. Car.), 144.

And in such cases, where the law recognizes the deputy, after the death of the sheriff the deputy may act in his own name. Timmerman v. Phelps, 27

Ill. 496. In West v. Thompson, 27 Vt. 613, it was held that a deputy-sheriff may sue in his own name, either in trover or assumpsit, upon a receipt taken in his own name for personal property attached by him. And in Miller v. Good, 2 Tyler (Vt.), 439, an action by a deputy-sheriff on a promise made to him by a third person to surrender the body of a debtor during the life of the execution, it was held that the action might be maintained in the name of the deputy. But this is not the rule in all the States. See ACTIONS BY DEPUTIES, infra.

1. Tillotson v. Cheetham, 2 Johns. (N. Y.) 63.

"In England, there are two grades of subordinates to the sheriff: the undersheriff, whose jurisdiction is coextensive with that of the sheriff, and who, in the event of the death of that functionary, succeeds him and holds the office until a successor shall have been appointed; and bailiffs, whose powers are limited to one or more hundreds or other subdivisions of the country. In the United States, this distinction is not usually made: the deputy-sheriffs are of equal rank and power, and can perform their duties as well in one part of the country as another. New York, however, and in a few other States, the office of under-sheriff exists as distinguished from and superior to the office of an ordinary deputy-sheriff.' Murfree on Sheriffs, § 15.

Special Sheriff.—Under the Texas con-

stitution, where a sheriff is interested. process must be executed by a constable; and no such officer can exist as a "special sheriff" appointed by the court to execute all necessary process which may issue in a case; but such defect must be taken in limine, by motion to quash citation and service. McClane v. Rogers,

42 Tex. 214.

Senior Deputy-sheriff.—The "senior deputy-sheriff in service," who by Mass. " senior St. 1877, ch. 200, § 23, is required, in case a vacancy occurs in the office of sheriff in any county, to perform all the duties required by law to be performed by the sheriff, until the office of sheriff is filled in the manner required by law, is the deputy-sheriff who has been longest in office continuously when the vacancy occurs. Justices' Opinions, 126 Mass.

2. Statutory Regulations as to Appointment.-Murfree, in his work on Sheriffs. § 72, gives the following as instances of the provisions made in the several States

on this subject:

"In Kentucky, it is necessary that the county court approve the deputy, and although the sheriff may appoint, the county court may refuse to approve the appointee, if in its judgment he is incompetent or unworthy. Day v. Justices, 3 B. Mon. (Ky.) 198. In Maine, deputylaw, a sheriff cannot appoint a deputy except by warrant in

writing.1

In appointing a deputy, it has been held that the sheriff cannot limit or abridge his powers,² nor is he allowed to vest in the deputy irrevocably the office to which he has been appointed, such an act amounting to a sale of the office.³

The appointment of a deputy-sheriff, however, under an agreement that he shall pay to his principal one half of the fees received by such deputy for his services, is not the selling of an office. But

sheriffs must be commissioned, and their commissions must be recorded, and are then notice to all the world of the deputy's official character. In New Iersey, a deputy-sheriff must be sworn in, and cannot act before this ceremonial, which in no case relates back or validates antecedent action on his part. Lee v. Evans, I N. J. L. 283. In New York, the appointment of a deputy-sheriff must be under the hand and seal of the sheriff. His dismissal must be in writing, but need not be under seal. His power to bind the sheriff ceases as soon as he has notice of his dismissal. Edmunds v. Barton, 31 N. Y. 495. In the same State the deputy sheriff is an officer, and as such has by statute the right to resign, though it is not necessary that his resignation be under seal. Gilbert v. Luce, II Barb. (N. Y.) 91. In Ohio, it seems that a warrant is the usual evidence of a deputy-sheriff's appointment. It is not necessary, however, to prove the appointment, that the clerk's indorsement be placed upon the warrant. Haines v. Lindsey, 4 Ohio, 88. In Arkansas, it has been held that the power of the deputy-sheriff expires with the term of his principal, and a reappointment and reapproval by the county or circuit court is necessary to keep alive his official character, although his principal, having been re-elected, was his own successor. Green-

wood v. State, 17 Ark. 332."

In McWilliams v. Richland Co., 16 Ill. App. 333, it was held that as the Illinois statutes provide for appointment of deputy-sheriffs by the sheriffs, county supervisors have no authority to appoint them, but courts have power to appoint bailiffs to serve at the term, and supervisors are liable for their pay, though they are at the same time deputy-sheriffs.

1. People v. Moore, 2 Doug. (Mich.) 1; 6 Bacon's Abr. 441; Blatch v. Archer, Cowp. 63; Murfree on Sheriffs, § 70. In People v. Moore, 2 Doug. (Mich.) 1,

In People v. Moore, 2 Doug. (Mich.) r, it was held that an arrest made under verbal authority from the sheriff by a constable was void, the arrest being made under a writ directed to the sheriff, and not under the general powers of a peace officer.

But a deed executed by a general deputy-sheriff appointed by parol has been held valid in Alabama. McGee ν . Eastis, 3 Stew. (Ala.) 307. And in North Carolina, the relation between the sheriff and his deputy may be established by the same means by which that between the sheriff and the public is established, namely, by showing that he acted as such without going back to his appointment. "We know of no law," says the court "which requires the sheriff to make his deputation in writing. If a man acts as a deputy with the knowledge and consent of the high-sheriff, the high-sheriff is as much bound by his acts and omissions as if the deputation was in writing." State ν . Allen, 3 Ired. L. (N. Car.) 36; Murfree on Sheriffs, § 69; Wiseman ν . Bean, 2 Heisk. (Tenn.) 390; Bosley ν . Farquar, 2 Blackf. (Ind.) 661.

And in Wintermute v. Smith, I Bond (U. S.), 210, it was held that the fact that no return was made by a United States marshal to the district judge of the appointment of a deputy, if the deputy was duly appointed and sworn, would not affect the legality of the service of subpoenas by such deputy, so as to deprive

him of the right to fees.

But in Perkins v. Reed, 14 Ala, 536, it is held that the sheriff cannot exercise the power of appointment ex post facto, by ratifying the acts of a person who assumed, without any authority, to act as a deputy-sheriff.

See Special Deputies, infra.

2. As where, upon a covenant by an under-sheriff not to execute any process over twenty pounds without the sheriff's leave, the court held the covenant void, "as being against law and justice; for since being made under-sheriff he is liable by law to execute all process, he could no more than the sheriff himself covenant not to execute process without another special warrant; for that is to deny or delay justice." Norton v. Semmes, Hobart, 13 (a); Abrecht v. Long, 27 Minn. 81.

3. Outon v. Rhodes, 3 A. K. Marsh.

(Ky.) 432. 4. Mott v. Robbins, I Hill (N. Y.), 21 where the agreement is not to pay out of the profits, but to pay generally a certain sum at all events, the appointment of a deputy under such contract is void, and a bond conditioned for the pay-

ment of such sum is void.1

(c) Special Deputies.—Two kinds of deputies of a sheriff are well known: 1. A general deputy, or under-sheriff, who by virtue of his appointment has authority to execute all the ordinary duties of the office of sheriff. He executes process without special power from the sheriff, and may even delegate authority in the name of the sheriff for its execution to a special deputy. 2. A special deputy, who is an officer pro hac vice, to execute a particular writ on some certain occasion. He acts under a specific, not general, appointment and authority.² An infant may be a special deputy to serve a particular writ; 3 so may the attorney of the plaintiff; and the appointment may be made by a mere indorsement on the writ itself.⁵ But a deputation of authority to serve a writ signed by a justice of the peace in blank, as an indorsement on the writ, and afterwards filled up by a stranger, confers no authority upon the person therein apparently authorized.6

It has been held that a sheriff is not liable for a default of a special deputy, selected by the plaintiff to serve and return a pro-

To resist or obstruct a special deputy in the discharge of his duty is as much an offence as though he were a regular officer.8

A United States marshal has power to appoint a special bailiff to execute a particular process.9

s. c., 37 Am. Dec. 286. It was held in this case that the sheriff could take the agreement for the payment to him of part of the fees of the office, because he is in law entitled to the whole thereof; and he may divide his fees with a deputy as a mode of paying the latter for ser-And see Godolphin v. Tudor, 2 Salk. 468; Culliford v. Cardinel, Comb. 356; Carlton v. Whitcher, 5 N. H. 196; Meredith v. Ladd, 2 N. H. 517; Cardi-gan v. Paige, 6 N. H. 183.

It appears that it was once held to be lawful for the deputy to pay to the sheriff a stipulated sum per annum for his office. De Forest v. Brainard, 2 Day (Conn.), 528. But it is certain that such contracts are not now valid. See

authorities supra and infra.

1. Hall v. Gavitt, 18 Ind. 390.

And where a person receives a deputation to a public office which entitles him by statute to a certain percentage upon the fees and emoluments of the office of his principal, and on receiving his ap-pointment, enters into an agreement to perform the duties of his office at a fixed salary, such agreement is void, although it be not certain that the stipulated sum would be less than the percentage al-Wend. (N. Y.) 175.

2. Allen v. Smith, 12 N. J. L. 159. Tappan v. Brown, 9

An under-sheriff may appoint special bailiffs to summon jurors. McGuffie v. State, 17 Ga. 497.

3. Barrett v. Stewart, 22 Vt. 176. 4. Wilford v. Miller, 1 Morr. (Iowa)

5. Guyman v. Burlingame, 36 Ill. 201; Miller v. McMillan, 4 Ala. 530; Procter v. Walker, 12 Ind. 660.

In Alabama, it is held that the appointment may be made by parol. McGehee v. Eastis, 3 Stew. (Ala.) 307. And in Kansas, the delivery of the process to the special deputy is held to be sufficient evidence of his authority. McCracken v. Todd, I Kan. 148.

6. Ross v. Fuller, 12 Vt. 265; s. c., 36 Am. Dec. 342.

7. Skinner v. Wilson, 61 Miss. 90. See LIABILITY OF SHERIFF FOR ACTS

OF DEPUTY, infra.

8. State v. Moore, 39 Conn. 244.

9. So held where the appointment in question was made within a State, the laws of which conferred that power upon

(d) POWERS AND DUTIES.—A deputy is regarded as a general agent for the sheriff. He is generally authorized by law to represent the sheriff in all the duties confided to the latter.1

sheriffs. United States v. Jailer of Fayette Co., 2 Abb. (U. S.) 265. And see Hyman v. Chales, 12 Fed. Rep. 855; Matter of Crittenden, 2 Flipp. (U. S.) 212: The E. W. Gorgas, 10 Ben. (U. S.)

1. In Connecticut, it has been held that the deputy-sheriff is not the mere agent of the sheriff, but is to a certain extent, Dayton an independent public officer. v. Lynes, 30 Conn. 351. And it will not be presumed that a deputy-sheriff is the deputy of the balliwick only. Evans v. Wait, 5 J. J. Marsh. (Ky.) 110.

What a Deputy-sheriff May Do—Service

of Writs .- A writ directed to the sheriff may be served by his general or special deputy, though not particularly named. Clark v. Brady, Kirby (Conn.), 237; Henry v. Halsey, 13 Miss: 573; Wilford v. Miller, 1 Morr. (Iowa) 405. But he must show his authority and make known his business if required by the party who is to obey the same. Burton v. Wilkinson, 18 Vt. 186; s. c., 46 Am. Dec. 145.

Writs de homme roplegrando, and of forcible entry and detainer, can only be served by the sheriff, and not by his deputy. Wood v. Ross, 11 Mass. 271. All writs of inquiry may be executed by a deputy, except where the sheriff is directed by statute, or the writ itself, to execute it in person. Tillotson v. Cheetham, 2 Johns. (N. Y.) 63. The writ of ad quod damnum, issued upon an application for the building of a mill, may be executed by the deputy-sheriff. Wroe v. Harris, 2 Wash. (Va.) 126; Gay v. Caldwell, Hard. (Ky.) 68.

But a deputy-sheriff cannot serve process in favor of the town of which he is a ratable inhabitant, although the sheriff under whom he acts is at the time an inhabitant of another town, and has no property or interest in the town in favor of which the process issues. Lyman v. Burlington, 22 Vt. 31. He may, however, serve a writ upon a deputy-jailer.

Gage v. Graffam, 11 Mass. 181.

In Tennessee, a deputy-sheriff may serve process issued by a justice. Union Bank v. Lowe, 1 Meigs (Tenn.), 225. But in South Carolina, the district sheriffs cannot serve any process relative to the county courts. Stewart v. Childs, I Bay (S. Car.), 362.

It is improper for a sheriff who receives a process against one of his deputies to deliver it to that deputy to ex-

Holbrook v. Brennan, 6 Dalw ecute.

(N. Y.), 46.

Other Matters .- In Louisiana, deputy. sheriffs have the power to receive an appearance bond and discharge the accused upon its execution, although the order of the judge directed it to be taken by the State v. Wilson, 12 La. Ann. 180. And a deputy who has not made the service of a petition and citation, or other proceeding, has no authority to make the return. McKwight v. Connell, 14 La. Ann. 396.

A deputy-sheriff, who is an inhabitant of a town through which a highway is laid out by the county commissioners, is incompetent, by reason of interest, to summon or preside at the trial before a jury granted on the application of a party aggrieved by the doings of the commissioners in locating the way or assess-Merrill v. Berkshire, 11 ing damages.

Pick. (Mass.) 260.

A deputy has no authority, in Mississippi, to appoint agents to take charge of Jamison, 2 Miss. 160. But in Alabama, it is held that when he seizes goods upon an attachment or execution he is presumed to have authority to provide for their safe-keeping by committing them to a bailee; and to engage such bailee, if the goods be live-stock, to give them. food, water, and proper care; that such transaction comes within the scope of a sheriff's duty, and may be entered into by his deputy as his general agent. the deputy has instructions limiting his authority in this particular, the person with whom he deals is not affected by them, unless they are brought to his knowledge. Ramsey v. Strobach, 52 Ala. 513. But see Dooley v. Root, 13 Gray (Mass.), 303; Krum v. King, 12 Cal. 412.
No deputy can transfer his general

powers, but he may constitute a servant or bailiff to do a particular act; hence an under-sheriff may depute a person to serve a writ. Hunt v. Burrill, 5 Johns. (N. Y.) 137; New Albany, etc., R. Co. v. Grooms, 9 Ind. 243; McGuffie v. State, 17 Ga. 497. And if a deputy-sheriff empowers a stranger to make a levy, and afterwards adopts it by his return, it becomes his own act. Clarke v. Gary, II Ala. 98. And in Thrift v. Frittz, 7 Ill. App. 55, it was held that a deputy sheriff's indorsement on a summons, appointing a special deputy or bailiff pro hac vice,

(e) ACTIONS BY DEPUTIES.—As a general rule, only the sheriff. and not the deputy, can sue for the conversion of property in the actual possession of the deputy under a precept: for the possession of the deputy is, in law, the possession of the sheriff. But a deputy-sheriff may have an action against another deputy of the same sheriff to recover goods which they had both attached for different creditors.2

must be taken as the act of the sheriff

A deputy who sells goods seized by him upon execution cannot himself be the purchaser of the goods he sells. Perkins v. Thompson, 3 N. H. 144. But where a deputy is plaintiff in a judgment, he may purchase under an execution thereon, directed to his principal. Jackson v. Collins, 3 Cow. (N. Y.) 89.

He may sell lands on execution, and execute a deed to the purchaser, as in the name of the sheriff. It is not necessary to show any special authority from the sheriff to his deputy. Jackson v. Davis, 18 Johns. (N. Y.) 7; Haines v. Lindsey, 4 Ohio, 88. And in New York it has been held that a deputy-sheriff may complete a sale and make a deed after the principal is out of office, provided Collins, 3 Cow. (N. Y.) 89.

A deputy-sheriff exceeds his general

authority in insuring property, held under legal process, in the name of his principal, in a mutual insurance company. White v. Madison, 26 N. Y. 117.

A sheriff employed a deputy to collect certain levies. The deputy applied the levies due from a third person in discharge of his private indebtedness to such third person, and gave him a receipt in discharge of his dues. Held, nevertheless, that the sheriff could recover them of such third person. Morris v. Chamberlayne, Jeff. (Va.) 14. And a deputy-sheriff who takes a judgment in the name of the sheriff, against a purchaser at a sheriff's sale, and mixes up with such judgment a private demand due to himself, cannot control the judgment; it belongs to the sheriff. Wilson v. Gale, 4 Wend (N. Y.) 623.

Where land is sold for a sheriff by his deputy for non-payment of taxes, and a conveyance is made by the deputy, it is indispensably necessary, in order to give effect to the deed, that it should be proved that the one is sheriff and the other his deputy. Rockbold v. Barnes,

3 Rand. (Va.) 473. Under the Virginia act of February, 1814, for the sale of lands forfeited for non-payment of taxes, the deputy-sheriff

as well as the high-sheriff is competent to make such sales. Chapman v. Ben-

nett, 2 Leigh (Va.), 329.

A deputy-sheriff, by virtue of such office, is not, in New Hampshire, authorized to act as deputy-jailer. Skinner v. White, 9 N. H. 204. In South Carolina, a deputy-sheriff is authorized to take bail. Delieseline v. Bunch, Harp. (S. Car.) 226.

A deputy-sheriff making an arrest in the line of his duty, and when sent by the principal sheriff to attend to it in his stead, cannot, as a matter of public policy, be entitled to claim a reward offered for such arrest. Stamper v. Temple, 6 Humph. (Tenn.) 113; s. c., 44 Am. Dec. 206.

He is disqualified to amend an erroneous return of process, by reason of the sherin s having atterwards become interested as warrantor of property sold under a judgment obtained by virtue of the proceeding. O'Conner v. Wilson, 57 Ill. 226. the sheriff's having afterwards become in-

1. Terwilliger v. Wheeler, 35 Barb-(N. Y.) 620; Hampton v. Brown, 13 Ired. L. (N. Car.) 18. Contra: West v. Thompson, 27 Vt. 613; Miller v. Goold, 2 Tyler (Vt.), 439. And see DEPUTY MUST ACT

IN PRINCIPAL'S NAME, supra.

And in Polley v. Lenox Iron Works, 4 All. (Mass.) 329, it was held that a deputysheriff who has attached personal property in the manner provided by statute, and resigned his office and removed from the commonwealth before judgment was recovered, may maintain an action in his own name for a conversion of the property before the recovery of the judgment, if the execution which issued thereon was delivered to another deputy-sheriff, who, being unable to find the property, de-manded the same of the sheriff of the county, and returned the execution wholly unsatisfied; and it is not necessary that the return upon the execution should set out the demand upon the sheriff.

It seems, also, that a deputy has been allowed to maintain an action for fees and services rendered. Nutt v. Merrill,

40 Me. 237. 2. Gordon v. Jenny, 16 Mass. 465; Thompson v. Marsh, 14 Mass. 269.

(f) DEPUTY'S BOND AND SURETIES.—The bond of a deputysheriff to his principal is a private bond, with which the public has no concern. It is a matter exclusively between the sheriff and his deputy, and it concerns nobody else whether any bond whatever is given. Consequently the bond of a deputy to the high-sheriff is not to be interpreted by the rules which govern the construction of the official bonds of the high-sheriff, drawn in pursuance of the statute which specifies what bond shall be given and the conditions of the same.1

The sureties of a sheriff, having been compelled to pay for a default of his deputy, may recover the amount paid from the sureties of the deputy.2 And sureties in a bond given to a sheriff for the faithful conduct of his deputy are liable for the deputy's misconduct in embezzling money collected by him on a precept which comes into his hands while the sheriff is in office, although the money is collected and embezzled after the sheriff has resigned, the sheriff being liable to a creditor.3

(g) DEPUTY'S LIABILITY TO SHERIFF AND HIS SURETIES .-Whenever the sheriff or his sureties have had to pay for the default or misfeasance of a deputy, the deputy in turn is usually liable to them,4 and the same rules applicable to common-law actions

goods, and another deputy of the same sheriff attaches and takes the same goods out of his possession, by virtue of another precept against the same debtor, the deputy who made the first attachment may have trespass vi et armis for this in jury against the sheriff himself. Walker v. Foxcraft, 2 Me. 270. And see Robin-

son v. Ensign, 6 Gray (Mass.), 300.

1. Mullen v. Whitmore, 74 N. Car.

477; Murfree on Sheriffs, § 64.
2. Brinson v. Thomas, 2 Jones Eq.

(N. Car.) 414.

In a suit by a sheriff against the sureties of his deputy, for failure to pay over revenue tax and county levy, the receipts and certificate of the auditor of public accounts, not transcripts from the books and records of the auditor's office, are inadmissible. Combs v. Brashears, 6 J. J. Marsh. (Ky.) 631.

 Larned v. Allen, 13 Mass. 295.
 Welms v. Williams, 18 Ala. 650. In this case it was held that where the deputy fails to pay over the money collected by him as such, the sheriff may maintain an action against him without previous demand. And see Varner v. Wooten, 38 Ga. 575.

And where a deputy-sheriff settled a judgment obtained against the sheriff for acts done by the deputy, but failed to have satisfaction entered, held, that he was liable to the sheriff on his bond, conditioned to indemnify the sheriff against all suits having their origin in the default of the deputy, for expense incurred by the sheriff in defending a suit subsequently brought on the unsatisfied judgment.

White v. Blake (Me.), 8 Atl. Rep. 457.
The sheriff cannot recover of his deputy more than the amount of the money which such deputy had received on execution, although the judgment which the creditor may have recovered against the sheriff himself, on account of the failure of his deputy, may be for a greater amount. Drew v. Anderson, I Call (Va.), 51. Thus, the sheriff cannot, by prosecuting an unsuccessful appeal, make the deputy liable for the costs thereof. Conner v. Keese, 32 Hun (N. Y.), 98. And see Stowers v. Smith, 5 Munf. (Va.) 402, where it was held that the sheriff cannot recover judgment for greater damages against his deputy than have been recovered against himself.

Where a sheriff farmed out his office to A, giving him the management of the office, with power to select, control, dismiss, or employ deputies, and A selected B as a deputy, who gave no bond to the sheriff, held, that this contract between the sheriff and A did not divest the former of his power of dismissing the deputies, but that A, within the terms of the contract, was an agent for managing the office; and that B, who had paid over money collected on executions, and re-turned executions to A, was not liable to the sheriff because A had failed to pay the money collected and to return the against the sheriff for failing to pay over money collected by virtue of his office applies where the deputy is sued by the principal sheriff for a similar default. But a special action on the case will not lie against a jailer at the suit of the sheriff for a negligent escape: if the sheriff has omitted to take a bond of indemnity, the jailer is answerable to him only in assumpsit, on his implied undertaking to serve the sheriff with diligence and fidelity.2

Where the sureties of a sheriff have had to pay money for the default of a deputy, they have a right in equity to be substituted to the right of the sheriff against such deputy, and to resort to a fund which such deputy had secured from the defendant in the original writ, to indemnify himself against the consequences of the

same default.3

In many of the States it is provided by statute that a sheriff may have judgment by motion against his deputy for official misconduct.4

execution to the creditors, though the sheriff had been compelled to pay for his default. Holland v. Helm. 7 Gratt. (Va.)

An execution against the body of R., issued to plaintiff, as sheriff, was delivered by him to defendant, M., his deputy, who could have, but omitted to arrest the execution debtor, and returned the process to plaintiff with the statement that R. could not be found, whereupon plaintiff made return of "not found." After the false return, but before any action therefor had been brought, R. was surrendered by his bail to, and taken in custody by, plaintiff; but before the bail had taken the necessary steps to exonerate themselves from liability upon their bond, plaintiff wrongfully discharged him, in consequence whereof the bail was held liable for the judgment, and in turn recovered of plaintiff. In an action against M. and the sureties on his bond, held, I. That it was no defence that plaintiff's under-sheriff had knowledge that the return was false. 2. That the knowledge of the under-sheriff was not imputable to the sheriff as between him and his deputy. 3. That the fault of the deputy having been remedied by the surrender, and the damages sustained by plaintiff having been occasioned by his own subsequent wrongful act in discharging R., he could not recover such damages of defendants. Walter v. Middleton, 68 N. Y. 605.
A judgment was rendered against a

sheriff for an alleged default of his deputy, which was erroneous as to the law and unjust as to the merits. The sheriff made no defence in the suit, and did not give his deputy any notice of the proceedings. Held, that the sheriff could not in such case recover the amount of the judgment from his deputy.

Chapman, 2 Leigh (Va.), 560.

A record of a judgment against the sheriff is not evidence against the deputy of any other fact than that a judgment was rendered, but not that such judgment was incurred by the default of the deputy. Lewis v. Knox, 2 Bibb (Ky.), 453.
Where a sheriff sees a false return in-

dorsed upon process by a deputy before the same is delivered into the clerk's office, and, with a knowledge of the facts, allows the return to be made, it is in law and fact his return, and he cannot hold the bond of the deputy responsible. Wasson v. Linster, 83 N. Car. 575. 1. Nelms v. Williams, 18 Ala. 650.

In an action by a sheriff against his deputy, the admission of the deputy that he had received certain sums of money on executions put into his hands as a deputy-sheriff, was admitted in evidence without producing the executions. Mantz v. Hollis, 4 Har. & M. (Md.) 65.

2. Kain v. Ostrander, 8 Johns. (N. Y.)

Where a debtor, arrested on a ca. sa., escaped from jail, where he had been committed by the sheriff without any bond of indemnity from the jailer to keep him safe, and the creditors recovered the amount of their debts against the sheriff, and the jailer had used due care and diligence in the performance of his duty, held, that the jailer was only liable to the sheriff for ordinary care and diligence, except where he gave a bond to indemnify. Turrentine v. Faucett, 11 Ired. L. fy. Turrenti (N. Car.) 652.

3. Blalock v. Peake, 3 Jones Eq. (N. Car.) 323; Brinson v. Thomas, 2 Jones Eq. (N. Car.) 414.
4. Stephens v. Womack, 3 Ala. 738; Wo-

(h) DEPUTY'S PERSONAL LIABILITY TO THIRD PERSONS.—At common law, a stranger cannot sue a deputy-sheriff for the breach or non-performance of his official duties; the principal sheriff is liable to persons thus injured, and the deputy is liable to his principal. The same rule applies in case of the commonwealth, in the absence of any statute rendering the deputy liable to it; and the sheriff and his sureties are liable for such breach. Nor will a

mack v. Nichols, 39 Miss. 320; Asberry v. Colloway, I Wash. (Va.) 72; Stowers v. Smith, 5 Munf. (Va.) 402.

In Kentucky, it is held that the general court has no jurisdiction of a motion by a sheriff against his deputies. Lindsay v. McClelland, I Bibb (Ky.), 262. And in the same State it is held to be error to give judgment, in favor of a principal sheriff, against his deputy, where the latter makes default, without establishing the claim by evidence. Lampton v. Scott, 3 A. K. Marsh. (Ky.) 172; Trabue v. Thomas, 3 A. K. Marsh. (Ky.) 173.

In order that a sheriff may recover

of his deputy, in a proceeding by motion in *Alabama*, it must appear that the deputy had one day's notice of the proceeding against the sheriff for the default of the deputy; that judgment was obtained against him for such default, and the amount; that he was in fact his deputy, and that the others sought to be charged were his sureties. Stephens v.

Womack, 3 Ala. 738.

Where a sheriff has paid money for his deputy he can recover a judgment against the deputy by motion, without having the extent of such sheriff's liability ascertained by a judgment against him. Jarnagin v. Atkinson, 4 Humph. (Tenn.) 470. And the Tennessee act of 1829, which provides that where a sheriff has paid, or is liable to pay, money for the default or misconduct of his deputy, he may by motion recover judgment against the deputy and his sureties, upon satisfactory proof, etc., does not change the common-law principles applicable to such cases; and therefore, if the insufficient return is in the handwriting of the sheriff. though signed by his deputy, there is no "default or misconduct" on the part of Cate v. Howard, i Swan the deputy. (Tenn.), 15.

Judgment by motion cannot be had against a deputy sheriff under the Tennessee Code, § 3594, which authorizes such judgment against "any sheriff, coroner, or constable, or other execu-tive officer to whom the execution is directed and by whom it is received." Although a deputy-sheriff may be an executive officer, and to that extent indicated

in the section cited, he is not an officer to whom process is directed, and hence is not liable to judgment by motion. Robertson v. Lesson, 7 Coldw. (Tenn.) 159.

Where a high-sheriff has satisfied a judgment recovered against himself for the default of his deputy in failing to pay over money received on an execution, he can, upon a motion against the deputy and his sureties, recover only the amount of such judgment, and not the aggregate amount of debt, interest, and costs, with interest thereon. Weaver v. Skinker. 4 Gratt. (Va.) 164. And see Jacobs v. Hill, 2 Leigh (Va.). 293.

A deputy-sheriff, against whom the sheriff has taken judgment over by motion, after a recovery against himself for the default of the deputy, has no equity to be relieved upon defence which might have protected the sheriff from the original recovery, unless he avers and shows that the sheriff was notified of the defence, and neglected to make it, or failed to give the deputy-sheriff an opportunity to defend the original suit. v. Patterson, 2 Tenn. Ch. 171,

1. Owens v. Gatewood, 4 Bibb (Ky.), 404; Murrell v. Smith, 3 Dana (Ky.), 462; Harlan v. Lennsden, 1 Duv. (Ky.) 86; Abbott v. Kimball, 19 Vt. 551; Morgan v. Chester, 4 Conn. 388; Paddock v. Cameron, 8 Cow. (N. Y.) 212; White v.

Johnson, I Wash, (Va.) 150.

Thus, where a deputy sheriff sold real estate upon execution, and a junior judgment creditor, on redeeming from such sale, paid to the deputy for the use of the purchaser the amount of the bid and interest. Held, that an action would not lie against the deputy to recover the money, although he had not paid it over to the sheriff, and had refused, on demand duly made, to pay it to the plaintiff, who was the assignee of the certificate of sale. Colvin v. Holbrook, 2 Comst. (N.Y.) 126. A deputy-sheriff is not liable to a plain-

tiff in attachment for failing to require sufficient security on the replevy bond taken by him for goods seized under attachment. Pond v. Vanderveer, 17 Ala. 426.

2. Harlan v. Lemsden, I Duv. (Ky.) 86.

joint action lie against the sheriff and his deputy for the acts of

the deputy.1

In Maine, Massachusetts, and Vermont, however, the character of a deputy-sheriff differs essentially from that in the other States and England. In these States a party aggrieved by a deputysheriff may sue him directly, or, at his election, may sue the sheriff, declaring specially that the wrong had been committed by the deputy. And in Wisconsin the common-law rule has been changed by statute.3

But the deputy's promise, upon request, to pay over money which he had collected will make him personally responsible; but it must be a clear and absolute promise.4 He is liable to indictment for neglect of duty in *Indiana*, and there are some other in-

stances in which he has been held personally responsible.6

1. Hurlock v. Reinhardt, 41 Tex. 580; Campbell v. Phelps, 1 Pick. (Mass.) 62. Compare Cotton v. Marsh, 3 Wis. 226; Morgan v. Chester, 4 Conn. 387; Waterbury v. Westervelt, 9 N. Y. 598, over-ruling Moulton v. Norton, 5 Barb. (N. Y.) 286; Christian v. Hoover, 6 Yerg. (Tenn.) 505; Elliott v. Hayden, 104 Mass. 180.

2. Murfree on Sheriffs §§ 907, 908; Walker v. Haskill, 11 Mass. 177; Nye v. Smith, 11 Mass. 188; Draper v. Arnold, Smith, 11 Mass. 188; Draper v. Arnold, 12 Mass. 449; Campbell v. Phillips, 17 Mass. 244; Pervear v. Kimball, 8 Allen (Mass.), 199; Esty v. Chandler, 7 Mass. 464; Harrington v. Fuller, 18 Me. 277.

3. In this state a deputy-sheriff who

neglects or refuses to execute process, or to make due return thereof, is guilty of misconduct in office, and is punishable under the Revised Statutes, and there is no necessity to institute proceedings against the sheriff who appointed him. Heymann v. Cunningham, 51 Wis. 506. And see Remlinger v. Weyker, 22 Wis. 383; Cotton v. Marsh, 3 Wis. 221.
4. Tuttle v. Love, 7 Johns. (N. Y.)

470.

5. State v. Berkshire, 2 Ind. 207.
6. One deputy-sheriff may covenant with another deputy of the same sheriff to perform a part of his official duties: and, on failure, he will be liable to an Dupuy v. Dickaction on the covenant. erson, Litt. Sell. Cas. (Ky.) 163.

And where a defendant is surrendered by his special bail in open court, and prayed in custody of the jailer by the plaintiff's attorney, the jailer is liable to the plaintiff in case of his escape, although no execution has issued against him. Commonwealth v. Dulen, 4 Bibb (Ky.), 316. And if a jailer without legal authority discharges a debtor committed under execution, he becomes liable for the whole debt. Johnson v. Lewis, 1

Dana (Kv.), 182.

A deputy-sheriff insured property held under legal process, in a mutual insurance company, giving a premium note signed, A. D. S., sheriff, by A. Z. M., deputy. In a suit against him by the company, he was held liable for the amount of the note, and of costs of a previous action against the sheriff, which was nonsuited for want of authority in the deputy to give such note, on the ground of an implied warranty that he had such authority. White v. Madison, 26 N. Y. 117.

A deputy-sheriff gave his receipt for the collection of notes placed in his hands. Held, that he thereby assumed an agency which was extra official, and was personally responsible to the party injured for negligence or misconduct in the fulfilment of it. Rose v. Lane, Humph. (Tenn.) 218.

But an action for deceit will not lie against a deputy for giving an erroneous opinion upon a matter of law. deputy sheriff, intending to deceive one who made the inquiry, said that his return to a fi. fa. was in due form of law. Held, that the deputy was not liable to an action for deceit, though the inquirer filed a creditor's bill upon the faith of the deputy's reply, and lost the advantage thereof, in consequence of the deputy's return being insufficient. Starr v. Bennett, 5 Hill (N. Y.), 303.

In Virginia, a deputy-sheriff is not

liable for failing to take a bail bond; and if in an action for such failure against a deputy-sheriff and another, judgment be entered against both, the deputy may alone obtain a supersedeas. Annistead v. Marks, I Wash. (Va.) 325. And see White v. Johnson, I Wash. (Va.) 159.

Where a deputy-marshal receives

(i) LIABILITY OF SHERIFF FOR ACTS OF DEPUTY.—I. Acts Done under Color or by Virtue of his Office.—For most purposes the law regards the sheriff and his deputies as one officer; and the sheriff and his sureties are responsible for all official neglect or misconduct of his deputy, and also for his acts not required by law, where he assumes to act under color or by virtue of his office.2 In an action against a marshal for the acts of his deputy. it is not necessary to state in the complaint the official character of the defendant, nor need the trespass be charged as having been committed through a deputv.3

money on a judgment, after he has returned the execution, he may be attached on a neglect to pay over the amount in on a neglect to pay over the amount in pursuance of the order of court. Bagley v. Yates, 3 McLean (U. S.), 465; United States v. The Lawrence, 7 N. Y. Leg. Obs. 174; The Laurens, Abb. Adm. 508. And a statutory provision giving a right to a judgment, by motion, against a controlled corrections.

any "sheriff, constable, coroner, or other executive officer to whom an execution is directed," for failing to make due return thereof, does not apply to a deputysheriff; for the execution is directed, not to him, but to the sheriff. Robertson v. Lesson, 7 Coldw. (Tenn.) 159.

A deputy charged with an execution, who fails to sell goods on which he has levied, only because a claim is interposed, which, however, is not duly authenticated, is liable to a rule for the money which he ought to have made by a sale, notwithstanding he may have acted in good faith. Charles v. Foster,

56 Ga. 612.

acter in good faith. Charles v. Poster, 56 Ga. 612.

1. Watson v. Todd, 5 Mass. 571; Campbell v. Phelps, 17 Mass. 244; Vinton v. Bradford, 13 Mass. 514; Perley v. Foster, 9 Mass. 112; Congdon v. Cooper, 15 Mass. 10; Prewitt v. Neal, Minor (Ala.), 386; Moore v. Downey, 3 Hen. & M. (Va.) 127; Hazard v. Israel, 1 Binn. (Pa.) 240; Estes v. Williams, Cooke Tenn.), 413; Jentry v. Hunt, 2 McCord (S. Car.), 410; Walden v. Davidson, 15 Wend. (N. Y.) 275; Tomlinson v. Wheeler, 1 Aik. (Vt.) 194; Johnson v. Wheeler, 1 Aik. (Vt.) 299; Green v. Lowell, 3 Greenl. (Me.) 377; Morse v. Betton, 2 N. H. 184; James McCubbin, 2 Call (Va.), 273; Clute v. Goodell, 2 McLean (U. S.), 193; Lawrence v. Sherman, 2 McLean (U. S.), 488. 488.

2. See authorities cited supra. Clute v. Goodell, 2 McLean (U.S.), 193; Lawrence v. Sherman, 2 McL. (U.S.) 488; Harrington v. Fuller, 18 Me. 277; State v. Moore, 19 Mo. 369; Evans v. Hays, 1 Mo. 697; Lucas v. Locke, 11 W. Va.

81; Sangster v. Commonwealth, 17 Gratt. (Va.) 131; James v. McCubbin, 2 Call (Va.), 273; Knowlton v. Bartlett, 1 Pick. (Mass.) 273; Marshall v. Hosmer, 4
Mass. 60; Bond v. Ward, 7 Mass. 123;
Waterhouse v. Waite, 11 Mass. 207;
Mansfield v. Sumner, 6 Metc. (Mass.) 94;
Tobey v. Leonard, 15 Mass. 200; Smith
v. Joiner, 1 D. Chip. (Vt.) 62; Murrell v. Smith, 3 Dana (Ky.), 462; Owens
v. Gatewood, 4 Bibb (Ky.), 494; Adams
v. Jewett, 10 Me. 426; McIntyre v.
Trumbull, 7 Johns. (N. Y.) 35; People v.
Dunning, 1 Wend. (N. Y.) 16; Walden
v. Davidson, 15 Wend. (N. Y.) 575;
Corning v. Southland, 3 Hill (N. Y.), 555;
Pond v. Leman, 45 Barb. (N. Y.) 152;
Satterwhite v. Carson, 3 Ired. L. (N. Car.) (Mass.) 273; Marshall v. Hosmer, 4. Satterwhite v. Carson, 3 Ired. L. (N. Car.) Satterwhite v. Carson, 3 Ired. L. (N. Car.) 549; Wilbur v. Strickland, I Rawle (Pa.) 458; Chiles v. Holloway, 4 McCord (S. Car.), 164; Christian v. Hoover, 6 Yerg. (Tenn.) 505; Cotton v. Marsh, 3 Wis. 221; Douglas v. Stumps, 5 Leigh (Va.), 292; Forsyth v. Ellis, 4 J. J. Marsh. (Ky.) 298; s. c., 20 Am. Dec. 218; United States v. Moore, 2 Brock. (U. S.) 317; Haley v. Thurston, 6 N. H. 204.

3. Hirsch v. Rand. 39 Cal. 315.

The Sheriff Liable.—The sale of propis a taking by the sheriff for which he is answerable. Gayle v. Weir, 3 Port. (Ala.) 193.

A refusal by a deputy-sheriff to pay over money collected by him on execution puts his principal in default; a demand upon him is a demand upon the sheriff. Hill v. Fitzpatrick, 6 Ala. 314.

Neglect to pay over money in the hands of an officer, to one entitled to it, whether it occurs in the service of civil or criminal process, renders the sheriff liable. Norton v. Nye, 56 Me, 211.

A sheriff is responsible for the acts of

his deputy in respect to any writ or process, however such writ or process may have come to the hands of the deputý, whether through the sheriff or not; and where a sheriff, on going out of

II. Unofficial Acts.—An official act does not mean what a deputy might lawfully do in the execution of his office; if so, no action could ever lie against the sheriff for the misconduct of his deputy. If means, therefore, whatever is done under color or by virtue of his office. And if the act from which the injury resulted was not an official but a personal act, it is clear that the sheriff is not answerable.1

office, becomes the deputy of his successor, the successor will be responsible for the acts of such deputy, in respect to process which came to his hands while sheriff. Matthis v. Pollard, 3 Ga. 1. But where an execution was placed in the hands of a deputy-sheriff, who made an indorsement of this fact upon it, but before it was levied the sheriff died, and the deputy was appointed a deputy by his successor, and afterwards levied the execution as deputy of the latter, held, that it was the duty of the deputy to complete the execution of the fi. fa. as deputy of the former sheriff, and that his successor was not responsible for an illegal levy thereof. Hamilton v. Vail, 2 Metc. (Ky.)511. And see Wilton Man-ufacturing Co. v. Butler, 34 Me. 431; Pillsbury v. Small, 19 Me. 435. Where a deputy-sheriff, having a writ

in his hands for service, undertook to receive the money of the debtor, and made no service of the writ, held, that the sheriff was liable, under a charge for neglecting to serve and return the writ, to the amount of the money and interest, and this without any previous demand on the officer.

Green v. Lowell, 3 Me. 373.
Where a deputy-sheriff attaches goods, he has the custody of them in his official capacity until the suit is determined, whether he continues in office or not, and is officially bound to deliver them to any officer who may seasonably demand them in execution; and the sheriff is liable for his neglect or misdoing in relation thereto. Morton v. White, 16 Me. 53. And see Rider v. Chick, 59 N. H. 50. But the sheriff is not liable for the loss of property attached by his deputy, unless occasioned by the deputy's want of ordinary care.

The neglect of a deputy to take a sufficient bond in replevin is an official misconduct for which the sheriff is responsible; and the officer cannot justify by showing that the plaintiff in replevin is a person of abundant property. Har-

riman v. Wilkins, 20 Me. 93.

If a deputy-sheriff, who, on receiving a writ for service, has been authorized by the plaintiff to settle the suit by receiving an order on a particular person, receives the amount of the claim in money of the defendant, and does not pay it to the plaintiff or serve the writ, the sheriff is answerable for his default. Hammond v. Root, 15 Gray (Mass.), 516.

A sheriff is liable if he places in hisoffice a clerk who embezzles money paid to him, although he is not the clerk whose duty it is to receive money. Abercombie v. Marshall, 2 Bay (S. C.),

90; Carlin v. Kerr, 2 Bay (S. Car.), 112.

1. Knowlton v. Bartlett, 1 Pick. (Mass.)
273; Bagley v. Yates, 3 McLean (U. S.),
465. And it has been held that the relation of principal and agent does not exist between public officers in respect of acts which, although performed under color of office, are not authorized by law. First Nat. Bank v. Watkin, 21 Mich. 483. But see, however, ante, Acts Done under Color or by Virtue OF HIS OFFICE, and authorities cited.

Sheriff not Liable. - Where a deputysheriff had collected the amount due upon an execution and paid it over to the plaintiff's attorney, who immediately loaned a part of it to the deputy, it was held that the official duty of the deputysheriff had been fully discharged when he paid the money; that the loan of the money to him by the attorney was a private transaction, for which the sheriff could not be held responsible. Odom v. Gill, 59 Ga. 180.

The sheriff is not liable for the neglect of any act or duty which the law doesnot require the deputy officially to perform. Clute v. Goodell, 2 McLean (U. S.), 193; Harrington v. Fuller, 18 Me. 277; Lawrence v. Sherman, 2 McLean (U. S.), 488; State v. Moore, 19 Mo. Nor for the contracts of his deputy, though such contracts grow out of and are connected with his official duties,

so long as they are not a part thereof. Dyer v. Tilton, 71 Me. 413.

A statute required that the trustees, after a specified time, should make out and deliver to the constable of each civil district a certified statement of unpaid taxes, and if there is no constable, or the constable fail to give bond, that the

III. Criminal Acts.—The sheriff is responsible civiliter for the acts of his deputies, but in no degree is he liable for the criminal acts.1

IV. After Expiration of his Term.—The sheriff's liability for the default of his deputies is not terminated by the expiration of his term of office, when the execution of process is commenced before that time, but not finished until afterwards.2

statement should be addressed to and put in the hands of the sheriff of the county. Held, that the sheriff is not liable for the default of a deputy, into whose hands the statement was placed by the trustee. It should have been addressed to and put into the hands of the Tucker v. Bingham, 12 Lea sheriff.

(Tenn.), 653.

The return of "debts and costs satisfied" by a deputy-marshal, on original process, is not an official act for which the marshal is liable, the deputy having no authority to adjust the debt and hold himself responsible to the plaintiff. United States v. Moore, 2 Brock. (U. S.) 317. Nor is the acceptrnce by a deputy of an order on him to pay over the proceeds of an execution in his hands for collection. Moore v. Jarrett, 10 Tex.

If there is a departure from the ordinary execution of his office by the deputy under the instructions of the plain-tiff, the sheriff is not responsible. Gor-

ham v. Gale, 7 Cow. (N. Y.) 739.

The sheriff is not liable on contracts made by his deputies; but setting forth a promise of a deputy to levy on property turned out, does not vitiate, if there is other matter showing neglect of his official duty. Wetherby v. Foster, 5 Vt.

A deputy sold goods on execution, on credit, by direction of the plaintiff's attorney. Held, that the sheriff was not responsible for his deputy's neglect to return the execution, etc., as he did not act officially. Kimball v. Perry, 15 Vt. 414. Compare Seaver v. Pierce, 42 Vt. 325. And when the plaintiff in an execution directs a deputy-marshal to receive a certain description of money (not being gold or silver) in satisfaction thereof, upon the condition of immediate payment, the latter becomes immediately the creditor, and the marshal is in no manner responsible to the plaintiff for any loss arising from a violation by the deputy of his instructions, Gwinn v. Buchanan, 4 How. (U. S.). And see Rogers v. Marshall, 1 Wall. (U. S.) 644.

In any proceeding to "fix up" an execution, in the hands of a deputy-sheriff for collection, by taking an indorsed note

from the judgment debtor under the instruction of the creditor, the deputy would be acting as agent for the creditor, and not in his official capacity. Dyer v. Tilton. 71 Me. 413.

A sheriff is not liable for the services of a person employed by his deputy to keep property attached by the latter. Dooley v. Root, 13 Gray (Mass.), 303; Krum v. King, 12 Cal. 412; Kendrick v. Smith, 31 Me. 162. Compare Ramsey v. Strobach, 52 Ala. 513.

Where, by way of foreclosure of a chattel mortgage, a deputy-sheriff, at the request of the mortgagee, seized the mortgaged chattels, and upon his re-port the sheriff approved his action, the latter is not liable, because the seizure was the individual act of the deputy as agent of the mortgagee, it being, under the statutes of the State, no part of the official duty of the sheriff to make such

seizure. Dorr v. Mickley, 16 Minn. 20.
Trespass' on the case for mere non-feasance of a deputy will not lie against the sheriff; this is never sufficient to make the latter a tort-feasor ab initio. Abbott v. Kimball, 19 Vt. 551; s. c., 47

Am. Dec. 708.

It is no part of a sheriff's official duty to obtain an alias execution in cases where he has the original in his hands for collection. A deputy's undertaking of such service is personal and not official, and does not bind the sheriff. Cowdery v. Smith, 50 Vt. 235.

An action of trespass will not lie against a sheriff for the act of his deputy in taking possession of property at-tached by him on a writ while acting as deputy of a former sheriff, no judgment having been rendered on the writ, and the possession being demanded and received, by virtue of a receipt taken of the plaintiff and another at the time of the attachment, in which they agreed to safely keep the property attached, and deliver it to the officer on demand. Barden v. Douglass, 71 Me. 400.

1. Murfree on Sheriffs, § 61; State v.

Sellers, 7 Rich. (S. Car.) 368.

But the deputy himself may become responsible for criminal acts committed under color of his office. White v. State,

2. Hill v. Fitzpatrick, 6 Ala. 314; Laf-

V. Deputy of De Facto Sheriff.—If a deputy of a de facto sheriff. while acting as such, commits a wrongful act, the sheriff is liable. 1

- (i) REMOVAL FROM AND VACATION OF OFFICE.—"It has been from time immemorial of the very essence of the relations between the sheriff and his subordinates that the latter hold their offices at the pleasure of the former." And where a deputy-sheriff has been removed from office, or by removal from the county virtually resigns his office, he is thereby disqualified from even completing an execution begun by him previous to his dismissal or resignation.3
- 6. Deputy-coroner.—At common law a coroner could not appoint a deputy for the performance of his judicial duties, and it may be safely laid down that a coroner has no power to appoint a deputycoroner, except when special provision is made therefor by statifte.4 But the service of a summons by a coroner in a case where.

land v. Ewing, 5 Litt. (Ky.) 42; s. c., 15 Am. Dec. 41; Larned v. Allen, 13 Mass. 295; Tyree v. Wilson, 9 Gratt. (Va.) 59; s. c., 58 Am. Dec. 213; Simpson v. Pierce, 42 Vt. 334; Stewart v. Hamilton, 4 McLean (U. S.), 434; People v. Baker, 20 Wend. (N. Y.) 602; Jackson v. Collins, 3 Cow. (N. Y.) 89. And see Fowble v. Reyberg, 4 Ohio, 45; Murfree on Sheriffs, § 62. Compare Blake v. Shaw, 7 Mass. 505; Canterbury v. Kouns, 3 Litt. (Ky.) 449; Morse v. Belton, 2 N. H. 184. H. 184.

1. Sprague v. Brown, 40 Wis. 612. See DE FACTO OFFICERS, 5 Am. & Eng.

Encyc. of Law.

2. Muríree on Sheriffs, § 85. But it appears that for an unjust and unreasonable exercise of this right the deputy may have an action for damages against the sheriff. Hoge v. Trigg, 4 Munf.

(Va.) 150.

In Pennsylvania, there is a statute which confers upon the courts a supervisory power over the sheriff as to the appointment and retention or dismissal of his deputies. Under this statute a rule was made upon the sheriff to show cause why he should not dismiss a certain deputy-sheriff charged with taking illegal fees, that being the offence for the commission of which the deputy was liable to be removed under the statute, upon the requisition of the court. It was held that the proceeding to effect the removal of the obnoxious deputy was not a criminal proceeding, but a civil remedy; that the sheriff, being a public officer under the control of law, holds his office under the law in question as under other laws, that the law was constitutional, and that its enforcement in all proper cases to prevent extortion under color of office

was eminently salutary. Leeds' Appeal.

75 Pa. St. 75.

 Ferguson v. Lee, 9 Wend. (N. Y.).
 The court say: "The principle is well established, that when a sheriff hasbegun to execute an execution, he has, after he goes out of office, a right to complete it; and in pursuance of that principle, it has been held that a deputy of a sheriff whose term of office has expired possesses a similar power. The authority of the deputy continues as long as the authority of the principal. But this supposes a continuance of authority derived from the principal, and not revoked by him. In such cases the principal must continue liable for the acts of the deputy. If a sheriff for any cause think proper to remove a deputy, does not the power of that deputy cease intoto?—and are the sureties of the deputy any longer liable for his acts? If a deputy dies, there is surely an end of his acts; if he resign, is that resignation partial only, reserving a right to complete his. unfinished business, or does he not return to the sheriff, or hand over to some other deputy, his unfinished business? The case is not entirely analogous to that of a sheriff going out of office. It is not necessary that the deputy who begins to execute an execution should finishit, as it is with a sheriff. Every deputy acts in the name and on behalf of the sheriff, and the sheriff is responsible for the acts of all his deputies, but he is not responsible for the acts of a man from whom he has withdrawn all authority, or of one who has resigned his authority, or incapacitated himself by removing from the country."

4. Crompton's Just. 227, a; 2 Hale P.

the sheriff is interested, being the discharge of a purely ministerial duty, may be made by a deputy of the coroner's appointment.1

7. Deputy-marshal.—A deputy United States marshal is an officer of the United States.² Unlike a deputy-sheriff, he is an officer known to the law, and he may return, as deputy, the process served by him; but, as in the case of sheriffs, the remedy for neglect of official duty by a deputy-marshal is against the marshal, and not the deputy. When a prisoner is regularly committed to a State jail by the marshal, he is no longer within his custody or control. the marshal having no authority to command or direct the keeper in respect to the nature of the imprisonment.⁵ In this respect also there is a manifest difference between the case of a marshal and a sheriff; the latter being the keeper of the county jail, and the jailer his deputy, appointed and removable at his pleasure. 6

In other cases the rules applicable to the deputies of sheriffs will

apply to deputy-marshals.7

8. Deputy-constables.—Constables may act by deputy, in the exercise of their ministerial functions.8 They may appoint as many deputies as they please, and deputies appointed by them are not guilty of any trespass in levying by virtue of legal process in his

In England, provision was made for the appointment of a deputy by 6 & 7

Vict. c. 83; and similar provisions have been made in several States.

1. Yeargin v. Siler, 83 N. Car. 348,

2. United States v. Tinklepaugh, 3
Blatch. (U. S.) 425; State v. Martin, 17 Fed. Rep. 150.

3. Spofford v. Goodell, 3 McLean (U.

pal and agent.

S.), 97.
4. Elyea v. Williamson, 59 Ga. 432.
5. United States v. Moore, 2 Brock.

6. Randolf v. Donaldson, 9 Cranch (U. S.), 76. It was held in this case that the marshal is not liable for the escape of a debtor committed to the State jail under process from the courts of the United States. There is no provision in any act of Congress declaring the keepers of State jails, as to prisoners in custody under process of the United States, to be deputies of the marshals, or making the latter liable for escapes committed by the negligence or malfeasance of the former. Nor is such liability to be inferred from the general powers and duties of their office or the doctrine of the common law applicable to the case of princi-

But in State v. Martin, 17 Fed. Rep. 150, it was held that the keeper of a State jail, to whose custody a person is committed by legal process issued by a United States court or judicial officer, with the consent of the State, and taking such person from his custody without authority, is a violation of § 5398 of U.S. Rev. Stat., within the purview of which a deputy-marshal is an officer of the United States.

7. See DEPUTY SHERIFFS, ante.

8. Jobson v. Fennel, 35 Cal. 711; Lawson v. Buzines, 3 Har. (Del.) 416.

In Pennsylvania, a deputy-constable may execute a domestic attachment, though it is directed to the constable. Such is the proper direction. McCormack v. Miller, 3 Pa. 230.

But in Downs v. McGlynn, 2 Hilt. (N. Y.) 14, it was held that a constable has no power to substitute another officer in the performance of duties intrusted to him; and where another undertakes these duties, the first becomes responsible for his default or neglect.

9. Taylor v. Brown, 4 Cal. 188; 60 Am.

Dec. 604.

A deposited with B, a justice of the peace who rendered judgment against him, money to be paid over when an ex-ecution should be demanded. The constable charged with the collection of the claim against A authorized C to apply to B, and get out execution in all cases he had control of, and place them in the hands of the plaintiffs. C did apply, but B did not pay over the money to C, and in the mean time the money depreciated. Held, that B was not authorized to pay it to C; that he could have paid it to no one but the officer, the plaintiff in the execu-

- 9. Deputy-clerk.—A deputy-clerk may be appointed by parol, and such deputy may discharge most of the duties of the clerk's The clerk is bound by the acts of his deputy in the ordinary course of business, but not by an act out of the ordinary course.2
- 10. Deputy-notary.—Protest of a foreign bill cannot be made by deputy-notary, or otherwise than by the notary in person, except when the law of the place where the protest is made authorizes the act to be done by a deputy or other agent of the notary.3

11 Other Deputies.—Cases concerning other deputies than those separately treated are collected in the note.4

tion, or his authorized agent, and was not liable to A for the original value of the money, Lytle v. Smith, 3 Humph. (Tenn.) 327.

1. Bonds v. State, 1 Mart. & Yerg. (Tenn.) 143; s. c., 17 Am. Dec. 795.

A county clerk may contract with his deputy that the latter for his compensation shall have a certain share of the fees taxed and collectable in the clerk's office during his deputyship. Cheek v. Tilley. 31 Ind. 121.

A deputy county clerk who holds his office at the pleasure of the county clerk has no "term" of office. Gibbs v. Mor-

gan. 39 N. J. Eq. 126.
What Duties Deputy Clerk May Perform. - See DEPUTY MUST ACT IN PRIN-

CIPAL'S NAME, ante.

The business of a deputy is to perform the duties of his principal; and a deputy clerk may authenticate instruments for record when his principal is authorized to do so. Rose v. Newman, 26 Tex. 131; Cook v. Knott, 28 Tex. 85; Wert v. Schneider, 64 Tex. 327.

He may subscribe the name of his principal. Triplett v. Gill, 7 J. J. Marsh.

(Ky.) 440.

A deputy-clerk of court may approve a stay bond, although the clerk is present, and for negligence in so doing the deputy is liable to the clerk. Moore v. McKinley,

60 Iowa, 367.

The duty imposed by statute upon the clerk of the circuit court in Florida, to draw from the box the names of persons to serve as grand jurors at a term of the court, may be performed by a deputy. Willingham v. The State, 21 Fla. 761.

Where an order to seize property in an action for claim and delivery was signed by an unsworn deputy-clerk, who had never been formally inducted into office, but the objection was not made until after ae answer to the merits had been filed, it was held too late. Butts v. Screws, 95 N. Car. 215.

But deputy-clerks are not authorized to

grant orders of arrest for debt. gerter v. White, 5 La. Ann. 487. Nor can a deputy prothonotary appoint refer ees, under the Delaware act of assembly, to bind lands. Carlisle v. Carlisle, 2 Harr. (Del.) 318.

A deputy-clerk cannot take proof of a deed or other instrument, or make orders concerning their registration. Tatom v.

White, 95 N. Car. 453.
2. Welddes v. Edsell, 2 McLean (U. S.), 366; Abrams v. Ervin, 9 Iowa, 87; Bonds v. State, I Mart. & Yerg. (Tenn.) 143; s. c., 17 Am. Dec. 795.

3. Carter v. Union Bank, 7 Humph.

(Tenn.) 548; s. c., 46 Am. Dec. 89.
Notaries public in New Orleans, being authorized by law to appoint deputynotaries, and it being their duty to keep a record of protests in which all acts done by them in relation to the protest and giving notice of protest of bills and notes are required to be entered, held, that upon proof of the death of a deputy-notary, an original entry in his handwriting, made at the time in such record, is competent evidence to prove the facts of demand, protest, and notice of a note or bill. Fossin v. Hubbard, 61 Barb. (N. Y.) 548.

4. Deputy Collector .- If no proof that a bond required on the appointment of a deputy-collector has been given can be discovered, yet if it appears distinctly that the treasurer who made the appointment recognized the appointee as deputycollector, delivering to him the list of delinquent personal taxes of the county for collection, that circumstance, if the bond was not given, would show a waiver of it by the treasurer. McCormack v. Fitch, 14 Minn. 252.

Clerk in Land Office. - Verbal assurances by a clerk in the office of the commissioner of the State land office-as that a part payment of the price of school lands will secure priority, etc .- cannot be relied upon unless sustained by express provisions of the statute. People v.

Pritchard, 19 Mich. 470.

DERELICTION—DERIVATIVE—DESCEND.

DERELICTION. by the civil law, is the voluntary abandonment of goods by the owner, without the hope or the purpose of returning to the possession.1

The gaining of land from the water by the sea's retiring below

the usual water-mark; opposed to alluvion or alluvium.²

DERIVATIVE.—Coming from another; taken from something preceding; secondary; as derivative title, which is that acquired from another person.3

DESCEND.—(See also DESCENT.)—To pass from one person to another by operation of law, as to an heir on the death of his ancestor.4

Deputy Assessors .- The legislature has the power to authorize the appointment of such officers, and an assessment made by them is valid. Meek v. McClure, 40 Cal. 624.

1. Administrators of Jones v. Nunn,

12 Ga. 473.

Dereliction is the act of abandoning a chattel or movable; as "if one is possessed of a jewel and cast it into the sea or a public highway, this is such an express dereliction that a property will be vested in the first fortunate finder that will seize it to his own use." 3 Bl. Com. 9

2. 2 Roll. Abr. 170; Dyer, 326, b; 2 Bl.

Com. 262; I Steph. Com. 419.

The term is also applied to the land left dry by the sea shrinking back below the usual high-water mark, or by a river changing its bed. If this dereliction is sudden and considerable, the new land in the case of the sea or a tidal river belongs to the government; in the case of a non-tidal river, the property in the bed and the adjoining land remains as before, so that if the river leaves its bed altogether, the old bed is divided between the riparian proprietors according to the medium filum, while the new bed remains the property of the person over whose land the river has made itself a course. If the dereliction is by small and imperceptible degrees, the new land goes to the owner of the adjoining land, -2 Bl. Com. 262, etc.;—and if the owner of the original bed of the river had a several fishery over it, he has a similar right over the new bed. Foster v. Wright, 4

C. P. D. 438.
3. There is considerable difference between an original and a derivative title; when the acquisition is original, the right thus acquired to the thing becomes property, which must be unqualified and unlimited, and since no one but the occupant has any right to the thing, he must have the whole right of disposing of it.

But with regard to derivative acquisition. it may be otherwise; for the person from whom the thing is acquired may not have an unlimited right to it, or he may convev or transfer it, with certain reservation of right. Derivative title must al-

ways he by contract.

Derivative (or secondary) conveyances. are conveyances which presuppose someother conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted They are by such original conveyance. releases, confirmations, surrenders, assignments, and defeasances. 2 Bl. Com.

A derivative power cannot be greater than the primitive or original. Wingate's Max. 26; Noy's Max. 4, Max. 8; Broom's Max. 15; Co. Litt. 321. "He was not possessed of this property except as a reversionary property by virtue of a derivative-title, that is to say, by descent." "I think the words 'derivative title' are apt words to express the state of this succession." Atty.-Gen. v. Rushton, 2 H. & C. 819.

4. 3 Pet. (U. S.) 58, 91.

Descent denotes the vesting of the estate by operation of law in the heirsimmediately upon the death of the ancestor. Dove v. Torr, 128 Mass. 40.

Strictly and literally, to pass from the ancestor to the heir in the descending line; to pass downwards. It is constantly applied, however, to transmission in theascending line. Burrill Law Dict.; Flem-

ing v. Fleming, I H. & C. 244.
"The word 'descend' was not used to express descent in its legal sense, but devolution by force of the devise; and the use of it was probably due to the fact that while the gift for life was to parents, the gift in remainder was to children. It is as if the testator had said 'go down to the children." Ballentine v. Wood, 42 N. J. Eq. 552.
"Of the blood of the person of whom

DESCENDANT.—(See also DESCENT.)—A person who is descended from another; any one who proceeds from the body of another, however remotely, is a descendant of the latter. The word is the converse or opposite of ascendant, rather than of ancestor, taking all these words in the legal technical sense.1

See INTERSTATE LAWS.

DESCRIBE.—To define by properties or accidents; to represent by words or other signs; to give an account: to relate.2

such estate came or descended." Gardner v. Collins, 2 Pet. (U. S.) 58.

1, Abbott's Law Dict.

"A sister's child is not a descendant of the testator." Armstrong v. Moran, I

Bradf. (N. Y.) 314.

Descendants includes every person descended from the stock referred to, is coextensive with "issue," does not em-brace as much as "relations." Barstow v. Goodwin, 2 Bradf. (N. Y.) 413; 2 C. E. Gr. (N. J.) 475; 8 C. E. Gr. (N. J.)

In general, the term "descendants" is broad enough to let in grandchildren with children; but, under a devise to such of testator's brothers and sisters as should survive him, and the descendants of such as should then be dead, equally; adding that the descendants of any deceased brother or sister are to take the share that would have belonged to the parent, the descendants take per stirpes, not per capita. Barstow v. Goodwin, 2 Bradf. (N. Y.) 413.

Brothers and sisters cannot take under the term "descendants." That word does not mean next of kin, or heirs atlaw generally, as these phrases comprehend persons in the ascending as well as in the descending line, and collaterals; but it means the issue of the body of the person named of every degree, such as children, grandchildren, and great-grand-Hamlin v. Osgood, I Redf. children.

(N. Y.) 409.

As used in a will, "descendants" means only lineal heirs, in the absence of clear indications of an intention on the part of the testator to enlarge its meaning. Baker v. Baker, 8 Gray (Mass.), 101, 119.

See Ralph v. Carrick, 11 Ch. Div. 873. "'Descendants' is a good term of description in a will, and includes all who proceed from the body of the person named; as grandchildren and great-grand-Crossly v. Clarke, I Amb.

"Descendants, those who have issued from an individual, and include his children, grandchildren, and their children to the remotest degree. The descendants

form what is called the direct descending line. The term is opposed to that of 'ascendants.'" Jewell v. Jewell, 28 Cal.

"Descendant," as used in 3 N. Y. Rev. Stat. (5th Ed.) 146, § 4, relative to devises, extends to all issue of the testator, however remote, but does not embrace collateral relatives. Van Beuren v. Dash, 30 N. Y. 393; Bryan v. Walton, 20 Ga. 480; Walker v. Walker, 25 Ga. 420.

"Descendants" must not be construed in one portion of a statute of descents, as in that of Rhode Island of 1887, § 1, to mean descendants nearest in degree, unless consistent with other portions, such as section 5, giving the right of representation. Daboll v. Field, 9 R. I.

266, 289.

The term "lineal descendants," as used in sec. 1 of chap. 483 of 1885, which imposes a tax upon all property which passes by will or by the intestate laws of this State to any person other than "to or for the use of father, mother, husband, wife, children, brothers, and sisters and lineal descendants born in lawful wedlock, and the wife or widow of a son, and the husband of a daughter," includes only the direct descendants of the testator or intestate, and does not include the children of brothers and sisters of the deceased." In re Mary E. Miller, 45 Hun (N. Y.), 244; Barry et al. Appeal, 2 Sup. Ct. Dig. (Pa.) 127.
"Eldest male lineal descendants" in a

will. Thelluson v. Rendelsham, 7 L. R. H. L. Cas. 629.

2. Worcester Dict.

"Every acknowledged dictionary in the English language would sanction, as an accurate definition of the word 'description,' 'A representation that gives to another a view of the thing intended to be represented." In re Fitzpatrick,

19 L. R. (Ir.) 210.
"But wherever it is apparent that a grantor has used a technical word to express an idea different from its technical signification, a court will construe it accordingly; and it seems to us clear that by the use of the words 'described in and

DESERT-DESERTER-DESERTION-DESERVING

DESCRIPTION.—See DEEDS: MORTGAGES, ETC.

DESECRATION.—See CEMETERIES.

DESERT-DESERTER-DESERTION.—(See also DIVORCE: MAR. ITIME LAW; MILITARY LAW.)—To forsake; to leave utterly: to abandon.1

DESERVING.—Meritorious.2

conveyed by,' Messick intended to convey to Foote the lands which he then owned, and which the former deed described and purported to convev."

R. Co. v. Beal, 47 Cal. 153.
"Claims too broad upon their face may be so restricted by the words 'sub-stantially as described,' or words of similar import, that they may be considered to the extent of the invention of the patentees." Seymour v. Osborne et al.,

3 Fisher's Pat. Cas. 555.

The words "circuit-breakers described by him prior to said application," in said act, defined and held to include such appendages and added instrumentalities, so previously described by Page, as were calculated to make the circuit-breaker more efficient or perfect. Page v. Holmes Burglar Alarm Telegraph Co., 17 Blatchf. (U. S.) 485.

1. Webster; Burr. Law Dict.

The lexicographers define the word to mean. "to leave with an intention not to return;" but Lord Somers, in his speech delivered in 1688, when James II. vacated the throne, said of "desert," that it, "in the common acceptance, both of the common and canon law, doth signify only a bare withdrawing, a temporary quitting of a thing, and neglect only; which leaveth the party at liberty of re-turning to it again." It thus differs from People v. Board of Police, 26 resign. . Barb. (N. Y.) 501.

Under a statute which enabled a wife who had been deserted by her husband, and had resided apart from him for a prescribed period, to gain a settlement apart from him, and acquire a status of irremovability, a desertion was held to have taken place where a husband having discovered that his wife had been repeatedly guilty of adultery, ordered her to leave his house, and she did so, and resided apart from him. "The statute," said Cockburn, C. J., "must be taken to mean that, where the husband permanently gives up the society of his wife and continues to live in a different place apart from her, she shall be looked upon as a different person from what she would otherwise be, for she resides where she does for her own, and not for any marital purpose." The Queen v. Maidstone Union, 5 Q. B. D. 31.
"Desertion, in the sense of the mari-

time law, is a quitting the ship and her service, not only without leave and against the duty of the party, but with an intent not to return to the ship's duty. There must be the act of quitting the ship, animo derelinquendi, or animo non snip, animo aereurquerus, oi animo um revertendi." Story, J, in Cloutman v. Tunison, I Sumn. (C. C.) 373; Coffin v. Jenkins, 3 Story, 108. "A seaman's leaving the vessel without permission is not necessarily desertion. In order to constitute desertion in the sense of the law, he must quit the ship and her service not only without leave, but without justifiable cause, and with intent not again to return to the ship's duty." Nixon, D. J., in The Mary C. Conery, 9 Fed. Rep. 222. Where seamen go upon shore upon the ship's duty, and when the boat is about to return ask leave to remain on shore to get some food, which is denied them, and the boat goes without them, and they subsequently offer to return to duty, this is not a desertion which will work a forfeiture of wages. Sigard v. Roberts, 3 Esp. 71. Desertion cannot take place after a voyage is ended. Cloutman v. Tunison, I Sumn. (C. C.) 373. Where a sailor is compelled by the inhuman treatment of the master to leave the ship, in order to insure his safety, it Limland v. Stephens, is not desertion. 3 Esp. 269.

To call one a "deserter" is not per se slanderous, as the offence of desertion is not indictable, but is only cognizable by a court-martial, Hollingsworth v. Shaw, 19 Ohio St. 430; s. c., 2 Am. Rep. 411.

2. Webster.

" Deserving' denotes worth or merit, without regard to condition or circumstances, and is in no sense of the word limited to persons in need of assistance, or to objects which come within the class of charitable uses." Hence, a bequest to executors in trust to "distribute to such persons, societies, or institutions as they may consider most deserving," is void for indefiniteness. "A bequest for the relief of 'deserving poor,' or of 'indigent but deserving 'individuals, is a charitable

DESIGN.—(See also COPYRIGHT: MURDER: PATENTS: PRE-MEDITATE.)—Purpose; intention; aim; implying a scheme or plan in the mind: 1 to delineate a form or figure by drawing the outline; to plan: to project: 2 to designate.3

DESIGNATE.—(See also APPOINT.)—To show or point out; to indicate by description or by something known or determinate.4

DESIRE.—(See also PRECATORY WORDS; TRUSTS.)—To wish: to express a wish.5

bequest, not by force of the word 'deserving,' but in virtue of the word 'poor' or 'indigent,' and would be equally charitable if the word 'deserving' had been omitted, Kendall v. Granger, 5 Beav. 300." Nichols v. Allen, 130 Mass. 211; s. c., 39 Am. Rep. 445. 1. Webster.

In construing a policy of insurance, by which the insurers agreed to make good any loss or damage "by fire, originatany cause, except design in the assured," etc., Story, J., said: "Design imports plan, scheme, intention, carried into effect. The loss, to be by design of the assured, in the sense of the policy, must be by incitement, connivance, or co-operation of the assured, directly or indirectly, with the persons who were the agents in the act. It is not sufficient that he is negligent in leaving the premises derelict, and thus exposing them to the wanton or criminal acts of intruders. Negligence is not design." Legal design is imputed where the consequences naturally flow from an act, where they are connected with it as a cause, not where they merely follow it. Catlin v. Spring-field Fire Ins. Co., I Sumn. (C. C.) 434.

Under a condition in a policy of insurance that it should not extend to cases where death was "the result of design, either on the part of the deceased or any other person," where the insured was killed by another, there must have been an intention to kill him, in order to constitute his death the result of design. Utter v. Travellers' Ins. Co. (Mich.), 9 W. Rep. 108.

2. Webster.

A design for ornamenting woollens, consisting of a combination of two patterns, which were not new but had never before been used in combination, was held not to be a "new and original design" within the meaning of an act relating to the copyright of designs for ornamenting articles of manufacture. Harrison v. Taylor, 3 H. & N. 301, Martin. B., defined "design" as "a project." "an idea." and said: "Here the idea was motinew, but there was merely the applying an old idea to a different kind of cloth. This is a mere combination in a manner well known. There must be something like projecting or forming an original idea to make a design within this act of parliament." But this was reversed in the Exchequer Chamber, where it was held that a new and original design was "not a project or idea in the nature of an invention, but the representation of something, which a draughtsman has for the first time produced. makes no difference that its component parts had been formerly produced. Harrison v. Taylor, 4 H. & N. 815.

3. An occasional meaning. United States v. Bott, 11 Blatchf. (C. C.) 346.
4. In re Election of Bedford, 1 Pa. L.

J. R. 484, where it was decided that under an act requiring each ticket voted at an election to "designate, on the outside, the office or offices, and on the inside the name of the person voted for to fill such office or offices," a ticket having the name of the candidate on the inside, and on the outside the words "prothonotary and clerk of the several courts of L. county.' contained a sufficient designation of the office of prothonotary of the court of common pleas and the clerk of the courts of quarter sessions, oyer and terminer, and orphans' court of the county of L., both offices being held by one per-The act does not require the offices to be designated by name, but simply to be designated on the outside of the ticket.

In State v. Green, 3 Harr. (N. J.) 179, the word was defined "to point out, or mark by some particular token;" and under a statute requiring an application for the opening, altering, or vacating of a road to designate the points or places from and to which it was to be laid out, altered or vacated, a description "to begin at a stake in the middle of the road, called, etc.," when in fact no stake was standing anywhere in the middle of the road named, was held not to be such a designation as was contemplated.

5. "Any person or persons desiring to prosecute the same," in an act providing that informations in the nature of quo war-

DESIRABLE-DESPATCH-DESPERATE-DESTROY

DESIRABLE.—See note 1.

DESPATCH.—(See also CHARTER-PARTY.2)—To send away:3 speed: expedition.4

DESPERATE.—Hopeless: used in inventories of property, as a designation of debts or claims considered worthless.5

DESTINATION.—(See also PORT.)—End of a voyage.6

DESTROY.—(See also CAST AWAY; SHIPPING; WILLS.)—To make of no effect; to do away with; to put an end to; to spoil, render useless; to injure.7

ranto might be exhibited by such, means any person having an interest to be affected, Com. v. Cluley, 56 Pa. St. 270; Com. v. Alleghany Bridge Co., 20 Pa. St. 185; State v. Boal, 46 Mo. 528; State
ν. Lawrence, 38 Mo. 535.
A declaration in a bond, issued by a

school district to secure a twenty-five years' loan, that it "will be redeemed, if desired, twelve years after date," is intended for the benefit of the holder alone. giving him the option of paying principal and interest at the expiration of that time; but the school district could not of its own motion redeem the bond until the twentyfive years had expired, Allentown School Dist. v. Derr's Admr. (Pa:), o Atl. Rep. 55; s. c., 19 W. N. C. (Pa.) 189.

Where an importer gave notice to a collector of customs that an appraisement of certain goods was not satisfactory, and that "if desired, such evidence and statements will be produced to you, as can be furnished, to satisfy you of the fairness of our invoice, and of the foreign market price," this was held not to be an absolute unconditional notice of dissatisfaction, consequently was not an appeal, or was an abandonment of an appeal, and the Schmaire v. appraisement was final. Maxwell, 3 Blatchf. (C. C.) 408.

1. A corporation with power to purchase "property deemed desirable in the transaction of its business," may purchase its own stock. Iowa Lumber Co. v. Foster, 49 Iowa, 25; s. c., 31 Am. Rep.

2. Vol. III. p. 148.

3. Webster.

An agreement in a charter-party that the vessel shall be despatched from a given place within a certain time, is only fulfilled by an actual sailing on the voy-The mere breaking ground is insufficient, and the agreement is broken if the vessel is prevented from proceeding after spreading sail by a mutiny. Sharp v. Gibbs, 1 H. & N. 801.

4. Webster.

A contract to manufacture and deliver goods "with all possible despatch," is a contract to do so within a reasonable time. Rowan v. Sharp's Rifle Manfg. 5. Burr. Law Dict.; Schulz v. Pulver, 11 Wend. (N. Y.) 361.

6. Where a statute gives a person who labors at cutting or driving logs a lien thereon, "to continue for sixty days after the logs or lumber arrive at the place of destination for sale or manufacture." that place is the place where the driving ends; it is the last boom into which the logs are driven before rafting. On the Penobscot river, that place is "Penobscot Boom." Sheridan v. Ireland, 66 Me. 65.

7. Thus, on an indictment under the acts of Congress for casting away and destroying a vessel, the court, Washington, J., charged the jury that "to destroy a vessel is to unfit her for service, beyond the hopes of recovery by ordinary means. This, in extent of injury, is synonymous with cast away." U. S. v. Johns, 4 Dall. (U. S.) 412; s. c., 1 Wash.. C. C. 363. See U. S. v. Vanrast, 3 Wash. C. C. 146.

Under the English statutes of a similar import, it has been ruled that if the ship be only run aground or stranded upon a rock, and be afterwards got off in a condition capable of being easily refitted, she cannot be said to be cast away or de-2 East Pleas Crown, 1098. stroved.

Upon this subject see also I Bish. Cr.

L. (7th Ed.) § 570, and note.

On the question of the revocation of a will, in South Carolina, under the Statute of Frauds in force there, which declares that all "devises and bequests, duly made and executed, shall continue in force until the same be burnt, cancelled torn or obliterated by the testator, etc.," where the jury found that the will was torn animo revocandi, the court, Huger, J., said: "Although the words of our statute of 1789 (P. L. 491; 2 Brev. 35) are not precisely those used in the Stat-

DESTRUCTION. -- See WASTE.

DESTRUCTIVE.—(See also BOILING.)1—Causing or tending to destruction: that which destroys.2

ute of Frauds, they are so much alike as to make it almost unnecessary to notice them. The act of 1780 uses the word 'destroying,' instead of burning, cancelling, and tearing; the former appears to include them all: a will burned, cancelled, or torn, animo revocandi, is destroyed."

Johnson v. Brailsford, 2 N. & Mc. (S. Car.) 272; s. c., 10 Am. Dec. 601. So in England, scratching out the signature with a knife has been held to be "tearing or otherwise destroying" the will within section 20 of the Wills Act, 1837. In the Goods of Morton, 56 L. J. R. Pr. & D.

But where a testator drew his pen through the lines of various parts of his will, wrote on the back of it, "this is revoked," and threw it among a heap of waste papers in his sitting-room; a servant took it up and put it on a table in the kitchen, and it remained lying about in the kitchen till the testator's death seven or eight years afterwards, and was then found uninjured; it was held that the will was not revoked, the words, 'or otherwise destroying" in the Wills Act 1837 (7 Wm. IV.; I Vict. c. 26, § 20), not being satisfied, as whatever the testator intended, the will had not been actually injured, the court, James, L. J., saying: "All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying: there must be the two." Cheese v. Lovejoy, L. R. 2 Prob. Div. 251.

This word is used in various statutes in its ordinary sense of destruction or in-Thus, where an indictment was framed, under a statute which declared "that if any person shall unlawfully and maliciously cut, break, or destroy," for destroying a threshing-machine, and the evidence showed that the owner had taken his threshing-machine to pieces, expecting a mob to come and destroy it, and the mob came and destroyed the different parts of the machine when thus separated, this was held to be within the statute. R. v. Mackerel, 4 C. & P. 448.

And this has been extended even to the water-wheel by which the threshing-machine was worked. R. v. Fidler, 4 C. & P. 449.

Where an act declared: "If any person shall unlawfully and maliciously cut down or otherwise destroy," etc., it was held that cutting down a tree is sufficient to bring the case within the act, although the tree is not thereby totally destroyed. R. v. Taylor, Russ. & Ry. 373.
In Alabama, it has been held that

where slaves are attached and sold under an order of court as "perishable proper-" the sale is sufficient to pass the title to the purchaser under the act. Clay's Dig. pp. 56, § 8, as follows: "When any estate attached shall . . . be certified . . . to be likely to waste, or be destroyed by keeping, . . . such estate shall be Millard's Adm'rs v. Hall, 24 Ala. sold."

On an indictment for mayhem which charged that the accused did "cut, bite, slit and destroy" the thumb of the prosecutor, it was objected that the indictment was defective in that it did not allege that the thumb was "disabled" in accordance with the statutory definition of the offence, 2 R. S. 665, § 27. But the court, Andrews, J. held that "the word 'destroy' used in the indictment is more comprehensive than the word 'disable, and includes what is signified by it, and the indictment is not defective by reason of the substitution." Tully v. People, 67 N. Y. 15.

1. Reg. v. Crawford, 2 C. & K. 129; s. c., i Den. C. C. 100.

2. A defendant having been convicted under a statute as follows: "Every person who, with intent to kill, administers. or causes or procures to be administered to another any poison, or other noxious or 'destructive' substance or líquid, but by which death is not caused, is purishable by imprisonment in the State prison not less than ten years," appealed on the ground inter alia that the court, in instructing the jury, defined poisonous and noxious substances as follows: "A poisonous substance is one which has an inherent, and deleterious property capable of destroying life A noxious substance is not necessarily poisonous, but may be a substance which is hurtful and injurious." On appeal, the court reversed the judgment, and remanded the cause for a new trial, saying: "Accurate definitions of those terms cannot be readily given, and perhaps are impossible, and proximate accuracy is all that may be required in the application of the statute in a given case; but the above definitions omit some of the essential elements of the meaning of those terms as employed in the statute. . . . The noxious or 'destructive' substance or liquid

DETAIL.—(See EXEMPTION.)—A minute part, used in the phrase "matters of detail;" a body or number of men set apart for some special duty.²

DETAIN.—(See DETINUE.)—To keep in custody or confinement:

mentioned in the statute is not merely such as might, when administered, be hurtful and injurious, but, like a poison, it must be capable of destroying life, Pulverized glass or boiling water, when administered in sufficient quantities. would destroy life, but they are not poisonous. The purpose of the statute is to provide a punishment for attempt to kill by the means therein mentioned; and in order to bring a case within the statute, it must be proved that the substance or liquid which was administered was capable of destroying life. The intent to kill could not be inferred from the act of administering a substance which has not the capacity of destroying life. The omission of the quality or capacity from the definition of a noxious substance, as given at the request of the prosecution, rendered it erroneous." People v. Van

Deleer, 53 Cal. 147,

1. Where a receiver of an insolvent corporation was appointed, and an agreement among the secured and general creditors of the corporation was entered into, whereby certain income bonds were to be issued, "payable in thirty years," and a committee to arrange the "details" of the plan was appointed, it was held that the committee had authority to consent that the bonds should be made payable, at the option of the company, on or before the expiration of thirty years from the date of their issue, the court, Runyon, Ch., saying: "When the nature of the agreement and the different interests of the various parties to it, and the great number of persons constituting some of those parties, are considered, the necessity for referring 'matters of detail' to a committee is evident. And by the term 'matters of detail' in the agreement was obviously meant not merely such matters as regarded the formal execution of the provisions of the agreement, but also such alterations in the terms of the agreement itself (not changing the plan) as might be deemed necessary or advisable to effectuate the object." Lehigh etc., Co. v. Central R. Co., 34 N. J. Eq.

2. On a writ of habeas corpus to procure the release and discharge of two men held as militiamen, it appeared that these men had been exempted as overseers of plantations under the acts of the Con-

gress of the Confederate States from the Confederate State service. It was claimed that as such exempts they were not liable to serve in the State militia on the ground that the exemptions granted to overseers and agriculturists were designed to provide support, in the way of subsistence, for the army; but the court held otherwise, and remanded the men, Phelan, J., saying: "Such a construction would make exemptions under the act in reality 'details,' and would destroy the distinction, which is a very broad and material one, between exemptions and details. This distinction is one fully recognized and established on many grounds. In the first place, it arises naturally out of the words themselves, and the things which they clearly import. An 'exempt' is one who is 'free from any etc. A detail, on the contrary, is one who belongs to the army, but is only 'detached' or 'set apart' for the time to some particular duty or service, and who is liable, at any time, to be recalled to his place in the ranks. This distinction is made by the law itself, which uses the two words obviously for different purposes." State ex rel. Dawson in re Strawbridge and Mays, 39 Ala. 367,

3. A defendant was summoned before a justice to answer the plaintiff "in a plea of trespass in damages not exceeding three hundred dollars." The parties appeared and went to trial, the plaintiff claiming and recovering a judgment of five dollars "for damages done to his personal property by defendant unlawfully detaining and milking plaintiff's cow." A certiorari was taken on the ground that the plaintiff's remedy was by an action of trespass on the case, and therefore the justice did not have juris-diction. But the court held that the incidents of a judgment in trespass being the same as of a judgment in trover, the proceedings before a justice should not be reversed because of a technical mistake in the form of action, Rice, P. J., saying: "The argument of counsel is, that the presumption is that the cow came lawfully into the defendant's possession, and that the damages arose from the unlawful detention. A justice in stating the plaintiff's cause of action is not held to keep or hold back that which belongs to another; to with-

to the strict rules of special pleading, and it is quite possible in this case that the justice used the word 'detaining' in one of its popular meanings ('to restrain from proceeding; to stay or stop;" Webster), or in place of one of its synonyms ('to stop; stay; arrest; check; retard; delay; hinder;' Webster), without a proper appreciation of the nice distinction which the rules of pleading make between an unlawful taking and an unlawful detention of property. But, assuming that the transcript is to be understood in the precise sense claimed by counsel, it does not follow that the justice did not have jurisdiction. As the counsel for the plaintiff pertinently answers, the justices of the peace have jurisdiction of actions of trover and conversion, and one of the instances of conversion which will support the action is a wrongful detention." Brader v. Conniff, 4 Kulp (Pa.), 321.

K. having been committed to prison by virtue of an execution issued on a judgment against him in an action of assumpsit, was admitted to the liberties of the prison, and gave bond to the sheriff to remain there or within the limits thereof until he should be lawfully discharged. Imprisonment for debt having been abolished by the act of 1842, of which the first section provides "that no person shall be arrested, held to bail, detained, or imprisoned upon any process, mesne or final, founded upon contract, merely express or implied," etc. On the 4th of July, 1842, when the act took effect, K., without license or permission of the sheriff, and contrary to his will, departed from prison, and did not return. In an action brought on the bond, it was held that K., on the day of his departure from prison, was lawfully discharged therefrom by force of the act of 1842 to abolish imprisonment for debt, the court, Hinman, J., saying: "The principal question in the case is, whether this departure from prison is a breach of his bond to the sheriff to remain a prisoner on the limits of said jail, until lawfully discharged therefrom. This, of course, depends upon the question whether this act lawfully discharged him from prison. We think it did so discharge him. Indeed, there is no room for any different construction of the act short of a total disregard of the plain meaning of the language used. It was said in the argument that the word 'detained' had no meaning, but was inserted merely to fill up the sentence. But if we expunge this word from the act, we may, for the same reason, expunge any other in the same connection, which would be altering the law, not construing it." Sedgwick v. Knibloe, 16 Conn.

1. In an action of detinue, the declaration alleged that the plaintiff delivered certain paper writings to defendant to be redelivered on request, after payment to him of a certain sum, averring that that sum was paid to desendant. breach was that defendant had not delivered the paper writings, though requested, but "detains" the same. The defendant pleaded that the paper writings were deposited with him as a pledge and security for £210, advanced by him to the plaintiff, and that on payment of that sum defendant tendered and offered to deliver up and return them to plaintiff, who then refused to receive them. On demurrer it was held that this plea was bad, for denying the detention argumentatively and for amounting to non-detinet; the court, Pollock, C. B., saving: "The principal point argued in this case was whether the plea amounted to. and was an argumentative plea of nondetinet, that being the first cause of special demurrer assigned. The court intimated its opinion that this question turned on the meaning of the word 'detain 'in the declaration in detinue. meaning be that the defendant has the goods in his possession, the plea admits the detention. If it mean that the defendant has omitted to deliver, in the sense of taking the goods to the plaintiff and giving them up to him, the plea admits the detention, and excuses it. If it mean that the defendant withholds the goods, and prevents the plaintiff from having the possession of them, the plea denies the detention argumentatively, and We are satisfied that the last is is bad. the true meaning of the word 'detain.' If it meant the mere keeping a possession, not adverse, how could such a possession form the ground of an action? If it meant that the defendant had omitted, and still omitted, to be active in bringing the goods to the plaintiff, the action could not be maintained without showing an obligation by contract to do We have no doubt therefore that the detention complained of is an 'adverse' detention." Clemens v. Flight, 16 M. & W. 42. See Bain v. McDonald, 32 U. C. Q. B. 190.

DETAINER DETAINMENTS DETENTION

DETAINER.—(See also FORCIBLE ENTRY AND DETAINER.)—The act, usually a wrong, of keeping a person against his will, or of withholding possession of real or personal property from a person entitled to it. In this sense it is substantially equivalent to DETENTION (which see), but has a more technical use.

DETAINMENTS.—A word used in the phraseology of a marine policy of insurance, in the sentence, "arrests, restraints, and detainments." (See also RESTRAINTS.)

DETENTION.—The state of being hindered or delayed; or the act of detaining, keeping back, or withholding that which belongs to another.² Used in the phrase "House of Detention," of a

1. Abbott's Law Dict., sub voce.

2. Where cattle were shipped and the carriage was prepaid, under a contract that the carrier was "not to be liable in respect to any loss or 'detention' or injury to said animals, or any of them, in the receiving, forwarding, or delivering thereof, except upon proof that such loss, 'detention,' or injury arose from the wilful misconduct" of the carriers: on the arrival at the destination, the prepayment of the carriage not having been noted, the carrier refused to deliver the cattle, alleging in good faith that the carriage was not paid. This was held not to be a "detention" within the contract, Grove, J., saying: "Does the word detention" there apply-not merely to some stoppage in transit, or mistake by which the cattle track had been sent into a wrong siding, or delivered in course of transit to the wrong person, or any such mistake causing delay, but to the withholding of the cattle by the company, under claim of a supposed right on which they insisted. I think that is not 'detention,' within the meaning of the conditions, or that anybody would naturally suppose that it was so. It was not any detention which had delayed or prevented their arrival. . . . I think that the word 'detention,' as used in this condition, does not mean any 'detention' by absolute refusal, but by something that prevents the company from delivering at the proper time." Cited, without the name of the case or volume of report being given, as an example that "detention" does not in such cases mean retention in Browne's Judicial Interpretations of Common Words and Phrases, 97.

Detention by Ice.—Where a charterparty allowed a certain number of layingdays to the charterer, but contained this exception, "detention by ice and quarantine not to be reckoned as laying-days," in a suit against the charterer, the question arose whether the days during which the river above the port of loading was frozen, though the port itself was free. were to be reckoned as lay-days in which case the plaintiff was entitled to recover. or were to be considered as within the exception "detention by ice." It was contended on behalf of the plaintiff that the words "detention by ice not to be reckoned as lay-days" must be construed with reference to the object for which in the preceding clause the lay-days are stated to be allowed, viz., for loading and unloading, and that no obstruction by ice is within the meaning of those words. except an obstruction by ice in contact with, or near, or about the ship, and interposing such a barrier against the access of lighters alongside of her as practically to prevent or interrupt the actual work of loading. For the defendant it was contended that, regard being had to the circumstances under which shipments take place at the mouth of the river, and particularly the fact that the storehouses which supply grain to ships lying at the nort are at a distance of about 100 miles therefrom, the words "detention by ice" must be taken to include not only the prevention and interruption by ice of the actual work of loading, i.e., of bringing along-side the ship in lighters and transferring from them to the ship, cargo brought down to the port in fulfilment of the charter-party, but also the delaying of the ship's loading, by reason of the detention by ice, of lighters during any part of the time allowed for loading and unloading, and at any distance from the port. And the court, Blackburn, J., held that this exception to the charter-party, whereby "detention by ice" is not to be reckoned as laying-days, applies where the ice not only renders access to the ship impracticable in the port itself, but blocks up a river by means of which alone the intended cargo can be conveyed to the Hudson v. Ede, 8 B. & S. port. 631.

DETERGENT-DETERMINABLE-DETERMINATION

place where offenders or accused persons are kept in custody; to where juvenile offenders are sentenced to be sent, as to a reformatory school, to be there retained for a certain period of time.

DETERGENT.—Having the property or quality of cleansing or cleaning.³

DETERMINABLE.—See note 4.

DETERMINATION.—(See also ACTUAL; FINAL.)—See note 5.

1. The Encyclopædic Dict. (Cassell), sub voce.
2. Rapalje & Lawr. Law Dict., sub

DOCE. 3. A suit was brought for the infringement of a patent, granted on the following specification: "The nature of our invention consists in a new soap compound, produced by incorporating carbolic and cresylic acids, either one or both, with ordinary soap. These substances are well known for their useful properties, and we have found that, when combined with soap, the detergent value of the soap is improved, and the properties of the acids are not masked or destroyed," etc. The specification also disclaimed a mixture, already known and patented, of which it said: "The mixtures so made do not owe their efficiency to the small proportion of carbolic acid contained in them, and they are impracticable for the purposes to which soaps are applied.' The court, however, held, that the incorporation in a compound of a purer and more concentrated acid than existed and was used at the time of the prior production of a similar compound produced by substantially the same means, whereby the latter compound was rendered applicable to new purposes, did not constitute an invention, and dismissed the bill; Blatch-ford, C. J., saying: "The specification of the patent states that the 'new soap compound,' which is the invention, is made by incorporating the acid with ordinary soap. It, then, defines the word 'soap,' as used in the specification, to mean 'any of the compounds of alkali with oil or fat which are known or used in the arts under that name.' "It also says that the invention is 'applicable to all kinds of ordinary detergent soap,' and that when the acid is combined with soap, the detergent value of the soap is improved, while the properties of the acid are not masked or de-It says that the acids named are well known for their useful properties, but it does not specify the properties. It also speaks of 'satisfactory effects,' but it does not state what effects are referred to other than such as are elsewhere mentioned. A detergent soap is a cleansing soap. Detergent means 'cleansing.' It is the nature of a soap to be detergent or cleansing. article is a soap, it is detergent. is not detergent, it is not a soap. Whatever is a soap, is a detergent soap:" and farther on: "The carbolic acid in the earlier patent was efficient, and it was efficient to the extent to which it existed in the mixtures, and they were soaps. They were not impracticable for the purposes to which soaps were then applied. Soaps made with the purer carbolic which existed in 1867 may be applicable to purposes to which soaps made with less pure carbolic acid, cannot be applied, but that shows only a difference in degree, and not invention." Buckan v. Mc-Kesson, 7 Fed. Rep. 100.

4. A demise for "a term of three years

4. A demise for "a term of three years determinable on a six months' previous notice to quit, otherwise to continue from year to year, until the term shall cease by notice to quit at the usual times," was held a demise for three years certain, determinable at the end of that period by six months' previous notice; and if not determined, a subsisting tenancy from year to year;—in opposition to the contention that "determinable" signified "capable of being determined before the term of three years expires." Jones v. Nikon, 1 H, & C, 48.

Determinable fees are "fees which are lable to be determined by some act or event expressed on their limitation to circumscribe their continuance, or inferred by law as bounding their extent. McLane z. Bovee, 35 Wis. 36, quoting I Washb. Real Prop. 62. See also People z. White, II Barb. (N. Y.) 28.

5. Where a judge, on a number of facts stated, orders a verdict, there is no "determination or direction of the judge in point of law" to which an appeal lies. "If, in coming to a right conclusion, the judge lays down some proposition of law erroneously, I do not think there is such a 'determination in point of law' as the

DETERMINE.—(See also LEGALLY.)—To fix permanently; to settle; to adjust.¹ To terminate or bring to an end.² To terminate or bring to an end.2

legislature meant to be a ground of appeal. I must confess I do not very well see how there can be an appeal against the 'determination or direction of the judge in point of law' where the parties do not choose to have a jury." Templeman v.

Haydon, 12 C. B. 513.

A having recovered in an action against B, proceedings were staved on B giving security for the amount, and B entered into a bond with a condition that "if the determination of the action should be in favor of the plaintiff," and B should pay the money, the bond should be void. A rule was obtained on a point reserved at the trial to set aside the verdict, but this was afterwards dis-charged. B gave notice of appeal under the Common Law Procedure Act, but no bail was put in, nor any further steps taken by B for over a year, when an action was commenced on the bond. Held. that there was a "determination of the action in favor of the plaintiff." "We are of opinion that, as there was at the commencement of this action a judgment in favor of the plaintiff, and there was no stay of execution on that judgment, such a state of things amounts to a 'determination' of the action in favor of the plaintiff within the meaning of the condition. Had the defendant, by putting in bail or otherwise, obtained a stay of execution on the judgment, we are disposed to think that then, though there would still have been a valid judgment in favor of the plaintiff, there would not have been such a determination of the action in his favor as is contemplated by the condition of this bond. But where, as in this case, the plaintiff has obtained a judgment in his favor, and is in a condition to enforce it by execution, the action, as far as he is concerned, may be properly said to be determined in his favor, and unless the amount mentioned in the condition is paid, the bond is forfeited. Burnaby v. Earle, L. R. 9 Q. B. 490.

The term "determination of the risk

insured" in a policy of insurance means "that determination of it which is occasioned by the loss or safe arrival of the thing insured, or by the final end and conclusion of the voyage." Kensington v.

Inglis, 8 East. 291.

1. Field v. Marye (Va.), 3 S. E. Rep. 710, quoting Webs. Dict., where the provisions of the Virginia Const, that the attorney-general shall receive such compen-sation "as may be prescribed by law," and that the salary of the secretary, trea-

surer, and auditor of the State "shall be determined by law," were considered, "a distinction is sought to be drawn based upon the signification of these two This distinction is far from clear. Mr. Webster defines 'prescribed' thus: 'To set down authoritatively; to order; to direct; to dictate; to appoint. . 'To set down authoritatively,' and 'to fix permanently, or to settle.' do not admit of a wide distinction." Held. accordingly, that the duty of prescribing the salary of the attorney general was legislative; and there being no limitation of its exercise, the general assembly could pass an act diminishing his salary during his term.

With regard to the statement by the judges that they were not to "determine" the privilege of the high court of Parliament before which they were called to advise, Lord Ellenborough said: "Surely the word 'determine' was not. there meant to be used by them in the sense of adjudge; but they meant to say no more than this: You, the lords' house, ask our opinion upon a question concerning privilege of Parliament before you, but we are not to determine that question; that is, we are not to give you any determinate purpose upon that subject. The question was not addressed to them as to persons who were to determine or adjudge upon it, but as advisers to the lords on the law. They say, in effect, It. is not a proper subject for us to enter into: it properly belongs to yourselves; and therefore it is not for us to advise you upon it." Burdett v. Abbott, 14 East,

An order for final judgment for plaintiff and denying defendant's motion for judgment being merely interlocutory, is not applicable on the ground that it "de-termines the action." "On the contrary, it orders a judgment which will determine the action, and from which an appeal may be taken." Murray v. Scribner (Wis.),

35 N. W. Rep. 313.
2. Sharp υ. Curds, 4 Bibb (Ky.), 548. "We do not mean to say that 'to become void 'and ' to be determined ' are convertible phrases. The former, however, differs from the latter only as a species differs from its genus, and must therefore be included in it; for to say that a thing has become void necessarily implies that it has in effect been terminated or brought to an end; but the expression applies only to its end or termination in one specific mode: whereas, to say that

DETINUE.—(See also ACTION; EVIDENCE; PARTIES.)

- 1. Definition, 651.
- 2. When Action Lies. 652.

 - (a) Generally, 652. (b) Kind of Property, 652. (c) When Demand Must be Made,
- 3. When Action Will Not Lie, 653.
- 4. Parties to Action, 654.
- (a) Plaintiff, 654.

- (b) Defendant, 654. 5. Pleading, 655.
- (a) Declaration, 655.
- (b) Plea, 655.

 6. Election of Actions, 656.
- 7. Amount of Recovery, 656. 8. Judgment, 657. 9. Verdict, 657.
- Verdict, 657.
 Evidence, 657.
- 1. Definition.—Detinue is a common-law action which lies for the recovery of personal chattels in specie, where the same are unlawfully detained from the claimant; damages may also be received for the unlawful detention. 1 It is an action ex delicto, and not ex contractu.2 There is a strong resemblance between trespass, trover, and detinue. Trespass and trover are founded on a single act which is indivisible; detinue, on the detention of the property

a thing 'has been determined,' though it clearly imports simply that the thing has been terminated or brought to an end, vet the expression is generic in its nature, and comprehends every mode of terminating or bringing a thing to an end."

1. Stephen's Pl. 47; I Chitt. Pl. 136;

Bouy, Law Dict.

It was formerly held that this action would not lie where the goods were unlawfully taken, and this was Blackstone's idea. See 3 Bl. Com. 151. And this is included in the definition of other of the early authorities. Brooke Abr. Detinue 21, 36, 63. Chitty, however, says that this doctrine is erroneous, and that it is the proper specific remedy for the recovery of the identical chattels personal when they have not been taken in dis-3 Bl. Com. 152, Chitty's note.

In England, this action has yielded to the more practical and less technical ac-

tion of trover.

In the United States, it was formerly used a great deal in the slave States for the recovery of slaves. The action has been abolished in all the States which have adopted a civil code of procedure, and in such States the remedy sought by the old action of detinue is now had by replevin.

In nearly all of the common-law States it has been superseded by the action of trover, and also by replevin as modified by statute. So at this time the action is one not often resorted to. In Alabama and the Federal Courts, and some other

courts, it is sometimes used. 2. Stephen on Pl. 47; I Chitty on Pl.

It is an action somewhat peculiar in its character and in its nature, and it may be very difficult to decide whether ex contractu for breach of contract.

it should be classed among forms of actions ex contractu, or should be ranked with actions ex delicto.

The right to join detinue with debt, and to sue in detinue for not delivering goods in pursuance of the terms of a bailment to the defendant, seem to afford ground for considering it rather as an action ex contractu than an action of tort. On the other hand, it seems that detinue lies, although the defendant wrongfully became the possessor thereof in the first instance without relation to any contract. And it has recently been considered as an action for tort, the gist of the action not being the breach of contract, but the

wrongful detainer. I Chitt. Pl. 136.
Pollock on Torts, p. 11, n., says that
the reason given by Blackstone, p. 152, for the wager of law being allowed in debt and detinue is some one's idle guess, due to mere ignorance of the earlier his-

From history it appears that the action of detinue was originally no other than the action of debt in the detinet instead of debt. 1 Chit. Pl. 136, 11. d'; 1 Reeves Hist. E. Law, 261, 333, 336; 3 Reeves Hist. E Law, 66, 74.

In the recent case of Spippen v. Tankersley, 13 Fed. Rep. 537, it was said that the distinction between actions founded in contract and those founded in tort is, in general, very clearly defined. If the cause of action is a wrong, with a resulting injury, the action is ex delicto. The sale of forged bonds, with a knowledge of the forgery, is a tort dependent upon a contract, and a suit to recover the consideration paid may properly be maintained, either as an action ex delicto for the breach of duty, or as an action

in whatever way it may have come into the possession of the

2. When the Action Lies.—(a) Generally.—This action is only sustainable for the recovery of a specific chattel, and not for real property.2 It lies for the recovery of charters and title-deeds, the property in which generally accompanies the title to the land to which they relate.3 And it is sustainable upon contract for not delivering a specific chattel in pursuance of a bailment or other contract.4 It lies whether the defendant wrongfully acquired possession of the chattel in the first instance, or acquired it by lawful means. as by bailment, delivery, or finding.6 To support the action of detinue the plaintiff must have not only the right of property in the thing claimed, but also the right of present possession. An action will lie, although the defendant has parted with the possession of the property before demand and suit is brought.8 It lies for personal property distrained by the defendant for delinquent taxes, in payment of which the plaintiff had duly tendered coupons cut from bonds issued by the State of Virginia under the funding act of March 3d, 1871.9

(b) Kind of Property Recovered.—Oil taken from a well sunk by the owner of the freehold may be recovered. It may be maintained for a horse, or a cow, or money in the bag; but not for money or coin not in a bag or box, etc., and therefore undistinguishable from other money or coin. 11 Nor will it lie for a horse, without any description of the horse demanded. 12 It lies for the recovery of a deed, note, or other muniment of title or document

1. Wittick v. Traun, 27 Ala. 562; Traun v. Wittick, 27 Ala. 570; Harriss v. Hill-

man, 26 Ala. 380.

The action of detinue proceeds on the ground of the property in the plaintiff at the time of action brought; and therefore the recovery in that action proves no more than that at the time of its in-stitution the right of property, either absolute or special, was in the plaintiff. Hughes v. Jones, 2 Md. Ch. 178.

2. Coupledike v. Coupledike, Cro. Jac.

39.
3. Atkinson v. Baker, 4 T. R. 231; Stoker v. Yerby, 11 Ala. 322; Lewis v. Hoover, 1 J. J. Marsh. (Ky.) 500.
4. Fitz. N. B. 138; Kettle v. Bevensall,

Willes, 120; 3 Bl. Com. 152.
5. 1 Chit. Pl. 136; Owings v. Frier, 2 A. K. Marsh. (Ky.) 268; Schunlenberg v. Campbell, 14 Mo. 491.

6. Kettle v. Bevensall, Willes, 118;

Darre v. Darre, 43 N. H. 37. 7. O'Neal v. Baker, 2 Jones L. (N.

Car.) 168.

8. Haley v. Rowan, 5 Yerg. (Tenn.) 301; Kershaw v. Baykin, I Brev. (S. Car.) 301; Woodruff v. Bentley, 1 Hempst. (U. S.) 111.

It has been decided that if goods, etc., taken away continue in specie in the hands of the executor of the wrong-doer, replevin or detinue will lie. I Chit, Pl. (16th Am. Ed.) 138.

9. Poindexter v. Greenhow, 114 U.S.

Where an officer held under the statute (Ala. Rev. Code, §§ 2593-94) no authority to retain possession of a steamboat, seized by him under an order in a detinue suit, for a longer term than ten days, it was held that the plaintiff, by insisting through his attorney upon the detention of the boat by the officer for a longer time than ten days, upon the ground of its being such officer's legal duty to do so, carefully abstaining from making any personal request, did not thereby make himself liable to the officer for expenses incurred in keeping the boat for a longer time. Hall v. Perrymore, 42 Ala. 122 (1868).

10. Hail v. Reed, 15 B. Mon. (Ky.) 479. 11. Co. Litt. 286; Banks v. Whetstone, Moore, 394; Isaac v. Clarke, 2 Bulst.

12. Boggs v. Newton, 2 Bibb (Ky.), 221.

of debt.1 It has been held that it does not lie for a commission issued by the President of the United States, although it had never

been delivered to the appointee.2

(c) When Demand Must be Made Before Suit.—Demand before suit is not necessary, except for the purpose of entitling the plaintiff to damages for detention between the time of the demand and the commencement of the suit.3

Although property be tortiously taken, if the tort be waived. and the form of action be detinue, no demand is necessary to en-

title the plaintiff to recover.4

3. When Action Will Not Lie. - Detinue cannot be maintained after the death or destruction of the chattel sued for; 5 neither will the action lie to recover money which it is alleged in general terms the defendant owes to the plaintiff; 6 nor where the party was not in possession of the chattel at the commencement of the action: 7 nor where it was alleged that it had been taken by the owner from the plaintiff by force.8

The gist of the action is the wrongful detention of the property, and therefore it cannot be maintained where the holding over was. permissive, so long as that kind of possession continues.9 It will not lie where property is in the hands of one, on a prior undischarged writ against the same defendant by the former adminis-

trator of the plaintiff's intestate. 10

And if a pledgee repledges, the original pledgor cannot maintain detinue against the sub-pledgee without having paid, or being ready and willing to pay, the original debt, to secure which the pledge was given. It is not the remedy for obtaining the com-

1. Atkinson v. Baker, 4 Term Rep. 229; Todd v. Crookshanks, 3 Johns. Ch. (N. Y.) 432; Stoker v. Yerby, 11 Ala.

2. Marbury v. Madison, I Cranch (U.

- 3. Jones v. Green, 4 Dev. & B. (N. Car.) 354; Vaughan v. Wood, 5 Ala. 304; Carraway v. McNeice, Walk. (Miss.) 538; Genfry v. McKehen, 5 Dana (Ky.). 34; Brock v. Headen, 13 Ala. 370; Jones v. Henry, 3 Litt. (Ky.) 46; Irwin v. Wells, I Mo. 9; Cox v. Robertson, I Bibb (Ky.), 604; Cole v. Cole, 4 Bibb (Ky.), 340; Tunstall v. McClelland, I Bibb (Ky.),
- 4. O'Neil v. Henderson, 15 Ark. 235. In detinue for slaves a demand is not necessary, although the defendant, previous to the action, held possession under one having a life interest. Dunn v. Davis, 12 Ala. 135.

Where, after the decease of one having a life estate in slaves, another held possession claiming it as his own, it was held that the remainderman might maintain the action for them without de-

- mand. Miles v. Allen, 6 Ired. (N. Car.)
- 5. Lindsey v. Perry, I Ala. 203; Cald-
- well v. Fenwick, 2 Dana (Ky.), 332.

 6. Brown v. Ellison, 55 N. H. 556.

 7. Davis v. Herndon, 39 Miss. 484;
 Foscue v. Eubank, 10 Ired. (N. Car.) 429.
- 8. Carroll v. Pathkiller, 3 Port. (Ala.) 279; Neely v. Lyon, 10 Yerg. (Tenn.)
- 9. Benje v. Creagh, 21 Ala, 157; 1 Chit. Pl. (16th Am. Ed.) 137.
- An agreement on the part of a debtor to deliver as security to his creditor cer-tain personal property will not enable the latter to maintain detinue therefor in case of non-delivery of the property. Berry v. Berry, 31 Iowa, 415.

10. McArthur v. Carrie, 32 Ala. 75. In detinue or the corresponding statutory action in Alabama for the recovery of chattels in specie the plaintiff cannot recover on proof of a mortgage to a partnership of which he is a member.

son v. Ardis (Ala.), 2 S. Rep. 879.

11. Donald v. Suckling, L. R. I Q. B.

585; s. c., 12 Jur. (N. S.) 795.

mission of an officer which has been signed, but is retained by the secretary of State.1

4. Parties to Action.—(a) Plaintiff.—One who has not the entire interest in the property sued for cannot maintain the action.2

A mortgagee of property to indemnify him as surety for the mortgagor may maintain the action for the property when the debt becomes due and unpaid.3 The plaintiff must have a property, either general or special, in the property; if special, it must grow out of an actual possession, or be coupled with an interest therein 4

A bailee of chattels may maintain the action for them upon his right of possession as bailee, 5 and possession alone is sufficient to maintain the action until a right to dispossess is shown.6

must have the right to immediate possession.

Where the plaintiff in an action of detinue has color of title, and has had peaceable possession of the chattels sued for, he can recover as against a mere wrong-doer who, by indirection or force, obtains and holds the present possession. The trustee in a deed of trust with a power of sale, if not restricted, may maintain detinue for personal property conveyed by the deed, and he cannot ordinarily come into equity to recover it.9

A special property in the things detained, as of an executor, or one holding under an order of the court, will sustain the action. 10

The owner of stolen goods may maintain detinue or trover against a thief, 11 and the neir maintain the action for an heirloom. 12

(b) Defendant.—Detinue may be maintained against executors or administrators for money obtained by them in that character, 13

1. Marbury v. Madison, 1 Cranch (U. :S.), 137.

Mandamus is the proper remedy.

2. Frierson v. Frierson, 21 Ala. 549; Miller v. Eatman, 11 Ala. 609, Bell v. Hogan, 1 Stew. (Ala.) 536.

3. Spaulding v Scanland, 4 B. Mon.

(Ky.) 365.

4. Ramsey v. Bancroft, 2 Mo. 151. And this must be at the time the action is commenced. I Chitt. Pl. (16th Am.

Ed.) 137.
5. Boyle v. Townes, 9 Leigh (Va.), 158; 2 Saunders, 47 a, note; 1 Chitt. Pl.

(16th Am. Ed.) 137.

6. Berry v. Hale, 2 Miss. 315.
7. Gordon v. Harper, 7 T. R. 9;
O'Neal v. Baker, 2 Jones (N. Car.), 168; Neither detinue, trover, nor trespass will lie in such cases.

A person who has only a special property as a bailee, etc., may also support the action where he delivered the goods to the defendant, or they were taken out of such a bailee's possession. Boyle v. Townes, 9 Leigh (Va.), 158; 1 Chitt. Pl. 137; Phillip v. Robinson, 4 Bing. 111.

8. Showe v. Caldwell, 21 Ala. 448:

Bryan v. Smith, 22 Ala. 534; Melton v. McDonald, 2 Mo. 45.
9. Chambers v. Mauldin, 4 Ala. 477.

A trustee to whom slaves are conveved

in trust by a debt r to secure the payment of debts may maintain an action of detinue agains' the cestui que trust for the recovery of the slaves. Newman o. Montgomery, 6 Miss. (5 How.) 742.

A deal by a cestui que trust purporting to convey the trust property, passes only her equitable interest, and her donee cannot maintain the action. Iones v Strong.

6 Ired. (N. Car.) 367.
10. Wade v. Edwards, Cam. & N. (N.

Car.) 416.

Executors appointed in Florida, to whom letters have been subsequently granted in Alabama, may maintain detinue for timber cut from wild and uncultivated land in the latter State. Leatherwood v. Sullivan (Ala.), I S. Rep. 718.

 Beazley v. Mitchell, 9 Ala. 780.
 Com. Dig. Detinue, "A."
 Mansell v. Israel, 3 Bibb (Ky.),510; Brener v. Strong, 10 Ala. 761. But detinue will not lie against an administrator who has come into possession of slaves and one tenant in common of a chattel cannot maintain the action against his cotenant.1

The action may be maintained against a bailee, though he has parted with possession before suit, unless he lost it by casualty or

by lawful conviction.2

The action should be against both the husband and wife where the goods were in the hands of the wife before marriage: 3 but against the husband alone if the goods came to the hands of the husband and wife after marriage.4

Where the maker of a note given to two executors paid the amount of it to one, taking his receipt therefor, the note remaining in the hands of the other, the maker cannot maintain detinue

for the note.5

5. Pleadings.—(a) Declaration.—With respect to pleadings in this action, more certainty is necessary in the description of the

chattels than in an action of replevin.6

In the case of a special bailment it is proper to declare at least in one count on the bailment, and to lay a special request; but in other cases it is sufficient to declare upon the supposed finding.7

The plaintiff must show that he is entitled to the entire prop-

erty, either general or special, in the thing sued for.8

A declaration for "a set of turners' tools" is too indefinite: but if there be added the words "being the same formerly owned by one Burkett," the description becomes sufficiently specific, and capable of being identified.9

(b) The plea in detinue is that of non detinet—that he does not detain the goods, etc., sought to be recovered. 10 This raises the

as such administrator, and sold them in due course of administration. Caldwell, 3 Hill (S. Car.), 242.

1. Bonner v. Latham, I Ired. (N. Car.)

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2. Rucker v. Hamilton, 3 Dana (Ky.),

In defence of an action of detinue against a sheriff, brought to recover a quantity of standing corn or its value, it was held that the defendant might show that the plaintiff had taken and converted to his own use an equal amount of corn from another portion of the field. Hanna v. Hawks, 31 Iowa, 146.

3. Co. Litt. 351, b.

4. Isaack v. Clark, I New R. 140; Keworth v. Hill, 3 B. & Ald. 689; Chit. on Pl. (16th Am. Ed.) *104, 138.

If an infant has bought goods, and on application for payment he refuse to pay on the ground of his infancy, and any of the goods remain in specie, they should be demanded, and afterwards the prudent course will be to declare in detinue for the goods with a count in debt for goods sold and delivered, and at least on the former the plaintiff would recover, should the defendant plead infancy in the latter. Chit. on Pl. (16th Am. Ed.) *138; Pen

5. Todd v. Crookshanks, 3 Johns. Ch.
(N. Y.) 432; Burk v. Kent, 3 Vt. 99;
Pierce v. Gilson, 9 Vt. 216.
In Savery v. Hays, 20 Iowa, 25, it

was held that replevin will lie.

6. 1 Chit, on Pl. (16th Am, Ed.) *139. 7. 1 Chit. on Pl. (16th Am. Ed.) *139.

8 Price v. Talley, 10 Ala. 946; Parsons v. Boyd. 20 Ala. 112; Reese v. Harris, 27 Ala. 301; Price v. Israel, 3 Bibb (Ky), 516; Kent v. Armistead, 4 Munf. (Va.) 72; Dunn v. Choate, 4 Tex. 14.

If others not joined with him are inter-

ested, he cannot recover.

9. March v. Leckie, 13 Ired. (N. Car.)

172; 2 Chit. on Pl. (16th Am. Ed.) 622.
10. 1 Chit. (16th Am. Ed.) 139; 2 Chit. (16th Am. Ed.) 729; Stephen on Pl. (Tyler's Ed.) 169-173.

The plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other degeneral issue. A lien must be specially pleaded, and so must the defence, that the defendant had a common interest in the goods with the plaintiff. A plea which only shows that the title was in the defendant on a specified day before the commencement of the suit is bad.2

- 6. Election of Actions.—It is now a well-settled rule, that replevin will lie for the recovery of any personal chattel wrongfully detained from the owner, although there may have been no tortious taking.3 An election may sometimes be made between trover and detinue. 4
- 7. Amount of Recovery.-In detinue the measure of damages is the value of the thing at the time of the verdict.⁵ If in the course of an action of detinue the plaintiff gets possession of the chattel. he cannot recover the damages. Where the title to the property sued for is legally divested from the plaintiff before the trial of the cause, he can recover nothing beyond his damages for its detention to the time of such divesture and the costs of the suit.7

fence than such denial shall be admissible under that plea. The adverse de-tention of the goods (not merely that the defendant has them) is put in issue by this plea, and therefore a plea of tender of the goods was held bad, as amounting to non definet,—Clements v. Flight, 16 M. & W. 42,—the word "detain" meaning that the defendant withholds the goods and prevents the plaintiff from the possession of them. 2 Chit. Pl. 728.

1. Mason v. Farrell, 12 M. & W. 674; Closeman v. White, 7 C. B. 43; White-head v. Harrison, 6 Q. B. 423; Barn-well v. Williams, 7 M. & G. 403.

By the common-law procedure act 1860, 23 & 24 Vict. 126, it was provided that "in any action for the detaining of goods of the plaintiff, it shall be lawful for the defendant, by leave of the court or a judge, and upon such terms as he or they shall think fit, to pay into court a sum of money to answer the claim of the plaintiff, to the value of the goods alleged detained; and such payment into court shall be made and pleaded in like manner, and according to the commonlaw procedure acts of 1852.'

As to what will constitute a lien to support the action, see 2 Chit. Pl. (16th

Am. Ed.) 728-29

2. Patten v. Hammer, 28 Ala. 618.

To an action of detinue for a slave, the defendant pleaded, in abatement, that he had brought an action against the plaintiff, in the name and in behalf of one F., for the recovery of the same slave, which action was still pending. It was held that the plea was bad on de-

murrer. Iones v. Muse, I Brev. (S.

Car.) 67.

3. Badger v. Phinney, 15 Mass. 359; Baker v. Fales, 16 Mass. 147; Stone v. Wilson, Wright (Ohio), 159; Boyle v. Rankin, 22 Pa. St. 168; Weaver v. Lawrence, 1 Dall. (Pa.) 157; Evans v. Elliott, 5 Ad. & El. 144; Marston v. Baldwin, 17 Mass. 606; State v. Jennings, 14 Ohio St. 73.

4. Beazley v. Mitchell, o Ala. 780. 5. Freeman v. Luckett, 2 J. J. Marsh.

(Ky.) 390. 6. Morgan v. Cone, 1 Dev. & B. (N.

Car.) 234.
7. Cole v. Conolly, 16 Ala. 271. The plaintiff is entitled to recover damages without proof of a demand from the commencement of the defendant's unlawful possession; but where the defendant's possession is not clearly shown to have commenced at the time of his purchase, it is error in the court toinstruct the jury that he is liable for damages from that time. Gardner v. Booth, 31 Ala. 186.

In an action on a detinue bond counsel fees for defending the suit in the circuit court are recoverable; but counsel fees for defending in the supreme court, to which the case was removed by the plaintiff below, cannot be recovered. Furgeson v. Baker, 24 Ala. 402. See-Hudson v. Young, 25 Ala. 376; Murphy v. Moore, 4 Ired. Eq. (N. Car.) 118; Miller v. Garrett, 35 Ala. 96.

In detinue as in trover, the jury may assess the value of the property at any time between the demand and trial.

Freer v. Cowles, 44 Ala. 314.

8. Judgment.—The judgment for the plaintiff should be entered in the alternative for the specific article claimed, or its value in money.1 If the jury do not find damages, judgment for the thing detained, without damages, is good; 2 and judgment may be given for damages and costs, though the article detained has been restored to the plaintiff.3

In an action of detinue the judgment is for the things sued for, and if that cannot be had, then the value of the things with damages and costs. 4 If the plaintiff voluntarily takes a nonsuit, the court can render no judgment but for costs for the defendant.

9. Verdict.—The separate value of each and every article sued for and found by the jury to be unlawfully detained from the plaintiff should be found. A verdict for a part of the things demanded is good for the plaintiff as to those found for him, and for the defendant as to the remainder.7

A verdict finding the detention of the goods and the value of the several articles, "if to be had; if not, \$200 in damages," is

good, and the surplusage may be disregarded.8

10. Evidence.—In order to sustain the action it is not necessary to prove that the plaintiff has actual possession.9 but it must be proven that the possession of the property was in the defendant at some period before the date of the writ. 10 And as against a wrong-doer possession is sufficient evidence of title. 11 Evidence is admissible to show, on the part of the defendant, that the title was not in the plaintiff, but in a stranger. 12 If the defendant relies

1. Brown v. Brown, 5 Ala. 508.

In Robinson v. Richards, 45 Ala. 354, it was held that there is no option of delivering up the property or paying the value

2. Daniel v. Prather, 1 Bibb (Ky.),

3. Merrit v. Merrit, Mart. N. S. (La.)

4. Waite v. Dolly, 8 Humph. (Tenn.) 406.

The judgment in detinue is for the thing itself, or its value. The value of a public office not to be sold is incapable of being sold, and the applicant has a right to the office itself or nothing. Marberry v. Madison, I Cranch, 137.

Where an action was brought for the recovery of certain slaves, one of whom was a female, it was held that judgment should be rendered for the slaves mentioned in the declaration and the issue of the female. Morris v. Peregay, 7 Gratt.

(Va.) 373. 5. Savage v. Gunther, 32 Ala. 467. In a statutory action for a team of oxen and a log cart and fixtures (Code Ala. § 2944), judgment on verdict being rendered for the plaintiff, the failure to assess the separate value of the several articles is reversible error. Jones v.

Anderson (Ala.), 2 S. Rep. 911. See 1 Chit. Pl. (16th Am. Ed.) 139.

6. Carraway v. McNeice, 1 Miss. 538; Haynes v. Crutchfield, 7 Ala. 189; Blakeley v. Duncan, 4 Tex. 184; Mulliken v. Greer, 5 Mo. 489. Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52. Thus in detinue for two slaves the jury should find a separate value as to each. Baker v. Beazley, 4 Yerg. (Tenn.) 570.

So in detinue for two horses, a verdict for the plaintiff must find the separate value of each. Buckner v. Haggin, 3 T.

B. Mon. (Ky.) 59. In Haynes v. Crutchfield, 7 Ala. 189, it was held that in detinue for a cow and calf and 14 hogs it was not error if the jury assess an aggregate sum as the value of the cow and calf, and another sum for the hogs.

7. Thomas v. Tanner, 6 T. B. Mon.

(Ky.) 52. 8. Trimble v. Stipe, 5 T. B. Mon.

(Ky.) 265. 9. Tunstall v. McClelland, I Bibb (Ky.), 186, 10. Burton v. Brashear, 3 A. K. Marsh.

(Ky.) 276.
11. Phillips v. McGrew, 13 Ala. 255.
12. Tanner v. Allison, 3 Dana (Ky.), 422.

upon his possession, either as a bar to the action or as a part of his title, the burden of proving its length lies upon him.1

DEVASTAVIT.—(See also EXECUTORS AND ADMINISTRATORS. etc.)—A devastavit is defined to be a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators shall answer out of their own pockets as far as they had or might have had assets of the deceased.2 (See Exec-UTORS AND ADMINISTRATORS.)

DEVIATION.—(See also CARRIERS; MARINE INSURANCE.)—A deviation is a voluntary departure without necessity or reasonable cause from the regular and usual course of the vovage. 3 Strictly

1. Darden v. Allen, I Dev. (N. Car.)

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The plaintiff must prove property in himself and possession in the defendant; but proof of a possession anterior to the bringing of the action is sufficient, unless he has been dispossessed, and this the defendant is to show. Burnley v. Lambert, I Wash. (Va.) 308.

If the plaintiff prove that he had title at the time of the action brought, and that the defendant then had the possession, the defendant, in order to defeat the action, must show that he has been divested of the property in due course of law. Lynch v. Thomas, 3 Leigh (Va.), 682.

A declaration in detinue for "a red cow with a white face" is not supported by proof that "the cow was a sorrel or yellow cow." Felt v. Williams, 2 Ill. 206. See Steel v. Worthington, 7 Port (Ala.) 266; Brown v. Brown, 13 Ala. 208; Slaughter v. Cunningham, 24 Ala. 260; Hall v. Chapman, 35 Ala. 553; Elam v. Bass, 4 Munf. (Va.) 301; Fowler v. Lee, 4 Munf. (Va.) 373; Macon v. Owens, 1 Brev. (S. Car.) 69.

The only State in which it seems that detinue is an action in much use is that of Alabama. It has generally been superseded by the action of replevin.

Authorities consulted were I & 2 Chit. Pl. (16th Am. Ed.); Stephen on Pl. Tvler's Ed.).

2. Ridgway v. Kerfoot (Md.), 4 West. Rep. 904; and Clift v. White, 12 N. Y.

531, quoting Wms. on Ex'rs, 1796.

A devastavit by an executor or administrator is defined to be a wasting of the assets, and may consist of any act or omission, every mismanagement, by which the estate suffers loss. Ayers v. Lawrence, 59 N. Y. 197, quoting 2 Wms. on Ex'rs, 1629.

The application of the assets to the

payment of claims which do not of themselves afford prima facie evidence of their validity, or, if affording such evidence. which he knows, or has good reason to believe, or the means of ascertaining by proper diligence, to be unjust or illegal, is a devastavit." Teague v. Corbitt, 57

Ala. 539-40.
3. Hostetter v. Gray, 11 Fed. Rep. 181; Coffin v. Newburyport, Mar. Ins. Co., 9 Mass. 447; Lawrence v. Ocean Ins. Co., II Johns. (N. Y.) 266 (diss. op.); Bell v. West. Mar. & Fire Ins. Co., 5 Rob. (La.) 445; s. c., 39 Am. Dec. 543; Riggin v. Patapsco Ins. Co., 7 H. & J. (Md.) 288; s. c., 16 Am. Dec. 302, where it is said: "How can that digression from the course of the voyage be said to be with-out 'necessity or reasonable cause' which is made to avoid an imminent peril of capture, or other disaster necessarily resulting in the entire loss of the subjectmatter of insurance? If not, then such a departure being no deviation, is justifiable, and impairs not the liabilities of the underwriters."

In Reade v. Com. Ins. Co., 3 Johns. (N. Y.) 358, it is said 'in every contract of marine insurance there is an implied condition on the part of the insured that the ship shall proceed on her voyage to her destined port in the shortest, safest, and most usual course. If this be not done, and the ship, without just and reasonable cause, leaves the regular and customary track, it is a deviation, and from that time the policy is at an end, and the insurer is discharged from all subsequent responsibility."

"A deviation is not merely the unnecessary going out of the track or course usually taken, but it is also a departure from either the express or implied terms of the contract." Warder v. Creole, I Pet. Adm. (U. S.) 40.

'In all cases, in order to determine

speaking, a "deviation" originally meant only a departure from the course of the voyage, but now it is always understood in the sense of a material departure from, or change in, the risk insured against, without just cause.1 A departure for the purpose of avoiding imminent peril is therefore no deviation; nor for the purpose of saving life; 3 otherwise of saving property. 4 But a departure will not be a deviation if shown to be a usage of trade.

whether a diversion from the direct course of the voyage is such a deviation as in law vacates the policy, it will be proper to attend to the motives, end, and consequences of the act as the true criterion of judgment. . . . And it [i.e., deviation] must of necessity be so [i.e., a question of fact], unless a diversion from the course of the voyage, from whatever cause, is of itself a deviation; which it is not; for a deviation is a voluntary departure, without necessity or any reasonable cause; and whether a deviation or not, must always involve the questions of fact. whether the departure is voluntary or not, whether with or without necessity, and whether with or without any reasonable cause." Foster v. Jackson Mar. Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 306.

"Any voluntary deviation is a change of the risk; it forms a departure from the contract, and an attempt to substitute It is not necessary that the risk should thereby be increased; it is sufficient if it be changed. Lord Mansfield daid down the rule 'that the true objec-tion to a deviation is not the increase of the risk: it is, that the party contracting has voluntarily submitted another voyage for that which has been insured. Natchez Ins. Co. v. Stanton, 2 S. & M. (Miss.) 375, where it was held that taking a brig in tow was a deviation, there being nothing in the policy to authorize it.

A calling at a point "for a purpose wholly unconnected with the voyage" is a deviation. Hammond v. Reid, 4 B. & Ald. 72; Solly v. Whitmore, 5 B. & Ald.

A departure from necessity, as the state of the wind and weather, is not a deviation. Clark v. Ins. Co., 7 Mass. 365. "The discharge of the underwriters from their liability in such cases depends

not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance. consequences of such violation of contract are immaterial to its legal effect, as it is, per se, a discharge of the underwriters, and the law attaches no importance to the degree in cases of voluntary deviation; necessity alone can sanction a deviation in any case; and that deviation must be

strictly commensurate with the vis major producing it." Md. Ins. Co. v. Le Roy, 7 Cranch (U. S.), 30.

Liberty to touch at a place does not justify trading there, and the act of trading would be a deviation. U. S. v. The Shearman. Pet. C. C. (U. S.) 98. See 3

Shearman. Pet. C. C. (U. S.) 98. See 3 Chit. Coml. Law, 471.

1. Wilkins v. Ins. Go., 30 Ohio St. 341, quoting 2 Pars. Mar. Ins. 1.

2. Reade v. Com. Ins. Co., 3 Johns. (N. Y.) 358; s. c., 3 Am. Dec. 495; Riggin v. Patapsco Ins. Co., 7 H. & J. (Md.) 288, quoted note 3, page 658.

"The only question in cases of this contraction of the state of the contraction of the state of the s

nature is whether what is done is fairly attributable to a mere intention of selfdefence, or to motives of another nature. such as the desire of profit. If the former, then the act is justifiable; if the latter, then it is a deviation." Haven v. Holland, 2 Mason (U. S.), 234.

3. "But after this object is effected, if the stoppage be continued or the risk increased by adding to the cargo, diminishing the crew, or by other means for the saving of property found, I think the underwriters are discharged." Bond v. Cora, 2 Pet. Adm. (U. S.) 377. See also Bark Nicholaus, 1 Newb. (U. S.) 449; Crocker v. Jackson, Sprague (U. S.),

4. Crocker v. Jackson, Sprague (U. S.), 141. "Delay to save life is not a deviation; but delay merely to save prop-

erty is."

5. Bulkley v. Prot. Ins. Co., 2 Paine (U. S.), 82. "Where, therefore, a policy is made upon a particular voyage, the usages relating to such voyage are impliedly made a part of the contract."

See also Hostetter v. Gray, 11 Fed. Rep. 181, where it is said: "It is, however, no deviation to touch and stay at a port out of the course of the voyage, if such departure is within the usage of the

"Deviation," in an act forbidding the deviation by a railway company of more than a certain distance from the line delineated on their deposited plans "is to be taken with reference to the line of railway only; that is, that the line of railway actually laid down shall not deviate more

DEVICE.—A device is that which is devised or formed by design: a contrivance; an invention. (See also DISTINCTIVE: GAMING: GAMBLING.)

DEVISE. See LEGACY AND DEVISE

DEVISEE.—(See also DEVISE.)—The term "devisee" accompanying a bequest of personalty will be held to mean legatee,2 It is sometimes used in common discourse, not of one named in the will and taking by devise, strictly speaking, but of one taking as heir. according to the special limitation contained in the will.3

DEVOLVE.—To devolve means to pass from a person dying to a person living; the etymology of the word shows its meaning.4

than one hundred yards from the line laid down and delineated in the Parliamentary plans, the medium filum viæ of each being the commencement and termination in measuring those one hundred yards." Doe d. Armistead v. Rail-

road Co., 16 Q. B. 537.

1. Henderson v. State, 50 Ala. 91, quoting Webs. Dict., in construing an indictment that ran "with cards or dice, or some device or substitute for cards or A substitute is that which is put in the place of another thing, or used instead of something else. As used in the statute, device seems to have a somewhat more narrow meaning than substitute. The latter word would embrace whatever might be used in place of cards or dice, whether designed or invented for that

purpose or not.
"There was a time when so much regard was paid to the name of a game, that when a game was prohibited, those professors of the science of gambling had only to change the name of the game to avoid the penalty. . . . Common-sense has triumphed over such absurdities, and by the introduction of the word 'device' into our statute, courts will inquire not into the name, but the game, to deter-mine whether it is a prohibited game; and if it is not the licensed game, the license will neither protect the owner of the table nor the players from the penalty of the law." Smith v. State, 17 Tex.

The words "or other device" in a penal statute were held not so loose and vague as to be rejected, in U. S. v.

Speeden, I Cranch C. C. 535.

The words "form" and "device" used in the definition of a trade mark "are very broad terms, and they might, in a general and comprehensive sense, embrace the form of a barrel or package, or of the article of merchandise itself sold. But the words of definition are all used in

connection with the word 'mark,' . . . The size or shape of the barrel, box, or package can scarcely be considered a mark, nor can that be the sense in which the terms 'form' or 'device' are used when employed as a definition of a mark used for purposes of trade." Moorman v. Hoge, 2 Sawv. (U. S.) 86-7.

A wheel revolved on a pivot, having a fixed index attached to it, which, when the wheel stops, points to one of the figures on its face, corresponding with other figures on cards, sold to the players before each revolution of the wheel -the holder of the one whose number corresponds to that at which the index points when the wheel stops, winning,—is a "de-vice of like kind" with a lottery, prohib-ited by statute. Chavannah v. State, 49. Ala. 396.

2. Hoffm. Ch. (N. Y.) 212.

3. Den v. Robinson, 2 South. (N. J.) 710, where it was held that the words first and next devisee were to be taken "in their appropriate and technical sense, meaning by first, the person to whom the estate is first given by the will; and by next, the person to whom the remainder

is given in tail."

4. Parr v. Parr, 1 Mylne & K. 648; s. c. 2 L. J. Ch. (N. S.) 168,—where it was held that in a provision by a testator that property should be settled upon his daughter in such a manner that in case of her death it should devolve upon her children if she had any, and if she had not, then she could bequeath it to whom she thought fit, the word "devolve imported transmission to the children living at the death of the mother; and upon her death, her husband, as representative of a deceased child, took no in-

terest under the will.

The words "the succession shall devolve" in letters patent were held to mean that "the estate shall immediately pass over to that person in the series to **DICE.**—(See also CHEAT; GAMING.)—The plural of DIE; a cube marked with figures on its respective sides, and used in games of chance.¹ At common law, cheating with false dice has been held to be indictable.²

DICTA.—Plural of DICTUM; called also *obiter dictum*, or "remark by the way." It is a remark more or less casual, dropping from a judge with respect to the law in matters like that at the time before him.³ An extra-judicial opinion.⁴

whom the succession is to devolve," and not that "the man upon whom the succession is to devolve is to become the next person in the succession." Cope v. De la Warr, L. R. 8 Ch. App. 993.

The making absolute a garnishee order in favor of judgment creditors of A attaching a judgment debt recovered by A against B, was held a "devolution of estate by operation of law" and to entitle A's judgment creditors to be added as co-plaintiffs in the action against B. Wallis v. Smith, 51 L. J. R. Ch. 577.

1. The Encyclopædic Dictionary (Cas-

sell), sub voce.

In Alabama, it has been held that backgammon, as usually played, though dice are employed, is not a "game played with dice" within the prohibition of the statute against gaming. Rev. Code, § 3620. "For," said the court, Stone, J., "in backgammon the dice do not determine the result of the game. That is determined by moves of the men by the opposing players; and, as we have said above, this is brought about much more by the skill of the contestants than by the accidental fall of the dice. In the case of Jones v. State, 26 Ala. 155, the parties were indicted for playing at a game with dice at a storehouse for the retailing of spirituous liquors. The proof was that each party put up money, and they threw dice for it, the one throwing the highest number to take the money. It was shown that the game was conducted precisely as a raffle for property; and for the defendant it was contended that this did not constitute a game with dice, but only a raffle, which was not within the statute. This court said: 'The court charged that if the jury believed the evidence, the defendant was guilty, and such is our opinion. It was a game played with dice in the strictest sense of the term, and although conducted on the principles of a raffle, it was not the latter. A raffle, it is true, is a game usually played with dice; but in this, property, or something of value, is put up as the thing to be raffled for, the owner receiving the value in the sale of chances. Here the parties bet money upon throwing the dice, which

money is to be won by the party throwing the highest number.' This case is an authority for two propositions: first, that when the throw of the dice determines the result of the game between parties who bet on the result, this is, in the strictest sense of the term, a game played with dice; and second, dice may be employed as an agency in determining the chances,—such as are resorted to in raffles,—and yet not offend the statute against playing at a game with dice. A raffle is much more nearly a game played with dice than is the game called backgammon:" Wetmore v. State, 55 Ala. 198.

2. Thus, where A was indicted for deceitfully coming to B, as sent from C, to whom B owed money, to call for and receive the money, and receiving the money when C never did send him, the court, in holding this not to be indictable at common law, said: "If he had come with a false token, it had been criminal, and therefore indictable; but the question is, whether this be such a cheat as is indictable, as playing with false dice is; for that is such a cheat as a person of an ordinary capacity cannot discover; but this is an indictment to punish one man because another is a fool." Anon., 6 Mod.

So where a defendant was indicted for "maliciously, wilfully, and wickedly killing a horse," and being convicted by the jury, it was urged, in arrest of judgment, that this offence was not of an indictable nature, the court, McKean, J., said: "It is true that on the examination of the cases we have not found the line accurately drawn; but it seems to be agreed that whatever amounts to a public wrong may be made the subject of an indictment. The poisoning of chickens, cheating with false dice, fraudulently tearing a promissory note, and many other offences of a similar description, have heretofore been indicted in Pennsylvania." Respublica v. Teischer, I Dall. (U. S.) 335. See People v. Gates, 13 Wend. (N. Y.) 311, 319.

3. Brown's Law Dict., sub voce.

ress of a cause, and frequently in the course of a judgment which a judge delivers, he has an opportunity of expressing two different kinds of opinion, namely, judicial and extra-judicial. . . . An extra-judicial may be an opinion given on a question that it was unnecessary to decide in the case where it was given, or on a point which was not the point then in question; or only an opinion declared incidentally in the argument of the case; or a proposition generally expressed, and which the case, or the circumstances of the case, did not call for; or an opinion on the point which was argued before the court, or upon which the court pronounced judgment; or words uttered upon a point totally different from that which the court had then to decide; or a state-ment that was not essential to the decision of the case; or that was wholly unnecessary for the decision of the actual points which were before the court; or an opinion not called for by the case, and which it was unnecessary to give. kind of extra-judicial opinion is an opinion called an obiter dictum, or saying, which is sometimes portrayed in these terms: "That dictum is an obiter saying only, and not a resolution or determination of the court, or a direct solemn opinion of the judge from whom it dropped; no formed decisive resolution, no adjudication, no professed or deliberate determination." Saunderson v. Rowles, 4 Burr. 2064, 2068. "These words are nothing more than an obiter dictum, uttered upon a point totally different from that which the court had then to decide," and by a judge who, in the discussion in which he uttered them, was in a minority. Purdew v. Jackson, I Russ. 1, 48. "It seems to have been a mere obiter opinion, not called for by the case, and which it was unnecessary to give." Powell v. Lloyd, 2 Younge & J. 372, 379. "What was dropped upon it in Calvin's case was a mere obiter opinion, thrown out by way of argument and example." Rex v. Cowle, 834, 858; Ram on Legal Judgment, chap. 5, page 36. See also Steel v. Houghton, I H. Bl. 51, 59, 63; Househill Co. v. Neilson, 2 Bell's App. Cases, I, 21, 22.

So Folger, J.: "It is urged that these remarks are obiter dicta, and that the real question to be decided, and which was decided in the case, was whether an administrator of an insolvent estate had such an interest in the real estate of his intestate as was insurable. Dicta are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full con-

sideration of the point—are not the professed deliberate determinations of the judge himself; obiter dicta are such opinions uttered by the way, not upon the point or question pending,—Overseers of Pittstown v. Overseers of Plattsburgh, 18 Johns. (N. Y.) 407, 419,—as if turning aside for the time from the main topic of the case to collateral subjects." Rohrback v. Germania Fire Ins. Co., 62 N. Y. 47, 58.

In speaking on the subject, Huston, L. in Pennsylvania, has said: "If general dicta in cases turning on special circumstances are to be considered as establishing the law, nothing is yet settled or ever can be long settled. An eminent judge (Benson) has left us in one of the New York cases an animated appeal against charging him as liable for the correctness of dicta on points not trying; and I join him most cordially. What I have said or written out of the case trying, or shall say or write in such circumstances, may be taken as my opinion at the time, without argument or full consideration; but I will never consider myself bound by it when the point is fairly trying, and fully argued and considered. And I protest against any person considering such obiter dicta as my deliberate opinion." Frantz v. Brown, 17 S. & R. (Pa.) 287,

This rule was adopted by the supreme court of the United States in refusing to be bound by the construction of a State statute put by the State court of Maryland, where such construction was not necessary to a decision of the case. Here, Curtis, J., said: "If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, and decide to whom the property in contestation belongs. And therefore this court, and other courts organized under the common law, has never held itself bound by any part of an opinion in any case, which was not needful to the ascertainment of the right or title in question between the parties. In Cohens z. The State of Virginia, 6 Wheat. (U. S.) 399, this court was much pressed with some portion of its opinion in the case of Marbury v. Madison, I Cranch (U. S.), 137, 174. And Mr. Chief Justice Marshall said: 'It is a maxim not to be

disregarded, that general expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is pre-sented. The reason of this maxim is The question actually before obvious. the court is investigated with care and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of Exparte Christy, 3 How. (U. S.) 292, and Jeness et al. v. Peck, 7 How. (U. S.) 612, are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains." Carroll v. Lessee of Carroll, 16 How. (U.S.)

275, 286. This opinion of the supreme court of the United States has been criticised at great length by Eccleston, J., and unfavorably in the case of Alexander v. Worthington, 5 Md. 471, 487. In the course of his opinion the judge said: "It is not necessary that there should be identity of parties or subject-matter, and hence it would seem that if the decision is made with a deliberation and solemnity which evidences a purpose on the part of the court to declare the law, such declaration ought to be accepted by the supreme court as an adjudication settling the question so decided. It ought to be presumed that the question was properly presented by the record, or if not necessarily involved in the issue, that it was in the exercise of a proper judicial discretion that the court deemed fit to pass upon it. But the supreme court, in the case of Carroll v. Carroll, 16 How. 275, appear to have unsettled their often enunciated rule. They now declare that they are bound to decide 'a question of local as they find 'it ought to be decided.' Hence the correctness of the deeision of a local court is a proper subject for inquiry. In making the examination preparatory to this finding the court follow two rules. The first is the maxim of the common law, stare decisis. The second is that rule of deference to the decisions of the local court which we have been so often informed was 'the established doctrine' of the supreme court. now declared that this last rule 'has grown up and been held with constant reference to this other rule, and it is only

so far and in such cases as this latter rule can operate that the other has any effect. Stare decisis is therefore, in effect, the only rule which the supreme court will hereafter acknowledge; and even this only rule is to be applicable under conditions which will serve to render the law more uncertain than if we were informed that the authority of the State courts was to be utterly disregarded, 'If the construction put by the court of a State upon one of its own statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law. an opinion on such a question is not a 'And therefore this court, decision.' and other courts organized under the common law, has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question be-tween the parties.' The supreme court, tween the parties.' The supreme court, therefore, claim the right to inquire whether the question adjudged was necessarily involved in the issue; and whether, if so involved, the case might not have been determined on some other point. a case presents a question broadly on its merits, and another on the pleadings or form of procedure, and the court decides on the merits, the decision is not to be regarded, if a decision on the point of form would have concluded to a like judgment. The rule prescribed by the supreme court is, therefore, more strict than prevails in cases of estoppel. For on the principle of estoppel it is conceded that a judgment is conclusive on any points fairly in issue, and on which the judgment might have been rendered. As the supreme court have not at all times respected their opinions pronounced on the very point in judgment, -vide Ex parte Christy, 3 How. (U. S.) 292; Peck v. Jenness, 7 How. (U. S.) 612, referred to in the opinion in the case of Carroll v. Carroll, 16 How. (U.S.) 275,-we are not surprised to learn that dicta falling obiter from the judges, or even founded in the judgment of the court, do not conclude. In Maryland it is usual to limit the judgment to the question of right involved in the issue. But where a question of general interest is supposed to be involved and is fully discussed and submitted by counsel, the court frequently decides the question with a view to settle the law, and it has never been supposed that a decision made under such circumstances could be deprived of its authority by showing that it was not called for by the record. The cases of Richardson v. Jones, 3 G. & J. (Md.) 163; Carter v.

Dennison. 7 Gill (Md.), 157, amongst others, will establish this practice. All that is necessary in Maryland to render the decision of the court of appeals authoritative on any point decided, is to show that there was an application of the judicial mind to the precise question adjudged; and this, we apprehend, is the rule else-In the case of Cohens v. The State of Virginia, referred to, the position taken by the late chief-justice is, 'that general expressions in every opinion are to be taken in connection with the case in which these expressions are used. The same remark is equally true of general expressions found in any other writing; their precise import is to be determined by the contest. 'lf they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented. The reason of this maxim is presented. The reason of this manner presented. The question actually before abvious. The question actually before considered in its full extent.' All that is required, therefore, to establish the authority of any decision is, that the 'very point' decided was 'actually before' the mind of the court, and was 'investigated with care and considered in its fullest extent.' Nothing is intimated, much less declared, in regard to the supposed necessity for showing that the very point so adjudged was inseparably involved in the issue. Dicta attributed to the court by a short-hand reporter, especially of ancient date; opinions expressed by a judge speaking for himself, and not as the organ of the court; general views expressed by the court as illustrative of, but not necessarily leading to, the opinion on the point intended to be decided,-are not to be treated as conclusive, when similar topics come up directly for judgment. But we are not aware of the authority which will sustain the position assumed by the supreme court, that the unanimous opinion of a State court of the highest appellate jurisdiction, directly on a point which is supposed by the court to be presented by the record, and which is elaborately discussed by counsel and is investigated with care and solemnly delivered by the court, can be disregarded as obiter dictum, merely because it is since discovered that some other point existed on which the judgment rendered might have been rested. If any such authority exists, it has not been referred to. The canon of judicature, which we are informed is hereafter to prevail in the supreme court, would seem to have been from Ram on Legal Judgments, by whom it was borrowed from Vaughan, 382. In the course

of a long and elaborate argument by the chief-justice, it is given as the fifth in a series of seven objections taken by him to the authority of a case reported in Moore; the second in the series being. that the case itself bore internal evidence that the opinion, as reported, was no judicial opinion, nor given in any court. We are not informed of the response made by the other judges to those rules propounded by the chief-justice. does appear that in consequence of an equal division of the court the judgment was rendered for the defendant, in conformity with the case in Moore, the authority of which the chief-justice had labored to destroy. Perhaps then we may be allowed, upon the authority of the chiefjustice himself, that his entire opinion is no more than a prolatum, concluding in no degree to the judgment rendered in the case in which it was expressed. seventh canon of the chief-justice is that 'if a court give judgment judicially, another court is not bound to give like judgment, unless it think that judgment first given was according to law; and, in vindication of the right of individual and independent judgment, he does not hesitate to impeach the accuracy of Lord Coke, and to deny the learning of Littleton. But it deserves remark that the learned chief-justice, although ready to contemn the authority of precedents standing in conflict with his own opinions, conceded as his sixth rule, that 'an opinion, though erroneous, concluding to the judgment, is a judicial opinion, because delivered under the sanction of the judge's oath upon deliberation, which assumes it was, when delivered, the opinion of the deliverer." See pages 487 to 490 inclusive.

This case was followed in a later Maryland case, in which it was held that 'a decision cannot be said to be obiter dictum where the question was directly involved in the issues of law raised by the demurrer to the bill, and the mind of the court was directly drawn to and distinctly expressed upon the subject." By Bowie, C. J. Michael v. Mosey, 26 Md. 239, 261.

So in Tennessee it has been held by Nicholson, C. J., that the fact that a decision might have been put upon a different ground, existing in the case, does not place the actual decision upon a ground also arising, though less satisfactory, in the category of a dictum. Clark v. Thomas, 4 Heisk. (Tenn.) 419.

In Nevada also, on a quo varranto in relation to the office of attorney-general for the State of Nevada, by reason of the

fact that the person elected to that office was not eligible, because on the day of election he was United States district attorney for the same State, and the constitution of Nevada, art iv. sec. o, prohibits such a combination of offices, it appeared that one day prior to the election, the candidate holding the United States office wrote a peremptory resignation, to take effect immediately, In considering the claim that this was an absolute resignation of the United States office, independent of the will or convenience of the appointing power, the court, Beatty C. J., Brosnan. J., concurring, said: "The next point of inquiry is, Was the defendant United States district attorney on the sixth day of November, 1866? This, we think, depends on this question: Can a person holding a civil office under the United States Government resign the same at will, without any regard to the will or convenience of the appointing power? Upon this subject there appears to be no statutory or written law. find no English authorities, and but few decisions in the United States. We have one citation, - Hoke v. Henderson, 4 Dev. L. (N. Car.) 1,-to the effect that as offices are held at the will of both parties, an officer must retain his position until his resignation is accepted. As we have not the report itself, but a mere citation in Bouvier's Law Dictionary (tit. Resignation), we are not able to determine what weight should be given to the decision. It may be founded upon some State law, which would render it inapplicable in this case. In the case of The United States v. Wright, I McClean (U. S.), 509. upon a bond given as a surety for the faithful performance of duty by one Fogg, a revenue officer, one of the defences interposed by Wright was substantially to the effect that Fogg. for whom he was surety, resigned his office on the second of August, 1817, and that he had committed no default prior to that time. In the United States district court, where the case was first tried, it was found that Fogg on the twenty-fifth of July, 1817, had written a letter of resignation. The resignation, however, was by the terms of the letter to take effect when a successor should be appointed. That letter was received on the second of August by the commissioner of revenue. The commissioner requested Fogg to hold on for a time, and he continued to exercise his office for several months thereafter. The district judge before whom the case was tried instructed the jury that Fogg had resigned his office on the second of August, and his sureties were not bound for his acts

after that time. The United States took the case by writ of error before the circuit court, and the only point discussed seems to have been, whether the charge of the district judge was erroneous. The defendant contended, first, that charge was correct; second, that if not technically correct, it did the plaintiff no harm. The first point, then, for the court to determine was, whether the charge was This necessarily involved the correct. question. When did the resignation of Fogg take place—on or before the second If so, the plaintiff had of August? no cause of complaint. The court, in considering this question, came to the conclusion that the resignation did not take effect on the second of August, for the reason that it was not a peremptory resignation, but a conditional one in its terms. But whilst they arrived at this conclusion they took occasion to express themselves in regard to the right of resignation in the following terms: There can be no doubt that a civil officer has the right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office. is only necessary that the resignation should be received to take effect; and this does not depend upon the acceptance or rejection of the resignation by the president. And if Fogg had resigned absolutely and unconditionally. I should have no doubt that the detendant could not be held bound subsequently as his surety.' The relator, however, con-tends that this is a mere dictum, and therefore entitled to but little weight. Dictum is defined to be an opinion expressed by a judge on a point not necessarily arising in a case, Perhaps this may be called a mere dictum; for after determining that the resignation was not absolute, and for that reason did not take effect on the second of August, it was not essential to say that it would have taken effect on that day if it had been absolute. But whilst we may say that this was technically a mere dictum, it certainly is not liable on the main point (to wit, the absolute right of resignation) to the objections usually urged against the binding force of dicta. reason assigned for their not being entitled to weight is that usually they are upon some point not discussed at barsomething to which the attention of the court has not been particularly calledand something on which the judge uttering them may not have reflected a moment before expressing his opinion. Here one of the principal points of discussion must have been: Has a civil officer the abso-

DICTATION.—A technical word peculiar to the jurisprudence of Louisiana. It is defined as the pronunciation, word by word, of what is to be written by another. It is used in the Louisiana Code in reference to nuncupative wills.1

DID.—A part of the verb to do, used as an auxiliary with other verbs.2

lute right of resignation, without regard to the acceptance or non-acceptance thereof? The court, after listening to that discussion, says in effect: 'We have no doubt at all that he has such right, but we think this officer did not exercise that right; his resignation was not absolute. but conditional. A decision given under these circumstances, after full discussion, we think entitled to far more weight than an ordinary dictum upon a point not discussed, and not connected—except in some remote and incidental manner with the case decided." State ex rel.

Nourse v. Clarke, 3 Nev. 566, 571.

This case cited above, U. S. v. Wright, 1 McLean (U. S.), 509, was followed in People v. Porter, 6 Cal. 28; State ex rel. Williams v. Filts, 49 Ala. 402. But for a contrary view on the right of "resignation" with a discussion of the cases, see Edwards v. United States. 103 U. S. 471; and State ex rel. Toepke v. Clayton, 27 Kan. 442; s. c., 14 Cent. Law. J. 271.

1. Hamilton v. Hamilton, 6 Mart. N. S. (La.) 143.

Dictation is used in a technical sense, and means to pronounce orally what is destined to be written at the same time by another. Such is the settled definition of this term under our jurisprudence. Prendergast v. Prendergast, 16 La. Ann. 216. See also Bordeton v. Baron, 11 La.
Ann. 676.
2. It has been held in Texas that the

omission in an indictment of the word "did" in charging the defendant with the commission of the acts supposed to constitute the offence is a fatal defect, and cannot be supplied by intendment. State v. Hutchinson, 26 Tex. 111; State v. Dougherty, 30 Tex. 360; Edmonds v. State, 41 Tex. 496; Ewing v. State, 1 Tex. App. 362.

On the contrary, in Missouri it was held that the omission of the word "did" in an indictment for a misdemeanor before the words "assault, beat, and maltreat," was not fatal; the court, Ryland, J., saying: "The omission in this indictment consists of the neglect to insert the word 'did' before the words 'assault, beat, and maltreat one Page, in the peace then and there being, and

other wrongs,' etc., so as to make the sentence read thus: 'With force and violence, in a turbulent and violent manner, "did" assault, beat, and maltreat," etc. We are inclined to think that this word 'did' may, in this indictment, be supplied by intendment. In indictments for misdemeanors merely, such intend-ments is often resorted. The strictness and rigor in the construction of indictments for felonies are not applied uniformly to indictments for mere misdemeanors. In the case of State v. Holder, 2 McCord (S. Car.), 377, the omission to insert the word 'did' before the words 'feloniously utter and publish, dispose and pass' was held fatal, and the judgment was arrested. This indictment was for a felony. In the case of State v. Whitney, 15 Vt. 298, which was an indictment for a misdemeanor, selling liquor by the small measure, without license, the word 'did' was omitted, which should have been joined with the words "sell and This omission was held dispose of.' not to be fatal on motion in arrest of judgment. Bennet, J., in delivering the opinion of the court, said: 'In this indictment it is alleged that the respondent, on the first day of August, A.D. 1842, at, etc., sell and dispose of, etc. It is evident the omission is purely a clerical one; the auxiliary verb may be supplied by intendment.' There was no necessity to supply this auxiliary verb 'did' before one of the verbs used in this sentence above quoted, viz., the verb 'beat,' leaving out the words 'assault and maltreat,' and using the verb 'beat' alone, and the charge is positive and direct. The words in the beginning of this sentence, 'with intent' may be rejected assurplusage; they do not injure the indictment, being no part of the description of the offence, and may be stricken out, leaving the offence full and complete. But it is very clear that the words 'assault, beat, and maltreat' express all the action which is imputed to the defendant, and no one can misapprehend their sense in the connection in which they are used, and the helping verb will at once be supplied by intendment." State v. Edwards, 19 Mo. 674.

DIE.—(See COUNTERFEITING.)—A stamp for giving the impress. to coin.1

DIES NON.—(See also DAY; HOLIDAY.)—An abbreviation of the phrase dies non juridicus; that is to say, a day on which the courts, for reasons of religion, do not sit or transact any business.2

DIFFICULTY.—See note 3.

DIG.—To excavate.4

1. Under the statutes against countering in possession "any mould, pattern, die, etc., adapted or designed for coining," it has been held that this feiting, which impose a penalty for havevery part of the apparatus of coining, however much more might be necessary to make that part effective; and so, if it be shown that the respondent had in his possession one half of a mould, it is sufficient, without proof that he also had the other half, the court, Redfield, I., saving: "The alleged defect in the proof in this case is, that the respondent had only the mould for one side of the coin. and that, to constitute the entire offence, the person must have in his possession what will mould, at the least, one entire This reasoning is ingenious, but is certainly fallacious. The same severity of criticism would exempt from the operation of the statute every tool or instrument, if it had any material defect, so that, in its present form, it could not be applied to the purposes of coining; or, if one side of the mould were found in one man's possession, and the other half in that of another, and no concert were shown between them, would put the case beyond the reach of the statute. The statute was intended to reach every part of the apparatus for coining, however much more might be necessary to render that part effective. A die without any engine or press would be useless; so, too, of a punch without any other tool; and yet these are specifically enumerated in the statute." State v. Griffin, 18 Vt. 198. See Com. v. Kent, 6 Metc. (Mass.)

2. Brown's Law Dict., sub voce. Such are Sundays and legal holidays.

Chitty's Gen. Prac. 104.

This limitation is, however, only in regard to judicial acts; ministerial acts, such as an arrest, may be lawfully executed on the Sunday, for otherwise, peradventure, they can never be executed. McKalley's Case, 9 Coke, 66. On this subject see In re Worthington, 5 Cent. Law J. 26; Van Vechten v. Paddock, 12 Johns. (N. Y.) 177; Johnson v. Day, 17 Pick. (Mass.) 106; Pearce v. Atwood, 13. Mass. 324.

The declaration by statute that a certain day is a legal holiday is sufficient tomake it a dies non. Lampe v. Manning, 38 Wis. 673.

Where, however, public policy or the prevention of irremediable wrong requires it, the courts may sit on a dies non and issue process. Langabier v. Fair-

bury, etc., R. Co., 64 Ill. 243; s. c., 13. Am. Law Reg. 747. 3. "The term 'difficulty,' as applicable to what transpires between parties, when it results in some breach of the peace, or more flagrant violation of the law, is in general use, and well understood by all classes. It is of constant application in legal proceedings, and in the reports of adjudicated cases. It is expressive of a group or collection of ideas that cannot, perhaps, be imparted by any other term. Its use, therefore, avoids a great deal of circumlocution, which generally leads to confusion and misapprehension." Gainey v. People, 97 Ill. 270. Its use, which was approved in this case, which was one of homicide, was in the charge of the court, to indicate an altercation between the deceased and the accused.

Where a contract for paving casts upon the contractor "all loss or damage arising out of the nature of the work, or from any unforeseen obstructions or difficulties which may be encountered." the bad condition of the street necessitating additional material to keep the pavement upto grade, is a difficulty to be borne by the contractor. Murdock v. Dist. of Colum-

bia, 22 Ct. of Cl. Rep. 464.

4. Where it was agreed to pay a contractor, who had engaged to complete the excavation, refilling, and repaying of a. trench for water-pipes, seven cents per cubic yard "for executing the digging, the last word was held to be synonymous. with excavation, and to include the removal of hard-pan, or rock, as well as. common earth. Sherman v. Mayor, etc., 1 N. Y. 316.

A liberty to "dig a canal through thegrantor's land" does not include the pro-

DILIGENCE—DILUTE—DIP—DIPLOMA—DIRECT

DILIGENCE.—This word is synonymous with CARE (q.v.), and is the opposite of NEGLIGENCE (q.v.). For the degree of diligence, care, or skill required in various undertakings, see AGENCY: AT-TORNEY AND CLIENT: CARRIERS: etc.

DILIGENTLY.—See note 1.

DILUTE.—To thin, weaken, reduce the strength of.²

DIP.—In mining, the downward course of the vein.³

DIPLOMA.—An instrument given by colleges and societies, on commencement of any degree; a license for a clergyman to exercise the ministerial function, or a physician to practise his art.4

DIPSOMANIA.—(See also DELIRIUM TREMENS.)—An irresistible impulse to indulge in intoxication.5

DIRECT.—I. (a) Certain; ascertained; (b) straight.⁶

prietary interest in the soil dug up. Lyman v. Arnold, 5 Mas. (C. C.) 195.

The expression "digging gold," used

in a contract to share the proceeds of such an employment, does not apply to all employments by which wealth is ob-

all employments by which wealth is obtained, but is confined to the mining of gold. Hoyt v. Smith, 27 Conn. 63.

1. In reply to the request of a grand juror for an interpretation of "diligently inquire" in the qualification of grand jurors, McKean, C. J., said: "The expression meant diligently to inquire into the circumstances of the charge, the credibility of the witnesses who support it, and from the whole to judge whether the person accused ought to be put upon his trial. For though it would be improper to determine the merits of the cause, it is incumbent upon the grand jury to satisfy their minds by a diligent inquiry that there is probable ground for the accusation, before they give it their authority, and call upon the defendant to make a public defence." Respublica v. Shaffer, 1 Dal. (Pa.) 236.

2. This is the meaning given by Huddleston, B., as the ordinary dictionary meaning, and is adopted by him in Crofts v. Taylor, 19 Q. B. D. 524. In this case it was decided that a mixture of two kinds of beer of different strengths was a dilution of the stronger within the meaning of a statute imposing a penalty upon any retailer in whose possession was found any beer "adulterated or diluted, or

mixed with any other matter or thing."
3. "I have spoken of the 'dip' or 'downward course' of the vein, treating these words as synonymous, and so, I think, they must be regarded. 'Dip' and 'depth' are of the same origin— 'dip' is the direction or inclination

towards the depth, and it is 'throughout their depth' that veins may be followed, and that is surely their downward course. Duggan v. Davey (Dak.), 26 N. W. Rep. 901. See I Am. & Eng. Encyc. of L. бıз.

4. Whar. L. Lex.; Rapalje & L. L.

Dict.

It is sufficient proof of a diploma for a physician to identify the seal of the institution issuing the same, and to testify that he himself has received a diploma from the same institution, under the same seal, and subscribed by the same officers, and that though he had never seen them write their names, he had no doubt of the genuineness of the signatures, from a comparison of the diploma with others granted by the same institution and particularly with that received by himself. Finch v. Gridley, 25 Wend. (N. Y.) 469.
5. Ballard v. State, 19 Neb. 614.

6. (a) A direct interest is one which is certain, and not contingent or doubtful.

Lewis v. Post, 1 Ala. 72.

A statute provided that the plaintiff might have an attachment "in an action upon a contract, express or implied, for the direct payment of money." In construing this, the court said: "'Direct' means straightforward, not crooked, not winding, not circuitous, not sideways, not oblique. Apply these various terms to the description of a payment, and we reach no intelligible result. . . . It is obvious that the sense of the word, as used in common speech, does not afford much aid. In the law of descents we find the word 'direct' used as the opposite of 'collateral.'" So in the law of contracts; and the language here would be intelli-gible if it read "a direct contract for the payment of money," but this it does not; II. To appoint; 1 to place an address upon.2 For the use of this word as applied to taxation, see note 3.

and it follows that it "has been used in some unnatural or strained sense, and must be entirely disregarded unless we find something in the context or general policy of the act which will serve to illustrate the sense in which it is used." This is found; and the words are held to apply to promises "where the amount to be paid is fixed by the terms of the contract, or can be readily ascertained from the information which it affords." Hathaway information which it affords." v. Davis. 33 Cal. 161.

(b) A clause in a charter-party which read, "It is understood that the vessel is now loading for Key West or the Tortugas, and is to proceed thence direct to load on this charter," was held to mean that the vessel was to take a direct course from the Tortugas to the loading port, not that she was to depart immediately The Onrust, 6 Blatchf. (C. or instantly.

C.) 533.

1. Where commissioners have the power, given them by statute, to direct and regulate the stands of hackney-coaches within a certain district, they may remove a stand from one street to another. "I think," said Abbott, C. J., "that 'direct' means 'appoint.' And if the commissioners may appoint the stands of hackney-coachmen, that necessarily includes the power of saying that they shall not take their stand in a particular place, as well as that they may do so." The King v. Rawlinson, 6 B. & C. 23; s. c., 9 Dowl. & Rv. 7.

Where a captain, while acting in disobedience to the orders of his superior officer, took a prize, the successor of that superior officer cannot be said to have been "directing or assisting" in the capture, so as to be entitled, under a proclamation, to a share of the prize, as he was directing in or privy only to such orders as his predecessor issued. Harvey v. Cooke, 6 East, 220. And see Lady Gardner v. Lyne, 13 East, 585. See

PRIZE.

Where shipping articles authorize the master to touch at certain intermediate points "or as he may direct," it is no violation to stop at a place not named. The phrase is as wide as "or elsewhere, and is to be given the same construction. Wood v. The Nimrod, Gilp. (U. S.)

Where in a will the residue was given to be distributed "to my relatives, share and share alike, as the law directs." a distribution under the Statute of Distributions per stirpes and not per capita was

meant. Fielden v. Ashworth, L. R. 20-

Eq. Ca. 410.

2. A notice sent by post, to be "duly directed" must bear an external address to the person for whom it is intended. Birch v. Edwards, 5 C. B. 45.
3. Direct Tax.—Direct taxes, within:

the meaning of the constitution of the United States, are taxes on real estate, and poll or capitation taxes. They are contradistinguished from duties, imposts, and excises. "Much diversity of opinion has always prevailed upon the question of what are direct taxes. Attempts to answer it by reference to the definitions. of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations. . . . We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use, and in the opinion of those whose relations to the government and means of knowledge warranted them in speaking with authority.

"And considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear.

" It is, as we think, distinctly shown in every act of Congress on the subject. . . . In the practical construction of the constitution by Congress, direct taxes have been limited to taxes on land and appurtenances, and taxes on polls or capitation taxes.

"And this construction is entitled to great consideration, especially in the absence of anything averse to it in the discussions of the convention which framed and of the conventions which ratified the constitution.

"What does appear in those discussions, on the contrary, supports the construction." Chase, C. J., in Bank v. Fenno, 8 Wall. (U. S.) 533.

"The reason for this interpretation is obvious: chattels ordinarily have a value which is everywhere much the same, while the price of land depends on the local demand for it, and increases as population grows more dense. The object in both cases is equality, but owing to the diversity of the subject-matter the rule is necessarily different." Const. Law (Phila. 1885), 158.

Accordingly a tax on carriages was held not to be a direct tax. Hylton v. United States, 3 Dall. (U.S.) 171. Nor is an inDIRECTION.—See note 1.

DIRECTLY -- See note 2.

DIRECTOR.—See Officers of Private Corporations.

DISABILITY.—(See also LIMITATION OF ACTIONS: also the different kinds of disability, viz., INFANCY, INSANITY, etc.)—The want of a legal capacity to do a thing.3

Pacific Ins. Co. v. Soule, 7 Wall. (U. S.) 433; Springer v. United States, 102 U. S. 586; Clark v. Sickel, 14 Int. Rev. Rec. 6. Nor a tax on bank cir-culation. Bank v. Fenno, 8 Wall. (U. S.) 533. Nor a succession tax. Scholev v.

Rew, 23 Wall. (U. S.) 331.

1. A statute (25 & 26 V. c. 95 s. 75) provided that "whosoever having been entrusted . . . with any money, or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security . . for any purpose, or to any person specified in such direction, shall, on viola-tion of good faith and contrary to the terms of such direction, in any wise convert to his own use, . . . such money, etc., . . . shall be guilty of a misdemeanor. . . ." A stockbroker, who was employed by A to purchase securities for her, on one occasion wrote to her, "I enclose a contract note for £,300 Japanese bonds, at 112-£336." The enclosed note read, "Sold to A £300 Japanese at 112-£336." The letter further stated that he had secured the bonds for her, not doubting that she would ratify his action, and that they were a good investment. In reply she wrote, acknowledging the receipt of his letter, and said, "I enclose a check for £336 in payment. I am obliged to you, and perfectly satisfied that you have purchased the three shares for me." This was held to be a direction under the act to apply the proceeds of the check to pay for the bonds. The Queen v. Christian, L. R. 2 C. C. R.

2. In a provision in a settlement act that "every healthy, able-bodied person coming directly from some foreign port or place into this State shall be deemed and adjudged to be legally settled in the city or town in which he or she shall have first resided for the space of one year," "coming directly from some foreign port or place," means coming from some port or place out of the United States, without passing through either of the sister States, into this State. Overseers of Chatham v. Overseers of Middlefield, 19 Johns. (N. Y.) 56; Stillwater v. Green, 4 Halst. (N. J.) 63.

Under the British orders in council of 1798, directing British cruisers to seize and bring in for adjudication ships going directly from any port in the French, Spanish, or Dutch colonies to any port in Europe not English, "going directly," did not mean going in a direct course, but going in a direct voyage. "The voyage may be direct and the course indirect. Whether the voyage is direct, is a matter of fact to be determined from the circumstances of the case. If the circumstances warrant the conclusion, that a voyage from the colony to the mother country was the real intent, the case falls within the penalty of the orders." Kohne v. Ins. Co. of N. A., 6 Binn. (Pa.) 219.

It is a variance under a declaration upon a contract to be performed "within a reasonable time" to prove a contract to be performed "directly." The former denotes a more protracted space of time than the latter, although "directly" does not mean instanter. Duncan v. Topham, 8 C. B. 225; s. c., 18 L. J. C. P. 310;

Blackburn on Sales, 226,

3. Bouv. Law Dict. This definition is adopted in Meeks v. Vassault, 3 Sawy. (C. C.) 206, where, in construing the phrase "legal disability to sue" in an exception to a Statute of Limitations, it is said, "The disability may relate to the power to contract or to bring suits; and may arise out of want of sufficient understanding, as idiocy, lunacy, infancy; or want of freedom of will, as in the case of married women, and persons under duress; or out of the policy of the law, as alienage where the alien is an enemy, outlawry, attainder, pramunire, and the like. The disability is something pertaining to the person of the party—a personal incapacity—and not to the cause of action or his relation to it. There must be a present right of action in the person, but some want of capacity to sue."

In interpreting a similar provision, the court, after quoting Burrill's definition, "An incapacity of action under the law," "an incapacity to do a legal act, held that it was too narrow; that the term when applied to one imprisoned on a criminal charge, or to a married woman DISABLE.—(See MAYHEM.)—See note I.

DISBAR.—See ATTORNEY AND CLIENT.

DISBURSEMENTS.—See PAYMENTS.

DISCHARGE.—(See also ARREST: BANKRUPTCY; CONTRACT: HABEAS CORPUS; INSOLVENCY; MARINE INSURANCE: MASTER AND SERVANT: PAYMENT).—Receipt: 2 unloading of a vessel 3 For other meanings, see note 4.

means not the disability which results from a suspension of civil rights, but that which results from duress, or the control of other persons; and that consequently the "disability" of coverture was not removed by an act giving married women the absolute control of their separate estates as though unmarried. Wiesner v. Zann. 30 Wis. 180.

"Disability implies want of power, not want of inclination. It refers to incapacity, and not to disinclination. It is founded upon a want of authority arising out of some circumstance or other, not-

withstanding the presence of any amount or degree of willingness or disposition to act." People v. Supervisors, 32 Barb. (N. Y.) 473.

1. In a provision in a poor law, for the support of a non-resident, who "shall be taken sick, lame, or otherwise disabled, in any town," "disabled" refers to bodily or mental disability to procure a livelihood. McCaffrey v. Town of

Shields, 54 Wis. 645.

In a statutory definition of mayhem, "wherever the statute speaks of disabling a limb or member, a permanent injury is contemplated, as such was the common-law notion of the extent of the injury necessary to constitute a mayhem. A temporary disabling of a finger, an arm, or an eye would not be sufficient to constitute the statutory offence. State v. Briley, 8 Port. (Ala.) 472.

Under a statute making it mayhem "to cut off or disable any limb or member," an indictment which substituted "destroy" for "disable" is good, the former being the more comprehensive word, and including what is signified by the latter. Tully v. People, 67 N. Y. 15. An ear cannot be "disabled" within

the meaning of an act to prevent malicious disfiguring. United States v. Askins, 4 Cranch (C. C.), 98.

If a man is so disabled by an accident as to be incapable of following his usual business, occupation, or pursuits, he is "wholly disabled" from following them, within the meaning of a policy of insurance. An attorney who is confined, by injuries to his ankle, to his room, and is unable to see his clients, is "wholly disabled" from following his usual occupation. Hooper v. Accidental Death Ins. Co., 5 H. & N. 546.

2. Comm. v. Talbot, 2 Allen (Mass.),

Tht

An averment in a plea that a bill had been accepted "in discharge" of a debt was construed not to mean in full satisaction and discharge, but for and on account of, in Kemp v. Watt, 15 M. & W.

3. Discharge, when used in a charterparty, refers to the unloading of the vessel and not to the delivery of the freight. Certain logs of maliogany, 2 Sumn. (C. C.) 589; Kimball v. Ship Anna Kimball, 2 Cliff. (C. C.) 4.

"A vessel arrives at a port of discharge when she arrives at any place which it is usual to discharge cargo, and to which she is destined for the purpose of discharging cargo. Upon her arrival at that place a policy insuring her until arrival at a port of discharge terminates." Gray, J., in Bramhall v. Sun Mut. Ins. Co., 104 Mass. 510; s. c., 6 Am. Rep. 261.

If the shipping articles are to the final port of discharge, the voyage is not ended until the cargo is wholly unladen. U.S. v. Barker, 5 Mas. (C. C.) 404.

4. "Discharge is a generic term: its principal species are rescission, release. accord and satisfaction, performance, judgment, composition, bankruptcy, mer-

Rapalje & L. L. Dict.

Under an act which limits actions against the sureties on the bond of a guardian to four years after the guardian shall be discharged, by this word "is intended any mode by which the guardianship is effectually determined and brought to a close, either by the removal, resignation, or death of the guardian, the marriage of a female guardian, the arrival of a minor ward to the age of twenty one, or otherwise." Loring v. Allin, 9 Cush. (Mass.) 68.

To send to another a tin box containing gunpowder and detonators, intended to explode and destroy the person open-

DISCLAIMER.—(See also EJECTMENT; EQUITY PLEADING: LANDLORD AND TENANT; PATENTS.)—"A renunciation by the party of his character of tenant, either by setting up a title in another or by claiming title in himself." A formal mode of expressing dissent by a grantee to a conveyance, before the title has become vested in him.2

DISCLOSE.—To uncover; to produce from a state of latitancy to open view; to reveal; to impart what is secret; to discover; to open; to make known; to tell that which has been kept concealed.3

ing the same, is not "an attempt to discharge loaded arms" at one with intent to murder within the meaning of a statute providing a penalty for such. Rex v. Mountford, 7 C. & P. 242. See also Rex v. Harris, 5 C. & P. 159.

"In no sense can the term 'discharge' apply to the mere bringing up of the prisoner to testify or to be tried." Ex parte Paris, 3 Woodb. & M. (C. C.) 229.

1. Williams v. Cooper, 1 M. & G. 135;

 Williams v. Cooper, 1 M. & G. 135;
 Bl. Com. 275.
 Watson v. Watson, 13 Conn. 83.
 Reg. v. Skeen, 28 L. J. R. M. C.
 quoting from Johnson's and Richardson's Dictionaries; in which case it was held that a statement made by an agent before a commissioner in bankruptcy of matter which had been previously known and proved by evidence before a magistrate, before whom the agent had been charged with a violation of good faith in his agency, did not, on his trial, bring him within statutory protection, as showing that he had disclosed the act before the commissioner previous to being indicted for the offence. Lord Campbell, C. J., expressing the opinion of the majority of the court, said: "This question depends upon the sense in which the word 'disclose' is used in the proviso to the 6th section of this statute. If by 'disclosing the act' is meant merely stating the guilty act and confessing it, whatever may be the previous state of knowledge of the creditors, or of the commission-er of bankruptcy, and whatever means of proving the guilty act may exist, and whatever steps may have been taken and may be pending for prosecuting and punishing the offender, and although the statement or confession may be made while the grand jury are hearing evidence in support of the indictment, this convic-tion ought to be quashed. But [quoting the definitions in the text] . . . where an agent who has abused the confidence reposed in him and fraudulently made away with property with which he was intrusted reveals what was before un-

known or incapable of proof, it may bewell that for the information and advantage gained by his confession, he should be indemnified against the penal consequences of his misconduct, which without. his confession could not have been proved. But can it be supposed that the legislature intended wantonly to extend the indemnity to cases where there is no merit whatever in the accused, where he states only what he knows to be already notorious, and where neither civil nor criminal justice can be at all advanced. by the alleged disclosure? . . . It is highly proper, in construing this act of Parliament, that we should look to see in what sense the word 'disclose' is used in other acts of Parliament; and we find it in 52 Geo. III. c. 63, s. 5, and in 7 & 8 Geo. IV., c. 29, s. 52, both of which are in pari materia. The object seems to be the same in all the three, they having regard to a civil remedy, and to criminal proceedings in cases of breach of trust. by agents; the language employed is nearly the same in all the three; and I am of opinion that in all the three, for the same reasons, the word 'disclose,' admitting of the same construction, requires the same construction to be put upon it. There having been no judicial decision on the construction of these statutes, I do not see that they can be of use to us, except to show more strongly how justice might be defeated by now holding that a 'disclosure' means confession of what the party confessing waswell aware had been before made known, and had been before judicially proved. There is another set of statutes of a different description respecting bribery at elections, in which the word 'disclose' is to be found. The most recent of these is 15 & 16 Vict. c. 57. By section 9 of this statute. . . Here it is quite clear that the most ample indemnity is held out to the person so examined, if he makes a true answer to all the questions put to him, whether the facts he so states were before known or not. Section 10The word "disclose" may admit of two interpretations—a discovery of that which was before unknown, and a statement of that which was known before; and "we have to look in each act of Parliament to see in which sense it is used by the legislature." 1

DISCLOSURE.—See DISCLOSE.

goes on to enact that the person so examined shall not be indemnified without a certificate from the commissioners 'stating that such witness has upon his examination made a true disclosure touching all things to which he has been so examined.' But 'true disclosure' here evidently means a true statement, and the certificate required by the 10th section is merely that the witness has conformed to the duty cast upon him by the oth section, when examined upon the voir dire. The other statutes of this class admit of the same explanation, and the laudable objects of the legislature in enactingthemseem to be promoted by construing 'disclosure,' where used in these statutes, to mean 'statement.' But to give the word 'disclosure' the same meaning in the statute 5 & 6 Vict. c. 39, the same which treats of a totally different subject, I think would be to contravene the intention of the legislature, and to occasion great public mischief. For these reasons, I am of opinion that in the present case there was no disclosure within the meaning of the proviso relied upon, and that the conviction ought to be affirmed." Five of the justices, however, dissented, holding that as the statement of the agent was obtained on a compulsory examination instituted bona fide by the creditors for their own interest, it was a disclosure, notwithstanding the previous publicity of the matter inquired into. Cockburn, C. J., in the course of his dissenting opinion, says: "We are told on the authority of the lexicographers, that the proper and general signification of the word 'disclose' implies that the subject-matter of the communication is previously un-known; and that such, therefore, must be presumed to be the sense in which the term has been used in this statute. It may, I think, be admitted that such is the ordinary meaning of the term; but, on the other hand, it is equally certain that the word is in numerous instances used simply in the sense of to 'show,' to 'set

forth,' to 'state or declare,' without the collateral idea of the subject-matter of the communication being before unknown. And it is important to observe that this is peculiarly the case in legal phraseology. In professional language the form is generally, I had almost said, and I believe I should be justified in saying uniformly, so used. Thus we say, in common legal parlance, that a declaration discloses no cause of action, a plea no ground of defence, an affidavit no defence on the merits; in all which cases it is clear that the term is used in the more restricted sense contended for on behalf of the defendants..." proceeding to discuss the word as occurring in various

1. "We think that it is used in one sense in one set of statutes, and in another sense in the statute now under consideration." Lord Campbell, C. J., in reply to Cockburn, C. J., in above case—Reg. v. Skeen, 28 L. J. R. M. C. IOI.

"Disclosing a defence upon the merits," as the statutory requisite for an affi-davit, does not mean "stating that he has a defence upon the merits," but the defendant must show upon his affidavit what the nature of the defence is. Cockburn, C. I., says: "Considerable light is thrown upon the meaning of the proviso in question by the 2d section of the Bills of Exchange Act, 1855. . . . 'Disclosing' there manifestly points to something more than a mere statement of the existence of a defence. Independently of that statute, I should have felt no difficulty in coming to the conclusion I have stated, but with it all possibility of doubt is in my judgment removed." Willes, J., says: "It seems to me that 'disclosing' must be construed to mean what the obvious and natural sense would seem to indicate,-opening out,-and letting the judge see whether there really is a defence upon the merits." Whiley v. Whiley, 4 C. B. (N. S.) 653.

DISCONTINUANCE, 1—(See also Action; DISMISSAL; NOLLE NONSUIT: OUSTER: PROCESS: WAYS: WITH-PROSEOUI: DRAWAL.)

- I. In Pleading, 674.
- 2. Of Actions, 674. (a) Definition, 674.
- (b) The Right to Discontinue, 676. (c) Effect of Discontinuance, 677. (d) Costs, 678. (a) Definition, 674. (b) Effect, 674.
 - 3. Of Estates. 678.

1. In Pleading.—(a) Definition.—Discontinuance in pleading is the chasm or interruption which occurs when no answer is given to some material matter in the preceding pleading, and the opposite party neglects to take advantage of such omission.2

(b) Effects.—The effect of a discontinuance in pleading at common law was to discontinue the whole action; but it was afterwards provided that a discontinuance might be cured by subse-

quent proceedings.4

2. Of Actions.—(a) Definition.—Discontinuance in its most common use signifies the termination of a suit by the plaintiff's neglect or omission to keep it properly in court; or it may be oc-

1. "Discontinuare nihil aliud significat quam intermittere, desuescere, interrumpere." Coke Litt. 325. (To discontinue signifies nothing less than to intermit, to disuse, to interrupt. Wharton L. Dict.)

Of Post-route.—The "suspension" of a

post-route during rebellion is a "discontinuance" thereof. Reeside v. United

States, 8 Wall. (U. S.) 38.

2. Bouv. L. Dict.; Rapalje and Law.

L. Dict.

Where a plea purports to answer but part of a declaration and leaves unanswered a material part thereof, though the subject-matter of the plea, if properly pleaded, would be a sufficient answer to the whole declaration, and the plaintiff, instead of taking judgment by nil dicit for the unanswered part, replies or demuts to the plea, there is a technical discontinuance. Chitty Pl. *524, 525; Gould Pl. VI., §§ 104-107; Stephen's Pl. 215, 216; Tidd's Pr. *600, 661. Compare Etheridge v. Osborn, 12 Wend. (N. Y.) 402.

If the plea purports to answer the whole declaration, but in fact does not, a demurrer is proper. Chit. Pl. *524; Tidd's Pr. *661; Gould Pl. VI. §§ 104-107; Stepnen's Pl. 216.

Before replying or demurring, the plaintiff should sign judgment for the unanswered part, or enter a nolle prosequi thereto. Chit. Pl. *524, 525, 577; Stephen's Pl. 215, 216.

A discontinuance may occur where a replication purports to be to but part of a plea. Chit. Pl. *525; McAllister v.

Ball, 28 Ill. 210; Warren v. Nexsen, 4 Ill. (3 Scam.) 38.

The doctrine of discontinuance does not apply where one or more counts are fully answered. McAllister v. Ball. 28 Ill. 210.

The plaintiff made profert of an instrument, the defendant craved over, and on failure of the plaintiff to respond, held, that there was a discontinuance. Trapnall v. Craig, 19 Ark. 243.

A failure to join issue on pleas held a discontinuance. Williams v. Brunton, 8 Ill. 600.

3. Chit. Pl. *523. 4. The doctrine of involuntary discontinuances is not favored in this country. McAllister v. Ball, 28 III. 210. And courts have refused to enforce it. Bayless v. Tousey, 20 Ind. 151; Mallory v. Matlock, 7 Ala. 757; Taft c. Northern Transportation Co., 56 N. H.

Judgment for the unanswered part after verdict has been permitted at any time during the term. McDougle v. Gates, 21 Ind. 65; Chit. Pl. *523, note c. See also Warren v. Nexsen, 4 Ill. (3

5. Abbott's L. Dict.; Bouv. L. Dict. See Kahn v. Herman, 3 Ga. 266; Exparte Hall, 47 Ala. 675; Taft v. Northern Transportation Co., 56 N. H. 414; Kendell v. McMickle 7 Phila (Pa.) 217: nedy v. McMickle, 7 Phila. (Pa.) 217; McGuire v Hay, 6 Humph. (Tenn.) 419.

A discontinuance may occur in either civil or criminal actions. Ex parte Hall,

37 Ala. 680.

casioned by the voluntary withdrawal of his suit by the plaintiff 1

What Amounts to .- At common law the failure to continue a cause regularly from day to day, or term to term, between the commencement of the suit and final judgment, was a discontinuand that judgment, was a discontinu-ance. Germania Ins. Co. v. Francis, 52 Miss. 467; Tidd's Pr. *678; Pollard v. Huston, 7 Lea (Tenn.), 689. But the failure of the clerk to note the continuances regularly from term to term has been held no discontinuance. Malone v. Marriatt, 64 Ala. 486; Moreland v. Pelham, 7 Ark. (2 Eng.) 338; Gilbert v. Hardwick, 11 Ga. 599; Germania Fire Ins. Co. v. Francis, 52 Miss. 467; Hale v. Burwell, 2 Patt. & H. (Va.) 608.

The failure of the clerk to docket a case is not a discontinuance. Wiswall v. Glidden, 4 Ala. 357; Forrester v. Forrester, 39 Ala. 320; Davidson v. Middleton, 3 Rich. (S. Car.) 349; Pierce v. Bank of Tenn., 1 Swan (Tenn.),

The failure of the clerk to transmit the transcript to the court to which a change of venue has been taken, in time for the next term, is not of itself a dis-continuance. Harrall v. State, 26 Ala. continuance. 52; Sears v. Kirksey, 81 Ala. 98. But a failure to transmit it for seven years was held to work a discontinuance. Exparte Holton, 69 Ala. 164.

The failure of the certificate of reversal of a judgment to reach the lower court for several years was held no discontinuance. Brown v. Clements, 24 Ala. 354; Glenn v. Billingslea, 64 Ala.

Successive continuance for thirteen years were held not to amount to a discontinuance. Gillespie v. Bailey, 12 W. Va. 70. See also Buster v. Holland, 27 W. Va. 510.

Continuances from term to term after default are no discontinuance. Sheldon v. Sheldon, 37 Vt. 152. See also Governor v. Lassiter, 83 N. Car. 38.

A failure to continue process from term to term against a defendant not served, works a discontinuance. Pollard v. Huston, 7 Lea (Tenn.), 689; Bissell v. Gold, 1 Wend. (N. Y.) 210; s. c., 19 Am. Dec. 480. So does neglect to file a declaration for several years. Kennedy v. Smith, 2

Bay (S. Car.), 414.

Improper and unwarranted continuances amount to a discontinuance. Crichton v. Beebe, 7 III, App. (Bradw.) 272; State v. Board of Health, 46 N. J. L. 99; Gamage v. Law, 2 Johns. (N. Y.) 192; Paddleford v. Bancroft, 22 Vt. 520; Amis v. Koger, 7 Leigh (Va.).

The continuance of an action as to one defendant, and the refusal to continue it as to codefendants, amounts to a discontinuance as to all. Comstock v. Givens, 6 Ala, 95; Tippet v. May, 1 B. & P. 414.

Proceeding to trial on the general issue pleaded by one of codefendants in trespass, the other not having yet made any plea, is a discontinuance as to the latter. Breidenthal v. McKenna. 14

Pa. St. 160.

A confession of judgment is not a discontinuance. Fletcher v. Bennett, 36 Vt. 659. Nor is a judgment by default against a defendant a discontinuance as to codefendants subsequently served. though it is error. Prewett v. Caruthers. 8 Miss. 304.

A simple order to strike a case from the docket was held a discontinuance.-Ashlock v. Commonwealth, 7 B. Mon. (Ky.) 44,-as was a dismissal for want of prosecution. Rountree v. Key, 71 Ga.

The submission of a pending cause to arbitration is generally a discontinuance of the action. Reeve v. Mitchell. 15 Ill. 297; Norwood v. Stephens, 7 Coldw. (Tenn.) 1; Snodderly v. Weaver, 1 Coldw. (Tenn.) 256. But not necessarily. Crockett v. Beaty, 7 Humph. (Tenn.) 66; Nettleton v. Gridley, 21 Conn. 531. An agreement to submit to arbitration a pending cause may be a discontinuance. Eddings v. Gillespie, 12 Heisk. (Tenn.) 548. Compare Norwood v. Stephens, 7 Coldw. (Tenn.) I.

The failure of the legislature to pro-

vide for pending suits in an act changing the times for holding the terms of court works no discontinuance. Bennett v. bie, I Ark. 29; Halderman v. Frisbie, I Ark. 48; Borwell v. Newton, I Hempst. (U. S.) 264.

Informality in a citation, though sufficient to sustain an exception and order for a new one, is not a discontinuance. Lapice v. Smith, 13 La. 91; s. c., 33 Am.

Dec. 555.

1. Rapalje and Law. L. Dict. So that discontinuances are voluntary or involuntary. Hunt v. Griffin, 40 Miss. 742.

A discontinuance is similar to a nonsuit. Germania Fire Ins. Co. v. Francis, 52 Miss. 457; Kahn v. Herman, 3 Ga. 266. And the term as now used is much broader in meaning, undoubtedly, than formerly. See 3 Bl. Com. *296.

(b) The Right to Discontinue.—If the plaintiff finds that he cannot maintain his action, he may discontinue in most cases; 1 but not if such discontinuance would result in injury to the defendant.2

In actions ex delicto, he may discontinue as to one or more defendants and maintain his action against the remaining defendants.3 In actions ex contractu, a discontinuance as to one or more defendants operates generally to discontinue the whole action:4 but a discontinuance as to defendants who plead a separate. special defence does not have this effect.5

1. Tidd's Pr. *678.

It is said that, where no injury would result to others, leave to discontinue is not a matter of discretion with the court. In re Butler, 101 N. Y. 307; Noble v. Strachan, 32 Wis. 314. Compare Adderton v. Collier, 32 Mo. 507. Held, that a judge at chambers may grant leave to discontinue. Gamble v. Jenkins, 12 Rich. (S. Car.) 692. And that plaintiff may discontinue by simply filing the necessary papers with the clerk. De Wolf v. Sprague Mfg. Co., 12 R. I. 133. Compare Whitmore v. Williams, 6 T. R. 765.

2. Plant v. Edwards, 85 Ind. 588; State

v. Givan, 75 Mo. 516; Estell v. Franklin, 29 N. J. L. 264; Kennedy v. McMickle, 7 Phila. (Pa.) 217; Learned v. Tillotson, 48 N. Y. Super. Ct. 16; Bowe v. Knickerbocker Life Ins. Co., 27 Hun (N. Y.), 312; Schmick v. Noel, 64 Tex. 406; Sweet v. Mitchell, 19 Wis. 524; Holcomb v. Holcomb, 23 Fed. Rep. 781. Compare Young v. Grand Trunk R., 10 Biss. (U.

S.) 550.

After the defendant has filed a set-off. counter-claim, or cross-bill, the court may refuse to allow the plaintiff to discontinue the action, so far at least as the defendant's claim is concerned. Wilder v. Bovnant's claim is concerned. Wilder v. Boyliton, 63 Barb. (N. Y.) 547; Gwathney v. Cheatham, 21 Hun (N. Y.), 576; East St. Louis v. Thomas, 9 Ill. App. 412; McLeod v. Bertschy, 33 Wis. 176; s. c., 14 Am. Rep. 755. See also Livermore v. Berdell, 60 How. Pr. (N. Y.) 308.

Where the court ordered the plaintiff to pay temporary alimony, etc., it refused to allow him to discontinue until the order was complied with. Leslie v. Leslie, 3 Daly (N. Y.), 194.

The court refused to allow the plaintiff

to discontinue to the injury of his attor-Eberhardt v. Schuster, 10 Abb. N.

Cas. (N. Y.) 374.
3. Criner v. Brewer, 13 Ark. (8 Eng.)
225; Riley v. M'Gee, I A. K. Marsh.
(Ky.) 432; Popham v. Street R., 48 N. Y.
Super. Ct. 229; Weakly v. Royer, 3
Watts (Pa.), 460; Bloss v. Plymale, 3 W. Va. 393.

Failing to reply to the plea of one of joint trespassers, and proceeding to trial against the others, is a discontinuance as to him. Criner v. Brewer, 13 Ark. (8-

Eng.) 225.
4. Pleasants v. State Bank, 8 Ark. (3 4. Pleasants v. State Bank, 8 Ark. (3; Eng.) 456; Givens v. Robbins, 5 Ala. 676; Sillivant v. Reardon, 5 Ark. (Pike), 140; Bachus v. Mickle, 45 Ala. 445; Kendall v. Lassiter, 68 Ala. 181; Ballou v. Hill, 23 Mich. 60; Tolman v. Spaulding, 4 Ill. (3 Scam.) 13; Klinger v. Brownell, 5 Blackf. (Ind.) 332; Judson v. Gibbons, 5 Wend. (N. Y.) 224; United States v. Linn, I How. (U. S.) 104. Compare Brown v. Pearson, 8 Mo. 159; Governor v. Welch, 3 Ired. L. (N. Car.) 249; Freeman v. Clark, 3 Strobh. (S. Car.) 281; Ware v. Walker, 70 Cal. 591; Morrissey v. Schindler, 18 Neb. 672.

A discontinuance as to defendants not served does not discontinue the whole action in some States. Adkins v. Allen, I Stew. (Ala.) 130; Alston v. State Bank, 9 Ark. (4 Eng.) 455; Pollard v. Huston, 7 Lea (Tenn.), 689; Oliver v. Hutto, 5 Ala. 211. Compare Butler v. Stump, 4 Bibb (Ky.), 387.

Where a joint contract was declared

on, and a several contract proved, the plaintiff was given leave to discontinue as to part defendants. Jones v. Engelhardt, 78 Ala. 505. So plaintiff was allowed to discontinue as to indorsers sued with the principal. Adams v. Addington, 16 Fed. Rep. 89. So where part of several defendants sued as partners appeared not to be such, plaintiff was permitted to discontinue as to such defendants. Johnson v. Green, 4 Port. (Ala.) 126.

Discontinuance permitted as to de-ceased defendant, and the action maintained against other defendants. Thompson v. Real Estate Bank, 5 Ark. (Pike),

5. As infancy, coverture, Statute of Limitations, etc. Connerly v. Planters', etc., Co., 66 Ala. 432; Mock v. Walker, 42 Ala. 668; Woodward v. Newhall, I. Pick. (Mass.) 500; Pell v. Pell, 20 Johns.

A discontinuance as to any court, or as to one of two or more distinct causes of action, does not discontinue the whole suit.1

In civil cases 2 ex contractu the plaintiff may discontinue at any time before the verdict.3 In actions ex delicto leave to discontinue as to part of defendants is sometimes granted after verdict.4

(c) Effect of Discontinuance.—A discontinuance, if not aided, ends the particular action.⁵ It does not bar a subsequent action for the same cause. 6 A discontinuance is sometimes cured by subsequent proceedings in the same suit.7

(N. Y.) 126; Beidman v. Vanderslice, 2

(N. Y.) 129; Beldman v. Valuershict, 2 Rawle (Pa.), 334; Commonwealth v. Nes-bitt, 2 Pa. St. 16. 1. Thomas v. Farmer, 6 T. B. Mon. (Ky.) 52; Beard v. Van Wickle, 3 Cow. (N. Y.) 335; Steelman v. Sites, 35 Pa. St. 216. But see Backus v. Richardson, 5 Johns. (N. Y.) 476.

2. Nol. pros. not allowed in a criminal case after the jury was impanelled and sworn. Newsom v. State, 2 Ga. 60.

3. Mason v. Rogers, 26 Kan. 464; Mula. Mason v. Rogers, 20 Kan. 404; Multen v. Peck, 57 Iowa, 430; Burns v. Reigelsberger, 70 Ind. 522; Breckenridge v. Lee, 3 A. K. Marsh. (Ky.) 446. Compare Casey v. Jordan, 68 Cal. 246; Hunt v. Morris, 6 Mart. (La.) 676; s. c., 12 Am. Dec. 489; French v. French, 8 Ohio, 214; s. c., 31 Am. Dec. 441. But not after general verdict, or the decision of the court where the jury is waived. Goodenough v. Butler, 2 C. M. & R. 240; s. c., 3 D. P. C. 751; Houser v. Brown, 60 Ga. 366; Hiley v. Bridges, 60 Ga. 375; Clarkson v. Scroggins, 2 T. B. Mon. (Ky.) 52. So where the verdict was rendered against one of joint trespassers, and the jury retired to correct their verdict as to the others, it was too late to discontinue the action. Meador v. Dollar Savings Bank, 56 Ga. 605. So after an adverse report by a master a discontinuance was refused. Fisher v. Stovall, 85 Tenn. 316.

Leave to discontinue has been granted after special verdict. Tidd's Pl. *679. Compare Gray v. Gray, 2 Wm. Bl. 815. So also it may be after an interlocutory judgment for plaintiff. Kennedy v. Mc-

Mickle, 7 Phila. (Pa.) 217.

Leave to discontinue as to defendants not served has been granted even after appeal from a magistrate's court. v. Robinson, I Stew. (Ala.) 423; Moore v. Otis, 18 Mo. 118. But at a subsequent term after judgment leave to discontinue as to defendants not served was refused. Turpin v. Turpin, 3 J. J. Marsh. (Ky.) 327. See also Chaffee v. Jones, 19 Pick. (Mass.) 260.

A formal discontinuance as to a defendant not served has been declared unnecessary. Oliver v. Hutto, 5 Ala. 211.

4. Thomas v. Hoffman, 22 Mich. 45;

Hardy v. Thomas, 23 Miss. 544.
5. It discharges bail in the action. Rogers v. State, 79 Ala. 59.

After a discontinuance the defendant is not bound to attend. Germania Fire Ins. Co. v. Francis, 52 Miss. 457.

6. Harris v. Tiffany, 8 B. Mon. (Ky.) 225; Barrett v. Third Avenue R., 45 N. Y. 628; Webster v. Laws, 86 N. Car. 178; Williamson v. Yarnall, 12 Phila. (Pa.) 108: Gibson v. Gibson, 20 Pa. St. 9; Bingham v. Wilkins, Crabbe (U. S.), 50; Holmes v. The Lodemia, Crabbe (U. S.), 434; Minor v. Méchanics' Bank, I Pet. (U. S.) 46. But see Murray v. Jib-son, 22 Hun (N. Y.), 386.

7. As by proceeding to trial. Walker v. Cuthbert, 10 Ala. 213; Shorter v. Urquhart, 28 Ala. 360; Jester v. Hopper, 13 Ark. (8 Eng.) 43; Matthias v. Cook, 31 Ill. 83; McDougle v. Gates, 21 Ind. 65; Clarkson v. Scroggins, 2 T. B. Mon. (Ky.) 52; Thurman v. James, 46 Mo. 235; Horah v. Long, 4 Dev. & B. L. (N. Car.) 274. Or moving to put the case on the trial docket, Snodderly v. Weaver, I Coldw. (Tenn.) 256. And in other ways. Askew v. Stevenson, Phill. L. (N. Car.) 288; Warren v. State, 19 Ark. 214; s. c., 68 Am. Dec. 214. And by statute 32 Hen. VIII. c. 30, a discontinuance is cured by verdict; and by statute 4 & 5 Am. c. 16, after judgment by nil dicit confession or non sum informatus. I Chit. Pl. *524, note c; Stephen's Pl. *216, note p; Tidd's Pr. *924; Miller v. Plumb, 6 Cow. (N. Y.) 665; s. c., 16 Am. Dec. 456.

It is said that upon a voluntary discontinuance by the plaintiff the court loses jurisdiction, and cannot reinstate the action. Hutchings v. Buck, 32 Me. 277; McGuire v. Buck, 6 Humph. (Tenn.) 419. But where the proceeding is ex parte, the court may afterwards modify the order. Carleton v. Darcy, 75 N. Y. 375; Murray v. Silver, I C. B. 638; 14 L. J. C. P. 168. Or treat it as a nullity. Cunningham v. White, 45 How. Pr. (N. Y.)

Where the continuance is the result of not continuing the case regularly, it may

DISCONTINUANCE-DISCONTINUE-DISCOUNT

(d) Costs.—Generally, when the plaintiff discontinues his action.

he is required to pay the costs of both parties.1

3. Of Estates.—Formerly, in the law of real property, discontinuance was where a man wrongfully aliened certain lands or tenements and died, whereby the person entitled to them was deprived of his right of entry, and was compelled to bring an action to recover them.2

The estate so aliened was good so far as the interest of the alienor intended.3

DISCONTINUE.—(See also DISCONTINUANCE.)—See note 4.

DISCONTINUOUS.—See EASEMENT: SERVITUDE.5

DISCOUNT.—(See also Banks and Banking: Bills and Notes.) -By the language of the commercial world, and the settled practice of banks, a discount by a bank means, ex vi termini, a deduction or drawback made upon its advances or loans of money, upon negotiable paper or other evidence of debt, payable at a future day, which are transferred to the bank.6 The term "discount," as a substantive, means the interest reserved from the amount lent at the time of making the loan; as a verb, it is used to denote the

be cured sometimes by entering a continuance even after verdict. 'Tidd's Pr. *924, 679.

A discontinuance may be cured by a subsequent appearance in criminal as

well as civil proceedings. Humble v. Bland, 6 T. R. 255.

1. Tidd's Pr. *679, 681; Meserole v. Furman, 38 Hun (N. Y.), 355; Carpentier v. Wilson, 14 Abb. N. Cas. (N. Y.) 101.

And the discontinuance may sometimes be treated as a nullity, if the costs are not paid. Huntington v. Forkson, 7 Hill (N. Y.), 195. See also Edington v. Proudman, r D. P. C. 152. But not by the plaintiff himself. Folsom v. Van Wagner, 14 Abb. Pr. N. S. (N. Y.) 44.

An executor is liable for the costs on a discontinuance if he knowingly commenced a wrong action; otherwise not.

Tidd's Pr. *679.

Where the defendant has become a bankrupt since the commencement of the action, the plaintiff may discontinue without paying costs. Shaw v. Lyford, 14 N. H. 121; Hart v. Story, I Johns. (N. Y.)

2. Rapalje and Lawrence L. Dict.; and see also 3 Bl. Com. *171. As where a tenant in tail aliened a larger estate and died. Finch L. 190; 3 Bl. Com. *171; Whart. L. Dict. See other instances, 3 Bl. Com. *171.

Abolished. - Discontinuance of estates was abolished by statute. 3 & 4 Wm. IV. c. 27, sec. 39 (1833), and 8 & 9 Vict.

c. 106, sec. 4 (1845).

3. 3 Bl. Com. *171: Finch L. 100. Authorities on Discontinuance.-Chitty on Pleading; 3 Blackstone's Commentar-

ies; Tidd's Practice.
4. One does not "discontinue possession" within the meaning of the Statute of Limitations, by the fact that acts of user are committed upon land which do not interfere and are consistent with the purpose to which he intends to devote Leigh v. Jack, 5 Exch. Div. 264.

Establishing an alteration in a way is in law a discontinuance of the part altered. Com. v. Inhab. of Westborough,

3 Mass. 407.

Under an act authorizing the postmaster-general to discontinue under certain circumstances the postal service on any route, a "suspension" during the late rebellion, at the postmaster-general's discretion, of a route in certain rebellious States, with a notice to the contractor that he would be held responsible for a renewal when the postmaster-general should deem it safe to renew the service there, was held to be a discontinuance; and the mail-carrier's contract calling for a month's pay if the postmaster discontinued the service, held, he was entitled to the pay. Reeside v. U. S., 8 Wall. (U. S.) 38.

5. A discontinuous easement is "one the use of which can only be had by the interference of man." Morgan v. Menth, 60 Mich. 252.

6. Fleckner v. U. S. Bank, 8 Wheat. (U. S.) 351.

act of giving money for a note or bill of exchange, deducting the interest. A discount, as distinguished from a set-off, is a right

1. State v. Boatmen's Sav. Inst., 48 Mo. 101.

Discount "is the difference between the price and the amount of the debt, the evidence of which is transferred." Nat. Bank v. Johnson, 14 Otto (U. S.).

276.
"What are we to understand by the term 'discount,' when applied to the transaction of the bank in acquiring the bill of exchange? The term 'discount,' as a substantive, signifies the interest allowed in advancing upon bills of exchange or negotiable securities; and 'to discount a bill is to buy it for a less sum than that which upon its face is payable." Saltmarsh v. P. & M. Bank, 14 able."

Ala. 677.

"Although the discounting of notes or bills, in its more comprehensive sense, may mean lending money and taking notes in payment, as is said in 2 Cowen, 699, yet it is believed that in its more ordinary sense the discounting of notes or bills means advancing a consideration for a bill or note, deducting or discounting the interest which will accrue for the time the note has to run. The taking of interest in advance is called discount. ... When, then, by their charter, the power to loan is given, but the power to discount notes is denied, it is apparent that the term 'discount' must have been used in its more limited and common acceptation, more especially as the company are prohibited from the exercise of banking privileges." Phila. Loan Co. v. Towner, 13 Conn. 259-60.

Taking uncurrent bank bills "at less than their face may be properly termed discounting them. It is taking them at a 'discount.'" People v. Metr. Bank, 7

How. Pr. (N. Y.) 149.

Under the general power of discounting negotiable notes, granted by the corporation law to savings associations, such institutions have the power to purchase such notes. Pape v. Capitol Bk., 20 Kan. 440. "The term 'discounting' includes purchase as well as loan. discount signifies the act of buying a bill of exchange or promissory note for a less sum than that which upon its face is payable.' I Bouv. Law Dict., title Discount." And see authorities cited in this case, pp. 447-450.

To discount paper, in the language of banking, is "only a mode of loaning money." Niagara Co. Bk. v. Baker, 15 Ohio St. 85: Talmadge v. Pell, 7 N. Y. 328. In the former case it is said: "It

is also undeniably clear, that the term 'discount,' when used in a general sense, is equally applicable to either business or accommodation paper, and is appropriately applied either to loans or sales by way of discount when a sum is counted off, or taken from, the face or amount of the paper at the time the money is advanced upon it, whether that sum is taken for interest upon a loan, or as the

price agreed upon a sale."

Where A held two notes as collateral security for a debt against an insurance company, and B, having a claim against the company, paid the debt to A and took both notes, crediting the balance over and above the amount due A to the company, this was held not a "discounting" of the note, within the meaning of "As that section relates solely an act. to banking companies, its terms should of course be interpreted according to their ordinary use in the business of banking. The 'discounting' of a note by a bank is understood to consist in the lending of money upon it, and deducting the interest or premium in advance. Webster's Dictionary, etc." City Bk. of Columbus v. Bruce, 17 N. Y. 515.

"The word 'discount' does not necessarily imply a purchase and sale. It is quite as consistent with a loan upon the security of the notes of a third party as with the sale of them." In re Weeks, 13

Bankr. Reg. 269.

In Shober v. Accom. Sav. Fund and Loan Assoc., 35 Pa. St. 223, it was held that a loan by a saving fund society to one of its members, for which security is given, deducting the premium agreed upon for the sum advanced, was not a discount within the prohibition against "discounting privileges" in the consti-tution. "The inquiry is how was it [i.e. 'discount'] understood by the framers of the constitution? Did they contemplate a prohibition of anything which had even been called a discount, or which makes up any of the definitions of the word to be found in our dictionaries? Did they intend to prevent a corporation from selling any of its property, and throwing off a portion of the price for present payment? Yet such a transaction is discounting in one sense of the term. Did they intend to prevent a corporation from making a deduction from a sum due by a debtor in consideration of his paying the remainder before it became due? This, too, is in one sense discounting. It is too evident to admit of a doubt,

that the constitutional provision had in view the banking or discounting which was customary at the time it was framed. The framers used the word 'discounting' in its banking sense. It was then, as it is now, a well-known fact that bank discounting in this country has always been conducted by the deduction of the interest at the time the money is loaned, and has been confined to dealing in promissory notes, bills of exchange, or other negotiable paper. It has always been the buying of bills of exchange, promissory notes, or negotiable paper for less than its face."

"Every discount of a bill or note is a loan, and includes a contract of forbearance." Freeman ads. Britton, 2 Harr. (N.J.) 206, where the term is distinguished from sale.

Loaning money on notes, when the interest is taken at the termination instead of the commencement of the loan, was held within a prohibition against "discounting notes." Fulton Bk. v. Benedict, I Hall (N. Y.), 556.

But an advance upon a note of a sum of money equal to the face of it, without deducting any interest, or receiving any payment of interest, is not a "discount" of the note. Noble v. Cornell, I Hilt. (N. Y.) 102.

The buying exchange by a bank is, in effect, discounting paper. People v. Oakland Co. Bk., 1 Doug. (Mich.) 282.

Authority given to a bank to "discount" includes to "buy," "for discounting, in most cases, is but another term for 'buying at a discount." Tracy v. Talmage, 18 Barb. (N. Y.) 462; s. c., 9 How. Pr. (N. Y.) 536; 12 N. Y. Leg. Obs. 306. But see Farm. & Mech. Bk. v. Baldwin, 23 Minn. 198, infra.

"There is a transaction which is neither a loan nor a purchase of the note, and that transaction is discount. . . . A clear case, then, of mercantile discount, being the anticipation of funds, and not a loan of money, is not within that statute [against usury]." Bk. of Alexandria z. Mandeville, r Cranch C. C. (U. S.) 556.

The power to carry on the business of banking, by discounting bills, notes, and other evidences of debt, was held not a power to buy such securities, but to loan money thereon, with a right to take lawful interest in advance. Farm. & Mech. Bk. v. Baldwin, 23 Minn. 198. "Discounting a note and buying it are not identical in meaning, the latter expression being used to denote the transaction when the seller does not indorse the note, and is not accountable for it,'—

I Bouv. Law Dict., title Discount, citing Pothier De l'Usure, 128;—and it is admitted that such was the character of the transaction in this case. In view of this understanding of the functions of a bank of discount, the legal signification attached to the word 'discount,' and the distinction between it and the word 'purchase,' when applied to the business of banking, it is obvious that the power 'to carry on the business of banking by discounting notes, bills, and other evidences of debt,' is only an authority to loanmoney thereon, with the right to deduct the legal rate of interest in advance."

A, to whom B was indebted, received a bill from B "to get discounted or return on demand." A sent the bill to C with directions to place it to A's account with C; which C did, minus the discount. Held, in trover for the bill by B against A, that this was substantially a discounting of the bill by A, and that A was entitled to a verdict under a plea of not possessed. Wilkinson v. Whalley, 5 Man.

& Gran. 590. "It is true the term 'discount' may, in a general sense, be understood as a counting off, an allowance, or deduction, made from a gross sum on any account whatever. But in the section under consideration the term is evidently used in a more limited and technical sense. It is applied in the proviso to transactions in which the bank may take interest in advance. The power to discount promissory notes, upon banking principles and usages, is given in terms as distinct from, and additional to, the power to buy, sell, and negotiate promissory notes, which is also given in terms, and is unqualified." Dunkle v. Renick, 6 Ohio St. 534-5, arising on the construction of a statute against usury.

"A loan or discount on a pledge of stock is an expression of mercantile origin, and is understood to mean a loan or discount where the stock of the person for whose benefit it is made, or that of another, is expressly and specifically pledged at the time for its repayment. It would seem to imply, also, that that should be the only security then given." Vansants v. Midx. Co. Bk., 26 Conn.

The selling of railroad bonds on commission does not come within the power to discount and negotiate" promissory notes, drafts, bills of exchange, and other evidences of debt. Weckler v. First Nat. Bk., 42 Md. 592. "The ordinary meaning of the term 'to discount' is to take interest in advance, and in banking is a mode of loaning money. It is the ad-

which the debtor has to an abatement of the demand against him. in consequence of a partial failure of the consideration, 'or on account of some equity arising out of the transaction on which the demand is founded. 1

DISCOVERY.—(See also BILL OF DISCOVERY.)—See note 2.

DISCRETION.—(See also ABUSE, JUDICIAL.)—By discretion, when applied to a court of justice, is meant sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful; but legal and regular.3 means, when applied to public functionaries, a power or right, conferred upon them by law, of acting officially in certain circumstances, according to the dictates of their own judgment and conscience uncontrolled by the judgment or conscience of others.4

vance of money not due till some future period, less the interest which would be due thereon when payable.

1. Whereas a set-off is "an independent debt or demand, which the debtor has against his creditor, and which he can use to counterbalance the demand of the latter against him, either in whole or in Trabue v. Harris, I Metc. (Ky.)

598-9. So, in a statute allowing defendant the benefit of "all payments, discounts, and set-offs." "'discount' must be understood to mean every detention or abatement of the claim, or, more properly speaking, every equity against the claim." Ferguson v. Hill, 3 Stew. (Ala.) 488.

2. "Discovery of the fraud" in a stat-

ute allowing an action to be commenced within a certain number of years "after the discovery of the fraud," "implies knowledge, and is not satisfied by mere suspicion of wrong. The suspicion may call for further investigation, but is not tiself a discovery." Parker v. Kulm. 35 Alb. L. J. 387; s. c., 32 N. W. Rep. (Neb.) 74, quoting from Marbourg v. McCormick, 23 Kan. 38. The court continues: "This word [i.e., 'discovery'] when used in reference to part transactions or omissions, cannot have the same literal meaning as when applied to the discovery of a new continent, or of a principle in physics. Fraud in a past and consummated transaction cannot be the subject of direct ocular or auricular discovery or knowledge. The discovery, then, of which the statute speaks is of evidence or evidential facts leading to a belief in the fraud, and by which its existence or perpetration may be established, and not of the fraud itself, as an existing entity.

A trade-mark is not an invention, discovery, or writing within the meaning of the constitutional clause conferring on

Congress power to secure to authors and inventors the exclusive right to their writings and discoveries. Trade-mark Cases, 100 U.S. 82.

3. Lord Mansfield in Rex v. Wilkes.

4 Burr. 25, 39.

4. Senator Tracy in Judges of Oneida C. P. v. People, 18 Wend. (N. Y.) 99: "But what is to be understood by a discretion that is governed by fixed legal principles is, I must be allowed to say, something that I have not found satisfactorily explained, and what it is not

easy for me to comprehend."

In Platt v. Munroe, 34 Barb. (N. Y.) 293, it is said: "The discretion spoken of is said to be a legal discretion, not arbitrary; and yet it is not governed by fixed rules, for then there were no discre-If in all cases established rules, whether of practice or statutory, con-trolled the judgment and action of the court in granting or refusing new trials, a new trial would be a matter of right in cases within the rule, and not a favor or in the discretion of the court. Courts could not then be governed by circum-stances; and 'act without other control than their own judgment.' Lord Mansfield says (quoting the definition in the text): '. . . A definition which leaves but little room for the exercise of judgment, except to apply established rules of law, which is the duty of the judge in every case.' Tracy, Senator, says (quoting def-inition in text): '... Every fixed rule of law applicable to a case must be enforced at the demand of any suitor. Courts have not the right or legal power to refuse it. When it is said that something is left to the discretion of a judge, it signifies that he ought to decide according to the rules of equity and the nature of circumstances, and so as to advance the ends of justice. Bouv. Law Dic. h. t.

Lord Coke defines discretion as "a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colorable glosses and pretences, and not to do according to their wills and private affections. A discretionary trust is, when by the terms of the trust no direction is given as to the manner in which the trust fund shall be vested, till the time arrives at which it is to be appropriated in satisfaction of the trust.2

DISCRIMINATION.—(See Freight.)

DISEASE.—See note 3.

Whenever a clear and well-defined rule has been adopted, not depending upon circumstances, the court has parted with its discretion as a rule of judgment. Discretion may be and is to a very great extent regulated by usage or by principles which courts have learned, by experience will, when applied to the great majority of cases, best promote the ends of justice; but it is still left to the courts to determine whether a case is 'exactly like in every color, circumstance, and feature' to those upon which the usage or principle is founded, or in which it has been applied.

The discretion exercised by a court must be "not arbitrary and capricious, but a sound judicial discretion. It must be regulated upon grounds that will make it judicial." Seymour v. Delancy, 3 Cow. (N. Y.) 505, 521; s. c., 14 Am. Dec. 270. See, likewise, People v. Super. Ct. of N. Y., 5 Wend. (N. Y.) 126; Moon's Admr. v. Wellford (Va.), 4 S. E. Rep.

So of a discretionary power to trustees. Mulsington v. Mulgrave, 3 Madd. Ch. 491; Walker v. Shore, 19 Ves. 392.
"The exercise of this whole branch of

equity jurisprudence, respecting the rescission and specific performance of contracts is not a matter of right in either party, but it is a matter of discretion in the court; not, indeed, of arbitrary or capricious discretion dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself, as far as it may, by general rules and principles; but at the same time which grants or withholds relief according to the circumstance of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties."

Abbott v. L'Hommedieu, 10 W. Va. 700.

And see Rose v. Brown, 11 W. Va. 142.

A vote of a town empowering the selectmen to settle a claim against it "at

their discretion," authorizes the select-

men to submit the claim to arbitration. Campbell v. Inhab, of Upton, 113 Mass.

1. Rooke's Case, 5 Coke, 100, a.

Lord Mansfield said in Rex. v. Young. I Burr. 560: "But though discretion does mean (and can mean nothing else but) exercising the best of their judgment upon the occasion that calls for it, yet if this discretion be wilfully abused, it is criminal, and ought to be under the control of this court;" and in Rex v. Peters, r Burr. 570, denied that discretion was "another word for arbitrary will," saying that "discretion is, as Lord Coke says, 'discernere per legem, quid sit justum.'" And see Dooley v. Barker, 2

Mo. App. 328.
"Lord Coke says that 'in judicature discretion is a crooked cord.' Burke improved the saying by adding that 'in legislation it is a golden rule.'" Dor-

man v. State, 34 Ala. 235.

2. Deaderick v. Cantrell, 10 Yerg.

(Tenn.) 269–70. 3. Disease of the Liver .- An application for a life-insurance policy contained the question whether applicant had ever had "disease of the liver." Held, not to refer to a temporary, slight ailment, but to such an ailment as to indicate a vice in the constitution, or so serious as to have some bearing on the general health and the continuance of life; and the circumstance that the attending physician of the applicant testified, in an action on the policy, that previous to the making of the application he had attended applicant for slight attacks which he treated as affecting the liver, his testimony being in some respects in conflict with that of another physician, who knew applicant and his general physical condition, would not authorize the taking of the case from the jury upon the question whether applicant was affected with liver disease. Cushman v. U. S. Life Ins. Co., 70 N. Y. 72. Disease of the Brain.—To establish

DISFIGURE.—While the "maiming" of a domestic animal implies some permanent injury, the "disfiguring" of such animal is a lower grade of the same offence, and need not be of a permanent character to make the offence complete.¹ (See also MAYHEM.)

this, it was held that the insurance company must prove something more than that applicant had what he called sunstroke. It was essential to show that he had sunstroke in fact, and that it was such as to constitute disease of the brain. Knickerbocker Life Ins. Co. v. Trefz (Sup. Ct. of U. S.), 25 Alb. L. J. 14; s. c., 12 Reporter, 419.

Local Disease.—A tubercular affection of the lungs, or tubercles upon the lungs, or upon the brain, or consumption,—either of them,—constitutes a "local disease" within the meaning of the expression in a question asked an applicant for insurance. Scoles v. Univ. Life Ins. Co.,

42 Cal. 523.

Other Hereditary Disease, after an enumeration of specific diseases, in a question asked an applicant for insurance, was held only an inquiry whether any of the diseases mentioned had appeared among the relatives of the applicant in the form of an hereditary disease, and the answer denying such diseases was not falsified by proof of the temporary insanity of applicant's uncle. Gridley v. N. W. Mut. Life Ins. Co., 14 Blatchf.

(U. S.) 107.

Serious Disease .-- "The common understanding of the question as to whether the party has had, during the seven years, any serious disease (the word used in the question was 'severe') is, whether it was such disease as often impairs the constitution and tends to shorten life, and which, if known, would have deterred the insurer from taking the risk without further examination and information." Holloman v. Life Ins. Co., I Woods (U. S.), 674, where it was held that the policy was not avoided by the non-communication of the fact that the insured had, for a period of three months, about three years previous to the contract of insurance, disease of the bowels, she having been perfectly healthy during the interval, and having died three years after the policy was issued, of a disease of an entirely different character.

Sickness or Disease.—The following instruction to a jury was held correct: "A man might have a slight cold in the head, or a slight headache, that in no way seriously affected his health or interfered with his usual avocations, and might be forgotten in a week or a month, which might be of so trifling a character as not

to constitute a sickness or disease within the meaning of the term as used, and which the party would not be required to mention in answering the questions. But again, he might have a cold or a headache of so serious a character as to be a sickness or disease within the meaning of those terms as used, which it would be his duty to mention, and a failure to mention which would make his answer false." Life Ins. Co. v. Francisco, 17 Wall. (U. S.) 680.

Definition.

Throat Disease, in a proposal for life insurance, construed to mean something more than a temporary inflammation, which, at the time the proposal was made, was completely cured. Eisner v. Guard Life Ins. Co. (U. S. C. C.), 3 Cent. L.

Jour. 302.

Disease or Disorder.—An open sore or swelling resulting from "disease or disorder," as the words are used in a life-insurance application, means "such as result by defective action from some functional derangement, and not from wounds or accidental injuries." Life Assn. v. Gillespie, 110 Pa. St. 89.

1. State v. Harris, II Iowa, 414. "Thus to shave a horse's mane or tail is a disfiguring of the horse, but the injury is not of a permanent character. So the cutting off the hair, or cutting the skin of a cow or an ox, would tend to destroy the beauty or symmetry of the animal, and would, although not of a permanent character, be an indictable offence. Malice toward the owner of the animal is the ingredient of this offence; and although the injury may be but very slight, yet if it is of such a character as to lessen the value of the animal to the owner, and shows the malicious intention of the person committing the act, we think, under the statute, the offence is complete.

Cutting off the hair of the tail of a horse or his mane, if done maliciously and of purpose, were held a "disfigurement." "The words 'to disfigure' seem to operate to describe such an act as that charged, and are unnecessary and unmeaning in the statute if not applied. If all the hair belonging to the mane and tail of a horse be shaved off, it may be that we would not speak of him as having been dismembered, but all the world would say that he was much disfigured. It is the very term which would be used; and maliciously to impair the use and

DISFRANCHISEMENT.—(See also Amotion: Mandamus.)

Definition, 684.
 Right to Expel, 684.

3. Causes for Expulsion, 685

Mode of Expulsion, 688.
 Remedy for Illegal Expulsion, 689.

1. Definition.—Disfranchisement is the act of depriving a member of a corporation of his right of membership by expulsion. The term is sometimes confused with amotion. But amotion, strictly speaking, is the removal of an officer of a corporation from his office before his term has expired.2

2. Right to Expel.—The right to disfranchise its members may be either conferred upon a corporation by its charter or implied from the fact of the corporate existence. Corporations for profit, however, have no power to expel their members, unless the power is expressly given by charter.³ Other corporations and voluntary

value of a horse, by injuring his appearance and marring his beauty in remov-ing of those parts alike ornamental and useful, falls entirely within the mischief which the act seems to prevent." v. State, 2 Humph. (Tenn.) 39.

But shaving the mane and cropping the hair from the tail of a mare in the owner's stable were held not to constitute the offence of "disfiguring" in State v. Smith, Cheves (S. Car.), 157. There the act prohibited the "wilfully and knowingly marking, branding, or dis-figuring," and the court considered it clear that "the legislature looked to the preservation of the right of property against thieves or open trespassers, by guarding those brands and marks which were usually adopted, from being obliterated or disguised, and preventing the animal from being otherwise disfigured so as to mislead the owner," and that the act charged against the defendant was not of that description.

"Our will is that nothing be deemed a mayhem, but the deprivation of some member whereby a man is rendered less able to fight; as of an Eye, or a Hand, or a Foot, or by his Skull being fractured, or knocking out his fore Teeth; but the loss of the Grinders, or an Ear, or the Nose, is not held a mayhem, but a Disfigurement only of the body." Britton (Kelham's Transl.), 165. So in Chick v. State, 7 Humph. (Tenn.) 166, it is said "slitting or cutting off the nose, ear, or lip (the other injuries mentioned) would neither of them constitute a mayhem; but they would disfigure the person. Hence the statute, in this sense, having enumerated one injury that is a mayhem, and several others that are not, but only disfigure, concludes, very properly, whereby any person shall be maimed or disfigured.' The true reading of the or disfigured. In the true reading of the statute, therefore, is: 'no person shall unlawfully and maliciously put out an eye of another,' whereby any person shall be maimed; or slit, cut off, or bite off, the nose, ear, or lip of another. or any part of either of them, whereby any person shall be disfigured.

1. Disfranchisement is defined to be the taking of a franchise from a man for some reasonable cause. People v. Med. Soc. of Erie, 24 Barb. (N. Y.) 570; Sym-

mers v. Rex, 2 Cowp. 489.
2. "In a corporation, there is a distinction between what is called amotion, or the right to remove an officer, which is a power inherent in every corporation, and disfranchisement. former may be exercised without inter-fering with the franchise, as the officer, when removed, still continues a member; but disfranchisement is an absolute expulsion of the member from the body, and the taking away of his franchise."
White v. Brownell, 2 Daly (N. Y.), 329; Neall v. Hill, 16 Cal. 145; State v. Adams, 44 Mo. 570; The Queen v. Saddler's Co.,

44 Mo. 570; The gueen v. Sadders Sco. 26, 10 H. L. Cas. 404; s.c., 2 Kent's Com. 297.

3. Ang. & A. Corp. § 410; People v. N. Y. Cotton Exchange, 8 Hun (N. Y.), 216; People v. Board of Trade, 80 Ill. 134; People v. Mechanics' Aid Society, 22 Mich. 86; Gardner v. Freemantle, 19 W. R. 256; Dean v. Bennett, 6 L. R. 489; Fischer v. Keane, 11 Ch. D. 353; Dawkins v. Antrobus, 41 L. T. (N. S.) 490.

"The right of membership is valuable, and not to be taken away without an authority fairly derived either from the charter or the nature of the corporate bodies. Every man who becomes a member looks to the charter; in that he puts his faith, and not in the uncertain will of a majority of the members." Com. v. St. Patassociations are incidentally vested with the power to expel. Where the right exists, it must be exercised only for a just and sufficient cause, and the member to be expelled must be given an opportunity to be heard, and must be duly notified of the time and place of hearing.1

3. Causes for Expulsion.—Every corporation, not for profit, possesses inherently the power of expulsion in certain cases, because such power is necessary to the good order and government of the

rick's Benev. Soc., 2 Binn (Pa.), 440; Leech v. Harris, 2 Brews. (Pa.) 571; People v. American Institute, 44 How. Pr. (N. Y.) 468; Manning v. San Antonio Club, 63 Tex. 166; State v. Georgia Med. Soc., 38 Ga. 608; *In re* Long Island R. Co., 19 Wend. (N. Y.) 37; Hopkinson v. Exeter, L. R. 5 Eq. 63.

1. In every proceeding before a club, society, or association having for its object the expulsion of a member, the member is entitled to be fully and fairly informed of the tharge, and to be fully and fairly heard. Hutchinson v. Lawrence, 67 How. Pr. (N. Y.) 38; Fisher v. Keane, L. R. 11 Ch. Div. 353; State v. Adams, 44 Mo. 570; Manning v. San Antonio Club, 63 Tex. 166; Loubat v. Le Roy, 40 Hun (N. Y.), 546.

The power to expel cannot be exercised in an arbitrary and summary manner, the member charged with a violation of duty or breach of the rules must be given an opportunity to be heard. Sibley v. Carteret Club, 40 N. J. L. 295; People v. St. Franciscus Soc., 24 How. Pr. (N. Y.) 216; People v. Sailors' Snug Harbor, 5 Abb. Pr. N. S. (N. Y.) 119; Southern Plank-road Co. v. Hixon, 5 Ind. 165; State v. Adams, 44 Mo. 570; Fuller v. Trustees of Plainfield Academy. 6 Conn. 532; People v. New York Benev. Soc., 3 Hun (N. Y.), 361; Dawkins v. Antrobus, L. R. 17 Ch. Div. 615; Labouchere v. Earl of Wharncliffe, L. R. 13 Ch. Div. 346; Greene v. African M. E. Soc., 1 S. & R. (Pa.) 254; Page v. Hardin, 8 B. Mon. (Ky.) 648; Com. v. German Soc. L. Page 18 Barrows v. Med Soc. Soc., 15 Pa. 251; Barrows v. Med. Soc., 12 Cush. (Mass.) 402; People v. N. Y. Com. Assoc., 18 Abb. Pr. (N. Y.) 271; Delacy v. Neuse River Co., 1 Hawks (N. Car.), 274; State v. Georgia Med. Soc., 38 Ga. 608; Franklin Benef. Soc. v. 38 Ga. 608; Franklin Benet. Soc. v. Com., 10 Pa. St. 357; Evans v. Phila. Club, 50 Pa. St. 107; Cook v. College of Physicians, 9 Bush (Ky.), 541; Com. v. St. Patrick's Benev. Soc., 2 Binn (Pa.), 440; Black and White Smiths' Soc. v. Vandyke, 2 Whart. (Pa.) 309; Com. v. Penn. Ben. Inst., 2 S. & R. (Pa.) 147. Com. v. Guardians of the Poor, 6 S. & R. (Pa.) 469; Com. v. Pike Ben. Soc., 8 W.

& S.(Pa.) 247; Washington Benef. Soc. v. Bacher, 20 Pa. St. 425; State v. Lusitanian Soc., 15 La. Ann. 73; People v. Mechanics' Aid Soc., 22 Mich. 86; State v. Chamber of Commerce, 20 Wis. 68; Society v. Com., 52 Pa. St. 125; Gregg v. Med. Soc., 111 Mass. 185.

Even though the party charged should not appear, his offence should be proved before he can be expelled. People v. Young Men's Father Matthew Benev.

Young Men s rainer Manager Soc., 65 Barb. (N. Y.) 357.

A member of a society incorporated for literary purposes, but having neither capital stock nor corporate property, was expelled by virtue of a by-law providing that "any member shall forfeit his membership to the club whose conduct shall be pronounced by a vote of the majority of the board of directors present at a meeting to have endangered the welfare, interest, or character of the club." court held that in the absence of a by-law requiring the member to be notified that he was to be tried, he was not entitled to Manning v. San Antonio Club, notice. 63 Tex. 166.

Where the charter of a society provides

for an offence, directs the mode of proceeding, and authorizes the society, on conviction of a member, to expel him. this expulsion, if the proceedings are not irregular, is conclusive, and cannot be inquired into collaterally by mandamus, action, or any other mode. It is like an award made by a tribunal of the party's own choosing. Com. v. Pike Ben. Soc., 8 W. & S. (Pa.) 247; Black and White Smiths' Soc. v. Vandyke, 2 Whart. (Pa.) 309; Pitcher v. Board of Trade (Ill.), 13 309; Pitcher v. Board of Trade (111.), 13 N. Eastn. Rep. 187; Med. & Surg. Soc. v. Weatherly, 75 Ala. 248; The Society v. Com., 52 Pa. St. 125; Com. v. The German Soc., 15 Pa. St. 251; Hassler v. Phila. Mus. Soc., 14 Phila. (Pa.) 233; Chase v. Cheney, 58 Ill. 509; Dickenson v. Chamber of Commerce, 29 Wis. 45; State v. Chamber of Commerce, 47 Wis. 670; People v. N. Y. Commercial Assoc., 18 Abb. Pr. (N. Y.) 271; Leech v. Harris, 2 Brews. (Pa/) 571; People ex rel. Pinckney v. Relief Fire Ins. Co., 7 Hun (N. Y.), 248.

corporate body. A tacit condition is annexed to the franchise of a member, which, if he breaks, renders him liable to disfranchisement. The cases in which this inherent power may be exercised are of three kinds: 1. When an offence is committed, which has no immediate relation to a member's corporate duty, but is of so infamous a nature as to render him unfit for the society of honest men. Such are the offences of perjury, forgery, etc. But before an expulsion is made for a cause of this kind it is necessary that there should be a previous conviction by a jury according to the law of the land. 2. When the offence is against the duty of the member as an incorporator, in this case he may be expelled on trial and conviction by the corporation. 3. The third is an offence of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land.1

1. Com. v. St. Patrick's Benev. Soc., 2 Binn. (Pa.) 440; Hassler v. Phila. Mus. Assoc., 14 Phila. (Pa.) 233; People v. Board of Trade, 45 Ill. 112; State v. Chamber of Commerce, 20 Wis. 68; Peo-Chamber of Commerce, 20 Wis, 68; People v. Med. Soc. of Erie, 24 Barb. (N. Y.) 570; People v. N. Y. Commercial Assoc., 18 Abb. Pr. (N. Y.) 271; Leech v. Harris, 2 Brews. (Pa.) 571; Fawcett v. Charles, 13 Wend. (N. Y.) 473; Bagg's Case, 11 Co. 99; Rex v. Richardson, 1 Burr. 517 (the two cases last cited were cases of amotion, but the general question of disfranchisement was discussed); Evans of distranchisement was discussed; Evalls v. Phila. Club, 50 Pa. St. 107; People v. Board of Trade, 45 Ill. 112; Smith v. Smith, 3 Desaus. (S. Car.) 557; Com. v. Guardians of the Poor, 6 S. & R. (Pa.) 468; White v. Brownell, 2 Daly (N. Y.), 329; State v. Kuehn, 34 Wis. 229; Roehler v. Mechanics' Aid Soc., 22 Mich. 86; Black and White Smiths' Soc. v. Vandyke. 2 Whart. (Pa.) 309; Society for Visitation of the Sick v. Com., 52 Pa. St. 125.

"When a corporation is duly erected, the law tacitly annexes to it the power to make by-laws or private statutes for its government and support. . . . It is usual to confer the power by the charter or law authorizing the corporation. If the power is expressly conferred and in general terms, it is construed as an authority for the purpose of enabling the corporation to accomplish the objects of its creation, and the power, in its exercise, is to be limited to such objects or purposes. A bylaw must not be at variance with the general law of the land. It must be reasonable, and adapted to the purposes of the corporation." People v. Med. Soc. of Erie, 24 Barb. (N. Y.) 570; In re Long Island R. Co., 19 Wend. (N. Y.) 37; People v. Board of Trade, 45 III. 112; State ex rel. Graham v. Chamber of Commerce, 20 Wis. 68; State v. Tudor, 5 Day

(Conn.), 329; State v. Georgia Med. Soc., 38 Ga. 608; Hibernia Fire Engine Co. v. Com., 93 Pa. St. 264; People v. New York Benev. Soc., 3 Hun (N. Y.), 361; Hussey v. Gallagher, 61 Ga. 86; Com. v. St. Patrick's Ben. Soc., 2 Binn. (Pa.) 539.

When a person becomes a member of a corporation, he thereby voluntarily submits himself to the operation of all laws in force for its government, and by implication agrees to be bound by them, so far as they are within the corporate authority to act. People v. Board of Trade, 45 Ill. 112; People v. American Institute, 44 How. Pr. (N. Y.) 468.

The fact that plaintiff was expelled by the grand lodge is a good defence to an action to recover benefits from the order. Woolsey v. Independent Order of Odd Fellows, 61 Iowa, 492; s. c., 1 Am. &

Eng. Corp. Cas. 172, note.

'Individuals who form themselves together into a voluntary association for a common object may agree to be governed by such rules as they think proper to adopt, if there is nothing in them in conflict with the law of the land; and those who become members of the body are presumed to know them, to have assented White v. Brownell, 2 Daly (N. Y.), 329; Hopkinson v. Marquis of Exeter, L. R. 5 Eq. Cas. 63; Jones v. Wylie, 1 Car. & Kir. 262; Brancker v. Roberts, 7 Jur. N. S. 1185; Gardner v. Freenalte, 19 W. R.

The court is to be the sole judge whether a by-law is reasonable or not. reasonableness should be demonstrably shown. Hibernia Fire Engine Co. v. Com., 93 Pa. St. 264.

A by-law which alters the very constitution of the corporation is void. Queen v. Governors of Darlington Grammar School, 14 L. J. (Q. B.) 67.

The court will consider whether the violation of the by-laws is so injurious to the corporation as to warrant the imposition of the penalty of expulsion. People v. Board of Trade, 45 Ill. 112; Pulford v. Fire Dept., 31 Mich. 458; Dickenson v. Chamber of Commerce, 29 Wis. 45; State v. Chamber of Commerce, 20 Wis. 68; State v. Chamber of Commerce, 47 Wis. 670; Hussey v. Gallagher, 61 Ga. 86; State v. Georgia Med. Soc., 38 Ga. 608; Franklin Benef. Soc. v. Com., 10 Pa. St. 357; Com. v. St. Patrick's Ben. Pa. St. 357; Com. v. St. Patrick's Ben. Soc., 2 Binn. (Pa.) 440; Evans v. Philadelphia Club, 50 Pa. St. 107; Society for the Visitation of the Sick v. Com., 52 Pa. St. 125; People v. N. Y. Benevolent Society, 3 Hun (N. Y.), 361; People v. N. Y. Board of Fire Underwriters, 7 Hun N. Y.), 248; People v. Medical Society, 24 Barb. (N. Y.) 570; People v. Sailors' Snug Harbor, 54 Barb. (N. Y.) 532; People v. St. Franciscus Ben. Assoc., 24 How. Pr. (N. Y.) 216. See also Sale v. First Regular Baptist Church, 62 Iowa, 26; s. c., I Am. & Eng. Corp. Cas. 169; Woolsey v. Independent Order of Odd Fellows, 61 Iowa, 492; s. c., 1 Am. & Eng. Corp. Cas. 172.

An express provision of the articles of association providing for the forfeiture of a member's shares if he brings an action against the incorporation will be declared invalid where its effect is to disfranchise a member and permit an illegal act by the corporation. W. N. (Eng.) 1876, 257; People v. New York Cotton Exchange, 8 Hun (N. Y.), 216.

"The power to make by-laws is incidental to corporations, and generally expressly conferred by statute; but by-laws which vest in a majority the power of expulsion for minor offences are, in so far, void, and courts of justice will not sustain expulsions made under them." Evans v. Philadelphia Club, 50 Pa. St. 107; State ex rel. Graham v. Chamber of Commerce, 20 Wis. 68.

In Evans v. Philadelphia Club, 50 Pa. St. 107, it was held that the striking of one member of the club by another in the bar-room did not warrant expulsion.

A deviation from the duties prescribed by the by-laws before becoming a member of a corporation will in no case constitute a valid ground for disfranchisement. People ex rel. Bartlett v. Medical Society, 32 N. Y. 187.

Causes for Expulsion.—The following have been held sufficient causes of expulsion: Feigning sickness and drawing relief benefits. Society for Visitation of the Sick v. Com., 52 Pa. St. 125. Leaving premises without permission. 5 Abb. Pr.

(N. Y.) 110. Refusal to fulfil stock contract after notice. White v. Brownell, 2 Daly (N. Y.), 329. Carrying on business outside of the rooms of the association. State v. Chamber of Commerce, 47 Wis. Insolvency, if there be a special provision to that effect. Moxey's App., q W. N. C. (Pa.) 441. Altering physician's bill in order to secure greater aid from society. Com. v. Philanthropic Soc., 5 Binn. (Pa.) 486. Enlisting as soldier. Franklin Benev. Soc. v. Com., 10 Pa. St. 357. Failure to pay dues. Hibernia Fire Engine Co. v. Com., 93 Pa. St. 264; Hussey v. Gallagher, 61 Ga. 86. Resuming business after selling out practice. Barrows v. Mass. Med. Soc., 12 Cush. (Mass.) 402. In commercial associations: Failure promptly to comply with the terms People v. Board of Trade. of a contract. 45 Ill. 212; Dickenson v. Chamber of Commerce, 29 Wis. 45. The obtaining of goods under false pretences. People ex rel. Thacher v. N. Y. Commercial Assoc., 18 Abb. Pr. (N. Y.) 271. In some cases insolvency. Moxey's App., o W. N. C. 441.

Where associations are established to preserve uniform rates of insurance, the charging of lower rates than those established by the association is sufficient ground for disfranchisement. People ex rel. Pinckney et al. v. N. Y. Board of Fire Underwriters, 7 Hun (N. Y.), 248.

In beneficial associations, failure to pay dues is a sufficient ground for expulsion. Hibernia Fire Engine Co. v. Com., o3

Pa. St. 264.

Insufficient Causes for Expulsion .- Striking fellow-member of a club. Evans v. Phila. Club, 50 Pa. St. 107. Not attend ing confessional. People v. St. Franciscus Soc., 24 How. Pr. (N. Y.) 216. Instituting legal proceedings to prevent sale of seat. People v. New York Cotton Exchange, 8 Hun (N. Y.), 216. Refusal to submit to arbitration. State v. Chamto submit to arbitration. State v. Chamber of Commerce, 20 Wis. 68. Refusal to pay award of board of arbitratiors. Savannah Cotton Exch. v. State, 54 Ga. 668; White v. Brownell, 2 Daly (N. Y.), 329. Refusal to pay dues after illegal suspension. People v. N. Y. Benev. Soc., 3 Hun (N. Y.), 361. In medical societies. The preparation to the society. societies: The presentation to the society on entrance of a diploma insufficient to entitle to membership under the charter of the association. Fawcett v. Charles, 13 Wend. (N. Y.) 473. The advertisement of a patent instrument. People ex rel. Bartlett v. Medical Society, 32 N. Y. 187. The taking of a fee less than that prescribed by the tariff of the society. People ex rel. Gray v. Medical Society,

4. Mode of Expulsion.—The power of disfranchisement is to be exercised by the society at large, unless by the fundamental articles, or by a by-law founded on those articles, it is transferred to a select number. The method of expulsion provided by the charter must be strictly complied with.1

24 Barb. (N. Y.) 570. In beneficial societies: The vilifying of a fellow-member. Com. v. St. Patrick's Ben. Soc., 2 Binn. In social clubs: The striking of one member by another in the bar room of the club. Evans v. Philadelphia Club, 50 Pa. St. 107. The publication of a libellous pamphlet on another member, and sending the same to him anonymously. Dawkins v. Antrobus, L. R. 17 Ch. Div. 615. See also Hopkinson v. Marquis of Exeter, L. R. 5 Eq. 63; Labouchere v. Earl of Wharncliffe, L. R. 13 Ch. Div.

346.
"The civil courts will interfere with churches or religious associations when rights of property or civil rights are in-But they will not revise the decisions of such associations upon ecclesiastical matters, merely to ascertain their jurisdiction." Chase v. Cheney, 58 Ill. 509; Ferraira v. Vasconcellos, 31 Ill. (N. Y.), 296; Lawyer v. Cipperley, 7 Paige (N. Y.), 296; Lawyer v. Cipperley, 7 Paige (N. Y.), 281; Miller v. Gable, 2 Denio (N. Y.), 492; Robertson v. Bullions, 9 Barb. (N. Y.) 64; Dieffendorf v. Ref. Cal. Church, 20 Johns. (N. Y.) 12: German Ref. Church v. Seibert, 3 Pa. St. 282; Shannon v. Frost, 3 B. Mon. (Ky.) 258; Walker v. Wainwright, 16 Barb. (N. Y.) 486; People v. German, etc., Church, 53 N. Y. 103; Gartin v. Pennick, 9 Am. Law Reg. 210: Sale v. First Baptist Church, 62 Iowa, 26; s. c., I Am. & Eng. Corp. Cas.

1. Greene v. African M. E. Soc., I S. & R. (Pa.) 254; Com. v. Penna. Benef. Institution, 2 S. & R. (Pa.) 141; Hassler v. Phila. Mus. Soc., 14 Phila. (Pa.) 233; Medical & Surgical Soc. v. Weatherly, 5 Ala. 248; Weber v. Zimmerman, 22 Md. 156; State v. Chamber of Commerce, 20 Wis. 63; State v. Chamber of Commerce, 47 Wis. 670.

Where a corporation by its charter is authorized to make such rules, regulations, and by-laws as it may think necessary for its government, and also to admit or expel such persons as they may see fit, in a manner to be prescribed by the rules, regulations, and by-laws; and where, by the standing rules of the cor-poration, its government was vested in a board of directors and certain officers, and the board of directors were given power to expel a member for certain

offences.-by virtue of the authority thus given the board of directors has power to expel members, and their decisions to exper members, and their decisions cannot be attacked collaterally. Pitcher v. Board of Trade (Ill.), 13 N. E. Rep. 187; People v. Board of Trade, 45 Ill. 112; People v. Sailors' Snug Harbor, 5 Abb. Pr. N. S. (N. Y.) 119.

In Loubat v. Le Roy, 40 Hun (N. Y.),

546, the power to expel members was vested by the constitution of a club in the governing committee. At a special meeting of the board of governors a committee of five of their number was appointed to investigate and report to the board a statement of facts in relation to the difficulties existing between two members of the club. The committee, thus appointed, notified the two members to appear before it and give a statement of the facts of the matter. The parties appeared in response to the notice and made their statements, as also did others called by the committee. The statements of the latter, however, were taken in the absence of the member expelled. Upon the report of the committee of five with the statements thus taken, the governing committee expelled a member without notifying him to appear before them. The member so expelled filed his complaint against the treasurer of the club, alleging, inter alia, that the above action of the club was illegal. The court held that the failure of the governing committee to give the plaintiff notice of the meeting and an opportunity to be heard deprived the resolution of expulsion of all legal effect as to him, and that his failure to request that he be allowed to be present and to be heard did not affect. the result.

Notice should be served upon the member to be expelled, and an opportunity given him to defend himself against the charges preferred. Bogg's Case, 11 Rep. 99; Innes v. Wylie et al., 1 Carr. & C. 257; Blisset v. Daniel, 10 Hare, 493; Fisher v. Keane, L. R. 11 Ch. Div. 353; People ex rel. Delcher v. St. Stephen's Church, 53 N. Y. 103; People ex rel. Doyle v. N. Y. Benevolent Society, 3 Hun (N. Y.), 361; Wachtel v. Noah's Widows and Orphans' Beneficial Society, 84 N. Y. 28; People ex rel. Schmitt v. St. Franciscus Benevolent Society, 24 How. Pr. (N. Y.) 216; Com. v. Penna.

5. Remedy for Illegal Expulsion.—The remedy for an illegal expulsion from a corporation or association is a writ of mandamus.1

Ben. Soc., 2 S. & R. (Pa.) 141; Com. v. German Society, 15 Pa. St. 251; Diligent Fire Engine Co. v. Com., 75 Pa. St. 291; Dubree v. Reliance Fire Engine Co., 1 Dubree v. Reliance Fire Engine Co., I W. N. C. (Pa.) 524; Riddell v. Harmony Fire Engine Co., 8 Phila. (Pa.) 310; Murdock's Case, 7 Pick. (Mass.) 303; Murdock v. Phillips' Academy, 12 Pick. (Mass.) 244; Sleeper v. Franklin Lyceum, 7 R. I. 523; Sibley v. Carteret Club of Elizabeth, 40 N. J. Law, 295; Southern Plank Road Co. v. Hixon, 5 Ind. 165; State v. Adams, 44 Mo. 570; People v. Fire Department, 31 Mich. 458; State v. Chamber of Commerce, 47 Wis. 670; Article on Disfranchisement from Private Corporations by Lawrence Lewis, Jr., in Am. Law Reg., Nov. 1882.

The body in whom the power of disfranchisement is vested should not be a prejudiced one. Smith v. Nelson, 18 Vt. 511. The offence must be proved, even if the accused makes no defence or fails to appear. People v. Young Men's Father Matthew Ben. Soc., 65 Barb. (N. Y.) 357.

If a member acquiesces for nineteen years in the action of the society dropping his name from the list, the court will not interfere in his behalf, though the proceedings may have been of doubtful validity. Bostwick v. Fire Department, 49 Mich. 513.

A civil action to recover damages for loss of rights and privileges, occasioned by illegal expulsion, will be considered an abandonment of a right to a mandamus to restore a person to membership. State v. Lipa, 28 Ohio St. 665.

An injunction will not be granted to restrain the initiation of persons who, it is averred, were improperly elected. The proper remedy is by a summary application to the court to determine the legality of the election. Thompson v. Society of Tammany, 17 Hun (N. Y.), 305.

If a member appears before the board of directors of a corporation and submits his case for trial by them without objection, the merits of his expulsion will not be re-examined by the court, and all irregularities in the manner in which the board of directors was constituted, or the mode of their proceeding, are deemed to be waived. Pitcher v. Board of Trade (Ill.), 13 N. E. Rep. 187; Walker v. Wainwright, 16 Barb. (N. Y.) 486; Anacosta Tribe v. Murbach, 13 Md. 91.

Where a member has once been tried and acquitted, he cannot be again tried and expelled for the same offence. Com. v. Guardians of the Poor, 6 S. & R. (Pa.)

46a. But if there has been an irregularity in the trial, the corporation may reinstate him and expel him in a proper and legal manner. State v. Chamber of Commerce, 47 Wis. 670.

A court of chancery cannot restore a person to his position as a member of a corporation. The action of the board is final and complete, and if it has erred in that action either on the merits, or has acted in a case without having jurisdiction, chancery cannot afford a remedy. tion, chancery cannot afford a remedy. Fisher v. Board of Trade, 80 Ill. 85; People v. Board of Trade, 80 Ill. 134; Baxter v. Board of Trade, 83 Ill. 146; Sturges v. Board of Trade, 86 Ill. 441; State v. Lusitanian Soc., 15 La. Ann. 73; White v. Brownell, 2 Daly (N. Y.), 329.

1. "An irregular removal from connection with a private corporation will warrant the use of the writ of mandamus wariant the use of the wift of manual to effect a restoration of the expelled member to his corporate rights." Sibley v. Carteret Club, 40 N. J. L. 295; Evans v. Phila. Club, 50 Pa. St. 107; People v. Mechanics' Aid Soc., 22 Mich. 86; Delacy v. Neuse River Nav. Co., 1 Hawks (N. Car.), 274; People v. Med. Soc. of (N. Car.), 274; People v. Med. Soc. of Erie, 24 Barb. (N. Y.) 570; People ex rel. Graham v. Chamber of Commerce, 20 Wis. 68; People v. St. Franciscus Soc., 24 How. Pr. (N. Y.) 216; People v. American Institute, 44 How. Pr. (N. Y.) 468; State v. Georgia Med. Soc., 33 Ga. 608; Medical & Surgical Soc. v. Weatherly, 75 Ala. 248; People v. New York Benevolent Soc., 3 Hun (N. Y.), 361; Hibernia Fire Engine Co. v. Com., 93 Pa. St. 264; Hussey v. Gallagher, 61 Ga. 86; State v. Lusitanian Portuguese Soc., 15 La. Ann. 73; Union Church of Afri-People v. Mechanics' Aid Soc., 22 Mich. 86; People v. Board of Trade, 45 Ill. 112; Fuller v. Plainfield Academic School, 6 Conn. 532. The court will not grant the writ if there is other adequate remedy. Harrison v. Simonds, 44 Conn. 318; Cook v. College of Physicians, 9 Bush (Ky.), 542.

Where the charter or rules of a society provide for an offence, direct the mode of proceeding, and authorize the society on conviction of a member to expel him, this expulsion, if the proceedings are not irregular, is conclusive, and cannot be inquired into collaterally by mandamus, action, or any other mode. Leech v. Harris, 2 Brews. (Pa.) 571; White v. Brownell, 3 Abb. Pr. (N. Y.) 318; Olery v. Brown, 51 How. Pr. (N. Y.) 92; Man-

DISGUISE-DISHONOR-DISINTERESTED.

DISGUISE.—(See also CONCEAL.)—To change the guise or appearance of, especially to conceal by an unusual dress; to hide by a counterfeit appearance; a dress or exterior put on to conceal or deceive; artificial language or manner assumed for deception.¹

DISHONOR.—See note 2. (See also BILLS AND NOTES; HONOR.)

DISINTERESTED.—(See also INTEREST and WITNESS.)—To have no interest in the cause or matter in issue, and therefore to be lawfully competent to testify. This is also applied to arbitrators, magistrates, jurymen, appraisers, commissioners, etc.³

ning v. San Antonio Club, 63 Tex. 166; Dawkins v. Antrobus, L. R. 17 Ch. Div. 615; State v. Chamber of Commerce, 47 Wis. 670; Sale v. First Regular Baptist Church, 62 Iowa, 26; s. c., I Am. & Eng. Corp. Cas. 169; Woolsey v. Independent Order Odd Fellows, 61 Iowa, 492; s. c., I Am. & Eng. Corp. Cas. 172. But see People v. Mechanics' Aid Soc., 22 Mich. 86

1. "The verb 'ambush' means to lie in wait; to surprise; to place in ambush. 'Conceal' means, 1st, to hide, or withdraw from observation; 2d, to withhold from utterance or declaration. The synonyms of conceal are, to hide; disguise; dissemble; secrete. 'To hide' is generic; 'conceal' is simply not to make known what we wish to secrete; 'disguise' or dissemble is to conceal by assuming some false appearance; to secrete is to hide in some place of secrecy. A man may conceal facts, disguise his sentiments, dissemble his feelings, or secrete stolen goods. The verb 'disguise' means, 1st, to change the guise or appearance of, especially to conceal by an unusual dress; to hide by a counterfeit appearance; 2d, to affect or change by liquor; to intoxicate. The noun "disguise" means, 1st, a dress or exterior put on to conceal or deceive; 2d, artificial language or manner assumed for deception; 3d, change of manner by drink; slight intoxication. This learning I derive from Mr. Webster, and I am satisfied with it. I can hardly conceive of things better distinctly marked and different than that of a person or persons in ambush, or concealed in the bushes, where a person so concealed lies in wait to attack by surprise; and a person or persons in disguise, or disguised by an unusual dress, or, in the language of the preamble to the act to suppress secret organizations of men disguising themselves for the purpose of committing crimes and outrages, by the use of masks, hideous costumes, and other grotesque disguises." Dale County v. Gunter, 46 Ala. 142.

2. "The word 'dishonor' is a technical word, which intimates that the bill has been presented and refused payment." Shelton v. Braithwaite, 7 M. & W. 437.

"Any negotiable promissory note payable on demand, which remains unpaid four months from its date, shall be considered as overdue, and dishonored after that time." Seymour v. Continental Life

Ins. Co., 44 Conn. 307.

3. "When a person is required to be disinterested or indifferent in a matter in which other persons are interested, a relationship to either of such persons by consanguinity or affinity within the sixth degree by the rules of the civil law, or within the degree of second cousin inclusive, except by the written consent of the

parties, will disqualify."

"The matters in which disinterestedness and indifference are required are of a judicial character, where impartiality is required on the part of the person acting, as in case of magistrates, jurymen, appraisers, commissioners, etc. The authorities referred to in the margin are of this description. In Spear v. Robinson, 29 Me. 531, the justice of the peace be-fore whom the writ was returnable was held not to be disinterested or indifferent within § 22, because he had married a sister of the plaintiff. In Bard v. Wood, 30 Me. 155, it was decided that a magistrate related to the parties within the prohibited degree could not hear the disclosure of a poor debtor, though he was equally related to debtor and creditor, without their consent. In Hardy v. Sprowle, 32 Me. 310, the same rule of disqualification was held applicable to a juryman, and the verdict was set aside on account of the relationship of one of the jurors to one of the parties to the suit. When the rights of others are to be determined, the statute requires that those by whom they are to be decided should be disinterested and indifferent." Jones v. Larrabee, 47 Me. 477.

"It is objected, in this case, that one of the justices before whom the debtor

DISMISS.—To remove; to send out of court. Formerly used in chancery of the removal of a cause out of court without any further hearing. The term is now used in courts of law also.¹

made his disclosure was not 'disinterested,' and that they therefore had no jurisdiction. . . . He had been the friend and legal adviser of the debtor in the matter; and he may be presumed, whether conscious of it or not, to have been subject to the usual influences of that relation. If we had the power, as in jury trials, to send the case to another hearing, we should not hesitate to do so. But we have no such discretion. The question is simply one of legal jurisdiction, and however improper it was for him to sit as one of the justices in taking the disclosure, we cannot say that he had any such interest as to deprive him of jurisdiction, and render his official acts void." Lovering v. Lawson, 50 Me. 335.

"There was no selection of arbitrators by the parties, nor were they all 'disinterested,' Hovey being the acting agent of the company, etc." Ætna Ins. Co. v.

Stevens, 48 Ill. 33.

"Disinterested and credible witnesses." Warren v. Baxter, 48 Me. 194;

Freleigh v. State, 8 Mo. 607.

1. "The term 'dismiss' was not originally applied to common-law proceedings, but seems to have been borrowed from proceedings in the court of chancery, where in practice the term is applied to the removal of a cause out of court, without any further hearing. Bouv. Law Dict. The term, when used, is applied to the removal or disposal of the cause itself, and not to the mere annulment of the writ. Such we conceive to have been the sense in which the parties to this bond used the word 'dismissal.' And in our opinion the condition of the bond to pay the judgment, etc., if the writ of error should be 'dismissed,' has not been broken by a refusal to pay on the judgment of the court 'quashing' the writ." Bosley v. Bruner, 24 Miss. 462. "That rule provides that defaulted actions should not be continued without an order of court, and the entry 'dismissed by order of the court' appears to have been devised by the court for the purpose of absolutely putting an end to such actions. It is certainly true that ordinarily a man has a right to suppose that, if he permits himself to be defaulted, the action against him will be ended; and I can well understand that cases of hardship might arise under any practice which permitted defaulted actions to be continued term after term, indefinitely, without

any supervision of the court. But the term 'dismissed' acquired a technical meaning in suits at law in our practise. I think that under the rule spoken of by Judge Bell, and eversince in our practice, the term 'dismissed' has signified a final ending of the suit, not a final judgment on the controversy, but an end of that proceeding. When the rule was revived in 1859, and applied to actions continued for notice in which the order of notice had not been complied with, I think the term 'dismissed' had the same meaning." Taft v. Transportation Co., 56 N. H. 417.

Dismissals.—The effect of dismissals under the codes of some of the United States has been much discussed. In New York it is settled by § 1209 of the Civil Code, taking effect Sept. 1, 1877, viz.: "A final judgment dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced, does not prevent a new action for the same cause of action unless it expressly declares that it is rendered upon

the merits."

Dismissal of Action.—"A dismissal of an action is a final decision of the action, and it is a final decision of the action as against all claims made by it, although it may not be a final determination of the rights of the parties as they may be presented in some other action. In the case of Dowling v. Polack, 18 Cal. 625, the court say: 'In effect, a dismissal is a final judgment in favor of the defendants; and although it may not preclude the plaintiff from bringing a new suit, there is no doubt that for all purposes connected with the proceedings in the particular action the rights of the parties are affected by it in the same manner as if there had been an adjudication upon the merits.'

"The money became payable upon the dismissal of the action." Leese v. Sher-

wood, 21 Cal. 164.

Dismissal of Appeal.—A dismissal of the appeal may mean the dismissal of the case made by the plaintiff upon the new trial, or it may mean a transmission of the record back to the lower court.

"If the decision is against the jurisdiction of the courts,—and if one, of course of both courts,—the action must be dismissed by force of that judgment, but the judgment should be entered, and the record retained in the appellate court." Williamson v. Middlesex C. P., 13 Vroom (N. J.), 391.

DISOBEDIENCE-DISORDER-DISORDERLY CONDUCT

DISMISSAL.—See ACTIONS; APPEALS; ERRORS, ETC.

DISOBEDIENCE.—See note 1.

DISORDER.—Meaning disease.2

DISORDERLY CONDUCT.—Any conduct which is contrary to law.3

Dismissal of Bill .- A bill in equity may be dismissed by the court at the hearing. or by the plaintiff before decree, when unable to prosecute his suit. After decree the bill can only be dismissed upon rehearing or appeal, and by the defendant either for want of prosecution or upon an abatement by the death of the plaintiff or otherwise. Dan. Ch. Pr. (4th Ed.) See Skuse v. Davis, 10 Ad. & 731, 742. Ell, 638.

Dismissed .- "The entry of a judgment. 'that the suit is not prosecuted, and be dismissed,' is nothing more than the record of a nonsuit. The words 'dis-missed agreed' entered as the judgment of a court do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment. Haldeman et al. v. U. S., 1 Otto, 584.

"This entry, "dismissed without prejudice,' indicates that the libel was not dismissed upon the merits of the case, upon the ground that the evidence showed the libeliee to be innocent of the charge made against her, but for some insufficiency of the allegations, or in the service of the libel, . . . where it might be proper to allow the libellant to bring a new libel for the same cause." Ray v. Adden, 50 N. H. 84.

1. "The power of the courts to punish contempts 'shall not be construed to ex-

tend to any cases, except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts. Here nothing has been done in the presence of the court, or even of any of its officers; what has been done can only be claimed to come within that part of this provision relating to disobedience or resistance to a writ." Steam Cutter Co. v. Windsor Mfg. Co. et al., 3 Fed. Rep. 298.

2. "I am not aware of any disorder or circumstance tending to shorten life, or to render an assurance on my life more

than usually hazardous." It was enough to show that the illness of 1853 and 1854 did in fact tend to shorten the life of the assured, or to render an assurance upon it more than usually hazardous, without showing that the assured was aware that.

they were of that character." Jones v. Provincial Ins. Co., 3 C. B. (N. S.) 82, 3. "The question, then, is, What is disorderly conduct," within the meaning of the charter, for which a man may be expelled? The counsel for the relator would limit it to acts of turbulence, violence, or disorderly conduct in the body, and during the sessions of the common council. . . The words 'disorderly conduct,' as they stand in the charter, unlimited and unexplained, have a broader signification than that contended for by the counsel of the re-The legislature have not said that... the conduct termed disorderly must consist of acts or words in the body and during the session of the council, and we are not warranted in saying so. But we are to construe the words in reference tothe subject matter with which the legislature was dealing when it used them. They had reference to the conduct of a. member of council, as such, not as a member of the corporation nor as a citizen, but as a member of council acting in his official character, no matter where-He who, intrusted with official power, violates his public obligations. betrays his official trust, and abuses the. public confidence by selling his official influence or vote in the body of which he is a member, is guilty of disorderly conduct of a far deeper dye than he who merely forgets the proprieties of official business and intercourse. The violation of a rule of morals is a more heinous offence than the violation of a rule of order, as crime is more base and malignant than turbulence. Any conduct which is contrary to law is within the definition of disorderly conduct, as given by standard lexicographers, and any gross violation of official duty on the part of a member of the common council is within the legal meaning of the words used in the charter.

" Here the relator was charged with receiving bribes in his character of a mem**DISORDERLY HOUSE.**—(See also BREACH OF THE PEACE.)—

1. **Definition.**—A house the inmates of which behave so badly as to become a nuisance to the neighborhood.¹

ber of the council, with official corrupber of the council, with official contrap-tion, with yielding his judgment and conscience, in the honest exercise of which the public had a right to confide, to mercenary appliances. The charge appertained to his character as an officer. a member of council; and we think there can be no doubt that the common council had a right to arraign, try, and finding him guilty, to expel him. Suppose it had been charged and proved that the bribes had been received in the common-council chamber and during the session of the body, in the very presence of the members, could it possibly be contended that that would not have been disorderly conduct within the meaning of the charter? But why? Not because the transaction interrupted or disturbed the orderly progress of the business of the council, but because it was in itself an act of lawlessness, of turpitude, a gross violation of duty on the part of the member inculpated. The disorder would have consisted in the nature and character of the act, not in the manner or place in which it was done. And is the nature or character of the act, in its moral aspect, changed at all by the fact that it was committed outside of the council chamber, and when the body was not in session? We think such a distinction in such a case the court is not called upon to draw." State v. Iersev City. 1 Dutch. (N. J.) 541.

1. State v. Maxwell, 33 Conn. 259. See People v. Carey, 4 Park C. C. (N. Y.) 238; Hunter v. Com., 2 S. & R. (Pa.) 298; State v. Bailey, 21 N. H. 343; Clementine v. State, 14 Mo. 112; State v. Wright, 6 Jones (N. Car.), 25; State v. Wilson, 93 N. Car. 608; Hackney v. State, 8 Ind. 494; State v. Bertheol, 6 Blackf. (Ind.) 474; Com. v, Cobb, 120 Mass. 356; U. S. v. Coulter, 1 Cranch C. C. 203; U. S. v. Lindsay, 1 Cranch C. C. 245; U. S. v. Gray, 2 Cranch C. C. 675; U. S. v. Dixon, 4 Cranch C. C. 107; U. S. v. Milburn, 4 Cranch C. C.

A disorderly house is one kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passersby. State v. Wilson, 93 N. Car. 608. Or those who have the right of access. State v. Matthews, 2 Dev. & B. (N. Car.) 424.

A boat may be a "house of ill-fame." State v. Mullen, 35 Iowa, 199. Or a tent.

Killman v. State, 2 Tex. App. 222. Compare Callahan v. State, 41 Tex. 43.

The noises must be unusual or of common occurrence. Palfus v. State, 36 Ga. 280; People v. Carey, 4 Park C. C. (N. Y.) 238. See Hunter v. Com., 2 S. & R. (Pa.) 298; Dunnaway v. State, 9 Yerg. (Tenn.) 350.

A house the inmates of which behave so badly as to become a nuisance to the neighborhood. It has a wide meaning, and includes bawdy-houses, common gaming-houses, and places of a like character. I Bish. Cr. L. § 1106; 2 Cra. C. C. 675; Steph. Cr. Dig. 109.

A disorderly house, in its restricted sense, is a house in which people abide, or to which they resort, disturbing the repose of the neighborhood; but in its more enlarged sense it includes bawdyhouses, common gaming-houses, and places of like character, to which people promiscuously resort for purposes injurious to the public morals, or health, or convenience, or safety. Nor is it essential that there be any disorder or disturbance in the sense that it disturbs the public peace or the quiet of the neighborhood. It is enough that the acts there done are contrary to law and subversive of public morals, and the result is the same whether the unlawful acts are denounced by the common law or by statute. Cheek v. Com., 79 Ky. 359; Thatcher v. State, 48 Ark. 60.
"If the owners of a house," it is said,

"If the owners of a house," it is said, "are practically open to the public, alluring the young and unwary into it, to indulge in or witness anything corrupting to their virtue or general good morals, the keeper cannot excuse himself by alleging that the public is not disturbed." Whart. Cr. L. (9th Ed.) §§ 1449, 1451, 1456; I Bishop Cr. L. (6th Ed.) §§ 1110, 1111, 1107, 1113, 1119, 1120; State v. Williams, 30 N. J. L. 104; Com. v. Cobb, 120 Mass. 356; Vanderworke v. State 12 Ark 700

State, 13 Ark. 700.

In State v. Williams, 30 N. J. L. 104, the court said: "No private individual has a right, for his own amusement or gain, to carry on a public business clearly injurious to and destructive of the public quiet, health, or morals, and is indictable for so doing, because the injury is of a public character, and not merely private, or to a single individual."

It is not an essential element of the offence of keeping a disorderly house that the public should be disturbed by

noise; the keeping of a common bawdy or gambling house constitutes the house so kept a disorderly house. King v. People, 83 N. Y. 587; Barnesciotta v. People, 10 Hun (N. Y.), 137; Thatcher v. State (Ark.), 2 S. W. Rep. 343.

A place of public resort, kept for the sale of pools upon horse-races, is a dis-orderly house. State v. Lovell, 39 N. J. L. 463; Cheek v. Com., 79 Ky. 359.

The character of the house is the test,

The disorderly conduct may occur outside of it if the house is of a kind to attract the persons passing. Webb, 25 Iowa, 235. State v.

A complaint for keeping a disorderly house may be maintained by proof that only one person in the neighborhood or community was disturbed or annoyed, if the acts done were of such a nature as tended to annoy all good citizens. Com, v. Hopkins, 133 Mass. 381; s. c., 43 Am. Rep. 527. Compare State v. Wright, 6 Jones (N. Car.), 25.

A conviction on an indictment for keeping a disorderly house will be supported, although there is no evidence of any indecency or disorderly conduct being perceptible from the exterior of

the house. R. v. Rice, 35 L. J. M. C. 93.
Actions and Defences.—Whether an act is illegal, and what constitutes a disorderly house, is a question of law to be settled by the court; but it must be left to the jury to find, as a question of fact, whether satisfactory evidence is produced to show that the defendant is guilty of habitually permitting such acts upon his premises as are declared to be illegal. Brown v. State, 49 N. J. L. 61.

Whether an act is illegal, and what constitutes a disorderly house, is a question of law to be settled by the court; but it must be left to the jury to find, as a question of fact, whether satisfactory evidence is produced to show that the defendant is guilty of habitually permitting such acts upon his premises as are declared to be illegal. Brown v. State, 49 N. J. L. 61.

An indictment averring that the defendant kept "a disorderly tenement" charges no offence known to the law. Com. v. Wise, 110 Mass. 181. See Com. v. Stewart, 1 S. & R. (Pa.) 341; Hunter

v. Com., 2 S. & R. (Pa.) 298.

Keeping a disorderly house is not an indictable offence, unless it be laid as a common nuisance. A verdict of "guilty of keeping a disorderly house, and disturbing his neighbors," is bad. Hunter v. Com. 2 S. & R. (Pa.) 298; Com. v. Stewart, I S. & R. (Pa.) 342.

In an indictment for keeping a dis-

orderly house, it is not necessary to allege or prove the character of the persons who frequent the house. State v. Dame, 60 N. H. 479; s. c., 49 Am. Rep.

The defendant is entitled to a jury trial, and a statute punishing him sum-marily is void. Warren v. People, 3. marily is void. War Park C. C. (N. Y.) 544.

An indictment which charged the defendant with keeping an "ill-governed" house, and which omitted to state that it was "to the common nuisance," etc., was held sufficient to warrant a conviction for keeping a disorderly house. State v. Wilson, 93 N. Car. 608.

Evidence is inadmissible of what was said and done by disturbers of the peace in the highway at a considerable distance from the house, and not in the presence of the defendant or any of his family. Com. v. Davenport, 2 Allen (Mass.), 200. See Com. v. Sliney, 126 Mass. 49.

An indictment averring that the defendant kept "a disorderly tenement" charges no offence known to the law. Com. v. Wise, 110 Mass, 181.

Where the general State law punishes the offence with fine and imprisonment, and a city ordinance imposes a fine only, a conviction under the city laws is not a bar to a prosecution under the State law. Kemper v. Com. (Ky.), 3 S. W. Rep.

Under an indictment for keeping a disorderly house, it is no variance that the defendant kept only a single story in the building. Com. v. Bulman, 118

Mass. 456.

It is not a defence that the keeper endeavored to prevent disorderly conduct.

Com. v. Cobb, 120 Mass. 356.

Where a dance-hall kept by the defendant was the resort of men and women of bad repute, held, that evidence that the women solicited men to go away with them for the purpose of prostitu-tion, that the men did go, and that the defendant was then present in the hall, was admissible. Com. v. Cardoze, 119 Mass. 210.

Evidence of the doors being broken while the defendant occupied the house is admissible. Com. v. O'Brien, 8 Gray

(Mass.), 487.

An indictment for keeping a disorderly house generally, without specifying par-

ticular acts, is not good. Frederick v. Com., 4 B. Mon. (Ky.) 7.
Evidence of "shooting, yelling, and laughing" is admissible to sustain the laughing" is admissible to sustain the charge. Garrison v. State, 14 Ind. 287. The opinions of witnesses that a house

is a nuisance as it is kept, is incompetent

A disorderly house need not be a dwelling-house.1

2. Bawdy-houses.—The keeping of a bawdy-house is a common nuisance, both on the ground of its corrupting public morals, and of its endangering the public peace by drawing together dissolute persons.2

upon an indictment charging a nuisance. Smith v. Com., 6 B. Mon. (Kv.) 21.

A witness was asked "whether the house was a general cause of complaint by the neighbors, as disturbing them. *Held*, inadmissible. Com. v. Stewart, I

S. & R. (Pa.) 342.
Proof that the female members of a witness's family were not permitted, on account of the character of the house, to pass by it on their way to a Sunday-school, was properly left to the jury as some evidence of annoyance. State v. Robertson, 86 N. Car. 628.

1. State v. Powers, 36 Conn. 77.

It is sufficient to warrant a conviction to prove that the defendant kept a shop on a public highway, at which were seen drinking and disorderly crowds, in the morning and at night, participated in and encouraged by the defendant himself, whether few or many are proved to have been thereby in fact disturbed. State v. Robertson, 86 N. Car. 628.

The mere fact that a business establishment, such as a liquor-saloon, was habitually resorted to by prostitutes and vagabonds, as well as by good citizens, did not constitute it a disorderly house. McElhaney v. State, 12 Tex. App. 231.

The disorderly conduct may take place

in a single room of a house. State v. Garity, 46 N. H. 61.

2. Roscoe's Cr. Ev. (10th Ed.) 823; Hawk. P. C. b. I, c. 74, s. I; 5 Bac. Ab. Nuisances (A); I Russ. Cri. (5th Ed.) 427; King v. People, 83 N. Y. 587; Jacobowsky v. People, 6 Hun (N. Y.) Jacobowsky v. People, o Hun (N. Y.), 524; Com. v. Harrington, 3 Pick. (Mass.) 26; Jennings: v. Com., 17 Pick. (Mass.) 80; State v. Evans, 5 Ired. (N. Car.) 603; Ex parte Birchfield, 52 Ala. 377; Brown v. State, 2 Tex. App. 189; Killman v. State, 2 Tex. App. 222.

A house of ill-fame is one kept for the

resort and unlawful commerce of lewd people of both sexes. State v. Boardman, 64 Me. 529. See King v. People, 83 N. Y. 587; State v. Evans, 5 Ired. (N. Car.) 603; McAlister v. Clark, 33

The terms "bawdy-house" and "house of ill-fame" are synonymous. State v.

Boardman, 64 Me. 523.
Prostitutes and vagabonds are not synonymous. Springer v. State, 16 Tex. App. 591.

If the defendant's house was the resort of prostitutes plying their vocation there. to the knowledge of the defendant, the house was a bawdy-house. People, 83 N. Y. 587. King v.

It is not necessary that the indecency or disorderly conduct should be perceptible from the exterior of the house. v. Rice, L. R. I C. C. R. 21.

The bare solicitation of chastity is not indictable. Hawk. P. C. b. 1, c. 74, s. 1.

A lodger who keeps only a single room for the use of bawdry is indictable for keeping a bawdy-house. See R. v. Pierson, 2 Ld. Raym. 1197. See State v. Garity, 46 N. H. 61; Com. v. Howe, 13 Gray (Mass.), 26; Com. v. Hill, 14 Gray (Mass.), 24; Com. v. Bulman, 118 Mass. 456; State v. Main, 31 Conn. 572; State v. Mullen, 35 Iowa, 199. But a prostitute who occupies a room in the house does not render her a "keeper." Moore v. State, 4 Tex. App. 127. See People v. Ah-ho, I Idaho (N. S.), 691.

A woman who lives by herself, and is accustomed to receive men for illicit intercourse, is not, merely because she is unchaste, guilty of keeping a bawdy-house. State v. Evans, 5 Ired. (N. Car.) See Com. v. Lambert, 12 Allen (Mass.), 177; Cadwell v. State, 17 Conn.

The house must be open, notorious, and scandalous to the public. Brooks v.

State, 2 Yerg. (Tenn.) 482.

A single act of prostitution or habitual acts by one person does not constitute the house bawdy. Com. v. Lambert, 12 Allen (Mass.), 177; State v. Evans, 5 Ired. (N. Car.) 603; State v. Goring, 75 Me. 591.

On the trial of an indictment for keeping a house of ill-fame, it appearing that the house was so kept, and that the defendant lived and exercised acts of control and management there, held, that the facts that it was owned by his wife, and that she also lived there and carried on the business and received all the profits, were no defence. Com. v. Wood, 97 Mass. 225.

Married Women .- A feme covert is punishable for this offence as if she were sole. Roscoe's Cr. Ev. (10th Ed.) 823; R. v. Williams, I Salk. 383.

A married woman who lives apart from her husband may be indicted alone.

Com. v. Lewis, I Metc. (Mass.) 151.

See State v. Bentz, II Mo. 27.

A married woman may be convicted of keeping a disorderly house if she acts of her own free will and without any coercion by her husband. Com. v. Hopkins, 133 Mass. 381; s. c., 43 Am. Rep.

It is no defence for a married woman that her husband resided in the house, and hired, furnished, and provided for it. Com. v. Cheney, 114 Mass. 281. State v. Bentz, 11 Mo. 27.

Surety for the Peace. - Under a statute. the keeper or persons who frequent a bawdy-house may be required to give Conn. 572. See Warren v. People, 3
Park. C. C. (N. Y.) 544.

Accessories.—One who aids in estab-

lishing and maintaining a bawdy-house is guilty of a misdemeanor. Harlow v. Com., 11 Bush (Ky.), 610. See Clifton v. State, 53 Ga. 241; Com. v. Gannett, I Allen (Mass.), 7; State v. McGregor, 41 N. H. 407. But a prostitute who is an inmate is not by such residence a "keeper." Toney v. State, 60 Ala. 87.

Upon a trial for keeping a disorderly

house, the jury were instructed as fol-lows: "If the jury believe from the evidence that the defendant did, in Hunt county, Texas, on or about the fourth day of May, 1886, either alone or in connection with another, keep a disorderly house, or was in any way concerned in keeping a disorderly house, you will find him guilty, and assess his punishment," etc. *Held* correct, because keeping and being concerned in keeping a disorderly house amounts to one and the same thing, within the meaning of the law, Stone v. State (Tex.), 2 S. W. Rep. 585. Actions and Defences.—The gist of the

offence is the use of the house for lewd purposes, and not its reputation.

v. Boardman, 64 Me. 523.

The common-law remedy by indictment against a person keeping a bawdyhouse was not abolished or superseded by the provision of the N. Y. Code of Cr. Proc. as to disorderly persons (§ 899). People v. Sadler, 97 N. Y. 146.

Though the charge in the indictment is general, yet evidence may be given of particular facts, and of the particular time of these facts,—see Clarke v. Periam, 2 Atk. 339,—it being, in fact, a cumulative offence. Roscoe's Cr. Ev. (10th Ed.) 823.

If an indictment for keeping a bawdyhouse aver that the offence was committed in the county where the indictment is found, it need not allege that the house was kept in a public place, city, town, or village, or on or near any public street or highway, or that any person resided near thereto or was in the habit of passing thereby. Handy v. State, 63 Miss. 207.

Proof that a house was leased for the purposes of prostitution is evidence that the house was disorderly. State v. Lewis.

5 Mo. App. 465.

It is not necessary to allege in the indictment, or to prove, that it was kept for lucre and gain. State v. Porter, 38 Ark. 637; State v, Williams, 30 N. J. L. 102; State v. Bailey, 1 Fost. (N. H., 343; Com. v. Ashley, 2 Gray (Mass.), 356; Com. v. Wood, 97 Mass. 225; State v. Homer, 40 Me. 438; State v. Nixon, 18 Vt. 71; State v. Webb, 25 Iowa, 235. Compare (common law) Jennings v. Com., 17 Pick. (Mass.) 80. Or that prostitutes resorted to it. Brooks v. State, 4 Tex. App. 567.

It is not necessary to specify any time State v. Wister, 62 Mo. 592. See Com. v. Hart, 10 Gray (Mass.), 465; Wells v. Com., 12 Gray (Mass.), 326; Com. v. Langley, 14 Gray (Mass.), 21. It may be for a single day. State v.

Reckards, 21 Minn. 47.

Solicitation by a prostitute outside of the house, and not within the hearing of the defendant, is not evidence that the house is disorderly. Com. v. Sliney, 126
Mass. 49. See Com. v. Harwood, 4
Gray (Mass.), 41; Com. v. Davenport, 2 Allen (Mass.), 299.

A woman charged with keeping a bawdy-house may show as a defence, in rebuttal of proof that she was a prostitute, that her physical condition rendered prostitution improbable, if not impossi-

Toney v. State, 60 Ala. 97.

It is not necessary to prove who frequents the house, which in many cases it might be impossible to do; but if unknown persons are proved to have been there conducting themselves in a disorderly manner, it will maintain the indictment. J. Anson v. Stuart, I T. R. 754; I Russ.

on Cr. (oth Am. Ed.) 326.

It was not necessary to show particular acts of prostitution in the house. State v. Brunell, 29 Wis. 435; Drake v. State, 14 Neb. 535; Territory v. Chartrand, I Dakota, 379; State v. Hand, 7 Iowa, 411; Betts v. State, 93 Ind. 375. But the indictment must charge that the house was kept for fornication by the owner or some one else. Jordan v. State, 60 Ga. 656.

The fact that a defendant is a keeper of a bawdy-house cannot be shown by general reputation. Burton v. State, 16 Tex. App. 156; Allen v. State, 15 Tex.

App. 320; Sara v. State (Tex.), 3 S. W Rep. 330; State v. Hand, 7 Iowa, 411.

It may be inferred from the evidence. State v. Wells, 46 Iowa, 662; Couch v.

State, 24 Tex. 557.

Proof that he acted or held himself out as keeper is sufficient. State v. Hand. 7 Iowa, 411.

The fact that he resided in such a house is not proof of a charge of keeping. Toney v. State, 60 Ala. 97 See Moore v. State, 4 Tex. App. 128.

The defence interposed to a prosecution for keeping a disorderly house was that the accused had no connection with the establishment or its business, and no interest in its fortunes, save as a creditor of the actual proprietor. In order to support this defence, the accused offered in evidence certain promissory notes, secured by mortgage on the furniture and table-ware of the establishment, and executed by one B., whom he alleged was the actual proprietor. The trial court excluded the proposed evidence as irrelevant and immaterial. Held, error: and that the instruments were admissible as tending to show that B., and not the accused, was the keeper of the house. Stone v. State (Tex.), 2 S. W. Rep. 585.

A statute made it an offence for a female to live in houses of ill-fame—the plural "houses" therein importing also the singular-and hence an indictment charging such living in a house of illfame is in that respect good. State v. Nichols, 83 Ind. 228; s. c., 43 Am. Rep.

Admissions of the defendant are admissible. Com. v. Darn, 107 Mass. 210.

The street upon which the house is located need not be described in the indictment. State v. Stevens, 40 Me. 559. But the particular town in which the offence is committed must be set out. State v. Nixon, 18 Vt. 70. See M ald's Case, 3 C. H. R. (N. Y.) 128. See McDon-

The indictment need not be indorsed with the name of the prosecutor. 21 Mo.

Evidence of the bad character for chastity of women who frequent a house is competent. Com. v. Gannett, I Allen (Mass.), 7; Com. v. Kimball, 7 Gray (Mass.), 328; Clementine v. State, 14 Mo. 112; State v. Boardman, 64 Me. 523; Sparks v. State, 59 Ala. 82.

Evidence in defence that there has been no disturbance of the peace in such a house is incompetent. Com. v. Gannett, I Allen (Mass.), 7; Sylvester v. State, 42 Tex. 496; McCain v. State, 57 Ga. 390. Evidence of the arrest of the inmates

and harboring after conviction is compe-

tent. Harwood v. People. 26 N. Y.

It is admissible to prove that there were women in the house, and men and women resorted there at night. State v.

Garing, 75 Me. 591.
Evidence of a single witness that he had had sexual intercourse with the daughters of the defendant several times. but never at her house, is insufficient to sustain a conviction for keeping a disorderly house for the purpose of public prostitution. Smalley v. State, II Tex. App. 147.

An inmate of a bawdy-house is not a patron. Raymond v. People, 9 Ill. App.

It is admissible to prove the lewd and indecent conduct of the keeper in presence of inmates and visitors. State v.

Smith, 29 Minn. 193.

It may be shown that there were girls in the house, and that men and women were taken there at all hours of the night. In such a case when a witness had testified that he stopped all night with a girl. one of the inmates, in the house, it is admissible to show that he soon after suffered from a disease, and it is competent to prove conversation in the house by its inmates in the presence of the respond-State v. Garing, 75 Me. 591. ent

Proof of General Reputation .- On the trial of a party accused of keeping a bawdy-house, evidence as to the general reputation of the house is inadmissible to prove the offence. Henson v. State, 62

Md. 231; s. c., 50 Am. Rep. 204.

In Henson v. State, 62 Md. 231; s. c., 50 Am. Rep. no4, the court said: "The offence does not consist in keeping a house reputed to be a brothel or bawdyhouse, but in keeping one that is actually

"In the States which have statutes upon the subject, the decisions turn, in a great measure, upon the construction and particular language of these statutes, and of course to that extent can have little or no application to the question as it is presented in this case. In others a distinction is drawn between the terms 'bawdy-house' and 'house of ill-fame, and they hold that where the latter terms are employed, they are to be taken in their strict etymological sense, and that they put directly in issue the fame or reputation of the house itself, and hence that it is both permissible and necessary to prove that reputation in the only way in which it can be proved. Others again ignore this distinction, and hold the terms to be synonymous.

"In speaking of all these authorities,

Mr. Bishop, after stating the proposition in which they all agree (and to which we assent), that it is competent in all such cases to prove by general reputation the character for lewdness of the inmates of the house and of those who frequent and visit it, though such evidence pertains in a certain sense to hearsay, say: 'Some carry this doctrine a step further, and accept the reputation of the house for bawdy, as competent evidence prima facie that it is a bawdy-house. Others, and probably the majority, reject the evidence, in accordance with the humane principle that a man shall not be condemned for what his neighbors say of him.' 2 Bishop's Cr. Pr. (3d Ed.) §§ 112, 113. And in our opinion a majority of the best-considered decisions so hold, and upon correct principles, that such evidence is inadmissible in cases like this at common law. Thus in Cadwell v. State, 17 Conn. 467, the court, in an extremely well-reasoned opinion, after holding that, upon the proper construction of the Connecticut statute under which the prosecution was had, it was necessary for the prosecutor to prove in the first place the general reputation of the house, and in the next its actual character as a brothel, and that such reputation of the house could be proved like any other fact by the testimony of witnesses having knowledge of its existence, and in the same manner as the reputation of a person for truth or any other quality is proved, distinctly says: 'Testimony as to the reputation of the house would clearly be inadmissible for the purpose of proving that it was in truth a brothel, and such testimony, if offered for that purpose, would be obnoxious to the objection that it is mere hearsay.' So in the more recent case of State v. Boardman, 64 Me. 523, where the statute, among other things, declared that 'all places used as houses of ill-fame, resorted to for the purpose of lewdness or gambling, are common nuisances,' and therefore, in this respect, merely re-enacted the common law, a party was indicted for keep-ing a house of ill-fame, and the question was distinctly presented whether evidence of the reputation of the house as being a bawdy-house was admissible. The court, after holding that the offence charged was that of a common nuisance, that the terms 'house of ill-fame' and 'bawdy-house' are synonymous, and that the gist of the offence consists in the use and not in the reputation of the house, decided that the testimony was inadmissible because it was mere hearsay evidence, and that on trial of an indictment for a nuisance it is not admissible to show that the general reputation of the subject of the nuisance was that of a The judgment in that case nuisance. was reversed because of the error in admitting such evidence, and all the judges concurred in the curt remark or note of Judge Peters, that 'the house must be proved to be a house of ill-fame by facts. and not by fame.' And in the still more recent case of Toney v. State, 60 Ala. 97. it was held that under an indictment for keeping a bawdy-house, evidence of the general reputation of the inmates of the house, but not of the house itself, is admissible for the prosecution. A similar ruling was also made in State v. Lyon. 39 Iowa, 379, where the indictment was for 'leasing a house for the purpose of prostitution and lewdness.' In the District of Columbia, where the common law on the subject prevailed, two cases arose directly involving the admissibility of such evidence. The first was that of the U. S. v. Gray, 2 Cranch C. C. 675, where the testimony was admitted; but this decision was overruled by the second and subsequent case of U.S. v. Jourdine, 4 Cranch C. C. 338, decided in 1833, in which Thruston, J., is reported to have changed his opinion since the case of U. S. v. Gray, and a majority of the court held the evidence inadmissible, thus settling the law for that court upon this question, for the only point decided in U.S. v. Stevens, 4 Cranch C. C. 341 (which has sometimes been referred to as sustaining the admissibility of such evidence), was that the general reputation of persons who frequented the house was admissible. Where the charge is simply that of keeping 'a common disorderly house, the authorities, almost without exception, exclude this species of evidence, and hold that the nuisance must be shown as an existing fact, and not by evidence of reputation. State v. Foley, 45 N. H. 466; People v. Mauch, 24 How. Pr. (N. Y.) 276; Com. v. Stewart, I S. &

R. (Pa.) 342.

"These decisions all rest, as it appears to us, upon the elementary rule of evidence which excludes hearsay testimony. The common law is studiously careful to exclude such testimony, and does not allow its introduction in order to convict parties on trial for commonlaw offences. We take it to be clear that a man's general bad character or reputation cannot be brought up against him when he is on trial for a specific crime, unless he first opens the way by an attempt to prove his good character. And we hold it to be equally clear that the

When the house of a person is the resort of prostitutes, plying their vocation, with his knowledge, this constitutes a bawdy-house.¹

A person who demises a house to be kept as a disorderly house, and which is kept with his knowledge, may be called the keeper of the house and be punished as such.²

fact that a crime has been committed cannot be proved by common rumor or general repute. The decisions which hold this evidence admissible (where they are not founded on the language of interpretation of a statute) seem to rest its admissibility mainly upon the ground of necessity, or rather the difficulty or obtaining direct evidence, because the operations of such houses are necessarily shrouded in secrecy. But when it is open to the prosecution to prove the general bad character for chastity of the female inmates of the house, that it is frequented by reputed strumpets, and that men are seen to visit it at all hours of the night as well as the day, we do not think there can be any very great difficulty in obtaining such direct evidence as will warrant a jury in convict-ing. If, however, such difficulty or necessity does in fact exist, a remedy can be easily and speedily provided by legislation changing the rules of evidence for It is not the province of such cases. the courts to change or relax those rules in order to facilitate convictions in a par-ticular class of offences. We cannot ticular class of offences, convert the common saying, 'What everymaxim; nor can we justify the introduction of such evidence upon the ground that it will do no harm, because it 'may very rarely occur that a place acquires the general reputation of being a bawdyhouse without being one in fact.' Until the legislature intervenes and prescribes differently, the same rules of evidence must govern the trial of a party accused of this offence, which govern in all other criminal trials, and which have so governed from the time trial by jury under the common law was first instituted." See Handy v. State, 63 Miss 207; Sparks v. State. 59 Ala. 82; State v. Foley, 45 N. H. 466; State v. Hand, 7 Iowa, 411; Smith v. Com., 6 B. Mon. (Ky.) 21; Com. v. Hopkins, 2 Dana (Ky.), 418; Allen v.

State, 15 Tex. App. 320.

Cases Holding that the Character of the House May be Shown by its General Reputation. — Drake v. State, 14 Neb. 535; Territory v. Stone, 2 Dakota, 155; Allen v. State, 15 Tex. App. 320; Morris v. State, 15 Tex. App. 320; Morris v. State, 38 Tex. 603; Sylvester v. State, 42 Tex. 496; Sara v. State (Tex.), 3 S. W.

Rep. 339; Stone v. State (Tex.), 2 S. W. Rep. 585; State v. McDowell, Dudley (S. Car.), 346; King v. State, 17 Fla. 189; People v. Saunders, 29 Mich. 268; O'Brien v. People, 28 Mich. 213. Betts v. State, 93 Ind. 375; State v. Brunnell, 29 Wis. 435; State v. Smith, 29 Minn. 192; State v. McGregor, 41 N. H. 406; Com. v. Gannett, 1 Allen (Mass.), 7 Com. v. Kimball, 7 Gray (Mass.), 328. The evil repute of the keeper and the

rise ovir repute of the keeper and the visitors is admissible as to guilty knowledge, though not sufficient alone to show the actual use of the premises. People v. Saunders, 29 Mich. 268. See State v. Boardman, 64 Me. 523; Sparks v. State, 59 Ala. 82; Com. v. Kimball, 7 Gray (Mass), 328; Com. v. Gannett, I Allen (Mass.), 7.

Under statute which provides for punishment of every person who shall keep "a disorderly house" it is not necessary to show that the house had acquired the reputation of being a disorderly house. State v. Maxwell, 33 Conn. 259.

State v. Maxwell, 33 Conn. 259.

1. King v. People, 83 N. Y. 587.

A house of assignation is a bawdyhouse, though no prostitutes live there.
People v. Rowland, I Wheel. C. C. (N. Y.) 286; R. v. Pierson, I Salk. 382.

One is guilty of keeping a bawdy-house where his family are openly and notoriously unchaste, with his knowledge, and he does not object. Scarborough v. State, 46 Ga. 26.

It must be shown that the defendant was the owner, or had control of the house, and that he knowingly permitted it to be occupied as a house of ill-fame. Drake v. State, 14 Neb. 535. See State v. Leach, 50 Mo. 535.

2. People v. Erwin, 4 Denio (N. Y.), 129; Troutman v. State, 49 N. J. L. 33; State v. Williams, 30 N. J. L. 102; Smith v. State, 6 Gill (Md.), 425; Com. v. Harrington, 3 Pick. (Mass.) 26; Com. v. Johnson, 4 Pa. L. J. Rep. 398; Ross v. Com., 2 B. Mon. (Ky.) 417; Harlow v. Com., 11 Bush (Ky.), 610; People v. Saunders, 29 Mich. 268; State v. Potter, 30 Iowa, 587; State v. Abrahams, 6 Iowa, 117; Stevens v. People, 67 Ill. 587; Territory v. Stone, 2 Dakota, 155; State v. Lewis, 5 Mo. App. 465; U. S. v. Gray, 2 Cranch C. C. 675. Compare State v. Pearsall, 43 Iowa, 630.

The agent of the owner renting a house, knowingly, for the purpose of a brothel may be indicted as the keeper of such house. Troutman v. State, 49 N. J. L. 33; Lowenstein v. People, 54 Barb.

(N. Y.) 299.

One who has authority to let a tenement and receive the rents, has control of it; but the mere fact of control is not sufficient to charge a person with aiding in the illegal use thereof as a house of illfame. He must consent to it, though knowledge of the illegal use, and inaction to prevent it, may be evidence of consent, which is a fact to be proved in State v. Frazier (Me.), 8 Atl. each case.

Rep. 347.
An indictment for letting a tenement, to be used for purposes of prostitution, must allege some day as the time of making the lease. Com. v. Moore, II Compare Smith v. Cush. (Mass.) 600. State, 6 Gill (Md.), 425. It need not be proved to have been made on the day alleged. Com. v. Harrington, 3 Pick.

(Mass.) 26.

An indictment must give the name of the lessee, or state some reason for not giving it, and that he accepted the lease. Com. v. Moore, 11 Cush. (Mass.) 600.

It must be shown that the owner knew the purpose to which the leased premises were to be put. State v. Leach, 50 Mo. See Drake v. State, 14 Neb. 535; Frederick v. Com., 4 B. Mon. (Ky.) 7. And his assent must be established. State v. Abrahams, 6 Iowa, 117.

It must appear that the tenement was let for the illegal use, or that the illegal use was permitted. State v. Frazier (Me.),

8 Atl. Rep. 347.

Where the owner continues to receive the rent, or a renewal of the lease of a disorderly tenant by misconduct visible to the landlord, it is competent evidence that he consents to the disorderly conduct. State v. Williams, 30 N. J. L. 102. Compare Crofton v. State, 25 Ohio St.

Proof that the lessor of the house was frequently there, and stayed there Sundays, is not sufficient to render him liable as "keeper." State v. Pearsall, 43 Iowa,

630.

An instruction that a landlord could not be convicted of the offence charged without proof that he had knowledge that the house let was kept as a bawdyhouse, but that it was not necessary to prove that he had witnessed acts of prostitution in the house, or that he had been personally notified of such acts; that knowledge might be proved by circumstantial evidence, by proof of such facts and circumstances as would justify the jury in coming to the conclusion that he had such knowledge, is not erroneous, the jury having been instructed as to the Where it doctrine of reasonable doubts. is proved by the State that the ill-fame of the house existed, and that it was flagrant and notorious, and the other elements of the case are made out, a prima facie case is made out, and it is then incumbent on the defendant to show that he had no knowledge, or that the circumstances were such that he may have remained ignorant of the facts, want of knowledge being a fact so peculiarly within his own breast that it must be regarded as an essential element of his defence. Graeter v. State. 105 Ind. 271.

If a house be let to weekly tenants. and be used by them as a bawdy-house with the knowledge of the landlord, who nevertheless does not get any additional rent by reason of the purposes to which the house is applied, the landlord is not guilty of keeping a bawdy-house, or of being accessory thereto. R. v. Barrett, 32 L. J. M. C. 36; L. & C. 263; R. v. Stannard, L. & C. 349.

Mr. Russell says (Russ. on Cr. [9th Am. Ed.] 449: "On an indictment for keeping a bawdy-house, it appeared that the house was inhabited entirely by women, who lived by prostitution openly carried on, and whose conduct was often riotous and grossly indecent, so as to be a scandal to the neighborhood. The defendant owned the house, but occupied no part of it, did not keep the key, and had no right of entry. The apartments were let to weekly tenants, who occupied separately, under distinct takings, each lodger having her own room, her own key, and a door opening into the street, or into a passage communicating with the street. The defendant had nothing whatever to do with the management of the house (if indeed a house thus divided into separate holdings can be said to be managed as a house), or of any part of it. He received no share of the earnings of the women, nor did he derive any benefit therefrom, except so far as he may be said to have done so incidentally, from their ability to pay their rent being thereby increased. He had no control over the tenants, except such as might arise indirectly from his power as landlord to determine the tenancy from one week to another. He only went to the house to collect the weekly rent from the different lodgers, or, when being pressed by the complaints of the neighbors (as sometimes happened), to endeavor to prevail on the inmates to be more or4. Gaming-houses.—The keeping of a common gaming-house constitutes the house so kept a disorderly house, and an indictable nuisance at common law.

derly in their behavior. But it was abundantly clear that he knew the use to which the apartments were applied by the several lodgers, and that he let the apartments with a full knowledge that they would be applied to the purposes of prostitution, and with a perfect assent on his part to their being so applied. on a case reserved upon the question whether, under the circumstances, the defendant could be considered as having 'kept' the house in the legal sense of that term, it was held that he could not. The house was not kept by him. had no power to admit any one whom he desired to enter the house, or to exclude any one whom he wished not to enter. In fact, he was not the keeper of the R. v. Stannard, L. & C. 340. With all deference to the learned judges, it may well be doubted whether this decision, as well as Reg. v. Barrett, be not erroneous. The contract in each case was clearly illegal, as it is plain that the letting was for the purposes of prosthe letting was for the purposes of pros-titution. Crisp v. Churchill, I Selw. N. P. (7th Ed.) 68; Girarday v. Richardson, I Esp. N. P. C. 13. That being so, the defendant was in point of law the occu-pier of the house, and the residents in the house merely his agents or servants in carrying on the purposes in question. But even if they were the occupiers, they were guilty of the offence, and the part he took would have made him an accessory before the fact, if the offence were felony, and it made him a principal, as it was only a misdemeanor, and he might have been convicted on an indictment charging him with keeping the house. Besides, the law is clear that, if a man lets a house with a nuisance upon it, he is indictable, and à fortiori if he lets a house for the very purpose that a nuisance may be created by its use."

Upon an indictment for keeping two bawdy-houses, the evidence, in addition to the proof of the nature of the houses, was that the defendant owned the houses, which he let to weekly tenants, and that he had been repeatedly remonstrated with as to the manner in which the houses were conducted, and called upon to interfere so as to abate the nuisance; of these warnings he took no notice, and some months before the prosecution he was served with a notice to the like effect; he, however, took no steps to stop the nuisance, but continued to go to

the houses, and receive the rent every week; but it was not proved that the defendant obtained any additional rent by reason of the nature of the occupation; and it was held that the defendant was not really the keeper of the bawdyhouses in point of law, but was simply the owner of the houses, letting them to other persons who used them for an immoral purpose. R. v Barrett, 9 Cox C. C. 255.

C. 255.

1. King v. People, 83 N. Y. 587;
Brown v. State, 49 N. J. L. 61; R. v.
Dixon, 10 Mod. 335; 1 Hawk. P. C. 693.

In R. v. Dixon, 10 Mod. 336, it was held that the keeping of a gaming-house was an offence at common law as a nuisance. The keeping a common gaming house is an indictable offence, for it not only is an encouragement to idleness, cheating, and other corrupt practices, but it tends to produce public disorder by congregating numbers of people. Hawk. P. C. b. 1, c. 75, s. 6; 1 Russ. Cri. (5th. Ed.) 428; Roscoe's Cr. Ev. (10th Ed.) 821.

A person who sells in a house under his control pools upon horse-racing is punishable under an indictment for keeping a "disorderly house." Cheek v. Com., 79 Ky. 359; State v. Lovell, 39 N.

J. L. 463.

A ten-pin alley is not of itself a public nuisance. State v. Hall, 32 N. J. L. 158. But if it is kept for gain or hire, it is a public nuisance at common law, though gambling be expressly prohibited. Tanner v. Trustees of Albion, 5 Hill (N. Y.), 121; Com. v. Goding, 3 Metc. (Mass.) 130; State v. Haines, 30 Mc. 65. And the keeping in a public-house of "a certain common, ill-governed, and disorderly room," and procuring and suffering for lucre disorderly persons to meet and remain therein, by night and by day, "drinking, tippling, cursing, swearing, quarrelling, making great noises, rolling bowls, in and at a game commonly called ten-pins," is a public nuisance, and is indictable. Bloomhuff v. State, 8 Blackf. (Ind.) 205.

It seems that the keeping of a cockpit is not only an indictable offence at common law, but such places are considered gaming-houses within the statute. 33 Hen. VIII, c. 9; Hawk. P. C. b. I, c.

92, s. 92.

A feme covert may be convicted of this offence. Hawk. P. C. b. 1, c. 92, s. 30; Roscoe's Cr. Ev. (10th Ed.) 821.

DISORDERLY PERSONS-DISPARAGEMENT.

5. Drinking-places.—The habitual sale of liquor contrary to law, as upon a Sunday, will make the house a nuisance: 1 or if it is noisy and troublesome to the neighbors, it is indictable at common law 2

DISORDERLY PERSONS.—(See also Breach of the Peace.)— A class of persons subject to police regulations, described in local statutes which provide for their punishment.3

DISPARAGEMENT.—(See also DEFAMATION.)—In old English law, an injury by union or comparison with some person or thing of inferior rank or excellence.4

A public inn, where any instrument or device for gaming is used, and kept as such, either by the landlord or any other person, by his permission, however orderly the house may be in other respects. is a public nuisance at common law, and all persons resorting to such house, for the purposes of gambling, are, in the eye of the law, persons of ill-fame. Case, I C. H. R. (N. Y.) 66. Butler's

Keeping a common gaming house, and for lucre and hire unlawfully causing and procuring divers ill-disposed persons to frequent and come to play together a certain game called rouge et noir, and permitting the said idle and evildisposed persons to remain, playing at the said game, for divers large and excessive sums of money, is a sufficient statement of an offence indictable at common law. R. v. Rogier, r B. & C. And it would have been sufficient merely to have alleged that the defendant kept a common gaming-house. R. v. Rogier, I B. & C. 272. So in R. v. Mason, I Leach, 548, Grose, J., seemed to be of opinion that the keeping of a common gaming-house might be de-See also R. v. Tayscribed generally. lor, 3 B. & C. 502.

It is prima facie evidence that a person keeps a gaming-house if he deals the cards therein. U.S. v. Miller, 4 Cranch

C. C. 104.

An indictment under a statute in relation to the keepers of billiard-tables charged that the defendant, "having the control and management of" a saloon in which billiard-tables were kept, etc. Held, on motion in arrest, that the indictment was insufficient, as having the con-trol and management of a saloon is clearly different from having the care, management, or control of a billiard table, although the table might be within the saloon. Hanrahan v. State, 57 Ind.

527. See State v. Ward, 57 Ind. 537.
1. State v. Williams, 30 N. J. L. 102;
Huber v. State, 25 Ind. 175.

A house in which unlawful sales of liquor are habitually made is an indictable nuisance, although there is a city ordinance prescribing penalties for such sales, as such traffic is not only a breach of the city law, but is also forbidden by the State law. Meyer v. State, 42 N. I

L. 145.

2. Meyer v. State, 42 N. J. L. 145;
Wilson v. Com., 12 B. Mon. (Ky.) 2;
State v. Bertheol, 6 Blackf. (Ind.) 474;
State v. Mullikin, 8 Blackf. (Ind.) 250;
Cable v. State, 8 Blackf. (Ind.) 53;
State v. Robertson, 86 N. Car. 628; U. S. v. Lindsay, I Cranch C. C. 245; U. S. v. Elder, 4 Cranch C. C. 507; U. S. v. Columbus, 5 Cranch C. C. 304.

An excise license is no defence. State v. Buckley, 5 Har. (Del.) 508; State v. Ambs, 20 Mo. 214; Archer v. State, 10 Tex. App. 482; State v. Mullikin, 8 Blackf. (Ind.) 260; U. S. v. Elder, 4

Cranch C. C. 507.

3. 4 Bl. Com. 169; Rapalje & L. Law

Dict.

4. Marriage without disparagement was marriage to one of suitable rank and character. 2 Bl. Com. 70. The guardian in chivalry had the right of disposing of his infant ward in matrimony; and provided he tendered a marriage without disparagement or inequality, if the infant refused he was obliged to pay a valor maritagii to the guardian. parage, to marry unequally: used of a marriage proposed by a guardian between those of unequal rank and injurious to the ward. Bouv. Law. Dict.

Disparagements were of several kinds, of which the principal were propter vitium animi, as where the proposed wife or husband was an idiot, etc.; propter vitium sanguinis, as in the case of villeins, "men of trade," etc.; propter vitium corporis, by reason of some bodily defect.

Litt. § 109; Co. Litt. 80, a.

". . . Inequality of fortune never constituted disparagement. Thereby was contemplated some personal or social defect

DISPENSATION—DISPLACE—DISPOSE OF.

DISPENSATION.—In English law, an exemption from some laws to do something forbidden; an allowance to omit something commanded the canonistic name for a license. A relaxation of the law for the benefit or advantage of an individual.2

DISPLACE.—To put out of place.

DISPOSE OF.—To alienate: to effectually transfer.4

or disqualification, such as deformity. lunacy, disease, villenage, alienage, or corruption of blood. Co. Litt. 80, 81, 82. In no sense, analogous to the ancient import of the term, could the marriage of the female plaintiff with her first husband have been deemed a marriage in disparagement. It brought no disgrace on her or her kin; did not put her or them below their proper station." Shutt et ux. v. Carloss, I Ired. Eq. (N. Car.) 232, 240.

1. Wharton Law Dict.

This power of dispensation is unknown

in American law. Rapalje & L. Law Dict.

A dispensation and exemption differ in sound only; for a dispensation is properly to license a person to do a thing which he can do, but is by law penally prohibited from doing it. An exemption is properly to license a man or men not to do a thing which they are penally by law precepted to do. Thomas v. Sorrell, Vaughan's R. 349. See Apoth. Co. v. Greenough, I Q. B. 798.

2. In the United States no power exists except in the legislature, to dispense with law; and then it is not so much of a dispensation as a change of the law. Bouv.

Law Dict.

at at at

3. Stirling v. Maitland, 5 B. & S. 840. Where an insurance company covenants to pay a certain sum of money if they displace a certain agent, the dissolution of the company, and the transfer of its business to another company, is a dis-

placement of the agent.

A provision in shipping articles that if any officer or seaman is judged incompetent or indisposed to perform his duties. the master may "displace him and sub-stitute another in his stead," does not give the master a right to discharge such an incompetent or insubordinate seaman or officer, but only to degrade or reduce him to a lower station upon the ship. Potter v. Smith, 103 Mass. 68.

4. Crane's App., 2 Root (Conn.), 487. In an act allowing an attachment where the defendant has fraudulently concealed, removed, or disposed of his property, etc., "disposed of" covers all such alienations as may be made in ways not otherwise pointed out in the statute, and among others a mortgage. Bullene v. Smith, 73 Mo. 151. So in an ordnance forbidding any one to sell, deal in or dispose of intoxicating liquors without a license, the latter expression covers furnishing and delivering, whether for a compensation or not. "The terms 'discompensation or not. "The terms 'dispose of' are meant to include other forms of disposal than those indicated by the preceding words in the ordnance, though consistent with them as respects its intent and purpose." State v. Deusting, 33 Minn. 102. And see Lessee of

Clarke v. Courtney, 5 Pet. (U. S.) 319.

A power to "sell and dispose of" real estate, given by statute to a corporation, includes a power to mortgage. power to sell includes a power to mortgage, even under the Statute of Uses, though strictly construed; and u fortiori it ought under a statutory grant, which is to be beneficially construed in furtherance of the object. But the superadded words 'dispose of,' which would otherwise be redundant, leave no doubt of the existence of an intent to give the corporation power to part with its real estate by any voluntary act, without regard to by any voluntary act, without regard to the mode of its operation." Gordon v. Preston, I Watts (Pa.), 385. The words "dispose of" in the phrase "sell and dispose of" are held not to be redundant or synonymous with "sell," but to contemplate a use of the lands different from a sale, and a mortgage is such a use. Platt v. U. P. R. Co., 99 U. S. 48. But a power to dispose of lands given by statute includes a power to sell and convey. Rogers v. Goodwin, 2 Mass. 477; Fling v. Goodale, 40 N. H. 219. And to lease. United States v. Gratiot, 14 Pet. (U. S.) 526.

In an act providing that any person intrusted with or in possession of a bill of lading, etc., should be deemed the true owner of the goods mentioned therein, so as to give validity to a contract for the sale or disposition of the goods, "disposition" is something in the nature of a sale. Taylor v. Kymer, 3 B.

& Ad. 320.

A conveyance to a son by way of advancement is a disposal of property within the meaning of a covenant to renew a

DISPOSSESSION—DISPUTE—DISOUALIFY—DISTANCE.

DISPOSSESSION (or Ouster)—A wrong that carries with it the amotion of possession, and whereby the wrong-doer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy in order to gain possession, and damages for the injury sustained.1

DISPUTE.—See note 2.

DISQUALIFY.—To incapacitate; to disable; to divest or deprive of qualifications.3

DISSEISIN.—The wrongful putting out of him that is seised of the freehold.4

DISSOLUTION.—See CORPORATIONS: MUNICIPAL CORPORA-TIONS, ETC.

DISTANCE is to be measured in a straight line in a horizontal plane, unless there is a clear indication that another mode of measurement is to be adopted.5

lease, if the lessor "should not dispose

of "the premises during the term. Elston v. Schilling, 42 N. Y. 79.

The term "dispose of" when used of notes includes "collect." Fling v. Goodale, 40 N. H. 219.

In Sheffield v. Orrery, 3 Atk. 287, "dispose of" in a will was held to

mean not to sell, but to manage.

Under a statutory provision that all property acquired by husband or wife shall be common property, and that the husband shall have control of it, with absolute power to dispose of it, and that at the death of either one half shall go to the survivor, the husband's power does not extend to a disposition by devise. Biard v. Knox, 5 Cal. 252. And see Stevenson v. Glover, I C. B. 448.
Competent to Dispose by Will.—See

COMPETENT.

The Final Disposition of a Suit is its determination, the end of litigation therein. Ex parte Russell, 13 Wall. 664. See CAUSE.

1. 3 Bl. Com. 167.

Disseisin, which is one of its subdivisions, always implies a wrong, but dispossession may be by right or by wrong. Kilmit v. Mardman, 1 Burr. 111; Slater v. Rawson, 6 Metc. (Mass.) 444.

2. Under the Employers and Workmen's Act of 38 & 39 Vict. c. 90, creating a special jurisdiction of disputes between employers and workmen, the absence of a workman from work, without notice and complaint to the justices by his employer, amounts to a dispute. Clemson v. Hubbard, L. R. 1 Ex. D 179, Smith on Master and Servt. 699.

Matter in Dispute.—The subject of litigation. See Amount in Controversy and Appeal, Vol. I. pp. 619, 620. This expression, as used in statutes regulating the right of appeal, is appropriate only to civil cases, and is confined to them. United States v. More, 3 Cr. (U. S.)

A submission to arbitration of all matter in dispute does not include the question of the costs of reference. Neighbors, 64 N. Ĥoover v.

3. Matter of Maguire, 57 Cal. 604. This is the definition given by the court, after quoting Webster with approval. In this case it was decided that an ordinance prohibiting the employment of females in places where liquor was sold was in conflict with a constitutional provision that " no person shall on account of sex be disqualified from entering upon or pursting any lawful business, vocation, or profession." "The words employed in this ordinance incapacitate a woman from following the business for which the petitioner was fined, and disable her from doing so. This being so, she is disqualified by the ordinance under consideration from pursuing a business lawful for men.

The physical disability of a judge is a legal disqualification to act on the trial of

cause. State v. Blair, 53 Vt. 24. 4. 3 Bl. Com. 169, Co. Litt. 277. 5. Jewel v. Stead, 6 E. & B. 350 Lake

v. Butler, 5 E. & B. 92; Mouflet o. Cole L. R. 8 Ex. 32; Taylor on Ev. (8th Ed.) But see Smith v. Ingraham, 7 Cow 419.

DISTILL-DISTILLATION—DISTILLER—DISTILLERY.—To distil is to extract spirits from by evaporation and condensation; to manufacture alcoholic spirits.¹ A distillery is "a place or building where alcoholic liquors are distilled or manufactured."²

DISTINCT.—See note 3.

1. Distilled spirits, spirits, alcohol, and alcoholic spirit are defined in U. S. Rev. Stats., § 3248, to be "that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses or sugar, including all dilutions and mixtures of this substance. The term "distilled spirits," as thus used is generic, and not necessarily confined to the products of distillation. In its ordinary and literal meaning it is so confined, and is used in § 3296 of U. S. Rev. Stats. United States v. Anthony, 14 Blatchf. (C. C.) 92.

The term includes, on the other hand, all spirits which have been distilled, whether subsequently rectified or not. Boyd v. U. S., 14 Blatchf. (C. C.) 317.

The use of a still for rectifying spirits already distilled is not the distilling of spirits within the meaning of an internal revenue act, nor in the common understanding of mankind. United States v. Tenbrook, Pet. (C. C.) 180.

"The rectification or purification of spirits after their distillation has been complete, in order to fit them for certain purposes of combination with other materials, is no part of the process of distillation, and is not a breach of the provisions of the act of Congress. The distillation of spirits and the rectification of them after they are distilled appear to be separate and distinct acts." U. S. v. Tenbroek, 2 Wheat. (U. S.) 247.

In a revenue act which laid a tax upon distilled spirits, alcohol, etc., and which forbade any "mash, wort, or wash fit for distillation" to be made in any place other than an authorized distillery. "fit for distillation," meant not "fit for profitable distillation" but "capable of distillation and of the production of pure or impure alcoholic spirits." Accordingly, where vinegar was manufactured by the fermentation of a wash consisting of molasses and water, this was held to be "fit for distillation." because in the manufacture of vinegar from such a substance the saccharine matter was necessarily converted into alcohol, and although the use of a ferment which hastened the conversion into acetic acid, made it impossible that alcohol could be

profitably distilled from the wash. U. S. v. Prussing, 2 Biss. (C. C.) 344.
A distiller is defined in U. S. Rev.

Stats. § 3247, to be "every person who produces distilled spirits, or who brews or makes mash, wort, or wash fit for distillation or for the production of spirits. or who by any process of evaporization separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort, or wash, has also in his possession or use a still." But to make one who has in his possession a still and keeps mash, etc., a distiller, the mash kept must be such as will produce spirits on distillation; and a manufacturer of vinegar is not within the defi-nition who used a substance that had gone through a process of fermentation in a place where there was no still such as to render it incapable of yielding alcohol on distillation. U. S. v. Frerichs, 16 Blatchf. (C. C.) 547.

And where a manufacturer of vinegar used a process in which a mash, fermented in the same way as for the production of whiskey, was used, and by the application of heat, alcoholic vapor was produced, which passed directly into a chamber, where it was condensed by cold water and vinegar, and the mixture thus formed was then oxidized, and flowed out as vinegar, he was held not to be a distiller within the meaning of the Rev. Stats; and neither the mixture nor the vinegar was "the product of distillation," as the former could be used for no other purpose than to manufacture vinegar. One Vaporizer, etc., 2 Ben. (U. S.) 438.

2. Atlantic Dock Co. v. Libby, 45 N. Y. 499, where it was decided that a factory for distilling paraffine oil is not a "distillery" within a covenant not to erect upon a piece of ground "any manufactory of gunpowder, glue, varnish, vitriol, turpentine, or any brewery, distillery, slaughter-house, or other noxious or dangerous trade or business." So of a factory for distilling resin oil, though this was held to be a dangerous business. Atlantic Dock Co. v. Leavitt, 50 Barb. (N. Y.) 135, s. c., 54 N. Y. 35.

business. Atlantic Dock Co. v. Leavitt, 50 Barb. (N. Y.) 135, s. c., 54 N. Y. 35.

3. The purpose of a joint-stock company is "distinctly and definitely specified," within the meaning of a statute

DISTRESS.—(See also EJECTMENT; LANDLORD AND TENANT.)

r. Definition, 706.

(a) Exceptions, 709. 6. What Shall be Done with Distress, 2. Right of Distress, and How Extinguished, 706.

3. Who May Distrain, 707.

4. How to Distrain and When, 708. 7. Wrongful and Excessive Distress.

5. What May be Distrained, 709.

1. Definition.—Distress is one of the means by which a wrong done may be redressed by the mere act of the party injured,1 and is defined to be the taking of a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to

procure satisfaction for the wrong done.2 It is used to exact compensation for such damages as result from the trespass of cattle, to enforce the payments of rents, taxes, and other duties.3 The general use, however, of distress is

to enforce the payment of rent.

2. Right of Distress and How Extinguished.—The right of distress exists only when there is an actual demise 4 (not a mere agreement for one), but a parol demise will be sufficient.5

The rent must be fixed and certain. It need not be payable in

money. It may be payable in produce or services.6

The right to distrain is not extinguished by the taking of a

providing for the institution of such companies, by describing it as "manufacturing and selling daguerreotype mattings and preservers, and all other goods, wares, merchandise, and articles made of brass, silver, gold, iron, or other metals or compounds thereof." Bird v. Daggett, 97 Mass. 494.

Under a settlement act, by which one could gain a settlement by renting "a separate and distinct dwelling-house," the test whether a part or a floor of a house was such was decided to be whether it had a separate outer door, by which Little Usworth, 5 A. & E. 261; Regina v. Elswick, 3 E. & E. 437.

1. 3 Black. Com. 6.

2. 3 Black. Com. 6.

3. I Bouvier Law Dict. (15th Ed.) 540.

4. Wells v. Hornish, 3 P. & W (Pa.) 30; Jacks v. Smith, 1 Bay (S. Car.), 315; Dunk v. Hunter, 5 B. & Ald. 322. Where a tenant was in possession under a memorandum of agreement to let on lease, with a purchasing clause for 21 years, at the net clear rent of £63, the tenant to enter any time on or before a particular day, held, that this only amounted to an agreement for a future lease, and that no lease having been executed, and no rent subsequently paid, landlord was not entitled to distrain.

Valentine v. Jackson, 9 Wend. (N.Y.)

302.

A landlord has no right to distrain and sell the goods of the tenant for use and occupation. There must be an agreement between the parties for a fixed and certain rent, or rent capable of being re-

duced to a certainty.

Marshall v. Giles, 2 Const. (S. Car.)
7. Where landlord purchased prem-637. ises at judicial sale, and gave notice to the tenant to vacate at agiven time, or pay one hundred dollars per month rent, and the tenant refused to do either, landlord distrained. Held, that distress would not lie, as there was no agreement on the part of the tenant to pay a fixed

Clark v. Fraley, 3 Blackf. (Ind.) 264. A tenant contracted to deliver as rent one third of the corn he should raise on the premises. Held, that the remedy by distress does not lie in such a case.

5. Coke Litt. 96, a; Valentine v. Jackson, 9 Wend. (N. Y.) 302; Helser et al, v. Potts et al., 3 Pa. St. 179.
6. Payable in iron. Jones v. Gundrim, 3 W. & S. (Pa.) 531. One third of the tolls of a grist-mill. Fry v. Jones, 2 Rawle (Pa.), II. On a demise of a gristmill, the lessee to render one third of the toll, the lessor may distrain. One half the oats, corn, wheat, etc. Steel v. Frick, 56 Pa. St. 172. In Kentucky, payable in tobacco. Rector v. Gale, Hardin, Compare Clark v. Fraley, 3 Blackf. (Ind.) 264.

note, bond, or other security for the rent, unless it is expressly so taken as payment. Nor is it affected by right to re-enter reserved in the lease, or by a surrender of part of the premises.2

The surrender of the whole extinguishes it; so does the tender of the rent due at any time before sale, with costs,3 which tender

must be made to the landlord or his agent.4

At common law, distress could not be made after the expiration of the lease.⁵ This, however, has been modified by the statutes of the various States.

- 3. Who May Distrain.—It is held that each one of several joint tenants may distrain for the whole rent, or they may all join together for the purpose; 6 but tenants in common, having several estates, each one may distrain for his separate share,7 unless the rent be on an entire thing, as of a house, in which case they must all join, as the subject-matter is incapable of division.8
- 1. Cornell v. Lamb, 20 Johns. (N. Y.) 407. A landlord received a sealed note for rent due on a parol demise; held, he was entitled to distrain, it being a concurrent remedy with assumpsit to collect the rent.

Lofsky v. Mauger, 3 Sandf. Ch. (N. Y.) 69. Prior to the appointment of a receiver in a foreclosure suit on a mortgage, the owner of the equity of redemption by purchase from the mortgagor had received from his tenant a note for the rent accrued, and a mortgage on personal property executed by a friend of the tenant for its further security; but no actual payment had been made. Held, there was no merger of rent; the landlord's right to distrain continued, and the receiver was entitled to the unpaid rent in preference to the owner of the equity of redemption.

Printerns v. Helfried, I N. & McC. 187. A receipt was given for an order on a person. It was not paid, because the funds of the drawer were taken out of his hands: Held, the acceptance of the order did not extinguish the debt, and the right to distrain was not thereby lost.

Bailey v. Wright, 3 McC. (S. Car.) 484. The tenant gave landlord a single bill, promising to pay the sum of \$200 as rent for one year. *Held*, this was no satisfaction, and the landlord still had the

higher right of distress.

Snyder v. Kunkleman, 3 P. & W. (Pa.) 487. The lessor recovered a judgment in an action upon covenant to pay rent. Held, he may also distrain for the same rent in arrear.

2. Peters v. Newkirk, 6 Cow. (N. Y.) 103; Nichols v. Dusenbury, 2 N. Y. 283. In the case of the lease of an unfinished building, which was to be completed by the landlord, the tenant took possession and occupied the premises for two quarters, and then abandoned them for the reason that the landlord had not completed them according to his agreement. The landlord was allowed to distrain for the second quarter's rent. lor Land. & Ten. (8th Ed.) s. 565.

3. Hunter v. Le Conte, 6 Cow. (N. Y.) 728; Virtue v. Beasley, 1 Mood. & R. 21. 4. Browne v. Powell, 4 Burg. 230; s.

- c., 12 Moore, 454. A tenant's son made a tender to the wife of the landlord, with whom he had treated on similar occasions, and her acts confirmed by the landlord; on this occasion she refused to accept the tender. Held, the evidence was sufficient to show that the wife was the authorized agent of her husband, the landlord.
- 5. Knight v. Bennett, 3 Bingham, 361; Bukup v. Valentine, 19 Wend. (N. Y.) 554; Webber v. Shearman, 3 Hill (N. Y.),
- 6. Robinson v. Hoffman, 4 Bing. 562. One joint tenant may, without the assent of his fellows, appoint a bailiff to distrain for rent due to all the joint ten-
- 7. Croke Jac. 611; Coke Litt. 317; Harrison v. Barnby, 5 Term. 246; Whitley v. Roberts, 1 McClel. & Y. Exch. 107. Land was demised by four persons, whose original title did not appear, at one entire rent, to be divided and paid separately in equal portions. the four distrained upon the tenant for her own share of the rent, Held, the distress was regular, for whatever might have been the interest of the landlords as between themselves, as between them and the tenant they were tenants in common, and entitled, each, to a separate distress.
 - 8. Harrison v. Barnby, 5 Term, 246;

Distress may be exercised by husband and wife jointly or by the husband alone, for rents accruing from her lands during coverture; by guardians in their own names; by the executor of a lessor for rent accruing before his death; by a receiver in chancery without special order; or by an assignee of a reversion; but not by a mere assignee of a rent. A tenant may distrain against an undertenant.2

4. How to Distrain, and When.—A distress may be made in person by the landlord, or, which is the more usual and preferable method. by a constable or bailiff.³ It must be made in the name of the person to whom the rent is due.⁴ If made by constable or bailiff, he must be provided with written authority from the landlordthis is usually called the "warrant of distress." 5 Even if an agent distrains in his own name and gives written notice that the rent is due to him, yet he may justify in the name and as the bailiff of the lessor. 6

When to Distrain.—The distress cannot be made until the day after the rent is due vunless by the terms of the lease the rent is payable in advance, in which case the distress may be made immediately upon the tenant's taking possession.8 The landlord cannot break the outer door of a house to make a distress.9 But may enter an open door or window, and if he has entered the house may break open an inner door.10

The distress must be made in the daytime, 11 and on the demised premises. 12 A distress is made by seizing any piece of furniture or

Coke, Litt. 197, a. A tenant holding under two tenants in common cannot pay the whole rent to one after notice from the other not to pay, and if he do. the other tenant in common may distrain for his share.

1. Pitt v. Snowden, 3 Atk. 750.

Bennett v. Robins, 5 Carr. & Payne, 379. A receiver appointed by the court of chancery has a right to distrain for rent, without any special authority from

the court for that purpose.

Slocum v. Clark, 2 Hill, 475. In order to confer upon assignee of landlord a right to distrain, the lease or land should be included in the assignment; a mere transfer of the rent remaining unpaid does not carry with it the remedy by distress. See

Pa cases.
2. Harrison v. Guill, 46 Ga. 427. One who rents land and sublets it to a third person stands in the relation of landlord to the sub-tenant, and may have a distress warrant for his rent.

3. Hammd. Nisi Prius, 382.
4. Swearingen v. Magruder, 4 H. & McH. 347; Preece v. Corrie, 5 Bing. 24; Curtis v. Wheeler, M. & M. 493; Smith v. Day, 2 M. & W. 684.

5. Hammd, Nisi Prius, 382. A subsequent assent or confirmation of the landlord is sufficient.

6. Trent v. Hunt, 9 Exch. 14. The right of a person to do an act with regard to the property of another depends upon the authority or right which he really had to do the act, and not upon what he says he has. Therefore, if a person having authority to distrain for rent due to another, says at the time that he distrains for rent due to himself, he may nevertheless justify as bailiff of the other.

7. Swearingen v. Magruder, 4 H. & McH. 347; Preece v. Corrie, 5 Bing. 24; Curtis v. Wheeler, M. & M. 493; Smith v. Day, 2 M. & W. 684.

8. Russel v. Doty, 4 Cow. (N. Y.) 576.
9. Brown v. Glenn, 16 Q. B. 254.
10. Williams v. Spencer, 5 Johns.
(N. Y.), 353; State v. Thackara, 1 Bay (S. Car.). 358. A landlord may take up the boards of the floor of his room over his tenant's room and enter through it to distrain. Chambers Landlord and Tenant,

11. 3 Blackst. Com. 11; Brown v. Glenn, 16 Q. B. 254.

12. Roberts' Digest, 171. See Fumeans v. Fotherly, 4 Camp. 136. Where goods have been clandestinely or fraudulently of a chattel distrainable, declaring at the same time that it is seized in the name of all the chattels on the premises.1 After seizure an inventory of the goods should be made, and a copy thereof, with notice of the distress and the cause of such taking, should be left at the Mansion House, or other most notorious place on the premises charged with the rent distrained for.2 Goods distrained upon are usually left upon the premises for the period of five days in order that the tenant may have an opportunity to replevy them if a wrongful distress has been made.³ If the tenant or owner do not within five days after the distress is taken,4 and notice of the cause thereof given to him, replevy the same with sufficient security, the distrainor, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, and sell the same towards satisfaction of the rent and charges; rendering the overplus, if any, to the owner himself.5

5. What May be Distrained,—All personal chattels upon the premises may be distrained,6 unless particularly protected or exempted.7

removed from the demised premises they may be followed and distrained upon within thirty days after their removal. Williams v. Roberts, 7 Exch. 618. This is, however, regulated in some States by statute, as in *Pennsylvania* by Act of 21st Mch. 1772, 1 Sm. L. (Pa.) 371.

1. Dod v. Monger, 6 Mod. 215.
2. Kerby v. Harding, 6 Exch. 234.
The notice if given personally to the tenant need not be in writing. An omission to give notice does not render the sion to give notice does not render the distress unlawful. It is only necessary to warrant a sale of the goods distrained. M'Kinney v. Reader, 6 Watts (Pa.), 40. It may be given to the tenant or to the owner of the goods distrained. Coldcleugh v. Hollingsworth, 8 W. & S. (Pa.) 302.

3. 3 Blackst. Com. 12, 13.

4. A reasonable time after the expiration of the five days is allowed to the landlord for appraising and selling the goods. 4 B. & A. 208; I H. Black. 15: Waitt v. Ewing, 7 Phila. (Pa.) 195; Woglam v. Cowperthwaite, 2 Dall. (Pa.) 69. By the consent of the tenant, the landlord may continue in possession longer than the five days; a written memorandum of the tenant's consent to that effect ought to be obtained. 2 Arch. Pr. 60.

5. 3 Blackst. Com. 14. 6. 3 Blackst. Com. 7.

7. Exceptions.—The main exceptions of chattels personal which may not be distrained upon can be divided into six

First.-As everything which is distrained is presumed to be the property of the wrong-doer, it will follow that such things wherein he can have no absolute and valuable property, as cats, dogs, rabbits, and animals of *feræ naturæ*, cannot be distrained. 3 Black. Com. 7. But in *Pennsylvania*. dogs, when duly registered, are deemed personal property, and as such, it would seem, liable to be distrained. Acts 6th April, 1854, P. L. 286; and 18th May, 1878, P. L. 72. Yet if deer, which are of a wild nature, are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent. 3 Black. Com. 7.

Second. - Whatever is in the immediate actual use of the tenant, such as an axe, spade, or stocking loom in actual use, which cannot be taken away without a breach of the peace. Co. Litt. 47, a; Simpson v. Hartopp, Willes, 512. Otherwise if they be not actually in use at the time. Gorton v. Falkner, 4 T. R. 565; Edgecomb v. Sparks, 2 Show. 127 n. Nor can a distress be made upon a horse on which a man rides, when he is taken sick, from home, though it may on a led horse; nor on money out of a bag; nor on the tools of a man's trade; nor on beasts of the plough, nor anything belonging to it, while there are other goods or beasts, animalia otiosa, which may be distrained. It is here implied that beasts of the plough are only those that draw the plough. 2 Bac. Abr. 108-9. Horses drawing a cart may be distrained, but cattle distrained cannot be worked or used, unless it be necessary for the owner's benefit, as to milk a cow, etc. 5 Dane Abr. 34. By special acts of the legisla-

6. What Shall be Done with the Thing Distrained.—At common law a distress was simply in the nature of a pledge, and was impounded until it was redeemed by a payment of the rent in arrear, and could not be sold in satisfaction of the rent.¹ This has been remedied by several acts of Parliament 2 and by the statutes of the various States. The distrainor cannot use or work cattle distrained. unless it be for the owner's benefit.3

At common law the distrainor must have possessed a reversionary interest in the premises out of which the distress issued. unless he had expressly reserved a power to distrain when he parted with the reversion. But the English statute substantially abolished all distinctions between rents, and gave the remedy in all cases where rent is reserved upon a lease. The effect of this statute was to separate the right of distress from the reversion to which it had before been incident, and to place every species of rent as if the power of distress had been expressly reserved in each case.6 And this statute has been enacted in most of the United States.7

tures in the different States, there are provisions that goods to a certain amount are

exempt from distress.

Third.—Nor can such things as cannot be restored to the owner in the same be restored to the owner in the same plight as when they were taken, such as milk, fruit, and the like. So, anciently, sheaves and shocks of corn could not be distrained; this, however, has been remedied by the act of 2 W. & M. c. 5, 3 Bl. Com. 9; Wilson v. Ducket, 2 Mod. 61; Clark v. Gascarth, 8 Taunt. 431. This also in a great measure is regulated

by statutory provisions.

Fourth.—Things in the way of trade or for commercial purposes. Goods are also privileged in cases where the owner is either compelled from necessity to place his goods upon the land, or where he does so for commercial purposes, as the goods of a traveller at an inn. 3 Black, Com. 8; I W. Black. 483; 2 Keny. 439. Also the goods of a boarder. Riddle v. Welden, 5 Whart (Pa.) 9; Beall v. Beck, 3 Cr. C. C. 666. Unless used by the tenant with the boarder's consent and without that of the landlord. 1 Hill without that of the landlord. 1 Hill (N. Y.), 565. As goods on a wharf belonging to a stranger. Thompson v. Maskiter, 1 Bingh. 283. Or goods in possession of a factor. Gilman v. Elton, 3 Brod. & Bing. 75; Howe Machine Co. v. Sloan, 87 Penna. St. 438; Karris v. McKinny, 74 Penna. St. 387; Connah v. Hale, 23 Wend. (N. Y.) 462; Owen v. Boyle. 22 Me. 47; Stone v. Matthews, 7 Hill (N. Y.), 423. Goods on storage. Hill (N. Y.), 423. Goods on storage, Brown v. Sims, 17 S. & R. (Pa.) 138; Briggs v. Large, 30 Pa. St. 287. Goods sent to an auction store for sale. Himely

v. Wyatt, I Bay (So. Car.), 102; Brown v. Arundell, 10 C. B. 54; Williams v. Holmes, § Exch. 861. Even though the auctioneer has made advances upon the goods. Re Bailey, 2 Fed. Repr. 850. A horse in a smith's shop, goods with a carrier, corn sent to a mill or market, pledges, things delivered to persons exercising their trades, as cloth in a tailor's shop. 3 Black. Com. 8. But it was held that a carriage at a livery-stable might

that a carriage at a livery-stable might be distrained. Parsons v. Gingell, 4 C. B. 545; 11 Jur. 437; 16 L. J. C. P. 227. Fifth.—Fixtures, i.e., things attached to the freehold, as furnaces, windows, doors, and the like. Coke Litt. 47, b. An anvil fixed in a smith's shop. 5 Gilb. Dist, 13; Darby v. Harris, 1 Q. B. 895; Dalton v. Whitten, 3 Q. B. 961. Nor if detached from the freehold for a temporary purpose, as for repairs. Reynolds v. Shuler, 5 Cow. (N. Y.) 323. But it has been held in New York that trade fixtures when separated by the tenant permanently are liable to distress. Reynolds v. Shuler, 5 Cow. (N. Y.) 323.

Sixth.-Goods taken in execution cannot be distrained, Goods seized by sheriff under writ of replevin but left on the premises. Com. v. Lelar, I Phila. (Pa.) 173.

1. 3 Blackst. Com. 13.

2. 3 Blackst. Com. 14, note r.

3. As to milk a cow or the like. Dane Abr. 34.

4. 2 Cow. (N. Y.) 652; 16 Johns. (N. Y.)

159; 1 Term, 441; Coke Litt. 143, b.
5. 4 Geo. II. c 28.
6. 1 Bouv. Law Dict. (15th Ed.) 543.
7. Taylor L. & T. sec. 560.

7. Wrongful and Excessive Distress.—The whole rent due ought to be distrained for at once, and not a part at one time and a part at another. 1 But if the distress made for the whole turn out to be insufficient, either from the circumstance of not finding a sufficient distress upon the premises, or mistaking the value of the property seized, a second distress may be made to supply the deficiency. The distress must be made for the precise sum due, and the landlord cannot add interest to the arrears of rent,3 but all arrears of rent can be collected at the same time.4 Nor is the landlord bound to confine himself to the precise amount of rent due.5 If the distress be excessive, the remedy is by special action on the Statute of Marlbridge.6 And if made when no rent is in arrear the tenant may make rescue of the goods dis-So also if distress be made after tender; but tender must be made to the landlord, and of the whole amount with costs.8

Distress has become in a great measure unpopular in the United States, as giving a landlord undue advantage over other creditors in the collection of debts, and has been abolished or restricted and regulated by statutory provisions in the various States.9

1, 3 Blackst. Com., note f. But a fresh distress may be made on the same goods that have been replevied for subsequent arrears of rent. I Taunt. 218.

2. 3 Blackst. Com. 7, n. g.

3. Sparks v. Gargignes, I Binn. (Pa.)

4. Sherwood v. Phillips, 13 Wend. (N. Y.) 479; Lousing v. Rattoone, 6 Johns. (N. Y.) 43; Vechte v. Brownell, 8 Paige (N. Y.), 212.

5. A mere mistake in judgment as to the value of the property seized, or a want of knowledge of the sum due, will not render him a trespasser. Harms v. Solem, 79 Ill. 460. 6. Roberts' Digest, 170, 176; 3 Blackst.

7. 3 Blackst. Com. 12. And in Pennsylvania, under the act of 21st March, 1772, recover double the value of the goods distrained, and full costs; and under this act, if its directions be not complied with, the distrainer becomes a trespasser ab initio. Brisben v. Wilson. 60 Pa. St. 452.

8. Hunter v. Leconte, 6 Cow. (N. Y.) 728.

9. The common law and most of the statutory provisions of England regulating distress for rent have been adopted. Hartshorne v. Kiernan, 2 Halst. (N. J.) 29; Hoskins v. Paul. 4 Halst. (N. J.) 110; Charleston v. Price, I McCord '(S. Car.), 299, Terrel v. Lignon, Walker (Miss.), 170; Woglam v. Cowpetthwaite, 2 Dall (Pa.) 68 but now reconsted by Act Dall. (Pa.) 68, but now regulated by Act

21 March, 1772, 1 Sm. L. Pa.; Ridge v. Wilson, 1 Blatchf. (Ind.) 409; Garrett v. Hughlett, I Har. & J. (Md.) 3; Owens v. Conner, I Bibb (Ky.), 607; Biddle v. Biddle, 3 Har. (Md.) 539; Burkett v. Bonde, 3 Dana (Ky.), 209; Hale v. Burton, Dudl. (Ga.) 105; Mayo v. Winfree, 2 Leigh (Va.), 370.

In the New England States is superseded by the attachment on mesne process. 4 Dane Abr. 126; Potter v. Hall, 3 Pick. (Mass.) 368, 105. Was abolished in South Carolina, but has been restored by act of 8th June, 1877. Mobley v. Dent, 10 S. Car. 471; and see Jones v. Clarkson, 16 S. Car. 1. In Alabama and Tennessee there are no statutory provisions on the subject, except one in the former confining the remedy to the city of Mobile. Dumes v. McLoskey, 5 Ala. 239. And in Ohio a provision to secure the landlord's share of the crops from execution against the tenant. Griff. Law Reg. 404. In Mississippi and Wisconsin property cannot be taken in execution on the premises, provided a year's rent, if due, be first ises, provided a year's rent, if due, be first tendered the landlord, —Cornell v. Rulon, 4 Miss. 54; Peck v. Critchlow, 8 Miss. 243; Wisc. Laws 1866, p. 77;—who has a lien on the growing crops. Arbuckle v. Nelons, 50 Miss. 556. In Louisiana the landlord may follow furniture removed for fifteen days after; and when removed without his consent, seize it wherever found, if it continues the property of the lessee. Louis. Civil Code, arts. 2675, 2679, 3185. And his right un-

DISTRIBUTEE-DISTRIBUTION-DISTRICT.

DISTRIBUTEE.—A person entitled under a statute of distributions to the personal estate of one who has died intestate, or to a share thereof.¹

DISTRIBUTION.—(See also INTERSTATE LAWS; DESCENT.)—See note 2.

DISTRICT.—Territory; a prescribed piece of territory; 3

der this Code is superior to tenant's assignee in bankruptcy. Marshall v. Knox, 16 Wall. (U. S.) 551. In *Illinois* a landlord cannot distrain on an under tenant: and a tenant may defend if evicted from a part of the premises. Gray v. Rawson, II Ill. 527; Wade v. Halligan, 16 Ill. 507. He has a statutory lien on the entire crop for the rent of the year in which it was raised, and on the tenant's personal property; he may follow the former into the hands of a purchaser, or attaching creditor. Thompson v. Mead, 67 Ill. 395; Prettyman v. Unland, 77 Ili. 206; Mead v. Thompson, 78 Ill. 62; Hunter Whitfield, 89 Ill. 229; Wetsel v. Myers, or Ill. 496. As to the latter, the lien only accrues from levy. Morgan v. Campbell, 22 Wall. (U. S.) 381; Halden v. Knickerbocker, 70 Ill. 677. In Indiana all goods on the premises are liable, except such as are exempt by common law and by the statute which regulates the distress. Richardson v. Vice, 4 Blackf. (Ind.) 13; Stevens v. Lodge, 7 Blackf. (Ind.) 594. In Kentucky formerly allowed where rent payable in money or tobacco, now only where payable in the former, and if goods are sold and removed from the premises, are not liable, nor such as are under a bona fide mortgage. Snyder v. Hitt, 2 Dana (Ky.), 204; Hood v. Hanning, 4 Dana (Ky.), 21. In Maryland, until 1888, the provisions of act. 2 W. & M. c. 5, as modified by the act of 1834, c. 192, and this regulated the right of distress in that State. Under it the taking of a security for rent does not bar the right of distress, nor exempt such goods as are fraudulently removed. Dorsay v. Hays, 7 Har. & J. (Md.) 370; Giles v. Ebsworth, 10 Md. 333; Keller v. Webber, 27 Md. 660. But by the act of April, 1888, the law of distraint was abolished, and the law of ejectment enacted in its stead, so that all proceedings for the collection of rent in arrears are by virtue of its provision. In New Jersey the joint ownership of tenant's goods can be sold. A mortgagee may distrain for rent due the landlord, if mortgage be subsequent to lease and notice has been given tenant not to pay to the landlord. Sanders v. Vansickle, 8

N. J. 313; Allen v. Agnew, 24 N. J. Vroom, 417. In Pennsylvania, by the Acts of Assembly, the landlord's right to distrain continues after the termination of the term without limitation as to time. wherever the rent is in arrear and he retains the title. Moss' Appeal, 35 Pa. St. 162. In the District of Columbia, a lien on all the chattels of tenant on the premises is given, -Act Feb. 22, 1867,and this lien follows them into possession of any who has received them with notice. Fower v. Rapley, 15 Wall. (U.S.) And has been abolished in California, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Oregon, Utah, and Washington Territory, but is still retained as modified in Colorado, Delaware, Florida, Georgia, Texas, Virginia, and West Virginia.

1. Henry v. Henry, 9 Ired. (N. Car.) 278. The opinions in this case contain a discussion as to the propriety of the use of this word, which seems at present universal among professional men, although it has not obtained a footing in

the language.

2. "The term 'distribution,' as applied to a publication like a newspaper or a periodical, imports a delivery to persons who have bought or otherwise become entitled to the same." Accordingly, where one contracted to pay for an advertisement at a certain rate for every thousand copies of a publication delivered for distribution, the leaving of copies at random at various houses in the principal streets of the town is not a delivery for distribution within the terms of the contract. Dawley v. Aldsdorf, 13 N. Y. Weekly Dig. 92; s. c., 25 Hun (N. Y.), 226.

3. Comm. v. Dumbould, 97 Pa. St.

Within the meaning of acts for the collection of taxes, "district" means a part or portion of a State described for the purpose of assessment, and without reference to the civil or political divisions of the State, made for other purposes. Keely v. Sanders, 99 U. S. 441.

Election District, in a constitutional pro-

port.1 As a verb, the word means to fix the boundaries of a district.2

· DISTRICT OR PROSECUTING ATTORNEYS.—(See also ATTOR-NEY AND CLIENT: ATTORNEY-GENERAL.)

Definition, 713.
 Who are Eligible to Office, 713.

3. Disqualification, 714.
4. Appointment and Election, 714.

5. Duties of Office, 715.6. Power, 716.

- 7. To Comment on the Refusal of the Defendant to Testify, 717.

 8. Associate or Assistant Counsel,
- o. Compensation, 718.

1. Definition.—The district attorney is the officer who represents the State or National Government within a particular district or county.³ He is a *quasi* judicial officer, and stands indifferent as between the accused and any private interest.⁴

2. Who are Eligible to Office. In order to be eligible for the office of district or prosecuting attorney, the candidate must have a license to practise as an attorney, 5 and be a resident of the dis-

trict which he is to represent.6

vision defining the qualifications of electors, is "any part of a city or county where its boundaries are fixed by law, either by legislative enactments, or by the adjudication of a court or other auhorities to whom this power is delegated, where the citizens within the boundaries thus established assemble to vote for pubiic officers, whether their authority is ocal, or they are to act in governing the affairs of the State or nation." McDanel's Case, 2 Pa. L. J. Rep. 82.

"Election districts, within the meaning of our statutes, have denoted subdivisions of Pennsylvania territory, marked out by known boundaries, prear-

ranged and declared by public authority."
Chase v. Miller, 71 Pa. St. 420.

More Interior District.—Under an act prescribing a penalty upon any ship which, having arrived within the limits of the United States from any foreign port, shall depart without report or entry, unless to proceed on her way to some more interior district, by this phrase is intended "a district which, with reference to local and geographical position, and in common usage, is deemed interior to another, that is, further within the indentations or inlets of the contiguous or surrounding country than that in which the vessel has already arrived, and through which she would or might ordinarily pass, in order to reach such inner district." New York is not a more intesior district with reference to Barnstable, Massachusetts. U. S. v. Bearse, 4 Mas. (C. C) 192.

District of Alaska.—This phrase, as

used in an act authorizing the President of the United States to regulate the introduction of firearms, ammunition, and distilled spirits into that Territory, includes that portion of the sea along its coasts which lies inside of a line drawn from the promontory of Point Hope to the Cape Prince of Wales. The Louisa Simpson, 2 Sawy. (C. C.) 57. See McAllister v. U. S., 22 Ct, of Cl. 318.

1. In the revenue laws of the United States, "port" and "district" are often

used in the same sense. Ayer v. Thacher, Mas. (C. C.) 155. And see U. S. v. 3 Mas. (C. C.) 155. And Bearse, 4 Mas. (C. C.) 195.

2. By a vote of a town uniting two school districts therein, the town is "districted anew" within an act which requires that the assessors determine in what district land shall be taxed, and that it shall then be there taxed until the town is districted anew. Bacon v. School Dist. of Barnstable, 97 Mass. 421.

3. Bouv. L. Dict.; Abbott's L. Dict.
4. People v. Bemis, 51 Mich. 422.
5. Com. v. Adams, 3 Metc. (Ky.) 6; People v. May, 3 Mich. 598. Contra: People v. Dorsey, 32 Cal. 296; State v. Clough, 23 Minn, 17.

The office of district attorney and captain in the United States army have been held not to be necessarily incompatible. Bryan v. Cattell, 15 Iowa, 538.
6. People v. Annis (Colo.), 14 Pac.

Six months' residence previous to election is necessary in Minnesota in order to be eligible to this office. Parker v. Smith, 3 Minn. 240.

A prosecuting attorney usually has a right to hold his office during his good behavior and the continuance of such office. In some States, however, he holds office at the pleasure of the court. 2

3. Disqualification.—This is such an office as to which a disqualification under the Fourteenth Amendment of the Constitu-

tion of the United States would be applicable.3

4. Appointment and Election.—The statutes of the several States provide the method in which a person shall enter into the office of district attorney. It is either by appointment by the governor or by an election. The provisions on this subject are varied.⁴

1. Bruce v. Fox, I Dana (Ky.), 447;

Barkwell v. State, 4 Ind. 170.

Misfeasance in Office.—It is not enough to charge that the defendant while district attorney received a fee to dismiss certain prosecutions. It must allege that the fee was in excess of that allowed by law, or that he was entitled to none. Poole v. State (Tex.). 3 S. W. Rep. 476.

The provision in an act of the legislature of Kansas, prohibiting the manufacture and sale of intoxicating liquors, to the effect that "If any county attorney shall fail or refuse to faithfully perform any duty imposed upon him by this act, he shall be deemed guilty of a misdemeanor, and on conviction thereof in the district court shall be fined in any sum not exceeding five hundred dollars, and on such conviction shall be deemed to be removed from office," is not the exclusive remedy for the removal from office of a county attorney who neglects or refuses to perform the duty required of him by said act, or who corruptly performs any such duty. State v. Foster, 34 Kan. 14.

It is sufficiently charged by an allegation that in assuming to prosecute a party accused of an offence he had intentionally managed to have him acquitted, though he knew him to be guilty. Trigg

v. State, 49 Tex. 645.

2. Bouldin's Case, 6 Leigh (Va.), 639.
As to the effect of resignation, see

State v. Brown, 12 Ohio St. 614.
3. Matter of Tate, 63 N. Car. 308.

A prosecuting attorney is disqualified from prosecuting for obtaining money under false pretences where the complaining witness is his brother, and a firm to which he himself belongs is affected by the transaction. People v. Cline, 44 Mich. 290.

See, infra, ASSOCIATE COUNSEL.

4. See, infra, Associate Counsel. As to elections, see Moser v. Long, 64

Ind. 189.

In Elam v. State, 75 Ind. 518, it was held, under sections 7 and 8 of "An

Act concerning Criminal Courts," Acts 1881, p. 111, of *Indiana*, the Marion criminal circuit court became the criminal court of Marion county, organized under section I, and its prosecuting attorney, on September 19th, 1881, continued in office, and will continue to be the prosecuting attorney thereof, under section 3, article 15, of the constitution, until his successor shall have been elected and qualified. In such court the successor will be the prosecuting at-torney of the nineteenth judicial circuit, elected and qualified after the act took effect. T., who was elected and qualified as such prosecuting attorney before the enactment of the act approved April 12th, 1881, did not become the successor of E., who had been elected in 1878, and was holding, September 19th, 1881, beyond his term of two years, because of the failure of the electors of Marion county to elect or vote for his successor in October, 1880.

As to appointment generally, see Territory v. Aschenfelter (N. M.), 12 Pac. Rep. 879; Ex parte Lusk (Ala.), 2 So.

Rep. 140.

In State v. Peterson, 74 Ind. 174, the facts were these: Noble, De Kalb, and Steuben counties composed the thirtyfifth judicial circuit prior to March 21st, 1879, the judge and prosecutor, both residing in Noble. In 1878 the relator, a resident of Steuben, was elected prosecuting attorney of said circuit, for the two years commencing October 28th, 1879. By the act of March 21st, 1879, it was provided that, on and after its passage, Steuben and De Kalb should constitute the fortieth judicial circuit until October 1st, 1880, when they were again to become a part of the thirty-fifth circuit, and that the prosecutor-elect of the thirty-fifth circuit should be the rprosecutor of the fortieth, on and after his term commenced. Under said act, the relator was appointed prosecutor of the fortieth circuit, and served in that capac-

5. Duties of Office.—The duties of a prosecuting attorney are usually prescribed by statute. He has the exclusive right to prosecute criminal cases within the county. 1 to sign bills of indictment. 2

ity till October 28th, 1879, when he qualified under his election, and continued to serve and designate himself as prosecutor of the fortieth circuit till October 1st. 1880, and after that date so styled and signed himself, and received his compensation. At the October election. 1880, the defendant was elected prosecutor of the thirty-fifth circuit, but received no commission till February, 1881, when he qualified and entered upon the duties of his office. Held, that said act created a new circuit in which the office of prosecutor was vacant, which the governor had a right to fill. Also, that by force of said statute, the relator, on qualifying under his election, became the prosecutor of the fortieth circuit, so long as it lasted, and thereafter of the thirty-fifth circuit until October 28th, 1881, when the defendant's term will commence. And also, that the fact that the relator wrongly claimed to be, and designated himself as, the prosecutor of the fortieth circuit, after it ceased to exist, constituted no waiver of his title by election and statute to the office of prosecutor of the thirty-fifth circuit. And in State v. Borrow, 30 La. Ann., Pt. I. 657, it was held that, on the failure of the district attorney pro tempore to qualify within the proper time, there was a vacancy created, which the governor had power to fill.

In New York, district attorneys can only be legally appointed when the court of common pleas and the court of general sessions of the county for which the appointment is made are holden for the transaction of business; and the justices of the peace cannot participate in the appointment. People v. Albany Common Pleas, 19 Wend. (N.Y.)

Appointment of Deputy-solicitor. - Under the Alabama statute authorizing the appointment of a "competent attorney to act in the solicitor's place," when that officer is absent, or disqualified to act, the appointment must be made by the court while in session, and must be entered of record; and it can only be proved by the record. Joyner v. State, 78 Ala. 448. And it cannot extend beyond the absence or disqualification of the Ex parte regular district attorney. Driggs, 50 Ala. 78.

1. State v. Morrison, 64 Ind. 141.

It seems it is his duty to call important

witnesses, as on a trial for rape the physician who examined the person of the Donaldson v. Com., 95 Pa. St.

As to collect fines and costs for violations of the liquor law. State v. Village of St. Johnsbury (Vt.), 10 Atl. Rep. 531.

Where a statute provided that it shall be the duty of the district attorney and the assistant district attorney to conduct the prosecution of all criminal cases, it is not necessary that the former must be present when an information is prepared. signed, and filed by the latter. State v. Ryder, 36 La. Ann. 294. In Texas it has been held that it is not

the duty of the district attorney to bring suit on the bonds of a county treasurer, and even if allowed to prosecute such suits he is entitled to no compensation. Spencer v. Galveston Co., 56 Tex. 384. And in some States his duties are the same as those of the deputy-attorneygenerals, and under such circumstances he may file suggestions on which a quo warranto may issue. Gilroy v. Com., 105 Pa. St. 484.

If for the period of a year after a recognizance for the appearance of one indicted has been forfeited, the prosecuting attorney neglects to enforce the collection, the attorney-general has authority to do so, and after he has brought suit for that purpose, the prosecuting attorney has no right to interfere to embarrass or defeat the suit, nor will he be permitted to do so professionally after he goes out of office. Appearance by him to a motion to set aside the forfeiture is a nullity, and an order setting it aside without notice of the application to the attorney-general, is erroneous. State v. Schloss, 92 Ind. 293. And the judge of a district court has no right to refuse leave to the district attorney to file an information on the ground that in his opinion the statute under which the prosecution is instituted is unconstitutional. State v. Tenth District Judge, 33 La.

Ann. 1222.
2. Where the same prosecuting officer was designated in the constitution and statutes as "attorney for the State,"
"attorney-general," and district attorney," an indictment signed "district attorney" is good. The addition of an improper official title will not invalidate it. States v. Myers (Tenn.), 5 S. W.

Rep. 377.

and to prosecute or defend civil suits. Also, to appear in district courts in behalf of the State.2 And the duties of a district attorney pro tempore are the same.3

6. Power.—The district attorney is the only officer who has the power to prosecute suits.4 His authority is limited to the district for which he has been appointed or elected, and it termi-

nates at the expiration of his term of office.6

During the term of his office he can enter the grand jury-room and give the jurors instructions.7 And on his testimony before the grand jury an indictment may be found.8 Or he can send the case to the grand jury without a previous binding over, and consent to the trial of a criminal cause by a special judge. And if he thinks the cause of justice would not be advanced by a prosecution he may dismiss it. 11 That is, the district attorney has a general control of all the proceedings to which the county is a party. 12

1. Harrington v. Santa Clara Co., 44 Cal. 406: Hannah v. Wells, 4 Oregon,

2. Atchison, Topeka, etc., R. Co. v. People, 5 Colo. 60.

3. State v. Lakey, 35 Tex. 357.
4. United States v. Blaisdell, 3 Ben.

(C. C.) 132.

The want of authority, however, on raised for the first time in the supreme McLaughlin v. United States. 107 U. S. 526.

5. Thompson v. Carr, 13 Bush (Ky.), 215. He cannot constitutionally be required or empowered to perform official

duty within another district. 6. Munson v. Commrs, of Morris, 18

Kan. 240.

Therefore payment to him thereafter by a clerk of the court, with the knowledge of the expiration of his term of office, of money collected on a judgment in favor of the county is not payment to the county, notwithstanding such judgment was rendered in an action brought by him as county attorney during his term of office. Munson v. Commrs. of Mor. ris, 18 Kan. 240.
7. State v. McTanish, 12 S. Car. 89.
8. State v. Grady, 84 Mo. 220.

9. Com. v. English, 11 Phila. (Pa.) 439. 10. Early v. State, 9 Tex. App. 476, overruling Murray v. State, 34 Tex. 331.

11. Beecher v. Anderson, 45 Mich. 543. So he can dismiss a complaint of felony before the justice if he does not think it charges a sufficiently high degree of crime, or if it is defective. Ex parte Claunch, 71 Mo. 233.

Or he can stay proceedings or quash a writ of error in a criminal case. Carnal v. People, I Park Cr. (N. Y.) 262; People v. Strong, I Abb. Pr. N. S. (N. Y.) 244.

Prosecuting attorneys have no discretion allowed them to stop all criminal prosecutions instituted before justices of the peace; but a justice ought seldom to hold a respondent to bail, or convict him on trial, when the prosecuting attorney advises him in good faith that no crime is made out. A justice of the peace may properly take the advice of the prosecuting attorney before issuing a warrant, and refuse it even when the accuser can make a prima facie showing of a technical offence, if the prosecuting attorney thinks that the case would fail on full hearing, or that the criminal intent was so far wanting that the cause of justice would not be advanced by the prosecution. A prosecuting attorney can in no wise control the action of the sheriff when a writ has been placed for execution in the latter's hands; the sheriff may take his advice if doubtful as to his duty; but is not relieved from responsibility if he fails in his duty in following it. Beecher v. Anderson, 45 Mich. 543.

The district attorney of the United States possesses no absolute power to dismiss a criminal charge pending the examination of the accused before a commissioner, nor over a criminal charge pending before the grand jury. But after indictment found and before trial commenced he has the absolute power to enter a nolle prosequi; and aftertrial commenced he can dismiss the prosecution with the consent of the defendant. United States v. Schuman, 7 Sawy. (C. C.) 439.

12. As between the board of supervisors of a county and the district attorney on the one hand, and an attorney claiming to be special counsel for the county on the other, the former are superior in authority and have a right to control all proceedings in a case to which the county and he is authorized to follow and conduct the prosecution into

any other county or court.1

But he has no power to do anything to the prejudice of the State,² yet he can give a receipt which will discharge the party from all further claim.³ He cannot remit a portion of a term of imprisonment, although the jury fix the term, and they were erroneously instructed as to the term of imprisonment for committing a certain offence;⁴ nor by agreement extend the time allowed by law for the filing of a bill of exceptions.⁵

7. Comments on the Refusal of the Defendant to Testify.—The prosecuting attorney has no right to comment on the refusal of the defendant to testify in his own behalf. In some States this is provided for by statute. Consequently, if the district attorney uses such language as this: "If the defendant is the innocent man, these gentlemen would have you think, why did they not put him on the stand to testify," or similar language, and secures a conviction, the defendant is entitled to a new trial, though the judge instructs the jury that such comments are to be disregarded. In

is a party. An appeal taken by the county will therefore be dismissed on motion of the district attorney, made by direction of a resolution of the board over the objection of such special counsel. Allen v. County of San Bernardino (Cal.). 14 Pac. Rep. 18.

1. The prosecuting attorney in *Iowa* is authorized to follow and conduct a criminal prosecution commenced within his county into any other county or court to which the case may be taken by a change of venue or a writ of error. State v. Carothers, I Greene (Iowa), 464.

v. Carothers, I Greene (Iowa), 464.

In one case it has been held, however, that when a criminal case comes into the supreme court it passes from the control of the district attorney to that of the attorney-general. State v. Fleming, 13

Iowa, 443.

The United States district attorney cannot prosecute in cases arising under Territorial laws, but only when the courts are exercising jurisdiction as circuit and district courts of the United States, People v. Hood, I Idaho (N. S.)

- 2. As to agree to the entry of a judgment for a less sum than the amount stated by the comptroller in an account stated. State v. Allen, 32 Tex. 273.
 - People v. Christian, 59 Ill. 157.
 Allen v. Com., 2 Leigh (Va.), 727.
 Bartley v. State, 111 Ind. 358.
 The commissioners' court of a coun-

The commissioners' court of a county has the exclusive right to determine whether a suit shall be brought in the name and for the benefit of such county, except in a case where a concurrent or exclusive right is conferred on some other

officer or tribunal by the legislature, to exercise in some specified case a like dis-Art. 260, R. S. of Texas, which directs the district or county attorney to institute suit in certain contingencies against officers intrusted with the collection or safe keeping of public funds, confers on district and county attorneys no authority to institute suit against the wishes of the commissioners' court, to recover back money authorized by them to be paid out of county funds to an attorney retained by them to represent the county, or to enjoin further payments on such retainer. Looscan v. County of Harris, 58 Tex. 511.

6. Com. v. Scott, 123 Mass. 239; and cases cited in succeeding notes.

7. State v. Brownfield, 15 Mo. App.

8. Smith v. People, 8 Colo. 457; Long

v. State, 56 Ind. 182.

In a criminal action, where the prosecuting attorney, in making his argument to the jury, claims that the defendant is guilty because he failed to testify in the case and deny the facts alleged against him, and the defendant is afterward found guilty by the jury, held, that for such irregularity on the part of the prosecuting attorney, the defendant, on his motion, should be granted a new trial; and that a mere instruction from the court to the jury that the jury should not pay any attention to what was said by the prosecuting attorney with regard to the defendant's failure to testify is not sufficient to cure the error committed by the prosecuting attorney. State v. Balch, 31 Kan. 465.

order to raise such an objection it is generally necessary to make objection and save an exception in the trial court.1

It is not within the privilege of the district attorney to use lan-

guage calculated to humiliate and degrade the defendant.2

8. Associate or Assistant Counsel.—The court possesses the inherent discretionary power to appoint assistant or associate counsel.3 or to appoint a district attorney pro tempore, when for any reason the district attorney is unable or incompetent to prosecute,6 or where the case is of such importance as to make it proper to have such additional counsel.7 And the better view is that the county is bound for their services.8 But it is no objection that such associate counsel be paid by persons interested in securing a conviction.9 It has been held also, that the appointment of such special attorneys does not conflict with a constitutional provision requiring district attorneys to be elected. 10

9. Compensation.—The compensation of district attorneys is en-

Yet it was held in a Colorado case that if district attorney desists from comments immediately on objection being made, and the court warns the jury, there is no such prejudice worked against the defendant as to entitle him to a new trial. Petite v. People, 8 Colo, 518.

1. Bradshaw v. State, 17 Neb. 361; Bohanan v. State, 18 Neb. 57; Tucker v. Henneker, 41 N. H. 317; Gilooley v. State, 58 Ind. 182; McLain v. State, 18

Neb. 154.

2. State v. McCool, 34 Kan. 613. Or to impute to the defendant graver crimes than that for which he is tried. Smith v. People, 8 Colo. 95. Or to use insulting and degrading language. Coble v. People, 79 N. Car. 589; Hatch v. State, 8 Tex. App. 416. But he has the right to comment on the appearance of the defendant. Huber v. State, 57 Ind.

3. Dukes v. State, 11 Ind. 557. In this case it was held its action in appointing assistants would not be reviewed unless there was a clear abuse of discretion. State v. Harris, 12 Nev. 414; State v. Ocean Co., 47 N. J. L. 47.

Or the board of supervisors may employ assistant counsel with the sanction of the circuit court and the approval of the prosecuting attorney. People v. Bemis, 51 Mich. 422.

4. And such a district attorney pro

tem. has power to sign an information.

Shafer v. State, 18 Ind. 445.

5. As where an indictment was framed for conspiracy to violate the election laws by a district attorney who was elected at the election at which said conspiracies against the purity of the ballot were alleged to have been formed, it was

held proper, on the refusal of the district. attorney to sign the bills, to have them signed by private counsel, associated with the prosecuting attorney as a special district attorney. Commonwealth v. McHale et al., 97 Pa. St. 397.

6. State v. Gonzales, 26 Tex. 197.

As on account of bodily or mental ailments. Mitchell v. State, 22 Ga. 211. Or where the district attorney has acted for the defendant at a preliminary examination at which the defendant was discharged he cannot be permitted to appear for the State upon the trial of the same defendant indicted for the same crime. State v. Halstead (Iowa), 35 No. West. Rep. 457. Or where he has been of counsel for the defendant. State v. Sweeney (Mo.), 5 So. West. Rep. 614; State v. Vraux, 8 La. Ann. 514; Com. v. King, 8 Gray (Mass.), 501. But mere absence from the county does not make his office vacant. Kouns v. Draper; 43 Mo.

7. People v. Blackwell, 27 Cal. 65;

Ulrich v. People, 39 Mich. 245.

The defendant cannot object to such employment. Chambers v. State, 3 Humph. (Tenn.) 237. And it is not necessary that they be sworn or give bond in Ohio. Martin v. State, 16 Ohio St. 364.

8. Tull v. State, 99 Ind. 238. That the district court cannot so bind the county when the district attorney is present. Seaton v. Polk Co., 59 Iowa,

9. State v. Wilson, 24 Kan. 189; Polin v. State, 14 Neb. 540. See, infra, Com-PENSATION.

10. Keithler v. State, 18 Miss. 192; In re Snell, 58 Vt. 207.

tirely under the control of the legislature. It is paid from the county treasury.2 And in order to be entitled to any compensation or to fees, they must actually appear and act.³ In criminal cases a conviction is usually necessary to entitle them to their fees: 4 and in civil cases, where the compensation is a per centum of the amount of the claim, it is only a per centum on the amount actually recovered and paid over to the officers of the county, or

1. Ellis v. Jackson, 38 Iowa, 175.

2. Cropsey v. Henderson, 63 Ind. 268. The solicitor of the criminal court of New Hanover county has no claim upon the State for such compensation as is allowed the district solicitors under Bat. Rev. (N. Car.) ch. 105, § 13. The act establishing said court puts the burden of sustaining the same upon the county. Moore v. Roberts, 87 N. Car. 11.

In Texas, where the law does not fix the amount of commissions on money collected by the district attorney, he cannot deduct anything before paying the money into the treasury. State v. Moore,

57 Tex. 307.

3. Fonte v. New Orleans, 20 La. Ann. 22; State v. Jackson, 68 Ind. 58.

4. Patton v. State, 41 Ark. 486. And an attorney is not entitled to any fee for his services where, on an indictment for murder, the accused is acquit-

ted. State v. Thompson, 39 Mo. 427.

Nor can he claim- fees if after conviction the judgment be reversed and a nol. pros. entered, Keys v. State, 7 Lea (Tenn.), 408.

Nor on a judgment merely overruling the demurrer to an indictment. Patton

v. State, 41 Ark. 486.

The laws of Iowa do not allow a district aftorney to charge a fee for a conviction in addition to the fee allowed for a jury trial. Ellis v. Jackson Co., 38 Iowa, 175.

Where two are convicted under one indictment, and there is but one finding and one judgment, the circuit attorney is entitled to but one fee. In re Murphy, 22

Mo. App. 476.

And where, in a misdemeanor case, the district attorney agreed to a verdict of not guilty upon condition that defendant should pay costs, it was held that the district-attorney-general was not entitled to the fee prescribed by law in cases of conviction, although that disposition of the cause appeared proper. State v. Bachman, 6 Lea (Tenn.), 649.

A receiver of stolen goods not being an accessory after the fact in the present condition of our law, the solicitor is not entitled under the act of 1873-4, ch. 170, to a fee of ten dollars upon his conviction. Where, upon application of the defendant to retax the costs, the solicitor's fee is reduced from ten dollars to four, the solicitor has no right to appeal. the State having no interest in the result. State v. Tyler et al., 85 N. Car. 569.

State's attorneys are informing officers within the meaning of the Connecticut law concerning costs in a criminal prosecution. Fowler v. Bishop, I Root (Conn.),

5. The Pacific, Deady (U. S.), 192; Barrels of Whiskey, 2 Bond (U. S.), 7.

The right to commissions does not accrue until the rendition of the judgment. Com. v. Spraggins, 18 B. Mon

(Ky.) 512.

The per centum is to be assessed as costs. People v. Hagar, 52 Cal. 190.

A special statute of Alabama relating to Mobile county provided "that the moneys arising from fines and forfeitures shall be subject to a charge of five per cent on the amount that shall be collected in favor of the solicitor of the circuit. in consideration of the number of cases in which costs remain uncollected, and in consideration of his services in collecting and paying the same to the county treasurer." Held, the solicitor can only claim compensation on the amount of fines and forfeitures collected and paid into the county treasury by him. The State ex rel. Thompkins v. Stone, 72 Ala. 185.

It is not necessary, however, that the money should actually pass through his hands. Smith v. Lynn Co., 55 Iowa,

And where claims are filed, but before further proceedings Congress remits the forfeiture on payment of cost and charges, etc., the district-attorney is entitled to his fee. The Francis, I Gall. (U. S.) 453; Beckwith v. United States, 16 C. of Cl. 250.

Under section 825, United States Revised Statutes, there shall be taxed and paid to the district-attorney two per centum on all moneys collected or realized in any suit, arising under the revenue laws, conducted by him, and in which the United States is a party.

Accordingly it was held that the dis-

the State, where the district attorneys are authorized to perform the duties of deputy-attorney-general. When part of the services are rendered in the time of one district attorney and part in the time of his successor, there must be an apportionment of the fees.2

They can only recover compensation for the prosecution of such suits as the law requires them to prosecute.³ If, however, the district attorney at the direction of the proper authorities performs services not strictly within the line of his duty, it is proper that he should receive additional compensation: 4 and when the compensa-

trict-attorney was entitled to two per centum on money recovered in a suit against a surety upon a collector's bond for the faithful performance of his duties.

And it seems that where the attorney defends a suit against an agent of the treasury, at the direction of the secretary, and the judge of the court certifies his compensation therefor, the award cannot be re-examined in the court of claims when the only ground of Secretary of the Treasury objecting to its payment is that the appropriation for

Percentage on Forfeited Recognizance.

—In State v. Barron, 74 Ind. 374, it was held a prosecuting attorney is entitled to, and should be allowed, the same docket fee upon the forfeiture of money deposited as bail as upon a forfeited recognizance, such fee to be paid out of such forseited money; but he is not entitled to a percentage thereon unless he has prosecuted to final judgment a suit for the recovery of the forfeited money, and then only to a percentage on the amount collected. See also Ex parte Ford, 74 Ind. 415; Bryant v. Com., 3 Bush (Ky.), 9.

1. Cases cited supra; Gilroy v. Com.,

105 Pa. St. 484.

In some States the State's attorney is given a lien for his fees on money recovered on judgments for fines and forfeitures. People v. Nedrow (Ill.), 13 N. E. Rep. 533.

2. In Arkansas the auditor is authorized to deduct any amount that has been made to a prosecuting attorney pro tem. for the same district. White v. Berry, 28 Ark. 198.

The district attorney is not entitled to any part of a fine in a case where the conviction was after the attorney was out of office from any cause, although the prosecution was instituted by him.

Ashlock v. Com., 7 B. Mon. (Ky.) 44.

3. Spencer v. Galveston County, 56 (Tex.) 384. The fact that a district attorney for the district composed of the counties of Galveston and Harris was recog-

nized by the district court as having a right to prosecute a suit for Galveston county cannot estop the county, in a subsequent suit brought by him to recover commissions claimed in the former suit, from denying his authority to represent it, there being no such issue between the parties to the former suit. Before the adoption of the Revised Statutes. while county attorneys were required to perform certain duties which might be performed by district attorneys, there was no law expressly requiring district attorneys to perform the duties imposed upon county attorneys. Under the act of August 21, 1876, and the laws in force prior thereto, it was not the duty of a district attorney to institute suit upon a defaulting county treasurer's bond. district attorney who prosecutes a civil suit for a county when not required so to do by law can recover no compensation for his services in the absence of a con-

tract with the county.

4. As where the board of supervisors of a county employed the then district attorney for a special compensation to attend the interests of the county in a suit to be tried in another county after the expiration of his term of office, the contract if made in good faith is good and it is not a contract which increases the compensation allowed by law to the legal adviser of the county, and therefore void. Jones v. Morgan, 67 Cal. 308. Or the United States district attorney examines the revenue reports, although no actions are instituted. In re District Attorney, 23 Fed. Rep. 26. But see Huffman v. Board of Commissioners, 25 Kan. 64, where it was held that while a county attorney may recover additional compensation for attending any court, or doing any business, civil or criminal, that requires his personal attendance, outside of his own county, he cannot be allowed additional compensation for any advice he may give, or any consultation had with the officials of his county or other persons, in discovering and preparing evidence within his county in the prosecu-

DISTURBANCE—DISTURBING MEETINGS

tion is within the discretion of the court its certificate is conclusive 1

DISTURBANCE.2—A wrong done to an incorporeal hereditament by hindering or disquieting the owner in the enjoyment of it.3

DISTURBING MEETINGS .-- (See also CAMP-MEETING.)-Any disturbance of a lawful assembly of people for religious, political, or other purposes is indictable at common law.4 The offence is now regulated by statutes, but these statutes do not abrogate the offence under the common law.5

tion of a criminal action taken from his own to an adjoining county upon a

change of venue.

1. Waters v. United States, 21 Ct. of C. 30. The United States Revised Statutes (§ 824) provide that when an indictment is tried and a conviction had, the district attorney may be allowed a counsel fee in proportion to the importance and difficulty of the case, not exceeding \$30, involve an exercise of discretion by the court before which the cause is tried. And such compensation cannot be reduced by the attorney-general or the ac-United States v. Incounting officers. gersoll, Crabbe (U. S.), 135. The judge is to certify what is to be allowed. People v. Supervisors of Fulton, 14 Barb. (N. Y.) 52, it was held that the board of supervisors had a discretion as to the amount they would allow a district attorney, although his fee had been certified

by a justice of the supreme court.

Compensation of Associate Counsel.—

Where the court of common pleas has power to appoint assistant counsel to the prosecuting attorney, and it approves his bill for services, the county commissioners are bound to act in the matter, and allow such sum as seemed to them just

and proper.

The presiding judge's certificate is conclusive as to the necessity of employing associate counsel with the district attorney, and of the sum to be paid such an associate. State ex rel. Lindabury v. Freeholders of Ocean County, 47 N. J.

L. 417.

2. In construing an act which provides that "no person should do any work, business, or labor of his secular calling, to the disturbance of others, works of necessity and mercy excepted, on the first day of the week," it was held "that the only safe meaning that can be given to the word 'disturbance' in this connection is a comprehensive one, going upon the ground that the main purpose of this statute was to relieve an individual from the penalty who had been guilty of no

act that actually did or that tended to disturb and distract the minds of others from those religious observances which the law unquestionably intended to rerespect; that such being the object of the statute, nothing should be tolerated that tends to defeat it." Accordingly, "a Accordingly, valid contract cannot be made on Sunday if it relates to the business of one's secular calling, and is not an act of necessity or mercy, because two or more must necessarily be engaged in making such contract; and however willing and desirous they both and all might be to consummate it on that day, yet in doing it they would each necessarily disturb the other or others in the sense in which that term has been held to be used in our statute." Smith v. Foster, 41 N. H. 215; Varney v. French, 19 N. H. 233; George v. George, 47 N. H. 27.

The charge of committing a "disturbance of divers citizens" by noises in the public street does not set forth any criminal offence. If it is an offence, it is nuisance, and should be charged as such. Com. v. Smith, 6 Cush. (Mass.) 80.

3. Bouv. Law Dict., 3 Bl. Com. 235; Downing v. Baldwin, 1 S. & R. (Pa.) 298.

4. I Hawk. P. C. c. 28, § 23; I Keb. 491; Com. v. Hoxey, 16 Mass, 385; Campbell v. Com., 59 Pa. St. 266; Bell v. Graham, I N. & McC. (S. Car.) 278; State v. Jasper, 4 Dev. L. (N. Car.) 323; U. S. v. Aubrey, I Cranch C. C. 185;
U. S. v. Brooks, 4 Cranch C. C. 427.
5. People v. Crowley, 23 Hun (N. Y.),
412; 2 Bish. Cr. L. (7th Ed.) § 301.
A statute to "prevent disturbances of

schools and public meetings," and providing for the punishment of "every person who shall wilfully interrupt or disturb any school or other assembly of people, met for a lawful purpose," includes meetings assembled for the discussion of the subject of temperance, and also, it seems, political gatherings, meetings for amusement, and all public meetings held for lawful purposes. Com. v. Porter, I Gray (Mass.), 476.

Regulated by Statute, DISTURBING MEETINGS, Actions and Defences

A Sunday-school is a religious assembly. Martin v. State. 6 Baxt. (Tenn.) So is a church trial, held after the 244. religious services were over. Hollingsworth v. State, 5 Sneed (Tenn.), 518,

A church business meeting, opened with prayer, is not a religious assembly. Wood v. State, 11 Tex. App. 318. Nor is a Christmas festival. Layne v. State, 4 Lea (Tenn.), 199.

Disturbing a meeting of school directors is indictable at common law. Campbell

v. Com., 50 Pa. St. 266.

Disturbing a singing-school is indictable under a statute providing a penalty for molesting or disturbing public meetings. State v. Oskins, 28 Ind. 364. See State v. Leighton, 35 Me. 195. State v. Goger, 28 Conn. 232. Compare

A meeting of persons assembled for the purpose of singing together, for the common improvement, but without a teacher, is not a school within the Connecticut statute. State v. Goger, 28

Conn. 232.

Celebrating a Rite.-Held, that the collecting an offertory is not, according to the rubric, the celebration of a rite; and persons being churchwardens, who attempted to make such a collection, were not guilty of unlawfully molesting the clergyman. Cope v. Barber, L. R. 7 C. P. 393.

Actions and Defences. - The indictment must so describe the place as to identify the offence. State v. Kindrick, 21 Mo. App. 507. Com, Harr. (Del.) 490. Compare State v. Smith, 5

No indictment lies under the statute where the religious meeting is held at a street corner in open air, the place not having been set forth for such purposes. State v. Schieneman, 64 Mo. 386.

A prosecution for disturbing a congregation assembled for religious worship will not be sustained by proof that the congregation, though disturbed, was assembled exclusively for business purposes, even though the proceedings were Wood opened with religious exercises. v. State, 11 Tex. App. 318.

An affidavit in a prosecution for disturbing a religious meeting, under the Indiana statute, must allege, and it must be proved upon the trial, that the meeting disturbed was a collection of inhabitants of the State. Cooper v. State, 75

Ind. 62.

Upon the trial of defendant for wilfully disturbing an assemblage of persons met for religious worship, it is not error to charge that if the defendant voluntarily entered into a fight at the church door, and thereby disturbed a worshipping assemblage in the church, he would be Wright v. State, 8 Lea (Tenn) guilty.

565.
The indictment must set forth the v. State, 16 Tex. App. 159. Nor the State v. Hinson, 31 words spoken.

Ark. 638.

Over objection of the defendant, the State was permitted to ask a witness if the manner in which the defendant called the witness a d-d liar was calculated to disturb the congregation. The witness answered that it was; to which answer the defendant also objected. Held, that both objections were well taken, inasmuch as, under the facts in this case, the evidence may have had material weight in influencing the jury to convict. Calvert v. State, 14 Tex. App. 154.

Under a statute prohibiting unusual traffic within two miles of a religious assembly, the complaint need not allege that the traffic disturbed the worship.

State v. Cate, 58 N. H. 240,

A Sunday-school Christmas festival is not "an assembly of persons met for religious worship. Layne v. State. 4

Lea (Tenn.), 199.

Under a statute prohibiting the exposure for sale of provisions, etc., near a place of religious worship, an indictment need not specify the "provisions and other articles of traffic," nor allege that the act was done to the disturbance of the assembly. Riggs v. State, 7 Lea See Rogers v. Brown, 20 (Tenn.), 475. J. L. 119.

It is not essential that the congregation should be actually engaged in acts of religious worship. State v. Ramsay, 78 N. Car. 448; State v. Lusk, 68 Ind. 264; Dawson v. State, 7 Tex. App. 59; Lancaster v. State, 53 Ala. 398; Com. v. Jennings. 3 Gratt. (Va.) 624. Compare State v. Edwards, 32 Mo. 548; Williams v. State, 3 Sneed (Tenn.), 313.

Proof of acts of disturbance committed on another day from that complained of is not admissible in support of the charge laid in the indictment. Brown v. State,

46 Ala. 175.

A statute enacting "if any person shall disturb any religious society, or any member thereof, when met or meeting together for public worship," shall be fined, etc., is void for uncertainty, so far as it attempts to create and define a crime or misdemeanor. Marvin v. State, 10 Ind. 181.

A complaint charging a wilful disturbance of "a school, met and assembled for culture and improvement in sacred and church music," held fatally defective,

What Constitutes. - What constitutes an interruption and disturbance depends somewhat on the nature and character of each particular kind of meeting and the purposes for which it is held, and much also on the usage and practice governing such meetings. It is a question of fact in each particular case. It must be wilful and designed, an act not done through accident or mistake.1

The disturbance of any member of a congregation assembled for

religious worship is a disturbance of the congregation.²

DITCH.—(See also Drain and Sewers.)—See note 3.

in not alleging that the school was in State v. Gager, 28 Conn. 232.

An indictment under section 1988, R. S. 1881, charging in proper terms a disturbance of "a meeting of inhabitants of S. county, and State of Indiana, met together for a lawful purpose," is sufficient. without stating more specifically the purpose of the meeting. Howard v. State, 87 Ind. 68.

1. Com. v. Porter, I Gray (Mass.), 476. See Brown v. State, 46 Ala. 175; Wood v. State, 16 Tex. App. 574; Dorn v. State, 4 Tex. App. 67; Richardson v. State, 5 Tex. App. 470. Instances of Disturbance.—Cracking

and eating nuts in church during service. Hunt v. State, 3 Tex. App. 116.

Groaning aloud and giggling during a rayer. Friedlander v. State, 7 Tex.

App. 204.

Using opprobrious language toward fellow-members of the congregation, while making a statement after a prayermeeting, but before the congregation had dispersed. Lancaster v. State, 53 Ala. 398; s. c., 25 Am. Rep. 625.

Attempting to reply to an address of Wali v. Lee, 34 N. Y. the minister. Or persisting in addressing the congregation when requested to desist. State v. Ramsay, 78 N. Car. 448.

Or speaking in a violent manner, although leave to speak has been given. Lancaster v. State, 53 Ala. 398.

Fighting at the church door. Wright

v. State, 8 Lea (Tenn.), 565.

Disturbing the quiet of a camp-meeting after the people have retired to rest. Com. v. Jennings, 3 Gratt. (Va.) 624. Compare State v. Edwards, 32 Mo. 550.

Fighting, cursing, and swearing after the congregation are dismissed, and are on their way home. Dawson v. State, 7 Tex. App. 59. See State v. Lusk, 68 lex. App. 59. See State v. Lusk, 68 an averment in a declaration in an action lind. 264; State v. Yeaton, 53 Me. 125; against a town for damages occasioned by a defect in the highway, that there was therein "a ditch or uncovered drain runson, 82 N. Car. 576, Lancaster v. State, 53 Ala. 398; Kinney v. State, I Ala. Sel. proof of a water-bar six inches high Cas. 104. Compare State v. Edwards, 32 across the highway with a deep rut be-

Mo. 548; Williams v. State, 3 Sneed

(Tenn.), 313.

Using profane language, although addressed to a single member, and heard only by him. Cockrehan v. State, 7 Humph. (Tenn.) 11; State v. Wright, 41 Ark. 410; s. c., 48 Am. Rep. 43. See State v. Horn, 19 Ark. 578.

The offence is complete when the in-

dulgence of improper conduct concurs with attracting the attention of any part of the assembly; it is immaterial that witnesses were not "disturbed." Holt

v. State, 57 Tenn. 192.

Where a father entered a church and removed his minor child by force and violence, held a disturbance. Com. v. Sigman, 2 Pa. L. J. Rep. 36.

The disturbance may be outside of the assembly. Holt v. State, 57 Tenn. 192.
What Is Not.—Discordant singing, if

the singer does not intend to disturb the congregation. State v. Linkhan, 69 N. Car. 214. See Owen v. Henman, 1, W. & S. (Pa.) 548.

Mere mischievous or heedless conduct is not wilful. Brown v. State, 46 Ala. 175. See McLain v. Matlock, 7 Ind. 525; Harrison v. State, 37 Ala. 154; State v. Linkhaw, 69 N. Car. 214

Interruption of a meeting held in the street by the traffic. State v. Shieneman,

64 Mo. 386.

Leaving church during service. People v. Browne, I Wheel. C. C. (N. Y.) 124. 2. State v. Wright, 41 Ark. 410; s. c.,

48 Am. Rep. 43; Cockrehan v. State, 7 Humph. (Tenn.) II. Compare State v.

Bryson, 82 N. Car. 576.

3. "The words 'ditch' and 'drain 'have no technical or exact meaning. They both may mean a hollow space in the ground, natural or artificial, where water is collected or passes off." Accordingly, an averment in a declaration in an action

DIVERT .-- See note 1.

DIVERTISSEMENT.—See BALLET.

DIVIDE—DIVISION.—(See also COTENANCY: JOINT ESTATES.) The latter word is sometimes used as synony--See note 2. mous with "schism."

vond it. Goldthwait v. Inhabs. of East

Bridgewater, 5 Gray (Mass.), 61.
In Wetmore v. Fiske (R. I.), 2 New Eng. Rep. 626, where complainant brought a bill to enjoin respondent from stopping water flowing into respondent's drain, respondent under the statute set up an answer by way of cross-bill that plaintiff was wrongfully disposing of sewage through the drain, and prayed that he might be restrained from so doing. Complainant filed replication to the answer and answer to the crossbill; the respondent filed his replication to the answer to the cross-bill, and the cause was set for hearing. Complainant filed a discontinuance, claiming under it that the cross-bill must also be dismissed as a mere dependency upon the original bill. The court said: "This does not necessarily follow. 'Whether the dismissal of the original bill carries with it the cross-bill depends on the character of the latter. If the cross-bill sets up matters purely defensive to the original bill and prays for no affirmative relief, the dismissal of the latter necessarily disposes of the former. But where the cross-bill sets up, as it may, additional facts not alleged in the original bill relating to the subject-matter, and prays for affirmative relief against the plaintiff, in the original bill in the case thus made, the dismissal of the original bill does not dispose of the cross-bill, but it remains for disposition in the same manner as if it had been filed as an original bill.' Lowenstein v. Glidewell, 5 Dill. (U. S. C. C.) 239; Devees v. Devees, 55 Miss. 315; Jones v. Thacker, 61 Ga. 329; Worrell v. Wade's Heirs, 17 Iowa, 96; Ragland v. Broadnax, 29 Gratt. (Va.) 419; and W. Va. Oil Co. v. Vinal, 14 W. Va. 637, where this subject was elaborately dis-

"In Atlanta Mills v. Mason, 120 Mass. 244, a bill was filed by the owner of a mill against a lower owner on the same stream, to restrain him from maintaining his dam at a greater height than he was entitled to. The defendant filed a cross-bill alleging grievances in the use of the stream by the plaintiff, and the court held that, as it related to the same subject-matter, the respective rights in the use of the stream, it could be maintained, upon the principle that a plaintiff seeking equity should be prepared to do equity. We think that Fiske is entitled to proceed with his cross-bill notwithstanding the discontinuance of the original bill." The court further held that the cross-bill pertained only to the subiect-matter of the original bill, viz., the use of the drain, and the matter of the cross-bill was therefore not new or dis-

1. The diversion of a stream from a man's land differs from an interruption. and denotes the turning of the stream. or a part of it, as such, from its accustomed direction—its natural course—so that the water thus diverted never reaches the land, and cannot be used by its owner, as it might have been, were it not for such diversion. Parker v. Griswold, 17 Conn. 299. And see Griffith v. Marson, 6 Price, t.

2. Where a testator directed his property to be "lawfully divided" between his wife and two youngest children, after providing for other children, he was held to intend that his property should go to his wife and two youngest children, as if he had died intestate without other heirs, and not that there should be an equal division. Miller v. Miller, 1 Duv. (Ky.) 8.

Where a testator gave his real estate and the residue of his personal estate to trustees to sell and convert and pay his debts, and subject thereto, and to an annuity, to divide the same into six equal parts among certain nephews and nieces, the shares of the nephews to be paid as soon after his death as practicable; and directed that in case either of his nephews should die before him, or before the "division of his estate as before directed," then his share should go over; and similar provision was made in the case of the nieces. It was held that the "division" of the testator's estate meant the expiration of twelve months from his death, that being the period allowed by law for the division of a decedent's personal estate. In re Collison, 12 Ch. Div. 834.

DIVIDENDS.—(See also CORPORATIONS: STOCK: STOCKHOLD-ERS.)

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- 1. **Definition.**—A dividend is money paid out of profits by a corporation to its shareholders. It includes in its technical sense as well as in its ordinary and common acceptation all distributions to corporators of the profits of the corporation, whether such distributions are large or small, or whether made on long or short intervals, and without any regard to the manner or place of their declaration, or mode of payment.2
- 2. Duties of Directors in Declaring Dividends.—The directors of the corporation, and they alone, have the power to declare a dividend of the earnings of a corporation, and to determine its amount;3

1. Taft Trustees, etc., v. Hartford, etc., R. Co., 8 R. I. 33.

2. Clarkson v. Clarkson, 18 Barb. (N.

Y.) 657. A dividend to the stockholders of a corporation, when spoken of in reference to an existing organization engaged in the transaction of business, and not one being closed up and dissolved, is always, so far as we are aware, understood as a fund which the corporation sets apart from its profits to be divided Lockhart v. Van among its members. Alstyne, 31 Mich. 76.

A dividend, both in common and legal parlance, is a portion of the principal or profits divided among several owners of a thing. Penn. v. Erie, etc., R. Co., 10

Phil. (Pa.) 466; Bouv. Law Dict.
The word "dividend" ex vi termini imports a distribution of the funds of a corporation among its members, pursuant to a vote of the directors or managers. Williston v. Michigan, etc., R. Co., 13 Allen (Mass.), 404.

It is a sum of money distributed pro rata among the stockholders, without reference to the source from which it is

taken or paid. Osgood v. Laytin, 3 Keyes (N. Y.), 523. The term "dividend," when applied to something to be paid by corporations not insolvent,—Scott v. Eagle Ins. Co., 7 Paige (N. Y.), 198; Karnes v. Rochester, etc., R. Co., 4 Abb. Pr. N. S. (N. Y.) 107,-or in contemplation of dissolution, means a sum which the corporation sets apart from its profits to be divided among its members. Lockhart v. Van Alstyne, 31 Mich. 76; Boone on Corp. § 125. See also Gordon's Executors v. Richmond, etc., R. Co., 78 Va. 501.

8. The directors are the agents of the corporation, and in their official capacity agents of the stockholders also. alone have the power to declare a divi-dend of the earnings of the corporation. Until it is so declared the stockholder has no certain and fixed individual right. They may not only declare the amount of dividends, but also the time of their payment. No one will deny their right to fix the time of payment at a future day, so that it be reasonable and in good faith; and they have the like power to appoint a place of payment, so that it

and in the absence of a fraudulent design the directors in their resolution declaring a dividend may impose the terms of the payment as to the time and place, and each stockholder who would claim his share must claim and take it sub modo.1 But they have no power to discriminate in the apportionment of the dividend unless expressly invested with power so to do,2 and they must make the dividend equal and just among all who are interested.3 and it must in general be on all the stock.4 The directors cannot delegate the power of declaring dividends.⁵ They cannot wilfully withhold profits earned by the company, or apply them to any use which is not authorized by the company's charter. And generally, when the company has earned a dividend, the directors may elect to retain the moneys so earned for proper corporate pur-

be within a reasonable, convenient distance from their place of business, or from that of the stockholders. Should the place of payment be so remote as to prejudice the stockholders, it may suggest some fraudulent design; but in the absence of any such design, the directors, in their resolution declaring a dividend, may impose the terms of the payment as to the time and place, and each stockholder who would claim his share of the dividend must claim and take sub modo. In these respects the directors act for him as a corporator and as his agent, and their acts become his; and as such corporator he is bound by what they do in declaring the amount of dividend, and the time and place of payment. King v. Paterson, etc., R. Co., 29 N. J. Law. 88; Union Pacific R. Co. v. U. S., 99 U. S.

When a corporation has a surplus, whether a dividend shall be made, and if made how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors, uncontrollable by the courts. Williams v. Western Union Tel. Co., 93 N. Y. 162. See also Brown v. Monmouthshire, etc., R. Co., 4 Eng. L. & Eq. 118; Rex v. Bank of England, 2 Barn. & Ald. 620; Jackson's Adm. v. Newark Plank-road Co., 31 N. J. Law, 277; Belfast, etc., R. Co. v. City of Belfast, 77 Me. 445; New York, etc., R. Co. v. Nickals, 119 U. S.

1. It is ordinarily a matter of internal management, to be determined by the company or the directors, when to declare a dividend, and the amount. Chaffee v. Rutland, etc., R. Co., 55 Vt. 110; s. c., 16 Am. & Eng. R. R. Cas. 408; Barry v. Merchant's Exch. Co., 1 Sandf. Ch. (N.Y.) 280; Howell v. Chicago, etc., R. Co., 51 Barb. (N. Y.) 378; Pratt v. Pratt. 33 Conn. 446; Smith v. Prattville Manf.

Co., 29 Ala. 503. See also New Yo etc., R. Co. v. Nickals, 119 U. S. 296. See also New York,

And equity would not interfere with a dividend unless it appeared that somebody in particular was hurt or liable to be injured. Stevens v. South Devon R. Co.. g Hare, 313; Karnes v. Rochester, etc., R. Co., 4 Abb. Pr. N. S. (N. Y.) 107; Thorn v. Hudson R. R. Co., 12 Barb. (N. V.) 156; Jackson's Adm. v. Newark Plank-road Co., 31 N. J. Law, 277; Park v. Grant Locomotive Works, 40 N. J. v. Grant Locomotive Works, 40 N. J. Eq. 114; s. c., 10 Am, & Eng. Corp. Cas. 231; Chaffee v. Rutland, etc., R. Co., 55 Vt. 110; s. c., 16 Am. & Eng. R. R. Cas. 408.

2. Jones v. Terre Haute & R. R., 57 N. Y. 196; Phelps v. Farmers', etc., Pacels of Corp. 25 Challend She

57 N. Y. 196; Phelps v. Farmers', etc., Bank, 26 Conn. 269; Stoddard v. Shetucket Foundry Co., 34 Conn. 542; Goodwin v. Hardy. 57 Me. 143; March v. Eastern, etc., R. Co., 43 N. H. 515.

3. Jones v. Terre Haute & R. R., 57 N. Y. 196; State v. Balt., etc., R., 6 Gill (Md.), 363; Howell v. Chicago, etc., R. Co., 51 Barb. (N. Y.) 378; Kent v. Quicksilver Mining Co., 78 N. Y. 159; Reese v. Bank, etc., 31 Pa.St. 78; Hale v. Republican River Bridge Co., 8 Kan. 466; Hoole v. Great West., R. Co., L. R. 3 Hoole v. Great West., R. Co., L. R. 3 Ch. Div. 262.

4. Ryder v. Alton & R. R., 13 Ill. 516; Atlantic, etc., Tel. Co. v. Common-wealth, 3 Brewst. (Pa.) 366; Boone on Corp. § 125.

5. Gratz v. Redd, 4 B. Monr. (Ky.) 186. Morawetz on Corp. (2d Ed.) § 536.

6. Beers v. Bridgeport Spring Co., 42 Conn. 17; Pratt v. Pratt, 33 Conn. 446; Scott v. Eagle Fire Ins. Co., 7 Paige (N. Y.), 203; Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157; Brown v. Buffalo, etc., R. Co., 27 Hun (N. Y.), 342; Park v. Grant Locomotive Works, 40 N. J. Eq. 114; s. c., 10 Am. & Eng. Corp. Cas.

poses, and in lieu thereof issue to stockholders a corresponding amount of stock. But dividends cannot be applied by the directors to purposes not included in the charter or fundamental contract without the consent of the stockholders.2

3. From What Pavable.—Dividends are payable from the profits of the corporation, and if the corporation is solvent it is not necessary that all outstanding liabilities should be paid off before they are declared and paid to the respective shareholders.3

1. Howell v. Chicago P. R., 51 Barb. (N. Y.) 378; Rand v. Hubbell, 115 Mass. 461; Citizens' Ins. Co. v. Lott, 45 Ala. 185; Minot v. Paine, 99 Mass. 101; Wiltbanks' Appeal, 64 Pa. St. 256. See also STOCK DIVIDENDS, infra this

title.

2. March v. Eastern R., 43 N. H. 515. 3. Field on Corp. § 104; Scott v. Eagle Ins. Co., 7 Paige (N. Y.), 198; Karnes v.

Rochester, etc., R. Co., 4 Abb. Pr. N. S. (N. Y.) 107. What are Net Earnings.—In Union Pac. R. Co. v. United States, 99 U. S. 402, the court observed: "As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditures of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair, whilst expenses chargeable to capital include those which are incurred in the original construction of the works and in the subsequent enlargement and improvement thereof. With regard to the last-mentioned class of expenditures, however, namely, those which are incurred in enlarging and improving the works, a difference of practice prevails among railroad companies. Some charge to con-struction account every item of expense and every part and portion of every item which goes to make the road or any of its appurtenances or equipments better than they were before; while others charge to ordinary expense account, and against earnings, whatever is taken for these purposes from the earnings, and is not raised upon bonds or issues of stock. The latter method is deemed the most conservative and beneficial for the com-

pany, and operates as a restraint against injudicious dividends and an accumulation of a heavy indebtedness. The temptation is, to make expenses appear as small as possible, so as to have a large apparent surplus to divide. But it is not regarded as the wisest and most prudent method. The question is one of policy, which is usually left to the discretion of the directors. There is but little danger that any board will cause a very large or undue portion of their earnings to be absorbed in permanent improvements.

The practice will only extend to those which may be required from time to time by the gradual increase of the company's traffic, the despatch of business, the public accommodation, and the general permanency and completeness of the work. When any important improvement is needed, such as an additional track, or any other matter which involves a large outlay of money, the owners of the road will hardly forego the entire suspension of dividends in order to raise the requisite funds for those purposes: but will rather take the ordinary course of issuing bonds or additional stock. But for making all ordinary improvements as well as repairs. it is better for the stockholders and all those who are interested in the prosperity of the enterprise that a portion of the earnings should be employed.'

In Belfast, etc., R. Co. v. City of Belfast, 77 Me. 445, the court observes: "The difficulty is in deciding what should be considered as net earnings; that is, net earnings such as are applicable to dividends. In a general sense, net earnings are the gross receipts less the expenses of operating the road to earn such ereceipts. But several kinds of charges must first come out of net earnings before dividends are declared. The creditor comes in for consideration before the stockolder. The property of a corporation is a trust fund pledged for the pay-ment of its debts. Therefore, if there is a bonded, funded, permanent, or standing debt, the interest on it must be reckoned out of net earnings. If there is a floating debt, which it is not wise and prudent to place in the form of a funded debt, or to postpone for later payment, that should also be paid. If the financial situation of the company is such as to render it expedient to commence or continue the scheme of a sinking fund for the extinguishment of the company's indebtedness some day or other, an annual contribution out of the net earnings for that purpose would be reasonable. These deductions made from the net earnings, the balance will be the profits of the company distributable among stockholders."
Chaffee v. Railroad, 55 Vt. 110; s. c., 16 Am. & Eng. R. R. & Cas. 408; Taft v. Railroad, 8 R. I. 310; St. John v. Erie R. Co., 10 Blatchf. 271; s. c., 22 Wall. (U. S.) 136; Union Pacific R. Co. v. U. S., 99 U. S. 496.

In Park v. Grant Locomotive Works. 40 N. J. Eq. 114; s. c., 10 Am. & Eng. Corp. Cas. 231, the court observes: "The words 'net profits' define themselves. They mean what shall remain as the clean gain in any business venture after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution. If, as in this case, merchandise is sold, and securities, payable at a future date, are taken in payment, it is entirely proper-nay, if accuracy is desired, it is indispensable—that in making a statement of the condition of the business the securities should be put down as part of its assets; and they must, as a general rule, if the statement shows that profits have been made, represent the profits, either wholly or in part. And subsequently, if in attempting to collect them, losses are sustained or expenses incurred, the sum shown as profits will be reduced first to the extent of such loss or expense.

In Brown v. Monmouthshire R. Canal Co., 13 Beav. 32, it was decided that a court of equity would not interfere by injunction to restrain the directors of a railway from declaring dividends out of profits arising from part of their line, which had been completed, when the other part had not been completed, owing to lack of funds, and the time fixed by act of Parliament for completion had already elapsed. The directors acted with the consent of the majority of shareholders, the bill for injunction being filed by certain shareholders who were The court was of opinin the minority. ion that it could not safely be said that companies could in no case deduct any profits or receive any tolls till all their work was completed, and that when the majority of stockholders desired such distribution of profits the courts would not interfere on behalf of the minority; the declaring of dividends being a question of management or policy.

In New York, etc., R. Co. v. Nickals. 110 U.S. 206, the court observed: "A case very much resembling this is St. John v. Erie, etc., R. Co., 22 Wall. (U. S.) 136. Certain creditors of that company received preferred stock, in lieu of payment of their debts, under a clause of its charter providing that such stock should be entitled 'to preferred dividends out of the net earnings of said road (if earned in current year; but not otherwise), not to exceed seven per cent in any one year, payable semi-annually, after payment of mortgage interest and delayed coupons in full.' A preferred stockholder sought by suit to enforce full payment of his dividends from the net earnings, prior to any payment on account of new leases of road, or of debts subsequently contracted for borrowed money used in the construction and equipment of the road, in paying rent on leased lines, and interest on the money so borrowed. . . . Upon appeal to this court, it was held that the suit could not be maintained; that the takers of the preferred stock had abandoned their position as creditors and assumed that of stockholders, in which capacity they could claim dividends only when they were declared or should be declared; they were only entitled to dividends out of the net earnings of the principal roads and its adjuncts, accruing in the current year; that, as the company had not agreed to limit the exercise of its faculties and franchises, it had the right to conduct its operations in good faith as it may see fit; and that the materials for the computation of its net earnings in any particular year might be derived from all of its operations, viewing its business as a unit, and not from a part of its operations, or without reference to the necessary and legitimate purposes to which its current receipts might be applied to all those interested in the prop-These principles were again applied in the analogous case of Warren v. King, 108 U. S. 389." See also Union Pac. R. Co. v. United States, 99 U. S. 402; Barnard v. Vermont, etc., R. Co., 7 Allen (Mass.), 521; Williston v. Michigan Southern R. Co., 13 Allen (Mass.), 400; Chaffee v. Rutland, etc., R. Co., 55 Vt. 110; s. c., 16 Am. & Eng. R. R. Cas. 408; Taft v. Hartford, etc., R. Co., 8 R. I. 310; Elkins v. Camden, etc., R. Co., 36 N. J. Eq. 233; Lockhart v. Van Alstyne, 31 Mich. 76; Culver v. Reno Real Estate Co., 71 Pa. St. 367. Capital Stock Defined .- As to what is a

A corporation may be largely indebted and yet dividends may properly be divided amongst the shareholders out of the net profits before the indebtednesss has been paid. But a dividend cannot be paid out of the capital stock, 2 nor from money obtained by a company upon the sale of forfeited stock,3 or as compensation for property taken under the power of eminent domain,4 or as interest, or penalty on account of the failure of a contractor to complete his work.5

Agreements to pay dividends on the capital stock, without reference to the ability to pay from the earnings of the company, are

opposed to public policy, and void.6

4. Rights of Stockholders.—(a) Who is Entitled to Dividend.—The party who is the actual, legal, and beneficial holder and owner of the shares at the time when the dividends are declared and made payable is entitled to the dividends; and until separated by the

proper definition of the words "capital stock:" "The capital stock of a corporation is like that of a copartnership or joint-stock company—the amount which the partners or associates put in as their stake in the concern." Barry v. Merchants' Exchange Co., I Sandf. Ch. (N.Y.) Zabr. (N. J.) 195; Burrall v. Bushwick
R. Co., 75 N. Y. 211; Williams v. Western Union Tel. Co., 93 N. Y. 162.
The term "profit" may denote what re-

mains after defraying every expense, in-cluding loans falling due as well as the interest on such loans. Corry v. Londonderry R. Co., 29 Beav. 263; Curry v. Woodward, 41 Ala. 305: Queen v. Arnaud, 9 Ad. & E. (N. S.) 806.

The capital stock of a corporation is like that of a copartnership or joint-stock company, the amount which the partners or associates put in as their stake in the concern. To this they add, upon the credit of the company, from the means and resources of the others, to such extent as their prudence or the confidence of such other persons will permit. Such additions create a debt; they do not form capital. And if successful in their career, the surplus over and above their capital and debts becomes profits, and is either divided among the partners and associates, or used still further to extend their operations. Barry v. Merchants' Ex. Co., 1 Sandf. Ch. (N.Y.) 307.

1. Mills v. Northern R., L. R. 5 Ch.

Div. 631.

The question always is, whether or not there would remain a net increase upon the original investment, after deducting from the value of the assets of the company all present debts, and making provision for future or contingent claims. Morawetz on Corp. (2d Ed.) § 438.

2. Morawetz on Corp. (2d Ed.) §§ 435, 89. See also Davis v. Flagstaff Silver 78g.

Mining Co., 2 Utah, 74.

In Fawcett v. Laurie et al., 1 Br. & Sm. 192, the directors of a company had voted to apply a part of the surplus fund to the payment of subscriptions to capital stock. In this manner two pounds per share were added to the amount already paid on the shares. Later, the directors discovered a large detalcation, and in order to make it good, and at the same time to declare the usual dividends, passed a resolution retransferring the part of surplus fund above specified from the actual account, and devoting it and the rest of the surplus fund to the payment of the defalcation, and declaring a dividend out of the profits. On a bill by shareholders to enjoin the payment of this dividend, it was held that the directors having devoted the part of the surplus fund to the payment of subscriptions, thus converting it into capital, had no authority to use that fund for paying losses without first devoting profits for that purpose.

3. Gratz v. Redd, 4 B. Mon. (Ky.) 187. See also Phelps v. Farmers', etc., Bank, 26 Conn. 269; Ryan v. Leavenworth, etc.,
R. Co., 21 Kan. 365.
4. Heard v. Eldridge, 109 Mass. 258.
5. Bloxam v. Metropolitan R. Co.,

L. R. 3 Ch. 337.

6. Macdougall v. Jersey, etc., Hotel Co., 2 Hem. & M. 528: Lockhart v. Van Alstyne, 31 Mich. 76; Miller v. Pittsvan Alstyne, 31 Mich. 76; Miller v. Pittsburgh, etc., R. Co., 40 Pa. St. 239. Compare Ohio v. Cleveland R Co., 6 Ohio St. 489; Cunningham v. Vermont R. Co., 12 Gray (Mass.), 411; Evansville R. Co v. Evansville, 15 Ind. 395; Martin v. Zellerbach, 38 Cal. 300; Belfast, etc., R. Co. v. Belfast, 77 Me. 445.

7. Lermain v. Lake Shore R. of N. V.

7. Jermain v. Lake Shore R., 91 N. Y.

vote of the directors from the capital and funds of the corporation, and made payable to the shareholder as dividends, they pass upon every transfer, sale, gift, bequest, and descent of the stock or shares, and as a mere incident or accessory thereto.1 the dividends are payable at a future date, the owner of the stock at the time the dividend is payable is entitled to it.2

483; s. c., I Am. & Eng. Corp. Cas. III; Brisbane v. Delaware, etc., R. Co., 25 Hun (N. Y.), 438; Cleveland, etc., R. Co., v. Robbins, 35 Ohio St. 483; Field on

Corp. §§ 103-107.

A share of stock represents the interest which the shareholder has in the capital and net earnings of the corporation. The interest is of an abstract nature-that is, the shareholder cannot by any act of his, nor ordinarily by any act of the law, reduce it to possession. He can take, and is entitled to take, the surplus profits when a dividend has been declared by the proper officers of the company, and upon the dissolution of the corporation he can take his share of the assets thereof left for distribution pro rata among the shareholders. The corporation represents the whole body of the shareholders, and to it, before a dividend has been declared, belong in solido all the assets in which the shareholders, as such, are interested. When a dividend has once been declared out of the net earnings, the amount of such dividend is no longer a part of the assets of the company, but is appropriated or set apart for the shareholders. They receive credit for the dividends, and the corporation simply holds them as their trustee. Therefore, before a dividend has been declared, a share of stock represents the whole interest which the shareholder has in the corporation, and when he transfers his stock, he transfers his entire interest; and dividends subsequently declared, without reference to the source from which or the time during which the funds divided were acquired by the corporation, necessarily belong to the holder of the stock at the time the dividend was declared. But when the dividend has once been dedeclared and credited to the shareholder, the amount thereof has been separated from the assets of the corporation and been appropriated to his use. It is then no longer represented by his stock, and hence, when he transfers his stock, and hence, when he transfers his stock, he does not transfer his dividend, which remains subject to his control. Jermain v. Lake Shore R. Co., 91 N. Y. 483; s. c., 1 Am. & Eng. Corp. Cas. 115.

Conceding that, the right of the plain-

tiff depends upon a contract, that contract is connected with, relates to, and constitutes an integral part of the plaintiff's right as a stockholder. It cannot be separated from the rights accruing by virtue of, the stock which the plaintiff holds; and being thus a part and parcel of the same, it passes with the transfer as one of the incidents, and as composing an essential element thereof. A sale or assignment of the stock transferred by operation of law, all the benefits to be derived from the same, and all profits, income, or dividends or right to dividends by contract, which formed a constituent, valuable, and inseparable interest and portion of the stock when the contingency happened specified in the contract, the right to dividends became fixed, and existed independent of any act of the corporation or its officers. It became It became absolute and perfect in the stockholder, without a declaration to that effect, and passed as an incident of the stock upon the transfer. It cannot be maintained, upon any sound principle, that the contract for the payment of dividends continues to each stockholder only during the time he holds the stock, and accrues only to his benefit during that period, and that a separate and distinct assignment of the dividends was essential in order to confer title upon the holders. Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157.

1. Cogswell v. Cogswell, 2 Edw. Ch. (N. Y.) 231; Clapp v. Astor, 2 Edw. Ch. (N. Y.) 379; Leroy v. Globe, 2 Edw. Ch. (N. Y.) 379; Leroy v. Globe, 2 Edw. Ch. (N.Y.) 657; Lowerre v. Am. Fire Ins. Co., 6 Paige (N. Y.), 482; Tift v. Porter, 4 Selden (N. Y.), 616; Jones v. Terre Haute R. Co., 29 Barb. (N. Y.) 353; s. c., 57 N. Y. 196; Lombardo v. Case, 45 Barb. (N. Y.) 95; Hyatt v. Allen, 56 Barb. (N. Y.) 533; Smith v. Am. Coal Co., 7 Lans. (N. Y.) 317; Brundage v. Brundage, 60 N. Y. 544.

2. A sale of stock in a railroad com-

2. A sale of stock in a railroad company carries with it the dividends declared by the company, when they are paid at a day subsequent to the transfer of the stock. Therefore, when the North Carolina R. Co. declared a dividend on the stock in said company, on the 16th day of Feb., 1870, to be paid on the 1st days

An equitable owner of the stock is also entitled to the dividends accruing thereon.1

· If a dividend is unjustly withheld from a shareholder after the

same is declared, he may recover it, with simple interest.2

(b) When it Can be Required to be Paid.—When the dividend is declared, it thereupon becomes the individual property of the stockholder, and he is entitled to receive the same on demand of the proper agent, and if not paid on demand he may maintain an action therefor.3 But a stockholder is without claim to a dividend until it has been duly declared.4 If the dividend be paid to a per-

of April and July thereafter, and the owner of certain shares of such stock sold and transferred the same on the 17th day of Feb., it was held that the purchasers of said shares of stock acquired the dividends as well as the stock. Burroughs v.- North Carolina R. Co., 67 N. Car. 376; s. c., 12 Am, Rep. 611.

1. Conant v. Senaca Bank, I Ohio St.

2. Jackson v. Newark Plank Road Co., 31 N. J. Law, 277; Westchester, etc., R. Co. v. Jackson, 77 Pa. St. 321; Heck v. Bulkley et al. (Tenn.), 1886, 15 Am. &

Eng. Corp. Cas. 619.

Eng. Corp. Cas. 619.

8. Field on Corp. SS 106, 107; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90; Carpenter v. N. Y. R. Co., 5 Abb. Pr. (N. Y.) 277; Jones v. Terre Haute R. Co., 29 Barb. (N. Y.) 353; Howell v. Chicago R. Co., 51 Barb. (N. Y.) 378; Granger v. Bassett, 98 Mass. 462; Philadelphia R. Co. v. Cowell, 28 Pa. St. 329; Leroy v. Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657; People v. Merchants, etc., Bank, 78 N. Y. 269; Van Dyck v. McQuade, 86 N. Y. 38; Jermain v. Lake Shore, etc., R. Co., 91 N. Y. 483; Scott v. Central, R. Co., 91 N. Y. 483; Scott v. Central, etc., R. Co., 52 Barb. (N. Y.) 45; West Chester, etc., R. Co. v. Jackson, 77 Pa.
St. 321; Granger v Bassett, 98 Mass.
462; Stoddard v. Shetucket, etc., Co.,
34 Conn. 542: Beers v. Bridgeport Spring Co., 42 Conn. 17; King v. Paterson, etc., R. Co., 29 N. J. Law, 82; City of Chicago v. Cleveland, etc., R. Co., 6 Ohio St. 489; Harris v. San Francisco, etc., R. Co., 41 Cal. 393.

After the dividend is declared all com-

munity of interest in relation to such dividend, as between the stockholders and the corporation, is at an end. The right of a party to whom the dividend is payable is recognized as a separate and independent right, which may be enforced against the corporation. Davis v. Bank of England, 5 Barn. & Cress. 185; Coles v. Bank of Eng., 10 Ad. & E. 437; Carbilled v. Bank of Eng., 10 Carbilled v. Bank of Eng., 10 Ad. & E. 437; Carbilled v. Ban lisle v. S. E. Railway, 6 Eng. Rail. Cases, 685; I Redf. on Rail 205; King v. Paterson, etc., R. Co., 29 N. J. Law, 505.

The true principle is, that the dividend from the time that it is declared becomes a debt due from the corporation to the individual stockholder, for the recovery of which, after demand of payment, an action at law may be maintained. v. Balt. & Ohio Ř. Co., 6 Gill (Md.), 363; St. 320; City of Ohio & Crowell, 28 Pa. St. 320; City of Ohio v. Cleveland & Toledo R. Co., 6 Ohio St. 490; Seeley v. New York, etc., Bank, 8 Daly, 400; aff'd, 78 N. Y. 608.

In Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157, the court observes: "While, as a general rule, courts of equity will not exercise visitorial powers over a corporation, and its officers are the sole judges of the propriety of declaring dividends, and in this respect the court will not interfere with a proper exercise of their discretion, yet where the rights to the dividend is clear and fixed by the contract, and requires the directors to take action before it can be asserted in a court of law, and a restraint by injunction is essential to maintain the right of the stockholder, the injunction of a court of equity is a proper exercise of its power, and will be upheld."

4. In Moss's Appeal, 83 Pa. St. 264, the court observed: "As a general rule, nothing earned by a corporation can be regarded as profits, until it shall have been declared to be so by the corporation itself, acting by its board of mana-The fact that a dollar has been earned gives no stockholder the right to claim it until the corporation decides to distribute it as profits. The wisdom of such distribution must of necessity rest with the corporation itself. From motives of prudence and self-interest, it is frequently desirable to add all or a portion of the earnings to the capital. sometimes necessary as a basis of credit for more enlarged operations. It is often a wise exercise of discretion for a corporation to strengthen itself in this way, and with such discretion a stockholder cannot interfere. His only remedy is by appeal to the ballot at the election for

son not authorized to receive it, the company may be compelled to pay it again to the true owner. The person in whose name the stock appears on the books of the company can maintain the action.2 And it has been held that a bill in equity will lie to compel the payment of a dividend which has been declared.3 But mandamus is not the proper remedy, and a demand is necessary before an action for dividends can be maintained. The right to recover is individual, and each shareholder must bring his own special action.6 Dividends are presumed to be payable in lawful money.7 After the dividend is declared, the company holds it in trust for the shareholder and is responsible for its safe keeping.8

The Statute of Limitations does not run against a claim for dividends of capital stock (if at all) until after demand made for and

refusal to pay the same.9

(c) Source from which Time is Calculated.—The right of the stockholder is perfect to dividends declared while the stockholder is such, and without reference to the source from which, or the time

directors." Minot v. Paine, 99 Mass. 101; Phelps v. Farmers', etc., Bank, 26 Conn. 269; Gordon's Exrs. v. Richmond, etc., R. Co., 78 Va. 501; Elevator Co. v. Memphis, etc., R. Co., 85 Tenn. (1 Pickle)

Undeclared Dividends Pass as an Incident of a Transfer of Stock to the Assignee. -In Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157, the court observes: "A sale or assignment of the stock transferred by the operation of law all benefits to be derived from the same, and all profits, income or dividends, or right to dividends by contract, which formed a constituent, valuable, and inseparable portion of the stock. . . We think it cannot be maintained, upon any sound principle, that the contract for the payment of dividends continues to each stockholder only during the time he holds the stock, and accrues only to his benefit during that period, and that a separate and distinct assignment of the dividends was essential in order to confer title upon the owner. Such a conclusion is adverse to the rule, which is upheld by authority, that a transfer of stock of a corporation carries with it to the transferee its proportionate share of the assets of the company, including dividends which have not been declared, and all the incidents and advantages which appertain to the rights of a shareholder. Brundage v. Brundage, 65 Barb. 397; s. c., 60 N. Y. 544; Curry v. Woodward, 44 Ala. 305; Phelps v. Farmers', etc., Bank, 26 Conn. 269; Lockhart v. Van Alstyne, 31 Mich. 76; Burroughs v. North Carolina, etc., R. Co., 67 N. Car. 376.

1. St. Bomes v. Levee Steam, etc., 20 La. Ann. 381; Davis v. Bank of Eng., 2 83 N. Y. 40; Boone on Corp. § 125.

2. Brisbane v. Del., Lack. & W. R., 94
N. Y. 204; s. c., 5 Am. & Eng. Corp.

Cas. 135.

3. Beers v. Bridgeport S. Co., 42
Conn. 17; Leroy v. Bridgeport S. Co., 2 Edw. Ch. (N. Y.) 657.

4. Van Norman v. Cen. Car., etc., Co.,

41 Mich. 166.

5. State v. B. & O. R. Co., 6 Gill (Md.), 364; Hagar v. Union Natl. Bank, 63 Me. 509; Scott v. Central R. Co., 52 Barb. (N. Y.) 45.

6. Morgan v. Great Eastern, etc., R. Co., 1 Hern. & M. 560; Carlisle v. S. Eastern R. Co., 2 Hall & T. 366.

7. Ehle v. Bank of Chittenango, 24 N. Y. 548; Scott v. Cen. R. Co., 52 Barb. (N. Y.) 45.

And it seems that in England they must be paid in cash. Hoole v. Great Western, etc., R. Co., L. R. 3 Ch. 272. But in the United States the declaration of scrip or stock dividends is a matter of common occurrence. Morawetz on Corp. (2d Ed) § 448; Howell v. Chicago, etc. R. Co., 51 Barb. (N. Y.) 378; Bailey v. Citizens' Gas Light Co., 27 N. J. Eq. 196; Citizens' Ins. Co. v. Lott, 45 Ala., 185; City of Ohio Cleveland, etc., R. Co., 6 Ohio St. 489. It has been held that dividends on shares cannot be recovered from the treasurer. French v. Fuller, 23 Pick. (Mass.) 108.

8. King v. Paterson R. Co., 29 N.

J. Law, 504.
9. Phil., W. & B. R. Co. v. Cowell, 28 Pa. St. 329-339; I Rohrer on R. R. 173.

during which, the funds to be divided were acquired by the com-

pany.

A party therefore is entitled to dividends who did not become the owner of the stock until after the fund out of which the dividend is declared had accrued either in whole or in part.²

An unconditional bequest of the dividends of stock is a bequest

of the stock itself.3

(d) Action between Stockholders.—A stockholder who alleges that his right to participate in a dividend declared by a corporation has been wrongfully denied by it cannot maintain an action in the first instance for money had and received against another stockholder who has participated in such dividend.⁴ In this respect

1. Jermain v. L. S. & Mich. S. R. Co., oi N. Y. 483; s. c., i Am. & Eng. Corp. Cas. 111; Goodwin v. Hardy, 57 Me. Cas. 111; Goddwin v. Hardy, 57 Met. 143; March v. Eastern R. Co., 43 N. H. 520; Harvard College v. Amory, 9 Pick. (Mass.) 446; Granger v. Bassett, 98 Mass. 462; Minot v. Paine, 99 Mass. 462; Phelps v. Farmers' Bank, 26 Conn. 272; Jackson v. Newark, etc., Road, 272; Jackson v. Newark, etc., Road, 31 N. J. L. 277; Earp's Appeal, 28 Pa. St. 368; Reese v. Bank, etc., 31 Pa. St. 78; Gray v. Portland Bank, 3 Mass. 363; Coleman v. Columbia Oil Co., 51 Pa. St. 74; Burroughs v. N. S. R. Co., 67 N. Car. 376; Wilbank's Appeal, 64 Pa. St. 256; Brightwell v. Mallory, 10 Yerg. (Tenn.) 196; Rider v. Alton, etc., R. Co., 13 Ill. 516; Lathrop v. Lathrop, 15 Cal. 21; Dow v. Gould, etc., Mining Co., 31 Cal. 649; Wilson v. Carmen, 2 Vesey Sr. 672; Peasley v. Smith, 3 Alk. 260; Anson v. Twogood, I Jacobs & W. 637; Cuning v. Douglass, I Jurist (N. S.), 1005; Clive v Clive, Kay, 600; Shore v. Wheatley, 3 De Gex. & S. 467; Fowler v. Churchill, 11 Mees. & W. 57; Bristed v. Wilkins, 3 Hare, 235; Jacques v. Chambers, 2 Collyer, 435; Bartley v. Allen, 2 Jurist (N. S.), 500: Johnson v. Johnson, 15 Jurist, 714; Murray v. Glease, 17 Jurist, 816; Feistal v. King's College, 10 Beav. 491; Price v. Anderson, 15 Simons, 473; McLaren v. Stainton, 27 Beav. 460; Wright v. Tuckett, 1 Johns. & Hem. 266; Bates v. McKinley, 31 Beav. 280; Schofield v. Redfera, 8 Law Times (N. S.), 487; McLaughlin v. Detroit, etc., R. Co., 8 Mich, 100.

When a dividend upon its stock is declared by a corporation, it belongs to the holders of the stock at the time of the declaration, without regard to the source from which or the time during which the funds divided were acquired by the corporation. In 1857, the M. S. & N. I. R. Co., to whose rights and obligations defendant succeeded, issued certainpreferred and guaranteed stock, the same being en-

titled to annual dividends of ten per cent, payable out of the net earnings of the company, and also to a share pro rata with the common stock in any surplus. No dividends were paid on said stock until 1863. Subsequently dividends were regularly declared and paid on the common stock. The arrears of the dividends on the preferred stock were not paid, and no dividends were declared on funds set apart by defendant to pay the same. 1870 forty shares of said preferred stock were purchased and transferred to plaintiff, and defendant issued to him a certificate therefor. In an action to compel defendant to declare and pay the dividends in arrear, held, that the guaranty related to and was an incident of the stock, and passed with it upon assignment thereof; that although the guaranteed dividends became due in 1864, and payment thereof could have been enforced by the holder of the stock, yet as no part of the net earnings was set apart to pay the same, but on the contrary they were otherwise appropriated, the dividends remained payable to the holder, and on assignment of the stock carried with it the right to receive and recover said dividends, and that therefore the plaintiff was entitled to maintain the action. Jermain v. Lake Shore & Mich. Southern, 92 N. Y. 483; s. c., 1 Am. & Eng. Corp. Lake Shore & Mich. Southern, 91 Cas. 111.

2. Coly v. Belfast, etc., R. Co., 2 Irish, 6; s. c., Ch. S. 112; Manning v. Quick-silver Mining Co., 24 Hun (N. Y.), 361; City of Ohio v. C. & T. R. Co., 6 Ohio St. 489; Hyatt v. Allen, 56 N. Y. 553; Boardman v. L. S. & M. S. R. Co., 84 N. Y. 157.

N. Y. 157.

3. Collier v. Collier, 3 Ohio St. 369; 4 Kent Com. 54.

4. Thompson v. Meisser, 108 Ill. 359; s. c., 5 Am. & Eng. Corp. Cas. 47. "The defendant, in receiving the divi-

"The defendant, in receiving the dividends paid to him, did not act, or assume to act, in behalf of the plaintiff, or to they stand in the same relation as partners.1

(e) Action Between Stockholder and Director.—A director may be required to repay a dividend improperly declared out of the company's capital; but he has a right to be indemnified by any shareholders or creditors of the company who were privy thereto,3 and he may reclaim from the stockholder dividends which were declared out of what were supposed profits, but were afterwards ascertained by them not to be.4

A stockholder may enjoin the payment of a dividend where the directors are about to misapply the funds of the corporation in paying such dividend, there being in fact no money earned for

such a purpose.5

5. Rights of Creditors.—(a) Against Stockholders.—A creditor may proceed in equity against a stockholder where the property of a corporation has been divided before all its debts were paid.6

represent the shares claimed by her, or to receive any dividends payable thereon. He received only the dividends declared and admitted by the company to be due him on his shares, his title to which shares is not disputed, and in which the plaintiff claims no interest. The amount which he received was paid him in his own right, and was conceded by the company to be due to him. There was no privity between him and the plaintiff. The complaint alleges that the company in making the dividend and distributing the securities disregarded and ignored the rights of the plaintiff. Her remedy, if she was wrongfully excluded from the rights of a stockholder, was against the company, and she was not entitled to follow the assets of the company into the hands of parties to whom it had made payments, and to recover her dividends from them until at least she had established her right as a creditor of the company, and exhausted her legal remedies against it. She could not, in the first instance, resort to a common-law action against the persons whom the company had recognized as its only stockholders to recover a portion of the dividends admitted to be due and actually paid to them in their own right, and try her title to the shares in actions against them." Peckham v. Van Wagenen, 83 N. Y. 40; s. c., 38 Am. R. 392.

1. Thompson v. Meisser, 108 Ill. 359;

s. c., 5 Am. & Eng. Corp. Cas. 47.
2. Stringer's Case, L. R. 4 Ch. App.
475; Alexander Palace Co., L. R. 21 Ch. Div. 149; Rance's Case, L. R. 6 Ch. App.

3. Alexander Palace Co., L. R. 21 Ch.

Div. 149.

4. Lexington Ins. Co. v. Page, 17 B.

Mon. (Ky.) 412: Gaffney v. Colvin. 6 Hill (N. Y.), 567.

5. Carpenter v. New Haven R. Co., 5

Abb. (N. Y.) 277.

How far equity will interfere with and control the manner in which the profits of a corporation applicable to dividends are ascertained by the directors before division, see Stevens v. South Devon R. Co., 9 Hare, 313; Corry v. Londonderry R. Co. 29 Beav. 263; Stringer's Case, L. R. (4 Ch. App.) 475; Smith v. Prattville Manf. Ch. App., 475; Sinth v. Flativite Main.
Co., 29 Ala. 503; Stoddard v. Shetucket, etc., Co., 34 Conn. 542; Nickals v. New York, etc., R. Co., 15 Rep. 72; New York, etc., R. Co. v. Nickals, 119 U. S. 296; Williams v. Western Union Tel., etc., 93 N. Y. 162; Painesville, etc., R. v. King, 17 Ohio St. 534.

6 Bartlett v. Drew. 4 Lans. 444; s. c., 57 N. Y. 587; Hastings v. Drew, 76 N. Y. 9.

...The stockholder who has received part of the capital by way of dividend. without legislative authority has no right to it as against the creditors of the corporation, and no wrong is done him if he be compelled to repay it when it is required to pay the debts of the corporation. He, or those under whom he derives his title to his stock, placed that money in the treasury of the corporation to answer for its debts if necessary, and it was devoted to that object so long as it might be required for that purpose. If he withdraws or receives it back again, except where the amount of the stock is reduced accord. ing to law, it will, in his hands, be subject to that trust-the trust for the payment of the debts of the corporation, if needed for that purpose. The directors who declare the dividend may personally profit but little comparatively from the dividend, And he may proceed in his own name where the trustee or receiver neglects or refuses to do so; 1 and a statutory right to sue at law will not prevent his right to seek relief in equity. 2 But an assignee in bankruptcy cannot at law recover from a stockholder the amount of a dividend where neither the stockholder nor the directors knew as a fact that the company was insolvent when the dividend was declared.3

(b) Against Directors.—A creditor may proceed at law against the directors for improperly declaring dividends when there had been no profits to divide, 4 or in equity. 5 But, unless especially so

and yet under the above-quoted act they may be compelled to pay the whole of it to the corporation or creditors out of their own pocket. But that provision does not, either in terms or by implication, exonerate the stockholders, though a recovery of the money from the directors would in fact exonerate them. directors are their agents, and if redress has been obtained by recourse to the agent, it would of course exonerate the principal. The remedy given by the statute is cumulative. The legislature does not say that the stockholder shall be at liberty to keep the money, and that the creditors must have recourse to the directors alone. . . . Another objection is, that there is no allegation that any of the debts which now exist were debts or liabilities at the time of the payment of the dividends. The bill makes no such statement, nor is the fact fairly deducible from its statements. Although there are cases in which it has been said that recovery can only be had in cases of this kind by the creditors whose debts existed at the time of the withdrawal of the funds. that view is not to be adopted. distinction is not well founded. capital of the corporation is a fund pledged for the payment of its debts. Each person who gives credit to it does so in the confidence that the fund exists for his protection and security against loss. If the stockholders secretly withdrew it under the false pretence of dividends of profits when there are none, it is obvious that as great a wrong may be done to future creditors as to existing ones. In either case the stockholders hold a part of that fund which is pledged to the payment of the creditors. jury to the existing creditor is obvious. That to the future creditor is the same; for the stockholder holds out to him that the capital is the nominal amount, while in fact he has secretly withdrawn part of it. If all who should become creditors after the withdrawal had notice of the fact that the capital had been reducedthat the dividend had been paid out of the capital-then the distinction might, Boice, 38 N. J. Eq. 364; s. c., 6 Am. & Eng. Corp. Cas. 361.

1. Hightower v. Thompson, 8 Ga. 486;

Little, 101 U. S. 216; Bank of Pough-keepsie v. Ibbotson, 24 Wend. (N. Y.) 473; Terry v. Martin, 10 S. Car. 263; First Nat. Bank v. Smith, 6 Fed. Rep.

2. Eames v. Doris, 102 Ill. 350; Dozier v. Thornton, 19 Ga. 325; Norris v. Johnson, 34 Md. 485; Perry v. Turner, 55 Mo. 418; Van Hook v. Whitlock, 3 Paige (N. Y.), 409; Briggs v. Penniman, 8 Cow. (N. Y.) 387; Bronson v. Wilmington Ins. Co., 85 N. Car. 411; Coleman v. White, 44 Wie 200. Jones v. Jarman, 34 Ark 14 Wis, 700; Jones v. Jarman, 34 Ark. 323; Smith v. Huckabee, 53 Ala. 191; Erickson v. Nesmith, 15 Gray (Mass.), 221; Tinkham v. Borst, 31 Barb. (N. Y.)
407; Kennedy v. Gibson, 8 Wall. (U. S.)
498; Spence v. Shapard, 57 Ala. 598;
Pfohl v. Simpson, 74 N. Y. 137.

3. McLean v: Eastman, 21 Hun (N.

A creditor of a corporation cannot compel a stockholder to account for the proceeds of mortgage bonds of the company received by him on the distribution of the same among the stockholders pursuant to a resolution of the board of directors. There being no liability to account for such bonds to the corporation, there is none to creditors. Christensen v. Eno (N. Y., 1887). 12 N. E. Rep. 648.
4. Lexington v. Bridges, 7 B. Mon.

(Ky.) 556. 5. Dudly v. Price, to B. Mon. (Ky.) 84; Scott v. Eagle Ins. Co., 7 Paige (N.

Any act of the directory by which they intentionally diminish the value of the stock or property of the company is a breach of trust, for which any of the stockholders or creditors may justly complain, although all the other stockholders and creditors are benefited in some other provided by statute, the directors are not liable where the dividends were paid in good faith, although the corporation afterwards became insolvent.1

6 Life-tenant and Remainderman.—(a) Ordinary Dividends.— All ordinary dividends declared during the life-tenancy, no matter from what source derived, are to be considered as income, and are the property of the life-tenant.2 and this is irrespective of the time when the funds were earned out of which the dividend is declared.3 The mere use of the word "bonus" does not constitute a dividend other than an ordinary one if a contrary intent may be inferred from the terms of the resolution.4

(b) Extraordinary Dividends or Bonuses.—The early English rule was that the extra dividends or additions to the usual annual dividend, whether paid in cash or in capital stock, went to the corpus

of the trust.5

way more than they are injured as such. Goodwin v. Cincinnati, etc., Canal Co.,

18 Ohio St. 183.

1. Reid v. Eatonton Manf. Co., 40 Ga. 98; Le Roy v. Globe Ins. Co., 40 Ga. 08; Le Roy v. Globe Ins. Co., 2 Edw. Ch (N. Y.) 657; Loune v. Am. Ins. Co., 6 Paige (N. Y.), 482; Le Blanc's Case, 14 Hun, 8; 75 N. Y. 598; Field on Corp. § 403; Morawetz on Corp. (2d Ed.) § 446.
2. Hooper v. Rossiter, 1 McL. (C. C.)

Whether the will or deed by which the life estate is created provides that he shall have the "income" or the "dividends," or "the dividends and profits," or "the dividends, interest, and profits, or "the interest, dividends, profits, and proceeds," there is no substantial difference as to his rights, the phrases being generally considered identical in effect. Hooper v. Rossiter, 1 McL. (C. C.)

At certain stipulated periods most corporations are in the habit of dividing their profits or some part of them earned since the previous stipulated period among their stockholders. The sums which are thus periodically distributed are of course not constant in amount. Sometimes they are larger, sometimes smaller, according as the profits of the corporation have been large or small. But however great or insignificant they may be, the receipt of them at the usual periods is always looked forward to by the stockholders as a natural incident of their ownership. These constitute what are known as ordinary dividends of a corporation. They are clearly distin-guished from another class of dividends occasionally declared. These are such as are extraordinary in their nature, usually declared out of the accumulated profits, not at certain stipulated periods. but at irregular intervals, whenever and

in such amount as the corporation sees proper. These are termed bonuses or extraordinary dividends. The receipt of them cannot be looked forward to with confidence by the stockholder at any particular period. The true test as to whether a dividend is ordinary or extraordinary is not the fund from which it is derived. Ordinary dividends are sometimes declared out of the accumulated profits, extraordinary dividends out of the profits of the preceding year or half-year. sole test is what was the intent of the corporation declaring it. If the terms of the corporate resolution passed for that purpose, as seen in the surrounding circumstances, seem to contemplate the distribution of an ordinary dividend, it will not be deemed an extraordinary one simply because it is larger than usual in amount. Note to Millen v. Guerrard, 21 Am. Law Reg. 385; Barkley v. Wainright, 14 Vesey, 66; Price v. Anderson, 15 Sim. 473. See Minot v. Paine, 99 Mass. 101; Daland v. Williams, 101 Mass. 571; Leland v. Hayden, 102 Mass. 542.

3. Bates v. McKinlay, 31 Beav. 280.

4. Johnson v. Johnson, 15 Jur. 714; Preston z. Melville, 16 Som. 163.

We think the true rule to be that when a dividend upon its stock is declared by a corporation it belongs to the person holding the stock at the time of the declaration, whether the holder be a lifetenant or remainderman, without regard to the source from which, or the time during which, the profits and earnings during which, the profits and earnings divided were acquired by the company. Richardson v. Richardson, 75 Me. 570; s. c., 46 Am. Rep. 430; Goodwin v. Hardy, 57 Me. 143; Jermain v. L. S. & M. S. R. Co., 91 N. Y. 483; s. c., 1 Am. & Eng. Corp. Cas. 111.

But this rule was abandoned as unjust, and it is now uniformly held that cash dividends, extra dividends, or bonuses declared from the earnings of corporations are income, and go to the cestui oue trust. And such is the rule in the United States.2

Paris v. Paris, 10 Ves. 184; Witts v. Steere, 13 Ves. 67; Preston v. Melville, 16 Sim. 163: Hooper v. Rossiter, 13

Price, 774.

'If I am to go on your principle, I must hunt back, and see to what part of the saving each is entitled. I have often considered this question, and it has always seemed to me, in all the different ways that I could turn the consideration of it, that there was no way to be taken but to consider it as an accretion to the capital, and the tenant for life will have the benefit of the dividend." Lord Loughborough in Branden v. Branden, 4 Ves.

"Nor did it make any difference what the intention of the corporation might be as to the disposition of the bonus. 'Whatever conduct or language the bank may hold,' said Lord Erskine, 'if they do not increase the dividend, but take this mode of distributing the profit, it is a part of the capital." Witts v. Steere, 13 Ves. 363. See also Warde v. Combe, 7 Sim. 634, and In re Armstrong's Trust, 3 K. & J. 486. But the evident injustice of this line of decisions to the life-tenant made judges solicitous, whenever they could manage to do so, to secure the rights of the life-tenant. Coming v. Boswell, 2 Jur. N. S. 1005. Whenever, therefore, it appeared that the profits out of which a bonus was declared were all made during the life-tenancy, or subsequent to the investment in the particular stock, that bonus was adjudged income, and awarded the life-tenant. Murray v. Glasse, 17 Jur. 816; Plumbe v. Neild, 29 L. J. Ch. 618. And so far did the courts go, that in some cases, in the absence of all direct evidence as to when the profits out of which the bonuses were declared were made, they presumed them to have been earned during the life-tenancy. Murray v. Glasse, supra; Ashurst v. Field, 11 C. E. Greene (N. J.), 1; Lawrence Lewis, Jr., in note to Millen v. Guerrard (Ga. 1882), 21 Am. L. Reg. 394.

1. Price v. Anderson, 15 Sim. 473; Johnson v. Johnson, 15 Jur. 714; Bates v. McKinlay, 31 Beav. 280; Murray v. Glasse, 17 Jur. 816; Coming v. Boswell, 2 Jur. (N. S.) 1005; Wright v. Tucket, 1 Johns. & Hem. 266; Bouch v. Sproule (1887), L. R. 12 App. Cas. 385, reversing c., L. R. 29 Ch. Div. 635. 2. Cogswell v. Cogswell, 2 Ed. Ch. (N.

Y.) 231: Ware v. McCandish, 10 Leigh (Va.). 595; Read v. Head, 6 Allen (Mass.). 174; Lord v. Brooks, 52 N. H. 72; Moss's Appeal, 83 Pa. St. 264; s. c., 24 Am. R. 169; Minot v. Paine, 99 Mass. 101; Rand v. Hubbell, 115 Mass. 461; In re Kernochan, 104 N. Y. 618. But we are well convinced that the general rule, deducible from the latest and wisest decisions, declares all money dividends to be profits and income, belonging to the tenant for life, including not only the usual annual dividend, but all extra dividends or bonuses payable in cash from the earnings of the company. We are satisfied that this can be the only safe, sound, just, and practical rule, and that any attempt to engraft refined and nice distinctions upon such rule will be productive of much more evil than any good which can come from it. Richardson v. Richardson, 75 Me. 570; s. c., 6 Am. & Eng. Corp. Cas. 573.

Massachusetts and Georgia Cases .-Where the bonus declared is in the shape of cash, then the intent of the corporation will be presumed to distribute it as income, unless a contrary intent may be inferred, either from the terms of the resolution, or from attending circumstances. Leland v. Hayden, 102 Mass. 542; Millen v. Guerrard (Ga. 1882),

21 Am. L. Reg. 381.

But where the bonus declared is in the shape of stock, then the intent of the corporation will be presumed to distribute it as capital, unless a like contrary intention may be inferred. Minot v.

Paine, 99 Mass. 101.

But in every instance the court will look at the substance of the transaction, and not at its form merely. When, therefore, a corporation bought with its surplus profits some of its own stock, which it subsequently apportioned among its stockholders, it was held that in substance, as well as intent, a cash bonus had been declared which was to be considered as income; and where the corporation declared a cash bonus, and at the same time authorized the issue of new shares to an amount equal to the bonus, and the bonus was actually intended to be and was applied to the payment of the new shares, it was held that this was substantially the declaration of a stock dividend, and that the new shares were to be considered capital. Daland v. Williams, enhanced price for which stocks sell by reason of dividends earned but not declared inures to the benefit of the remainderman. If a dividend is payable in certificates of indebtedness of the com-

pany, they belong to the life-tenant.2

(c) Stock Dividends.—The rule as to stock dividends is not well settled. On the one side it is held that where such dividends create new capital in addition to that already existing, thereby enlarging the corporate property and increasing its value, they belong to the remainderman, whether they arise from earnings or from other sources.³ And this seems to be the opinion of the majority of the courts.

101 Mass. 571; Heard v. Elredge, 109 Mass. 258; Leland v. Hayden, 102 Mass.

In Gifford v. Thompson, 115 Mass. 478, where a corporation had sold its franchises and property preparatory to dissolving its corporate existence, and afterwards made distribution of all its cash assets among its stockholders, including a large amount of profits which had accumulated during the existence of a lifetenancy in a portion of its stock, it was held that it was the clear intent of the corporation not to make a division of earnings, profits, or income, as such, but to apportion and distribute all its property as capital. In Lord v. Brooks, 52 N. H. 72, under similar circumstances, the contrary was held.

New York, New Jersey, and Pennsylvania Cases.—Where the profits of a corporation have been accumulating for many years, and the owner dies, directing the income of his estate to be applied to particular objects for limited periods. these extraordinary accumulations are as much a part of his capital as any other part of his estate, and must therefore be regarded as forming a part of the principal from which the future income is to arise. . . . The profits arising since the death of the testator are income. That sum is rightfully the property of the life-tenant. The managers might withhold the distribution of it for a time, for reasons beneficial to the interests of the persons entitled. But they could not by any form of procedure whatever deprive the owners of it. The omission to distribute it semi-annually, as it accumulated, makes no change in the ownership. Hakes no change in the ownership. Lewis, J., in Earp's App, 28 Pa, St. 368; Doran v. Olden, 4 C. E. Greene (N. J.), 176; Woodruff's Esiate, 1 Tuck. (Va.) 59; In re Kernochan, 104 N. Y. 618. See Com. v. Boston & A. R. Co. (Mass. 1886), 25 Am. & Eng. R. R. Cas. 17.

In New Jersey the plan adopted is very simple. The per cent of accumulated

profits to each share at the time of the inception of the life-tenancy in the stock is ascertained. The per cent of accumulated profits to each share at the time of instituting the suit is then computed. If the latter sum be equal to or greater than the former, the whole of the bonus is awarded to the life-tenant. If it be less, sufficient is deducted from the bonus to make up the difference, and this is reinvested as capital. The balance, if any there be, goes to the life-tenant. Van Doren v. Olden, 19 N. J. Eq. 176; Lord v. Brooks, 52 N. H. 72.

In Pennsylvania a somewhat different method is adopted. The value of each share at the inception of the life tenancy in the stock is first ascertained. The value of each share immediately after the issuing of the bonus or stock dividend is then determined. If the value be less at the latter time than at the former, enough is deducted from the bonus to make up the difference, and this is deemed capital. The rest is accounted income. Earp's Appeal, 28 Pa. St. 368; Moss's Appeal, 83 Pa. St. 264-271; Biddle's Appeal, 99 Pa. St. 278.

1. Schofield v. Redfern, 32 L. J. Ch. 627.

2. Millen v. Guerrard (Ga. 1882), 21 Am. L. Reg. 381.

3. Hooper v. Rossiter, I McCld. 527; Barton's Trust, L. R. 5 Eq. 238; Bouch v. Sproule, L. R. 12 App. Cas. 385, reversing s. c., L. R. 29 Ch. Div. 635; Minot v. Paine. 99 Mass. 101; Daland v. Wiliams, 101 Mass. 571; Richardson v. Richardson, 75 Me. 573; 6 Am. & Eng. Corp. Cas. 573; Rohrer on Railways, 169; Morawetz on Corp. (2d Ed.) § 468; Field on Corp. §§ 108, 109.

In Barton's Trust, L. R. 5 Eq. 238, a testator left certain shares in a navigation company, the "interest, dividends, shares of profits, and annual proceeds" of which were to be paid to A. during her life, in remainder to A.'s children. By the articles of the association of the

Some courts, however, hold that all dividends arising from earn-

navigation company it was provided, that by a vote of a majority of the shareholders a dividend might be declared out of the half-yearly profits, and a sum reserved for such contingencies as the directors should specify; also, that any capital raised by the creation of new shares, should be considered as part of the original capital in all respects. During A.'s lifetime three new paid-up shares were added by the company to those originally held in trust, in pursuance of a resolution of the shareholders to apply a portion of the net earnings during the half-year to necessary works. , and to issue new shares to represent the money as applied, a dividend being declared out of the residue of the earnings. The new shares bore dividends which were paid to A. during her lifetime. After her death her administrator claimed such shares as a part of her estate, and it was held that the new shares were capital and not income, and belonged to the children in remainder.

The doctrine of the English courts upon this question may be said to be definitely settled by a recent decision of the House of Lords. This is the case of Bauch v. Spraule, 12 App. Cas. 385, wherein all the English cases bearing upon this subject are carefully consid-It appeared that a testator bequeathed his residuary personal estate to his executor, T. B., in trust for the testa-tor's wife for her life, and after her death to T. B. Part of the residuary estate consisted of shares in a company whose directors had power, before recommending a dividend, to set apart out of the profits such sums as they thought proper as a reserve fund for meeting contingencies, equalizing dividends, or repairing and maintaining the works. After the testator's death, the directors of the company proposed to distribute certain accumulated profits (which they had temporarily capitalized), as a bonus dividend, to allot new shares (partly paid up) to each shareholder, and to apply the bonus dividend in part payment of the new shares. This proposal was carried out, and with T. B.'s consent new shares were allotted to him and registered in his name; and the bonus dividend on the testator's old shares being applied in part payment of the new shares, held. reversing the decision of the court of appeal (29 Ch. D. 635), that, looking at all the circumstances, the real nature of the transaction was that the company did not pay or intend to pay any sum as dividend, but intended to and did appropriate the undivided profits as an increase of the capital stock; that the bonus dividend was therefore capital of the testator's estate, and that the life-tenant was not entitled to the bonus or the new shares.

In Leland v. Hayden, 102 Mass, 442, a fund bequeathed in trust to pay the income to one until his death, and then the capital to another, included shares in the stock of a railroad corporation. This corporation, out of its net earnings accumulated during the term of the trust, bought in the market part of its own stock, invested other such earnings to an amount equal to twenty per cent of the par value of the residue of its stock in property, a large portion of which was not required for the use and improvement of the railroad, and voted to create a number of new shares of the same par value, to be issued and disposed of as the directors should deem proper. rectors then voted to offer to the individual stockholders the right to take part of the new stock at par, in the proportion of twenty per cent of a new share for each old share held by the taker, and that if any individual stockand that if any individual stock-holder should not avail himself of his right, they would dispose of it as they saw fit; and at the same time, after a preamble reciting that "Whereas, there is a large amount of surplus earnings invested in the shares and property of this com-pany, which the stockholders have instructed the directors to divide." they declared a dividend of forty per cent on the old shares held by individual stockholders, payable "twenty per cent in the shares of the company, which were purchased and held by this corporation in its corporate capacity, and twenty per cent in cash, derivable from the shares which the stockholders entitled to this dividend shall respectively pay for the new stock taken by them under the terms of the preceding vote.'

The court held that of the avails of the dividend to the trustee, so much as was derived from the first twenty per cent was payable as income to the life-tenant. and so much as was derived from the second twenty per cent accrued to the capital of the trust fund. See Rand v. Hubbell, 115 Mass. 461; Boston, etc., v. Com., 100 Mass. 399; C., B. & Q. R. Co. v. Paige, I Biss. (C. C.) 461; Harris v. San Francisco, etc., 41 Cal.393; Hart v. St. Charles, etc., 30 La. Ann. 758. Compare In re Kernochan, 104 N.Y. 627.

ings or profits go to the life-tenant, whether in cash or stock.¹ And other courts hold that whether the dividends be stock or money, they are to go to whomsoever in equity is entitled to the profits.² A stock dividend may be defined to be the issue by a

1. Van Doren v. Olden, 19 N. J. Eq.

In Clarkson v. Clarkson, 18 Barb. (N. Y.) 646, a testator bequeathed money to trustees, with direction to buy shares in incorporated companies, and to pay the "interest, dividends, and proceeds" thereof to a daughter, with remainder over. The trustees bought shares in two railroad corporations. These shares paid annual dividends, which were paid to the cestui que trust. One of the corporations also declared an extra dividend of sixty per cent in the capital stock of the company at par. Subsequently these corporations were consolidated with others. and by the terms of the consolidation the trustees as holders of the stock became entitled to, and did receive, shares in the consolidated corporation, equal in number to those held in the two former companies, together with bonds of the new company to the amount of \$55 on each such share. The market value of such stock and bonds was double the amount originally invested. The supreme court held that the sixty per cent divi-dend belonged to the life-tenants, and they were decreed that or its substi-tute; but that the bonds of the new company not being issued as dividends or proceeds, but as the difference between the value of the old stock and the new, were capital, and belonged to the corpus, except the bonds received as the difference for the shares representing the stock dividend which belonged to the life tenant. Simpson v. Moore, 30 Barb. (N. Y.) 637.

In Lord v. Brooks, 52 N. H. 72, the question was considered at some length. The facts were as follows: A, owning forty-shares in P. Bank, executed in 1839, a trust deed conveying said shares to B, in trust to "pay the dividends of said stock as the same may from time to time be made and declared" to A, and after A,'s death to "transfer and convey the same to the heirs of C. Said deed contained a recital that A contemplated marriage, that she was desirous "of receiving the income or dividends on said shares to her sole and separate use, not-withstanding the said contemplated marriage, for and during her natural life, and that after her decease the said forty shares should be distributed and conveyed to and among" the heirs of C. The

charter of the P. Bank expired in 1845. From 1845 to 1840, the P. Bank made various cash dividends of the surplus. These dividends, together with \$4000 received as the par value of the forty shares. were invested by B in the purchase of fifty-three shares of the P. E. Bank. The P. E. Bank ceased to do business in 1864. From 1864 to 1868 the P. E. Bank made various cash dividends of surplus. which, together with the par value of the fifty-three shares, were received by B. From the funds so received. B invested \$4000 in the purchase of forty shares in the F. N. Bank, paid \$1000 to A. and had left in his hands a balance of \$3063.15. A died in 1869. The value of the forty shares in the P. Bank at the date of the trust deed was less than the value of the forty shares in the F. N. Bank at the time of A's death. It was held that A's administrator could recover the balance of \$3063.15 in A.'s hands, as income to which A was entitled under the trust deed. See Earp's Appeal, 28 Pa. St. 368; Wiltbank's App., 64 Pa. St. 286; s. c., 14 Am. R. 585; Moss's App., 83 Pa. St. 204.

2. "As was said by Chapman, C. J., in Minot v. Paine, 99. Mass. 101, the rule which regards cash dividends, however large, as income, and stock dividends, however made, as capital, is a very simple and convenient one, and may relieve, the trustees and courts of much trouble, but it is certainly not one that commends itself for its justice and equity; neither does it at all regard the facts of a case like Earp's Appeal or the case in hand. To us it seems like a bungling rule of law, that at one time would give what is indisputably income to the remainderman, and at another what is clearly capital to the life-tenant. It is, however, enough for us that our own authorities repudiate such a rule. case last referred to, it was held that the dividends from a corporate surplus fund accumulated before the testator's death must be regarded as part of the stock forming the trust fund, whilst after ac-cumulations, though distributed in the shape of stock, must be treated as income, and go to the life-tenant. In like manner it was held in Wiltbank's Appeal, 64 Pa. St. 286, that the earnings or profits of the stock of a decedent made after his death were income,

corporation, as a dividend, of new shares which have been paid up by the transfer from the surplus or profit and loss account, to the account representing capital stock, of a sum equal to their par value.1

(d) Apportionment of.—Where the life-tenant dies between the times of declaring dividends no apportionment is generally made.² In England, however, such apportionment is enjoined by statute.3 But the statute in question only applies to the stock of corpora-

tions, strictly speaking.4

(e) Reinvestment.—Where stock is sold for reinvestment between the dividend days, an additional value is often communicated to it by the relative proximity of the next dividend day. The difficulty of discovering exactly how much its value is enhanced has in some cases led the court to refuse to the life-tenant the benefit of the additional value.5

Where it is possible, however, to make the calculation, the life-

tenant is entitled to the increased value.6

(f) Option to Subscribe for New Stock.—Where a corporation with a large surplus gives to its stockholders the option to sub-

though put into the form of capital by the issue of new stock, and it was there said that equity, seeking the substance of things, found that the new stock was but a product, and was therefore income. So may we say in this case. Equity, seeking not the mere convenience but the substance of things, finds the dividends in controversy to be part of the actual capital of the company's money, raised by a sale of part of its original franchise and realty—that which is stock most specifically and directly represents; hence it awards the product to him in whom it is finally to vest.

Assume the contrary doctrine, and that which we have already pointed out may at any time occur: on a sale of the entire franchise and property of the company, with a like order by its directors for the distribution of the money so raised, the dividends must go, regardless of the equities of the parties, to the life-tenant, and nothing whatever be left for the remainderman. This might be very convenient for trustees and courts, for as it would definitely close out the trust, there would be no further trouble about it; nevertheless, the justice of such a disposition of the trust would be more than doubtful. Again, this same doctrine, which makes cash dividends income and stock dividends capital, would often work with equal harshness upon the interests of a life-tenant. For corporate earnings might be retained for an indefinite length of time, and then be distributed in the shape of stock shares, which the rule contended for would at once pronounce to be

capital, and thus the beneficiary would be deprived of his income. Than this, far better is the Pennsylvania doctrine, admirably stated by our brother, Mr. Justice Paxson, in Moss's Appeal, as follows:

"'But where a corporation, having actually made profits, proceeds to distribute such profit amongst the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards the form and grasps at the substance, would award the thing distributed, whether in stock or in money, to whomsoever was entitled to the profits." Gordon, J., in Vinton's Ap-peal, 99 Pa. St. 434. See Earp's App., peal, 99 Pa. St. 434. See Earp's App., 28 Pa. St. 368; Wiltbank's App. 64 Pa. St. 256; Moss's App., 83 Pa. St. 264.

1. Mr. Dwight Collier, Am. Bar Ass'n Proceedings 1885, p. 268; Gordon's Ex'rs v. R., F. & P. R. Co., 78 Va. 501; s. c., 22 Am. & Eng. R. R. Cas. 33.

2. Clapp v. Astor, 2 Ed. Ch. (N.Y.)

319; Earp's Appeal, 28 Pa. St. 368. 3. Hartley v. Allen, 4 Jur. (N. S.) 500; In re Maxwell's Trust, 1 H. & M. Ch. 610.

4. Jones v. Ogle, L. R. 8 Ch. App. 192. See Brinley v. Grow, 15 Cent. L. J. 161: Millen v. Guerrard (Ga. 1882), 21 Am. Law Reg. 381; Biddle's Appeal, 99 Pa. St. 278; Vinton's Appeal, 99 Pa. St. 5. Scholefield v. Redfern, 8 L. T. R.

(N. S.) 487.

6. Landsborough v. Somerville, 19 Beav. 295; s. c., 1 Am. & Eng. Corp. Cas. 111, note; 6 Am. & Eng. Corp. Cas. 575, note.

scribe for new stock, a question has sometimes arisen as to whether the value of the option is principal or income. It is generally ac-

counted as principal.1

(g) Proceeds of Corporate Property.—When a corporation makes a sale of its property or franchises and distributes the proceeds in the shape of a bonus to its stockholders, this is considered as capital, and will be reinvested for the benefit of the remainderman in any part of the stock, irrespective of the intention of the corporation.2

7. Purchasers of Stock.—The general rule is that the purchaser of stock has right to receive all dividends subsequently declared.

without reference to the time they were earned.3

1. The right or privilege to take new shares in a corporation is a benefit or interest which attaches to stock, not as profit or income derived from the prosecution of the corporate business, but as inherent in the shares from their very

It is an original incident or attribute pertaining to each share-a right to a larger participation or ownership in the capacity of the corporation to earn profits, and not the gain or income itself actually earned by the corporation. this view the value of the right must be Atkins v. Albree, regarded as capital.

12 Allen (Mass.), 359.

The only other State in which the question has arisen is Pennsylvania. merly they adopted the rule that it should be considered as income. Wiltbank's Appeal, 64 Pa. St. 256. Later cases, however, lay down a different rule. Moss's Appeal, 83 Pa. St. 264.

Whenever an option to subscribe to new stock is offered, and the value attained by the old stock above par is shown to have remained unaltered from the time of the inception of the life-tenancy in the stock down to the offering of the option, then the value of the new stock above what is paid for it, or the proceeds of the option to subscribe to it, will be decreed capital. But if, on the other hand, the total value of the old stock above par can be shown to have been caused by the accumulation of a fund, or from other circumstances arising since the inception of the life-tenancy in the stock, then the value of the new stock above what is paid for it, or the proceeds of the option to subscribe to it, will be Biddle's Appeal, 99 deemed income. Pa. St. 278; s. c., 21 Am. Law Reg. 394,

note. 2. Wheeler v. Perry, 18 N. H. 304; Heard v. Elridge, 109 Mass. 258; Gifford v. Thompson, 115 Mass. 478; Bark-

ley v. Wainright, 14 Ves. 66; Clarkson v. Clarkson, 18 Barb. (N. Y.) 646; Vinton's Appeal, 99 Pa. St. 434; Reed v. Head, 6 Allen (Mass.), 174; Balch v. Hallett, 10 Gray (Mass.), 402; Harvard v. Amory, 9 Pick. (Mass.) 446.

If the property in question has originally been purchased with profits, the dividends declared from the proceeds of the sale will of course be distributed just as dividends declared from those profits would have been. If, on the contrary, the property has been bought with the capital of the corporation, or has actually formed a part of that capital, a very different rule applies. Capital remains capital, no matter through how many transmutations it may pass. Hence property bought by capital is capital, the proceeds of that property are likewise capital, and dividends declared out of these proceeds must be deemed and accounted as capi-Note to Millen v. Guerrard (Ga. 1882), 21 Am. L. Reg. 392. See Winslow v. Haven, 52 N. H. 76.

Field on Corp. § 104; Foote, Appellant, 22 Pick. (Mass.) 299; Granger v. Bassett, 98 Mass. 462; Goodwin v. Hardy, 57 Me. 143; Gifford v. Thompson, 115 Mass. 478. "The purchaser of a share of stock takes

the share with all its incidents, and among these is the right to receive all future dividends, that is, in the proportionate share of all profits not then divided; and as we understand the law and the usage of such corporations, it is wholly immaterial at what times or from what sources these profits have been earned: they are an incident to the share to which a purchaser becomes at once entitled, provided he remains a member of the corporation until a dividend is made." Sargent, J., in

Marsh v. Eastern R. Co., 43 N. H. 520. 3. Rohrer on Railroads, 172; Central R. Co. v. Papus, 59 Ga. 342; Brundage v. Brundage, 65 Barb. (N. Y.) 397; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90.

When a dividend is once declared and payable, it does not pass to the purchaser of the stock: but if it has been declared and made payable at a future time, the owner of the share at the time the dividend is payable, and not the owner at the time it is declared. is entitled to the dividend.2 If the purchaser only has an equitable title to the stock, he is still entitled to the dividends.3

8. Guaranteed or Preferred Stock.—The term "guaranteed" is but the synonym for "preferred," when applied to corporation stocks and dividends. It is a provision for a dividend to be paid out of the earnings and profits of the company to the shareholder to the amount guaranteed by the certificate, in preference to payment of dividends on ordinary stock. If the profits for the year are deficient to meet the same, the holder is not entitled to payment otherwise, but must wait another year's result, and will have in that respect the prior claim thereon for the amount of such deficiency.⁵ The right of holders of preferred stock extends only

1. Goodwin v. Hardy, 57 Me. 143; Marsh v. Eastern R. Co., 43 N.H. 1; Rohrer on Railroads, 173; Morawetz on Corp. (2d Ed.) § 449; Ryan v. Leavenworth, etc., R. Co., 21 Kan. 403; Gifford v. Thompson, 115 Mass. 478.

2. Burroughs v. N. C. R. Co., 67 N. Car. 376; s. c., 12 Am. R. 611.

In this case it was held that when the dividend was declared on February 16, 1870, to be paid on April 1, 1870, and the person who owned the shares on February 16, when the dividend was declared, sold and transferred them on the 17th of February, that such purchaser who held them on April 7, 1870, when the dividends were payable, was entitled to the dividends declared Feb. 16; citing in Opinion Lindley on Part. 896; Jacques v. Chambers, 2 Coll. 435; Clive v. Clive, Kay, 600; Witts v. Stearne, 10 Ves. 185 Paris v. Paris, 13 Ves. 363; Phelps v. Farmer's Bank, 26 Conn. 272; Minot v. Paine, 99 Mass. 106; Goodwin v. Hardy, 57 Me. 143. But see Bright v. Lord, 51 Ind. 272; Ohio v. Cleveland, 6 Ohio St.

The defendant contends that the interest directed by the resolution to be paid was but an incident to the capital stock, and that the incident in law follows and accompanies the principal; and that the unconstitutional transfer of the stock to Litchfield carried with it and vested in him a right to receive all the interest or stock dividends unpaid at the time of the transfer. The legal principle here asserted is not denied; but we think it does not properly apply to the case before us. The interest follows the principal as an incident to it, so long as it remains an incident; but when it is separated and set apart from the principal by actual payment, or by being carried when due to the credit of the owner of the principal in his account with the debtor, and this, in pursuance of a provision in the contract creating and defining the principal debt, it is so separated and disjoined from the principal as to cease to be an incident to. and does follow it. Ohio v. Cleveland. 6 Ohio St. 495.

3. Conant, Ellis & Co.v. Seneca County

Bank, 7 Ohio St. 208.

4. Gordon's Exrs. v. Richmond, etc., R. Co., 78 Va. 501; Taft, etc., v. Hartford, etc., R. Co., 8 R. I. 310; s. c., 5 Am. Rep. 575; Green's Brice's Ultra Vires (2d Am. Ed.), 172: Henry v. Great Northern R. Co., 4 K. & J. I: Matthews v. Great Northern R. Co., 28 L. J. Ch.

375.
5. Taft, etc., v. Hartford, etc., R. Co., 5. Taft, etc., v. Hartford, etc., R. Co., 8 R. I. 310; s. c., 5 Am. Rep. 575; Burt v. Rattle, 31 Ohio St. 116; Harrison v. Mexican, etc., R. Co., L. R. 19 Eq. Cas. 358; In re Bangor, etc., 20 Law Rep. 59; Union Pacific R. Co. v. U. S., 99 U. S. 402; Lockhart v. Van Alstyne, 31 Mich. 76; Chase v. Vanderbilt, 62 N. Y. 307; Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157; Elkins v. Camden, etc., R. Co., 36 N. J. Eq. 233; Chaffee v. Rutland, etc., R. Co., 55 Vt. 110; s. c., 16 Am. & Eng. R. R. Cas. 408; Gordon's Exrs. v. Richmond, etc., R. Co., 78 Va. Exrs. v. Richmond, etc., R. Co., 78 Va. 501; Totten v. Tison, 54 Ga. 139.

Where there is preferred stock, and the same is allowable by the law, the holders thereof are entitled first to receive all the net earnings of each year, when dividends are being made up, to the amount of the per cent called for as preferred in their certificate. Next in order the comto a priority as to dividends; as to assets or capital, they stand in the same position as ordinary shareholders. They must be paid out of the profits; any agreement to pay them out of the capital would be ultra vires.2

When preferred dividends are to be paid out of the net earnings of the corporation, the net earnings of the current year are meant.3 Directors have no power to contract for the care and protection of the interest of the holders of preferred stock, or to pay specified dividends thereon.4 The rights of preferred shareholders must in every instance depend upon the peculiar provisions of the contract contained in the certificate.5

mon stock is entitled exclusively to a dividend of the residue of the earnings. until the dividend amounts in like manner to the per cent already allotted in the preferred stock; and finally, if there be a surplus remaining, then such surplus is to be applied to the whole of the stock, both preferred and common, alike, I Rohrer on Railroad, 168; Bailey v. Han-Thompson v. Erie Co., 45 N. Y. 465; Prouty v. Lake Shore, etc., R. Co., 52 N. Y. 363; Elkins v. Camden, etc., R. Co., 9 Am. & Eng. R. R. Cas. 639; Nickals v. N. Y., L. E. & W. R. Co. (U. S. C. C.), 13 Am. & Eng. R. R. Cas. 136; State v. Cheraw, 9 Am. & Eng. R. R. Cas. 631; St. John v. Erie R.Co., 22 Wall. (U. S.) 136; Belfast, etc. v. City of Belfast, etc., 77 Me. 362.

In New York, etc., R. Co. v. Nickals, 119 N. Y. 296, the court observed: "What was stipulated to be paid to them as holders of preferred stock of the new company was not a debt, payable in every event out of the general funds of the corporation, but a dividend, as 'declared by the board of directors,' and payable out of such portion of the profits as should be set apart for distribution among shareholders; non-cumulative, because 'dependent on profits of each particular year,' and not to be fastened on the profits of succeeding years. That the parties contemplated a declaration of dividends, and not a mere statement of net profits during a designated period, is made evident by the requirement that dividends to preferred stockholders should be paid 'in preference to the payment of any divi-This landend on the common stock.' guage is not consistent with the theory that the holders of preferred stock were entitled to six per cent thereon simply because there were profits, and irrespec-tive of any declaration of dividends. A declaration of profits as in itself, and without further action by the directors, entitling shareholders to dividends, is un-

known in the law and in the practice of corporations. Dividends are declared by some formal act of the corporation; the question whether there are or are not profits being settled entirely by the ac-counts of the company as kept by sub-ordinate officers, not by the mere statement of the directors as to what appears upon its books,"

Under the provisions of the act of April 28th, 1873, a real-estate company issued first preferred stock, with the right to the holder to dividends not exceeding five per centum semi-annually, as the profits of the company might warrant, payable out of the net earnings of the company, and the company was bound at all times to apply any funds in its treasury, or resulting from the sale of real estate, to the redemption at par of any portion of the stock upon demand of the holder. Held, that no holder of stock had a right to its redemption out of any specific assets other than proceeds of sale of real estate, nor out of money in the treasury if it would work injustice to the creditors or stockholders of the company by interrupting or crippling the business of the company. Culver v. Reno Real Estate Co., 91 Pa St. 367.

1. Re London India-rubber Co., L. R.

5 Eq. 510.

A preferred stockholder generally is not a creditor of his corporation. Belfast v. City of Belfast, 77 Me. 362.

2. McDougall v. Jersey, etc., 2 H. & M. 528; Pittsburg, etc., R. Co. v. Allegheney, 63 Pa. St. 126; Lockhart v. Van Alstyne, 31 Mich. 76; Curran v. Arkansas, 15 How. 304. See Cotting v. N. Y. sas, 15 How. 304. See Cotting v. N. Y. & N. Eng. R. Co. (Conn. 1888), 29 Am. &

Eng. R. Cas. 371.

3. St. John v. Erie R. Co. 22 Wall. (U. S.) 136; Union Pac. R. Co. v. U. S., 99 U. S., 402.

4. Chase v. Vanderbilt, 62 N. Y. 307; Lockhart v. Van Alstyne, 31 Mich. 76. 5. Bailey v. Hannibal R. Co., 17 Wall. (U. S) 96; Mathews v. Great Northern

9. Stock Dividends,—Where the directors of a corporation are invested with authority to issue new shares, and profits have been earned which may be legally distributed, and the directors have the power in their discretion to retain these profits for future use, a stock dividend may be declared. Such dividends are not a distribution of money to stockholders, but change the form of his investment by increasing the number of his shares, thereby diminishing the value of each share, yet leaving the aggregate value of all his stock substantially the same.² They do not diminish the

R. Co., L. R. 28 Ch. 375; Williston v. R. Co., L. R. 28 Ch. 375; Williston v. Mich. S., etc., 13 Allen (Mass.), 400; St. John v. Erie R. Co., 22 Wall. (U. S.) 136; West Chester, etc., R. Co v. Jackson, 77 Pa. St. 321; Morawetz on Corp. (2d Ed.) § 456; Field on Corp. § 123; I Rohrer on Railroads, 172; Art. in 20 Am. Law Reg. (N. S.) 644; Pierce on Pailroads Railroads, 125.

1. Morawetz Corp. (2d Ed.) § 453.
2. Howell v. Chicago, etc., R. Co., 51
Barb. (N. Y.) 378; Jones v. Terre Haute, etc., R. Co., 57 N. Y. 196; Williams v. Western Union Tel. Co., 93 N. Y. 162; Minot v. Paine, 99 Mass. 101; Rand v. Hybbell. Lift Mass. 177. Citizani, etc. Hubbell, 115 Mass. 471; Citizens', etc.,

Ins. Co. v. Lott, 45 Ala. 188.

In Terry v. Eagle Lock Co., 47 Conn. 141, the court observed: "There is a difference between a cash and a stock dividend. The former is created by a simple vote of the directors, and the amount thereby becomes severed from the general fund and belongs to the stockholders pro rata. The latter can be initiated only by a vote of the stockholders. That is followed by issuing the stock, and the increase can only be completed legally by filing with the town clerk and with the secretary of state the certificates required by law. Suppose the vote had been to increase, not from the surplus earnings, but by a sale of the newly-created stock. In such a case it cannot be said that the capital is actually increased until the new stock is subscribed for at least. Until that, there is an element of uncertainty about it. It may never be taken. It is very clear that the vote to increase is not per se an increase. Nor is it such where the increase contemplated is from the surplus earnings. Again, a cash dividend entitles the stockholder to so much money, the ordinary way in which he receives from time to time the fruits of his investment. dividends do not materially affect the value of the stock. A stock dividend is exceptional. It does not add to his ready cash, but it changes the form of his investment by increasing his number of shares, thereby diminishing the value of each share, leaving the aggregate value of all his stock substantially the same. It is of no special importance whether that value be divided into few or many shares."

In Browne v. Lehigh Coal & Navigation Co., 49 Pa. St. 270, a corporation, restricted to six per cent dividends out of profits, to stockholders, on the basis of an increased business and an enhanced value of the works and property, in accordance with a resolution of stockholders, issued scrip certificates from time to time, entitling the holder to additional shares of stock, distributing them ratably among share and scrip holders in proportion to the amount held at the date of the issue, the resolution, embodied in the scrip, providing that the scripholder should not be entitled to cash dividends until the funded debt of the company should be paid off, or adequate provision be made for its discharge when due and payment demanded, nor until conversion of said scrip into stock. After conversion, certain scripholders demanded by bill in equity the back dividends which had been declared on the stock from the issue to the date of conversion. It was held that the rights of the scripholders were measured by the contract under which it was issued, of which the scrip alone was the evidence; and that the contract was but an engagement that the holders of the scrip might become shareholders after payment of the funded debt or provision made therefor; and that, therefore, the scripholders were not entitled to dividends upon the scrip, nor on the stock into which it had been converted, except on such as had been declared subsequent to said conver-

In Commonwealth v. Pittsburgh, etc., R. Co., 74 Pa. St. 83, the court observed: "The whole question in this case depends on the fact whether the increase in the stock of this company was a stock dividend. . . . The stock dividend is a thing well understood, and has been property of the corporation, which remains as solvent as before the dividend, since the whole stock of the company before the dividend represented the company's entire property, and it can afterwards represent no more. Such dividends do not constitute a distribution of capital within the meaning of a statute prohibiting directors from paying dividends out of capital.

passed upon by this court in several instances. In Commonwealth v. Cleveland, etc., R. Co., 29 Pa. St. 370, it was said that 'in assessing the tax no difference can be made between the dividend actually paid to the stockholder and stock dividends, which are the profits added to the stock of each corporation.' Nor is it necessary that the corporation should formally declare the dividend payable in stock. This was determined in Lehigh Stock. This was determined in Lehigh Crane Iron Co. v. Com., 55 Pa. St. 448. There a company with a capital of \$100,000 from time to time increased its capital from its earnings until its stock reached to \$000,000, and we held that the increase having resulted from earnings, was liable to the tax. It was a dividend made, though not so declared. We said then that the earnings of the original capital belonged to the owners of the stock in proportion to their shares. So long as they remained in the profit and loss account, there was no division, express or implied; but when added to the capital and made a basis of dividends to the stockholders, they then reached the capital benefit of the earnings of their

1. In Williams v. Western Union Tel. Co., 93 N. Y. 162, the court observes: "By loss or misfortune, or misconduct of the managing officers of a corporation, its capital may be reduced below the amount limited by its charter; but whatever property it has up to that limit must be regarded as its capital stock. When its property exceeds that limit, then the excess is surplus. Such surplus belongs to the corporation and is a portion of its property, and in a general sense may be regarded as a portion of its capital; but in a strictly legal sense it is not a portion of its capital, and is always regarded as surplus profits. The very section we are considering contemplates that there may be a surplus, and that such surplus may be divided. The surplus may be in cash, and then it may be divided in cash; it may be in property, and if the property is so situated that a division thereof among the stockholders is practicable, a dividend in property may be declared, and that may be distributed among the stockholders. All such dividends diminish and deplete the property of the corporation, and that section was designed to prevent dividends of property which tended to deplete the assets of the com-pany below the sum limited in its charter as the amount of its capital stock. But stock dividends never diminish or interfere with the property of a corporation, and hence are not within the purview of that section. After a stock dividend a corporation has just as much property as it had before. It is just as solvent and just as capable of meeting all demands upon it. After such a dividend the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares before the stock dividend represented the whole property of the corporation, and after the dividend they represent that and no more. A stock dividend does not distribute property, but simply dilutes the shares as they existed before: and hence that section in no way prevented or related to a stock dividend. Such a dividend could be declared by a corporation without violating its letter, its spirit, or its purpose." See, also, next

2. In Williams v. Western Union Tel. Co., 93 N. Y. 162, it was held that the term "capital stock" in the provision of the New York Revised Statutes (I R. S. 601, § 2), prohibiting the directors of a corporation from making dividends, except from the surplus profits of a corporation, or from dividing, withdrawing, or in any way paying to the stockholders "any part of the capital stock of such company," means the property of the corporation, contributed by the stockholders or otherwise obtained, to the extent required by its charter. The object of the provision was to prevent a withdrawal of the property, which would reduce the value of its assets below the sum limited for its capital in its charter or articles of association. When the property of the corporation exceeds that limit, the excess is surplus, which may be divided among the stockholders, either in money or property. Where, also, a corporation has accumulated such a surplus, and an increase of its share capital has been lawfully authorized, a dividend of shares is (a) Stockholder's Right of Subscription to New Stock when Stock Dividend has been Declared.—It is well settled that when a stock dividend has been declared, each share of the old stock has a proportionate interest in the new, representing what would have been the stockholder's share of the dividend; neither the officers nor a majority of the stockholders can deprive the minority of this interest. Where a corporation with power to increase its capital stock

not prohibited by said provision; and where such a dividend does not exceed in amount the amount or value of the surplus, it is not in conflict with any

principles of public policy.

1. In Jones v. Morrison, 31 Minn.
140, the court observes: "The case presents the question. Have a majority of stockholders in a corporation the right to dispose, without the consent of the minority, of new stock, without regard to its actual value? If they have, the interests of the minority stockholders are to a large extent at the mercy of the majority. Fortunately, the rule of law determining the rights of stockholders in such a case is pretty well settled. In Gray v. Portland Bank, 3 Mass. 339, the corporation, a bank, had the power to increase the capital stock up to a certain limit, and did so increase it. The plaintiff, an original stockholder, claimed the right to subscribe to the new or increased stock in proportion to the original stock held by him-a right which the corporation denied, and it refused to receive his subscription. The court sustained the claim of plaintiff. . . . When the proposition that a corporation is trustee of the corporate property for the benefit of the stockholders, in proportion to the stock held by them, is admitted (and we find no well-considered case which denies it), it covers as well the power to issue new stock as any other franchise or property which may be of value held by the cor-poration. The value of that power, where it has an actual value, is given to it by the property acquired and the business built up with the money paid in by the subsisting stockholders. It happens not infrequently that corporations, instead of distributing their profits in the way of dividends to stockholders, accumulate them till a large surplus is on hand. No one would deny that, in such case, each stockholder has an interest in the surplus which the courts will protect. No one would claim that the officers, directors, or majority of the stockholders, without the consent of all, could give away the surplus, or devote it to any other than the general purposes of the corporation. But when new stock is

issued, each share of it has an interest in the surplus equal to that pertaining to each share of the original stock. And if the corporation, either through the officers, directors, or majority of stockholders, may dispose of the new stock to whomsoever it will, at whatever price it may fix, then it has the power to diminish the value of each share of old stock by letting in other parties to an equal interest in the surplus, and in the goodwill or value of the established business.' State v. Franklin Bank, 10 Ohio, 91; Eidman v. Bowman, 58 Ill. 444; Miller v. Illinois Central, etc., R. Co., 24 Barb. (N. Y.) 312; Atkins v. Albree, 12 Allen (Mass.), 359; State v. Smith, 48 Vt. 266; Jones v. Terre Haute, etc., R. Co., 57 N. Y. 196; Taylor v. Miami Exporting Co., 5 Ohio. 162; Dousman v. Wisconsin, etc., R. Co., 40 Wis. 418.

In Reese v. Bank of Montgomery County, 31 Pa. St. 78, it was held that

when a part of the authorized capital stock of a bank remains untaken at the time of its incorporation, the right to issue the remainder of it is a corporate franchise, held by the corporation in trust for the corporators, and it must be disposed of for the benefit of all. If the directors dispose of it to the corporators unequally, and in violation of the rights of any, each corporator injured by their act may have remedy in assumpsit against The resolution of the the corporation. directors, carried into effect, distributing such shares of stock among all the stockholders who are not in arrear on the shares taken by them, and excluding those who are, is an unlawful imposition of a penalty on those in arrear, and a violation of the equal rights of the corporator who was ready and offered to take his proportion of the new shares. See also Bank of Montgomery Co. v. Reese, 26 Pa. St. 143. But the action cannot be maintained by a stockholder without proof that he demanded and offered to subscribe for the same. a material averment in the declaration, and must be proved as laid. Wilson v. Bank of Montgomery County, 29 Pa. St.

537. In Curry v. Scott, 54 Pa. St. 270,

denies to a stockholder his right to subscribe to such stock in proportion to his former holding, the courts will sustain his claim.1 But this right is not such an absolute one that a stockholder is not bound by the conditions of the vote, or the order of the directors. as to the taking and payment for the shares within a specified time.2 So this rule is held not to apply to old stock purchased by the company, on which the right to vote is merely suspended: such stock directors may in their discretion reissue or sell for the benefit of the corporation.³ As a general rule, stock dividends. even when they represent net earnings, become at once a part of the capital 4 of the corporation, and of course entitle the holder to vote, unless it is otherwise provided in the charter or by-laws.5

10. Taxation of Dividends.—A tax levied on dividends cannot be disputed by the stockholders on the ground that the dividend was

declared when the corporation was insolvent.6

A tax on all dividends above a certain per cent on the capital refers to the capital paid in, not merely authorized.7

A tax on the capital stock as measured by the dividends is not

a tax on dividends.8

Mandamus will lie to compel payment by a corporation of a tax assessed on its dividends.9

the court observed: "But when it is said that the untaken stock belongs to the old stockholders, more is meant than can be admitted. In a certain sense the assertion is true. But it is not to be admitted that an old stockholder had a right to subscribe to the untaken stock superior to the right of one who owned no stock. If this were so, a first subscriber might compel all the remaining untaken stock to be sold, or at least to have a right to exclude any other person from subscribing." Compare Ohio Ins. Co. v. Minnemacher, 15 Ind. 294; Mason v. Davol Mills, 132

1. Gray v. Portland Bank. 3 Mass. 336; Jones v. Morrison, 31 Minn. 140; and see cases cited in preceding note.

2. Hart v. St. Charles Street, etc., R. Co., 30 La. Ann., pt. i., 758; Brown v. Florida Southern R. Co., 19 Fla. 472.
3. State v. Smith, 48 Vt. 290; Hart-

ridge v. Rockwell, R. M. Charlton, 260. See also State Bank v. Fox, 3 Blatchf. (C. C.) 431; Williams v. Savage Míg. Co., 3 Md. Ch. 418; Taylor Corp. (1st Ed.) § 569.

4. Compare Williams v. Western Union

Tel. Co., 93 N. Y. 162.
5. Bailey v. Railroad Co., 22 Wall. (U. S.) 604.

6. Pennsylvania Bank Assignee's Acct.,

39 Pa. St. 103.

A bridge owned by an incorporated company was declared a county bridge by

appropriation proceedings, and the company's damage was assessed at a much greater sum than the amount of its capital stock, and when paid the surplus was divided among the stockholders. Held, that the surplus was of the nature of profits, and was a proper measure of tax to be levied on the capital stock. Matson's, etc., Co. v. Com. (Pa., Jan. 3, 1888), 11 Atl. Rep. 813.

7. Street Railway Co. v. Philadelphia, 51 Pa. St. 465; Philadelphia v. Ferry R.

Co., 52 Pa. St. 177.

8. Phœnix Iron Co. v. Commonwealth 59 Pa. St. 104; State v. Alaney, etc., 92 N. Y. 458; s. c., 1 Am. & Eng. Corp. Cas. 466.

9. State v. Mayhew, 2 Gill (Md.), 487. As to taxes on income, etc., see Haight v. Railroad Co., 6 Wall. (U. S.) 15; Railroad Co. v. Jackson, 7 Wall. (U. S.) 262; U. S. v. Railroad Co., 17 Wall. (U. S.) 322; Chicago v. Page, 1 Biss. (C. C.) 461; State v. Charleston, 5 Rich. (S. Car.)

Authorities for Dividends .- Morawetz on Private Corporations (2d Ed.); Boone on Corporations; Field on Corporations; Pierce on Railroads; Rohrer on Rail-roads; an extremely full and valuable Note in 21 Am. Law Reg. (N. S.) 387; Article on "Dividends," 18 Alb. Law J. 264; Article on "Preferred Stock," 20 Am. Law Reg. (N. S.) 648. See also Am. & Eng. Corp. Cas. and Am. & Eng. R. R. Cas., and notes to these series.

DIVORCE.

DIVORCE.

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I. Definitions.—(1) Divorce.—The total or partial dissolution of a marriage by the State is called a "divorce.

The relation of two married persons to each other is not a mere personal relation depending on their will, but a status,1—a legal condition established by laws, 2—which the State has full power to create, change, and abrogate. 3 The relation is not a contract, and it is not a vested right; and a divorce, therefore, does not fall within prohibitions against the impairment of the obligation of contracts,4 or the divesting of vested rights.5 Thus it is that the State can, on any terms it pleases, 6 dissolve the marriage of any persons over whose domestic condition it has jurisdiction." In the United States of America the "State" means the local government of each State, as the central government has no jurisdiction over the domestic condition of the inhabitants of the several States: the several States can grant divorces, the United States cannot.8

The State can dissolve a marriage through its legislative department by special act—such a divorce being called a legislative divorce; or through its judicial department-such a divorce being

called a judicial divorce.

(2) Legislative Divorces.—A legislative divorce is a divorce granted directly by the legislature, and a divorce granted by a court under a special act of the legislature must also be so re-

title MARRIAGE.

2. Duntze ω . Levett, 3 Eng. Ecc. 360, 495, 502; Maguire ω . Maguire, 7 Dana (Ky.), 181; Adams ω . Palmer, 51 Me. 480, 482; Hunt v. Hunt, 72 N. Y. 217, 227.
3. Noel v. Ewing, 9 Ind. 37; Sewall,

122 Mass. 156, 160, 161.

4. Starr v. Hamilton, I Deady (U. S.), 268, 278; Strader v. Graham, 10 How. (U. S.), 82, 93; Dartmouth v. Woodward, 4 Wheat. (U. S.) 518, 695; Starr v. Pease, 8 Conn. 541, 546; Noel v. Ewing, 9 Ind. 37, 49; Levins v. Sleator, 2 G. Greene. (Iowa), 608, 654; Maguire v. Maguire, 7 Dana (Ky.), 181, 184; Cabell v Cabell, Dana (Ky.), 181, 184; Cabell v Cabell, 1 Met. (Ky.) 319, 326; Bertholemy v. Johnson, 3 B. Mon. (Ky.) 90, 91; Adams v. Palmer, 51 Me. 480, 482; Wright v. Wright, 2 Md. 429, 448; Sewall v. Sewall, 122 Mass. 156, 161; Carson v. Carson, 40 Miss. 349, 351; Bingham v. Miller, 17 Objo. 445, 447; Pugh v. Oli son, 40 Miss. 349, 351; Bingham v. Miller, 17 Ohio, 445, 447; Pugh v. Otterheimer, 6 Oreg., 231, 236; Cronise v. Cronise. 54 Pa. St. 254, 262; Grant v. Grant, 12 S. Car. 29, 30; Jones v. Jones, 2 Tenn. 2, 3. See, contra, Ponder v. Graham, 4 Fla. 23, 46; Bryson v. Bryson, 44 Mo. 232, 233; State v. Fry, 4 Mo. 120, 134, 187; Clark v. Clark, 10 N. 1, 280, 287 H. 380, 387.

5. See Starr v. Pease, 8 Conn. 541,

1. Niboyet v. Niboyet, 4 P. D. I, II; 545; Townsend v. Griffin, 4 Harr. (Del.) Sottomayer v. De Barros, 5 P. D. 94, 440, 444; Holmes v. Holmes, 4 Barb. (N 101; Askew v. Dupree, 30 Ga. 173, 176; Y.) 295, 300, 301. But see Clark v. Ellison v. Martin, 53 Mo. 575, 578. See Clark, 10 N. H. 380, 387. A divorce necessarily changes the property rights of the parties, but this they are presumed to have contemplated. Starr v. Pease, 8 Conn. 541, 546. Still, it cannot divest such rights as have vested, for instance, through a marriage settlement. v. Holmes, 4 Barb. (N. Y.) 205, 303. But it destroys mere inchoate rights, such as dower. Levins v. Sleator, 2 G. Greene. (Iowa), 604, 609. And rights dependent on the continuance of coverture. Starr v. Pease, 8 Conn. 541, 546. And generally restores to each of the parties his or her property. Wright v. Wright, 2 Md. 429. 456; post. Effect of Divorce. See title ALIMONY.

 Pennoyer v. Neff. 95 U.S. 714. 734.
 See Shaw v. Att.-Gen., L. R. 3 H. L. 55, 72, 81; Maguire v. Maguire, 7 Dana (Ky.), 181, 185; Bigelow v. Bigelow, 108 Mass. 38, 40.

8. Strader v. Graham, 10 How. (U. S.) 82, 93; Green v. State, 58 Ala. 190, 195: State v. Gibson, 36 Ind. 389, 395, 400; Sewall v. Sewall, 122 Mass. 156, 161; Hopkins v. Hopkins, 3 Mass. 158, 159; Hunt v. Hunt, 72 N. Y. 217, 228; Lonas v. State, 3 Heisk, (Tenn.) 287, 300, 310; Frasher v. State, 3 Tex. Ap. 263, 275; Cook v. Cook, 56 Wis. 195; s. c., 14 N. W. Rep. 33, 36, 443.

garded. Some courts have held that a divorce is in its nature purely a judicial act, but Parliamentary divorces were the earliest divorces in England, and legislative divorces were granted in the earliest days in some of the United States.⁴ As a rule, a State may grant a divorce unless expressly or impliedly prohibited by its constitution.⁵ The extra-territorial validity of such a divorce and its effect depend generally on the same principles as govern the validity and effect of judicial divorces. This subject is now of little importance, as legislative divorces are in the great majority of the States prohibited by the State constitution, and the remainder of this article will deal with judicial divorces.

(3) Judicial Divorces.—A judicial divorce is a decree of a court. wholly or partially dissolving a marriage. Such a decree must be carefully distinguished from a decree of nullity; 8 the first dissolves a valid marriage, the second declares that a valid marriage never existed. The fact that the word "divorce" has been used to include both classes of decrees has led to the most perplexing confusion.

A judicial divorce may be absolute or limited. An absolute divorce is usually called a divorce a vinculo matrimonii, or from the bonds of matrimony. The earliest form of judicial divorce was a limited divorce—the divorce a mensa et thoro, or separation from bed and board; this divorce was granted in England by the ecclesiastical courts when no absolute divorces were granted except by Parliament.9 In the United States both classes of divorces are known, though divorces a mensa et thoro are growing less and less usual.10 Other forms of limited divorces have been established in many States, such as divorces containing a prohibition against the marriage of the guilty party during the lifetime of the other, or for

1. Tefft v. Tefft, 3 Mich. 67, 69.

2. Gaines v. Gaines, 3 B. Mon. (Ky.) 295, 305; Bingham v. Miller, 17 Ohio,

445. 446-8.

3. Wright v. Wright, 2 Md. 429, 447. See Mordaunt v. Moncrieffe, Law R. 2

H. L. Sc. 374, 396.

4. Adams v. Palmer, 58 Me. 480, 416; Opinion, 16 Me. 479, 483, 485; Wright v. Wright, 2 Md. 429, 447; Levins v. Sleator, 2 G. Greene (Iowa), 604, 608; Starr

v. Pease, 8 Conn. 541, 545.
5. See cases cited supra, notes 4, 5, p. 746.
6. State v. Weatherly, 43 Me. 258, 263. Though a statute, it is in the national content of the conte ture of a decree. Gaines v. Gaines, 9 B. Mon. (Ky.) 295, 305; Bingham v. Miller, 17 Ohio, 445, 448. The marriage status is destroyed. Levins v. Sleator, 2 G. Greene (Iowa), 604; Starr v. Pease, 8 Conn. 541; Wright v. Wright, 2 Md. 429. The woman cannot claim any further rights in the man's property. Levins v. Sleafor, 2 G. Greene (Iowa), 604, 609. Nor the man in the woman's. Starr v. Pease, 8 Conn. 541, 546. The validity of the divorce does not depend on the

parties having had notice. Maynard v. Hill, 2 Wash. 3, 321.

But the legislature cannot grant ali-

mony. See Townsend v. Griffin, 4 Harr. (Del.) 440; Jackson v. Indlett, 10 B. Mon. (Ky.) 467, 470; Crane v. Meginnis, I Gill & J. (Md.) 463; State v. Fry, 4 Mo. 120, 193; Holmes v. Holmes, 4 Barb. (N. Y.) 295, 301. Consult West v. West, 2 Mass. 223, 227. So this is sometimes referred to the courts, where alimony will be granted after the divorce. Crane v. Meginnis, I Gill & J. (Md.), 463, 474; Richardson v. Wilson, 8 Yerg. (Tenn.) 67, 77.

7. See Cooley Const. Lim. [110], 113, n. 2. See Cal. Civ. Code 1881, s. 90; Ill.

Rev. St. 1880, p. 40, s. 32; etc., etc. 8. Brown v. Westbrook, 27 Ga. 102;

Chase v. Chase, 55 Me. 21, 23, 24.
9. Head v. Head, 2 Kelly (Ga.), 191. Prior to 1858 an absolute judicial divorce was unknown. The act of 20 & 21 Vict. c. 85, s. 27, consolidates all divorce jurisdiction in a divorce court, and allows both kinds of divorce.

10. See Bauman v. Bauman, 18 Ark.

320, 325.

a specified time, or without the consent of the court, or with the particeps criminis. All these forms of divorce are discussed below.

As will be seen in the discussion of the different branches of this subject, a decree of divorce may be void—a mere nullity, and so regarded in any court; 1 or voidable—one that can be set aside on the application of a proper party to the court which granted it.2 A divorce may also be valid as to one of the parties, but not as to the other; 3 may affect property in one place, but not in another; 4 may be given full effect in one State, and no effect in another; 5 or may be wholly valid, and be so considered everywhere.6 The validity of a divorce depends on the jurisdiction of the court which grants it, and on its being obtained regularly and without fraud.

(4) Decrees of Nullity.—A decree declaring a pretended marriage void ab initio, or avoiding a voidable marriage, is properly called a "decree of nullity," though not infrequently termed a "divorce" both in judicial opinions and statutes. It will be necessary to discuss such decrees incidentally in this article, but they properly belong to the title MARRIAGE, where they will be fully treated.

II. Divorce Jurisdiction. —(I) Elements of Jurisdiction, Generally.— In determining what court can dissolve a particular marriage, one must ascertain, first, what State has the necessary power and authority over the parties and their status; and secondly, to what court in that State that right and power has been delegated. ascertaining this, one may have to consider the principles of international law and comity, the "full faith and credit clause" of the United States constitution, and the particular statutes of the State where the suit is to be brought. Jurisdiction, at various times and in different States, has been made to depend upon the domicile or residence? of the party or parties at the time of their marriage,8 the commission of the offence,9 or the time of bringing the suit: 10 the place where the marriage took place 11 or the offence was committed; 12 and the State to which the parties owe allegiance. 13 But generally speaking, the whole question is one of the domicile of the parties.14

(2) Courts which have Jurisdiction, Generally.—Colonists carry with them laws. 15 but not courts: 16 and therefore the ecclesiastical

- 1. Miltimore v. Miltimore, 40 Pa. St. 151, 155.
- 2. Adams v. Adams, 51 N. H. 388, 397,
- 398.
 - People v. Baker, 76 N. Y. 78, 85, 89.
 Turner v. Turner, 44 Ala. 437, 450.
 Litowich v. Litowich, 19 Kan. 451, 454.
- 6. Cheever v. Wilson. 9 Wall. (U. S.) 108, 123.
 - 7. As to difference, see note 12.
- 8. Cheever v. Wilson, 9 Wall. (U. S.) 108, 124.
- 9. See Harvie v. Farnie, L. R. 6 P. D. 35, 47, 49, 51,
- Dicey on Dom., Appendix, n. vi.
 See Tovey v. Lindsay, I Dow. 117, 131, 140.

- 12. Colvin v. Reed, 53 Pa. St, 375, 380, 382.
- 13. See Harvie v. Farnie, L. R. 6 P. D. 35; Thompson v. State, 38 Ala. 12, 16; Dorsey v. Dorsey, 7 Watts (Pa.), 349,
- 14. Cheever v. Wilson, 9 Wall. (U. S.) 108, 124; infra, § (8).
 15. Cotterall v. Sweetman, I Rob. Ecc.
- 580, 581, 582; Lantour v. Teesdale, 8 Taunt. 830, 837; Rex v. Brompton, 10 East, 282, 288; Anon., 2 P. Wms. 75; Blankard v. Galdy, 2 Salk. 411; Com. v. Knowlton, 2 Mass. 230, 234; Sackett v. Sackett, 8 Pick. (Mass.) 309, 316.

16. Burtis v. Burtis, Hopk. Ch. (N.Y.)

557, 566.

courts, which alone in England could grant divorces. were not imported into this country, and the jurisdiction of such courts can be obtained only by statute.² Therefore, in the United States, all divorce jurisdiction is statutory, and no court can grant a divorce except as provided by statute. The United States courts have no jurisdiction given by statute, nor have they any ecclesiastical jurisdiction; 4 and so, although in the exercise of their chancery jurisdiction they may, like other equity courts, entertain a suit for alimony of a wife against her husband,⁵ they have no divorce jurisdiction.⁶ Nor could Congress vest such jurisdiction in the United States Courts; for, as has been shown, marriage is not a national matter, but a domestic institution within the exclusive control of the several States.7

In England there is now a special divorce court invested by

statute with exclusive divorce jurisdiction.8

In each of the United States, excepting South Carolina,⁹ divorce jurisdiction is given by statute to certain State courts. Such jurisdiction is not necessarily given by express words. 10 When certain causes for divorce are named by a statute, but divorce jurisdiction is not given by name to any particular court, a provision giving jurisdiction in all "civil cases both at law and in equity" to certain courts includes divorce suits, 11 although such suits are strictly not suits at law or in equity, but are suits sui genersis. 12 So when divorce jurisdiction is vested in certain courts

1. Head v. Head, 2 Kelly (Ga.), 191, 200; Wright v. Wright, 2 Md. 429;

200, Wight v. Lemery, 8 Oreg. 507, 512.

2. Crump v. Morgan, 3 Ired. Eq. (N. Car.) 91, 98; Lebarron v. Lebarron, 35 Vt. 365, 367. But see Rose v. Rose,

9 Ark. 507, 512. 9 Ark. 507, 512.
3. Hopkins v. Hopkins, 39 Wis. 167, 171; Lovett v. Lovett, 11 Ala. 763, 767; Moyler v. Moyler, 11 Ala. 620, 622; Bauman v. Bauman, 18 Ark. 320, 324; Conant v. Conant, 10 Cal. 249, 253; Stelle v. Stelle, 35 Conn. 48, 51; Jeans v. Jeans, 2 Harr. (Del.) 38, 43; McGhee v. McGhee, 10 Ga. 477, 480; Hamaker v. Hamaker, 18 Ill. 137, 139, 140; Maguire v. Maguire, 7 Dana (Ky.), 181, 188; Thornberry v. Thornberry, 2 J. J. Marsh. (Ky.) 322; Butler v. Butler, 4 Litt. (Ky.) 201, 203; Wright v. Wright, 2 Md. 429, 448; Carson v. Carson, 40 Miss. 349, 351; Stokes v. Stokes, 1 Mo. 320, 322; Perry v. Perry, 2 Paige (N. Y.), 501, 506; Burtis v. Burtis, Hopk. Ch. (N. Y.) 557, 566; Williamson v. Williamson, 1 Johns. (N. Y.) 488, 491; Jarvis v. Jarvis, 3 Edw. Ch. (N. Y.) 462, 463; Klein v. Klein, 42 How. Pr. (N. Y.) 166; Crump v. Morgan, 3 Ired. Eq. (N. Car.) 91, 98; Olin v. Hungerford, 10 Ohio, 268, 270; Northcut v. Lemery, 8 Oreg. 316, 322; Ristin v. Ristin, 4 Rawle (Pa.), 460, 461; 3. Hopkins v. Hopkins, 39 Wis. 167, Ristin v. Ristin, 4 Rawle (Pa.), 460, 461;

Groat v. Groat, 12 S. Car. 29, 30, 31; Wright v. Wright, 6 Tex. 3, 21; Nagers v. Nagers, 7 Tex. 538, 544; Almond v. Almond, 4 Rand. (Va.) 662, 666; Cast v. Cast, I Utah, 112, 114; Lebarron v. Lebarron, 35 Vt. 365, 367; Cook v. Cook, 56 Wis. 195. 4. Barber v. Barber, 21 How. (U. S.)

582, 604, 605.

5. Barber v. Barber, 21 How. (U. S.)

58. Barber v. Barber, 21 How. (U. S.) 582, 591; Bennett v. Bennett, Deady (U. S.), 299, 312.
6. Cheever v. Wilson. 9 Wall. (U. S.) 108, 124; Hobbs v. Hobbs, I Wood (U. S.), 537, 539; Barber v. Barber, 21 How. (U. S.) 582, 584, 602, 605.
7. Ante, I. (I), n. 8.

8. 20 & 21 Vict. c. 85.

9. Grant v. Grant, 12 S. Car. 29, 30. Divorce was allowed by act of 1872, but this act was repealed by the act of 1878. See also Matteson v. Matteson, I Strob. (S. Car.) 387

10. See Ellis v. Hatfield, 20 Ind. 101,

11. Ewing v. Ewing, 24 Ind. 468, 472; Ellis v. Hatfield, 20 Ind. 101, 102; Herron v. Herron, 16 Ind. 129; Bagley v. Bagley, 2 Md. Ch. 326, 331, 332; Hurt v. Hurt, 2 Lea (Tenn.), 176, 178; State v. Smith, 19 Wis. 531. 532.

12. Mangles v. Mangles, 6 Mo. App.

but no causes for divorce are named, such jurisdiction covers the canon and common law causes: 1 but if certain causes are named

all others are excluded by implication.2

If the court is given jurisdiction it must grant the divorce, although its decree may have no extra-territorial effect.3 But the statutes will be construed, if possible, so as to prevent any collision with the provisions of the United States constitution or of international law; 4 in other respects they will be construed strictly, but so as to fairly carry out their spirit and intendment.5

(3) Jurisdiction Locally and Extra-territorially Considered.— Every State has the right to regulate its own domestic policy. 6 to determine the status of its own citizens," and to choose for itself the terms and conditions under which its own courts shall grant divorces; 8 and a divorce granted in accordance with its laws must be valid within its own territory. But no State has primarily the right to push its domestic policy beyond its boundaries and into other States, or to dissolve the marriage or change the domestic status of persons belonging to other States; 10 and the acts of one State have force and authority in other States only by the consent of such other States—that is to say, by the comity of nations or international law, or by virtue of some paramount law, such as the United States constitution, or a treaty between nations.¹¹ But before considering the effect of the United States constitution and of international law the nature of the proceeding for divorce must be determined.

481, 484; Northcut v. Lemery, 8 Oreg.

316, 322, 323; post, II. s. 4.

1. Buckley v. Buckley, 15 Ill. 120, 121; Hamaker v. Hamaker, 18 Ill. 137, 139, 140.

2. Palmer v. Palmer, I Paige (N. Y.), 276, 277; Burtis v. Burtis, Hopk. Ch. (N. Y.) 557, 566; Northcut v. Lemery, 8 Oreg. 316, 322; Smith v. Smith, 8 S. & R. (Pa.) 248, 250.

State statutes are usually framed on the theory that divorce jurisdiction de-pends on domicile, and on the complainant's domicile in particular. Dutcher v. Dutcher, 39 Wis. 651, 657. They require residence, which means domicile, post, II. s. 7,—on the part of the complainant for from six months to three years, and allow service on the defendant by publication, when actual summons is impossible. They also provide in what county of the State divorce suits shall be brought. Some statutes make jurisdiction depend on other facts than domicile, as the place where the offence was committed, or where the parties were domiciled at that time. Becket v. Becket, 17 B. Mon. (Ky.) 370, 374; Hopkins v. Hopkins, 35 N. H. 474, 475. These courts have only such jurisdiction as is given them by statute, and a strict compliance

with the statute is required. Harteau v. Harteau, 14 Pick. (Mass.) 181, 184; Parish v. Parish, 32 Ga. 653, 655; Hop-kins v. Hopkins, 39 Wis. 167, 170; Ken-yon v. Kenyon, 3 Utah, 431.

3. Standridge v. Standridge, 31 Ga. 223, 224; Trevino v. Trevino, 54 Tex. 261, 264; Reel v. Elder, 62 Pa. St. 308,

315. 4. Goodwin v. Goodwin, 45 Me. 377, 378, 379; post, II. ss. 5, 6. 5. Sawtell v. Sawtell, 17 Conn. 284, 289; Becket v. Becket, 17 B. Mon. (Ky.) 370, 375; Northcut v. Lemery, 8 Oreg.

6. Kinnier v. Kinnier, 45 N. Y. 535, 344. See, further, notes in succeeding sections.

7. Strader v. Graham, 10 How. (U. S.) 82, 93

8. Hunt v. Hunt, 72 N. Y. 217, 227, 228, 229.

9. Maguire v. Maguire, 7 Dana (Ky.), 181, 186; Beard v. Beard, 21 Ind. 321,

324. 327.

10. People v. Baker, 76 N. Y. 78, 84.

11. People v. Dawell, 25 Mich. 247, 257, 258, 264; Doughty v. Doughty, 25 N. J. Eq. 581, 586; Hunt v. Hunt, 72 N. Y. 217, 226; Van Fossen v. State, 37 Ohio St. 317, 320.

(4) Jurisdiction In Personam and In Rem.—A suit for divorce is not a mere personal suit, like a suit on a contract or for a tort: 1 nor is it a criminal prosecution; but it is a proceeding sui generis, involving not only persons—the husband and wife, but a thing—their marriage. It is thus a proceeding partly in personam and partly in rem. The position of husband and wife, as hushand and wife, depends upon the marriage laws under which they live. and is called their status. So far as a divorce suit is to affect this status, it is to change a thing independent of the parties, and is a proceeding not against the parties in personam, but against their status—in rem. Iurisdiction to pass a decree in rem exists over anything fixed in the State, and notice by publication or otherwise to the parties concerned is rather to give them every chance and to exclude suspicions of secrecy and fraud than to meet a necessity of service or summons.8 Jurisdiction to pass a decree in personam depends, on the other hand, entirely on the courts having authority over the person, either by a regular summons 9 or by his personal voluntary appearance in the suit. 10 So far as a divorce suit relates to the status of the parties it is a proceeding in rem, 11 and a proceeding against two distinct things—the status of the husband and the status of the wife. 12 So far as it relates to alimony, 13 or costs, 14 or a prohibition against mar-

1. Mangels v. Mangels, 6 Mo. App. 481, 484.

2. Baker v. Baker, L. R. 5 P. D. 142, 149, 151; Delliber v. Delliber, 9 Conn.

233, 234.
3. Musselman v. Musselman, 44 Ind.

106, 111; cases in next note.

106. 111; cases in next note.

4. Turner v. Turner, 44 Ala. 437, 450;
Townsend v. Griffin, 4 Harr. (Del.) 440,
443; Beard v. Beard. 21 Ind. 321, 328;
Ewing v. Ewing, 24 Ind. 468, 472; Maguire v. Maguire, 7 Dana (Ky.), 181, 183;
Harding v. Alden, 9 Me. 140, 150, 151;
Ellison v. Martin, 53 Mo. 575, 578; Mangels v. Mangels. 6 Mo. App. 481, 484;
Niboyet v. Niboyet, L. R. 4 P. D. 1,

Jurisdiction is acquired in one of two modes: first, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. Pennoyer v. Neff, 95 U. S. 714. 5. Cook v. Cook, 56 Wis. 195; Ellison

v. Martin, 53 Mo. 575, 578.
6. Niboyet v. Niboyet, L. R. 4 P. D.
1, 12; Roth v. Roth, 104 Ill. 35, 46; Misch v. Martin, 53 Mo. 575. 578; Gould v. Crow. 57 Mo. 200. 203, 204; Coddington v. Coddington 20 N. J. Eq. 263, 264; Hunt v. Hunt, 72 N. Y. 217, 241; People v. Baker, 76 N. Y. 78, 84, 85; Cook

v. Cook, 56 Wis. 195.

7. See Story Confl. Laws, §§ 549, 592; Castrigue v. Imrie, L. R. 1 H. L. 414, 420; Hickey v. Stewart, 3 How. (U. S.) 750; Thompson v. Morton, 2 Ohio St. 26, 30; title International

8. See Pennoyer v. Neff, 95 U. S. 714, 733; Sandford v. Sandford, 5 Day (Conn.), 353, 358; Bissell v. Briggs, 9 Mass. 462, 468.

9. Maguire v. Maguire, 7 Dana (Ky.), 181, 187; Garner v. Garner, 56 Md. 127, 128; Hunt v. Hunt, 72 N. Y. 217, 237. 10. People v. Baker, 76 N. Y. 78, 83;

cases last cited.

11. Roth v. Roth, 104 Ill. 35, 46; cases

supra, n. 6.

12. Gould v. Crow, 57 Mo. 200, 203; People v. Baker, 76 N. Y. 78, 85; Cook v. Cook, 56 Wis. 195; Barrett v. Failing,

v. Cook, 50 Wis. 195; Barrett v. Failing, 111 U. S. 523, 524.

13. Beard v. Beard, 21 Ind. 321, 328; Turner v. Turner, 44 Ala. 437, 450; Thompson v. State, 28 Ala. 12, 17; Sandford v. Sandford, 5 Day (Conn.), 353, 358; Lytle v. Lytle, 41 Ind. 200, 202; Madden v. Fielding, 19 La. Ann. 357, 366; Flison v. Martin, 53 Mo. 575. 202; Maddel v. Frednig, 19 La. 1411. 505, 506; Ellison v. Martin, 53 Mo. 575, 578; Gould v. Crow, 57 Mo. 200, 204; Leith v. Leith, 39 N. H. 20, 39; Jacob-son v, Jacobson, I Johns. 424; Prosser v. Warner, 47 Vt. 667, 670, 673.

14. Lytle v. Lytle, 48 Ind. 200, 202.

riage. it is a proceeding in personam. So far as it relates to children, it seems to be proceeding in rem.—the children must be in court.2

- (5) The Effect of U. S. Constitution, Art. IV. s. 1.—By the United States constitution the judicial proceedings of one State are given full effect in all the States.³ It would have led to absurdity if this had been held to mean that any judgment that one State should see fit to authorize should be valid not only in such State but in all the States; for this would have left each State at the mercy of all the others.4 So it has been frequently decided that this does not mean that any divorce valid where granted is valid everywhere, but that it applies only to divorces granted by courts which had jurisdiction over the parties and the subject-matter.5 More accurately, it applies to divorces granted by a court which had jurisdiction over the parties and their married status; 6 or to such portion of the decree as being in rem acts upon things within the control of the State where the decree is passed, and as being in personam, acts upon a person duly summoned or voluntarily appearing.⁸ Thus, if both parties are domiciled out of the State where the divorce is granted, such State, having no control of their status, and therefore no jurisdiction over the thing proceeded against, in granting the divorce commits an act which no other State is, under the United States constitution, bound to recognize. although there was full jurisdiction over the parties by
- 1. Garner v. Garner, 56 Md. 127, 128; Maguire v. Maguire, 7 Dana (Ky.), 181, 187; Van Storch v. Griffin, 71 Pa. St.

240, 244.2. Wakefield υ. Ives, 35 Iowa, 238, 20; Kline v. Kline, 57 Iowa, 386; Allen v. Allen, 7 Cent. Rep. (N. Y.) 78; s. c., 101 N. Y. 658.

3. "Full faith and credit shall be given

in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and judicial proceedings shall be proved, and the effect thereof." U. S. Constit. art. 4, § 1. "And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." U. S. Stat. at Large, p. 122, ch 11; U. S. Rev. Stat. § 905.
4. See Strader v. Graham, 10 How. (U.

S.) 82, 93; Cheever v. Wilson, 9 Wall.

(U. S) 108, 123.

5. See Barrett v. Failing, III U. S. 523; Cheely v. Clayton, 110 U. S. 701; Cheever v. Wilson, 9 Wall. (U. S.) 108; Pennoyer v. Neff, 95 U. S. 714; Barber

v. Barber, 21 How. (U.S.) 582, 591; Tolen v. Tolen, 2 Blackf. (Ind.) 407; Hood v. State, 56 Ind. 263, 270; Wakefield v. Ives, 35 Iowa, 238, 240; Harding v. Alden, 9 Me. 140, 149; Barber v. Root, 10 Mass. 260, -264; Sewall v. Sewall, 122 Mass. 156, 161; People v. Dawell, 25 Mich. 247, 259, 101; People v. Dawell. 25 Mich. 247, 259, 262; Gould v. Crow, 57 Mo. 200, 204; Doughty v. Doughty, 28 N. J. Eq. 581, 586; People v. Baker, 76 N. Y. 78, 83; Hunt v. Hunt, 72 N. Y. 217, 234; Kinnier v. Kinnier, 45 N. Y. 235, 239; Borden v. Fitch, 15 Johns. (N. Y.) 121, 141; Van Fossen v. State, 37 Ohio St. 317, 262. 320; Northcut v. Lemery, 8 Oreg. 316, 322; Colvin v. Reed, 55 Pa. St. 375, 378; Ditson v. Ditson, 4 R. I. 87, 107; Cook υ. Cook, 56 Wis. 195.
6. Cheely υ. Clayton, 110 U. S. 701;

Thompson v. State, 28 Ala. 12, 19; cases

ante, II. § 4; cases last cited.

7. Pennoyer v. Neff, 95 U. S. 714; Ellison v. Martin, 53 Mo. 575, 578; Gould v. Crow, 57 Mo. 200, 204; ante,

II. § 4.

8 Beard v. Beard, 21 Ind. 321, 323; Hood v. State, 56 Ind. 263, 279; Litowich v. Litowich, 19 Kan. 451, 454; Sewall v. Sewall, 122 Mass. 156, 162; Garner v.

Garner, 56 Md. 127, 128; ante, II. § 4. 9. Harvie v. Farnie, L. R. 6 P. D. 35, 44; Shaw v. Att.-Gen., L. R. 2 P. &

their voluntary appearance in the case. If this were not true, a husband and wife could journey to any State that pleased them and there get a divorce, and the laws of their own State would be valueless. Likewise, as there are both the status of the husband and the status of the wife which the divorce can affect, 2 a case can easily arise where a court will have jurisdiction over one of these status and not over the other, and where the decree, as far as other States are concerned, will affect only the status of one of the parties.3 If the court has jurisdiction over the status of both of the parties, the decree must be recognized in all the States, although one of the parties was not summoned and did not appear.4 But such portions of the decree as are in personam will not have full effect unless the person has been duly summoned or has appeared.5

(6) Effect of Comity and International Law.—The rules of international law are neither as specific nor as binding as the "full faith and credit" clause of the United States constitution: but under them generally, as under that clause, a divorce suit is regarded as a proceeding against the status of the parties, partly in bersonam and partly in rem.6 The marriage state is recognized as a status,7 and to the country which has control over that status, which, as will be shown below, is the country where the parties are domiciled, and to that country only, is given the right to dissolve the marriage and change the status. But no country will consent to recognize a proceeding which is contrary to its views of public policy and morality, and will recognize even such divorces

D. 156, 162; Harrison v. Harrison, 20 Ala. 629, 645; House v. House, 25 Ga. 7. Ara, 029, 045; House v. House, 25 Ga. 473, 474; Hood v. State, 56 Ind. 263, 270; Whitcomb v. Whitcomb, 46 Iowa, 437, 444; Litowitch v. Litowitch, 19 Kan. 451, 454; Maguire v. Maguire, 7 Dana (Ky.), 181, 184; Sewall v. Sewall, 122 Mass. 156, 162: People v. Dawell, 25 Mich. 247, 254; State v. Armington, 25 Minn. 29, 36, 37; Smith v. Smith, 19 Neb. 706; Leith v. Leith, 39 N. H. 20, 33, 37; Van Fossen v. State, 37 Ohio St. 317, 319; Platt v. Platt, 80 Pa. St. 501, 504; Hare v. Hare, 10 Tex. 355.

1. Harrison v. Harrison, 20 Ala. 629, 645; Maguire v. Maguire, 7 Dana (Ky.), 181, 183; People v. Dawell, 25 Mich, 247, 257; Van Fossen v. State, 37 Ohio

St. 317, 319.

2. Garner v. Garner, 56 Md. 127, 128;
People v. Baker, 76 N. Y. 78, 83. See
Barrett v. Failing, 111 U. S. 523, 524.
Because wife may have a separate domicile. Cheever v. Wilson, 95 U. S. 714;
post, II. § 7.

3. People v. Baker, 76 N. Y. 78; People v. Dawell. 25 Mich. 247, 254; Cook

v. Cook, 56 Wis. 195.
4. See Pennoyer v. Neff, 95 U. S.
714, 733: Beard v. Beard, 21 Ind. 321,

323; Garner v. Garner, 56 Md. 127, 128;

323; Garner v. Garner, 50 Mu. 127, 120, Barber v. Root, 10 Mass. 260, 264.

5. Turner v. Turner, 44 Ala. 437, 450; Lytle v. Lytle, 41 Ind. 200, 202; Garner v. Garner, 56 Md. 127, 128; Prosser v. Warner, 47 Vt. 667, 670, 673.

6. Niboyet v. Niboyet, L. R. 4 P. D.

1, 12; supra, II. § 4.

7. Cook v. Cook, 56 Wis. 195; supra, 8. Harvie v. Farnie, L. R. 5 P. D.

153, 157; Shaw v. Gould, L. R. 3 H. L. 55, 56; Shaw v. Att.-Gen., L. R. 2 P. D. 156, 162; Thompson v. State, 28 Ala. D. 150, 102; Inompson v. State, 28 Ala.
12, 18; Harrison v. Harrison, 20 Ala.
620, 645; Jenness v. Jenness, 24 Ind.
355, 359; Maguire v. Maguire, 7 Dana
(Ky.), 181, 186; Harding v. Alden. 9 Me.
140, 150; Keerl v. Keerl, 34 Md. 21,
26; Barber v. Root, 10 Mass. 260, 266;
Harteny v. Harteny v. Heick, 184, Leith Harteau v. Harteau, 14 Pick. 181; Leith v. Leith, 39 N. H. 20, 35, 38; Coddington v. Coddington, 20 N. J. Eq. 263, 264; Doughty v. Doughty, 28 N. J. Eq. 581, 586; Hunt v. Hunt, 72 N. Y. 217, 226, Dutcher v. Dutcher, 39 Wis. 651, 657.

9. Shaw v. Att. Gen. L. R. 2 P. D.

156, 162; Doughty v. Doughty, 28 N. J. Eq. 581, 586; People v, Baker, 76 N. Y.

78, 84, 87; cases supra, 11. 8.

as the United States constitution would not compel it to recognize, if they were granted in a manner which it itself regards as

just and proper.1

(7) Domicile, Residence, and Wife's Separate Domicile.—A person's domicile is the place or country either (1) in which he in fact resides with the intention of residence.2—animus manendi; or (2) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence,3 animus manendi; or (3) with regard to which, having so resided there, he retains the intention of residence,—animus manendi,—though in fact he no longer resides there. It is in fact his permanent home. Such is domicile by the unwritten law; under divorce statutes it is frequently called "residence."

Divorce statutes frequently require the complainant to have been a "resident" of the State for a certain time. Under such statutes "residence" means domicile. 6—though distinctions have sometimes been made, 2—and the length of residence is required as a precaution against a pretended residence and fraud.8

1. See Hood v. State, 56 Ind. 263, 271; Hunt v. Hunt, 72 N. Y. 217, 237-239; Ditson v. Ditson, 4 R. I. 87, 106; Cook v. Cook, 56 Wis. 195; cases supra,

notes 8, 9, p. 753.

2. See title DOMICILE. Bell v. Ken-2. See title DOMICILE. Bell v. Kennedy, L. R. I H. L.; Sc., 307, 319; Briggs v. Briggs, L. R. 5 P. D. 163, 165; Wilson v. Wilson, L. R. I P. & D. 435, 443; Dolphin v. Robins, 7 H. L. Cas. 390, 414; Tollemache v. Tollemache, I Swab. & T. 557, 559; Shaw v. Gould, L. R. 3 H. L. 55. 96; Hinds v. Hinds, I Iowa, 36, 39; Whitcomb v. Whitcomb, 46 Iowa, 437, 443, 444; Greene v. Greene, 11 Pick. (Mass.) 410, 415; Hairston v. Hairston, 27 Miss. 704, 718; Leith v. Leith, 39 N. H. 20, 34; Crawford v. Wilson, 4 Barb. (N. Y.) 504, 520; Dutcher v. Dutcher, 39 Wis. 651, 659.

3. Ringgold v. Barley, 5 Md. 186,

193; State v. Frost. 4 Harr. (Del.) 558; Hall v. Hall, 25 Wis. 600, 607; cases

supra, n. 2.

4. Briggs v. Briggs, L. R. 5 P. D. 163, 164; D'Auvilliers v. D'Auvilliers, 32 La. Ann. 605, 606; Leith v. Leith, 39

N. H. 20, 39. 5. Att.-Gen. v. Rowe, 31 L. J. Ex. 314, 320; Whecker v. Hume, 28 L. J. Ch. 396, 400; Warren v. Thomaston, 43 Me. 406, 418: Hairston v. Hairston, 27 Miss. 704, 718; Crawford v. Wilson, 4 Barb. (N.Y.) 504, 518-520.

6. Hinds v. Hinds, I Iowa, 36, 38, 39;

Warren v. Thomaston, 43 Me. 406, 418; Reeder v. Holcomb, 105 Mass. 93, 95; Ross v. Ross, 103 Mass. 575, 576; Chariton v. Moberly, 59 Mo. 238, 242; Leith v. Leith, 39 N. H. 20, 41; Crawford v. Wilson, 4 Barb. (N. Y.) 504, 520; Lee v. Stanley, 9 How. Pr. (N. Y.) 272, 277; Williamson v. Parisien. I Johns. Ch. (N. Y.) 389; Dutcher v. Dutcher. 39 Wis. 657, 658; Hall v. Hall. 25 Wis. 600, 607.

7. Way v. Way, 64 Ill. 406, 412; Warren v. Thomaston, 43 Me. 406, 418; Walker v. Walker, I Mo. App. 404, 413; Wrigley v. Wrigley, 8 Wend. (N. Y.) 134, 139; Hall v. Hall, 25 Wis. 600, 607. See Briggs v. Briggs, L. R. 5 P. D. 163, 165.

8. Cases in fra, note 2, p. 755. On local questions as to Residence, see Reese v. Reese. 23 Ala. 785. 786; Crossman v. Crossman, 33 Ala. 486; Kashaw v. Kashaw, 3 Cal. Strait v. Strait, 3 McAr. 415; House v. House, 25 Ga. 473; Hod v. State, 56 Ind. 263; Watts v. Watts, 18 Ind. 449; Hinds v. Hinds, 1 Iowa, 36; Goodwin v. Goodwin, 45 Me. 377; Keerl v. Keerl, 34 Md. v. Hilds, I lowa, 30; Goodwin v. Goodwin, 45 Me. 377; Keerl v. Keerl, 34 Md. 21; Com. v. Blood, 97 Mass. 538; Loud v. Loud, 129 Mass. 14; People v. Dawell, 25 Mich. 247; State v. Armington, 25 Minn. 29; Kruse v. Kruse, 25 Mo. 68; Atkins v. Atkins, 9 Neb. 191; Hopkins v. Hopkins, 35 N. H. 474; Brown v. Brown, 14 N. J. Eq. 78; Goldbeck v. Goldbeck, 18 N. J. Eq. 42; McNeil v. McNeil, 3 Edw. Ch. (N. Y.) 550; Forrest v. Forrest, 6 Duer (N. Y.). 102; Schonwald v. Schonwald, 2 Jones (N. Car.), 267; Jacob v. Jacob, Wright (Ohio), 631; Hollister v. Hollister, 6 Pa. St. 449; Bishop v. Bishop, 30 Pa. St. 412; Love v. Love, 10 Phila. 453; Ditson v. Ditson, 4 R. I. 87; Fickle v. Fickle, 5 Yerg. (Pa.) 203; Hare v. Hare, 10 Tex. 355; Huckaboy v. Huckaboy, 35 Tex. 620; Cook v. Cook, 56 Wis. 195. residence under such statutes must be actual, not merely wished for or intended: 1 it must be bona fide, not taken for the purpose of divorce to be given up afterwards; 2 it must be permanent, not a mere visit.3 The residence must exist at the time the suit is brought, though not necessarily at the time of the trial; and it must continue for the statutory time. A residence or domicile is not given up or interrupted by temporary absences for pleasure. business, or health.7

In the *United States* at least, for the point does not seem fully settled in England, husband and wife may have distinct and separate domiciles, so far as divorce jurisdiction is concerned.9 Ordinarily the husband has the right to fix the matrimonial

1. State v. Frest, 4 Harr. (Del.) 558; Strait v. Strait, 3 McArthur (D. C.), 415, 417; Hood v. State, 56 Ind. 263, 270; Litowitch v. Litowitch, 19 Kan. 451, 454; People v. Smith, 20 N. Y. Supr. Ct. 414, 417; Hall v. Hall, 25 Wis. 600, 607

2. Shaw v. Gould, L.R. 3 H. L. 55, 87;.
Dolphin v. Robins, 7 H. L. Cas. 390;
Crossman v. Crossman, 33 Ala. 486,
437; Paralta v. Paralta, 4 Cal. 175, 176;
Way v. Way. 64 Ill. 406, 414; Powell v.
Powell, 53 Ind. 513, 516; Maxwell v.
Maxwell 52 Ind. 363, 364; Hinds v. Powell, 53 Ind. 513, 510; Maxwell v. Maxwell, 53 Ind. 363, 364; Hinds v. Hinds, r Iowa, 36, 39, 40; Whitcomb v. Whitcomb. 46 Iowa, 437, 443; Smith v. Smith, 4 Greene (Iowa), 266, 272; Warren v. Thomaston, 43 Me. 406, 418; Gregory v. Gregory, 76 Me. 535; Sewall v. Sewall, 122 Mass. 156, 162; Reed v. Reed, 52 Mich. 117; Hairston v. Hairston, 27 Miss. 704. 718; Leith v. Leith, 39 N. H. 20. 41; State v. Casinora, 1 Tex. 401;

20. 41; State v. Casinora, I Tex. 401; Dutcher v. Dutcher, 39 Wis. 651, 658.

3. Niboyet v. Niboyet, L. R. 4 P. D. I, 18; Hinds v. Hinds, I Iowa, 36, 39; Calef v. Calef, 54 Me. 365, 366; Boardman v. House, 18 Wend. (N. V.) 512; Wrigley v. Wrigley, 8 Wend. (N. Y.) 134. 139; Dutcher v. Dutcher, 39 Wis. 651, 658.

4. Pate v. Pate, 6 Mo. App. 49, 51; Kruse v. Kruse, 25 Mo. 68.

5. Waltz v. Waltz, 18 Ind. 440

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 Sanders v. Sanders, 29 N. J. Eq. 410.
 Chariton v. Moberly, 59 Mo. 238, 242; Fickle v. Fickle, 5 Yerg. (Tenn.)
 203, 204; Dolphin v. Robins, 9 H. L. Cas. 390; Gillis v. Gillis, L. R. 8 Ir. Eq. 597, 603; D'Auvilliers v. D'Auviliers, 32 La. Ann. 605, 606; Warren v. Thomaston. 42 Me. 406, 418. Ross v. Thomaston, 43 Me. 406, 418: Ross v. Ross, 103 Mass. 575, 576; Barnet v. Barnet, 1 Dall. (Pa.) 152.

8. Shaw v. Att.-Gen, L. R. 2 P. D. 156, 161; Yelverton v. Yelverton, I Sw+b. & T. 574, 591; Dolphin v. Robins, 7 H. L. Cas. 390, 420; Niboyet J. Niboyet, L. R. 4 P. D. I, 14. Nor does the contrary seem settled. Harvie v. Farnie, L. R. 5 P. D. 153, 157; Briggs v. Briggs, L. R. 5 P. D. 163, 165.

9. Cheever v. Wilson, 9 Wall. (U. S.)
108, 124; Shanks v. Dupont, 28 U. S.

242: Hanberry v. Harberry, 29 Ala. 719, 724; Turner v. Turner. 44 Ala. 437, 451: Moffatt v. Moffatt, 5 Cal. 280, 281; Smith v. Smith, 4 Mackey (D. C.), 255; Jenness v. Jenness, 24 Ind. 355, 357-359; Sawtell v. Sawtell, 17 Conn 284; Jenness v. Jenness, 24 1101, 355, 351-359; Sawtell v. Sawtell, 17 Conn 284; Hinds v. Hinds, I Iowa, 36, 39; Brett v. Brett, 3 Met. (Ky.) 233; Fishli v. Fishli, 2 Litt. (Ky.) 357; Harding v. Alden, 9 Me. 140, 150; Goodwin v. Goodwin, 45 Me. 377; Sewall v. Sewall, 122 Mass. 156, 162; Burlen v. Shannon, 115 Mass. 438, 449; Shaw v. Shaw, 98 Mass. 158; Harteau v. Harteau, 14 Pick. (Mass.) 181, 185; Wright v. Wright. 24 Mich. 180, 181; Hopkins v. Hopkins, 35 N. H. 474, 475; Payson v. Payson, 34 N. H. 518, 520; Master v. Master, 15 N. H. 159; Frary v. Frary, 10 N. H. 61; Yates v. Yates, 13 N. J. Eq. 280; People v. Baker, 76 N. Y. 78, 85; Kinnier v. Kinnier, 45 N. Y. 535, 544; Mellen v. Mellen, 10 Abb. N. C. (N. Y.) 329, 331, 333 n.; Smith v. Morehead, 6 Jones Eq. (N. Car.) 360, 364; State v. Schlachter, Phil. (N. Car.) 520; Hollister v. Hollister, 6 Pa. St. Car.) 520; Hollister v. Hollister, 6 Pa. St. Car.) 520; Hollister v. Hollister, 6 Pa. St. 449, 452; Colvin v. Reed, 55 Pa. St. 375, 379; Ditson v. Ditson, 4 R. I. 87, 107; Hull v. Hull, 2 Strob. Eq. (S. Car.) 174. 177; Shreck v. Shreck, 32 Tex. 579, 588; Rep. v. Skidmore, 2 Tex. 261; Hare v. Hare, 10 Tex. 355; Craven v. Craven, 27 Wis. 418; Dutcher v. Dutcher, 27 Wis. 418; Dutcher v. Dutcher, 25 Wis. 418; Cacher v. Carlon, 27 Wis. 418; Dutcher v. Dutcher, 28 Wis. 418; Dutcher, 28 Wis. 418; Dutcher v. Dutcher, 28 Wis. 418; Dutcher v. D 30 Wis. 651, 650; Cook v. Cook, 56 Wis.

"The proceeding for divorce may be instituted where the wife has her domicile. The place of the marriage, of the offence, and the domicile of the husband, are of no consequence." Cheever v. Wilson, 9 Wall. (U. S.) 108, 126; Ditson

v. Ditson, 4 R. I. 87.

home; 1 he may move as often as he pleases, and his wife must follow or she deserts him; and whether she follows him in fact or not, her domicile in law follows his, and is determined by his residence and animus manendi.² But there are exceptions: If the husband and wife are divorced a mensa et thoro, the law secures to them separate homes, and the wife has her separate domicile; 3 so, if he is guilty of conduct which justifies her in leaving him, she must have the right to live in a different place and to have her own domicile; 4 and as she has the right to separate from him whenever she has a cause for divorce against him, in all such cases she may have her separate domicile. 6 Authorities have gone further, and the supreme court of the United States has held that a wife may have a separate domicile whenever this is just and proper,7 while other cases have gone far towards holding that in all divorce cases husband and wife may have distinct domiciles.8 The identity of the wife's domicile with that of her husband is after all but a legal fiction,9 and a wronged wife who is not herself in fault may proceed against her husband in the place where she is actually domiciled. But if she is in fault, by the weight of the authorities, her domicile remains his, and the courts of his domicile have jurisdiction over her marriage status as well.¹¹ If she is not in fault, but has a cause for divorce against him, and is actually domiciled in another State, she cannot, by virtue of the legal fiction that his domicile is hers, sue him in the courts of his domicile as though she were residing in the same State with him. 12 And yet this is contradicted by other authorities; 13 and if a wife is,

1. Cutler v. Cutler, 2 Brews. (Pa.) 511, 513. See title HUSBAND AND WIFE.
2. Bennett v. Bennett, Deady (U. S.)

29, 305; Barber v. Barber, 21 How. (U. S.) 582, 594; Greene v. Greene, 11 Pick. (Mass.) 410, 415; Hairston v. Hairston, 27 Miss., 704, 722, South v. Morehead, 6 Jones Eq. (N. Car.) 360, 364; Hair v. Hair, 10 Rich. Eq. (S. Car.) 163, 175; Williams v. Saunders, 5 Coldw. (Tenn.) 60, 79.

3. Barber v. Barber, 21 How. (U. S.) 8. Barber v. Barber, 21 How. (U. S.) 582, 588, 593; Bennett v. Bennett, Deady (U. S.), 299, 305; Williamsport v. Eldred, 84 Pa. St. 429, 432; Williams v. Dormer, 9 Eng. L. & Eq. 598; Dolphin v. Robins, 7 H. L. Cas. 390, 416.
4. Hunt v. Hunt. 72 N. Y. 217, 242; Co vin v. Reed, 55 Pa. St. 375, 379
5. Cheever v. Wilson, 9 Wall. (U. S.)

108, 124; Mellen v. Mellen, 10 Abb. N. C. (N. Y.) 329, 333 n.; Cook v. Cook, 56

Wis. 195. 6. O'Dea v. O'Dea, 101 N. Y. 23;

cases cited supra.
7. Cheever v. Wilson 9 Wall. (U. S.)

8. Smith v. Smith, 4 Mack (D. C.), 255;

Phila. v. Wetherby, 15 Phila. 403; O'Dea v. O'Dea, 101 N. Y. 23. 9. Hunt v. Hunt, 72 N. Y. 217, 242; Wilson v. Wilson, 1 Dev. & B. (N. Car.) 568, 582; Colvin v. Reed, 55 Pa. St. 375.

379. 10. Burlen v. Shannon, 115 Mass. 439, Dutcher 20 Wis. 651, 449; Dutcher v. Dutcher, 39 Wis. 651.

11. Garner v. Garner, 56 Md. 127, 128, See Whitcomb v. Whitcomb, 2 Curt. Ecc. 351; Tovey v. Lindsay, 1 Dow. 117; Cheely v. Clayton, 110 U. S. 701; Bulen

Cheely v. Clayton, 110 U. S. 701; Buten v. Shannon, 115 Mass. 439, 449; Dutcher v. Dutcher, 39 Wis. 651, 659.

12. Pate v. Pate, 6 Mo. App. 49, 52; Hopkins v. Hopkins, 35 N. H. 474, 475; Schonwald v. Schonwald, 2 Jones Eq. (N. Car.) 367; Smith v. Morehead, 6 Jones Eq. (N. Car.) 360, 364; Dutcher v. Dutcher v. Wis 651, 652

Dutcher, 39 Wis. 651, 659.

13. Harrison v. Harrison, 20 Ala. 629, 643; Thompson v. State, 28 Ala. 12, 18; Hanberry v. Hanberry, 29 Ala. 719, 724; Kashaw v. Kashaw, 3 Cal. 312, 322; Ashbough v. Ashbough, 17 Ill. 476, 477; Davis v. Davis, 30 Ill. 180, 183; Masten v. Masten, 15 N. H. 159, 160. sued in her husband's domicile, she may file a cross-bill as answer though she be in fact domiciled in another State.1

(8) Domicile the Test of Divorce Jurisdiction.—Jurisdiction to grant a divorce and dissolve the marriage of any person is, as has been shown, whether in the theory of divorce statutes or under the "full faith and credit" clause of the United States constitution, or under the principles of international law, vested in that State which has control of the status of the person in question. "The status of marriage is the legal position of a married person as such in the community or in relation to the community;—which community is it which is interested in such relation? None other than the community of which he is a member; that is, the community with which he is living, so as to be one of the families of it. But that is in fact the community in which he is living at home, with the intent that among or in it should be the home of his married life. But that is the place of his domicile.2 So that generally speaking, divorce jurisdiction depends upon domicile.3 The only fair and satisfactory rule to adopt in the matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country where they are domiciled. . . . It is both just and reasonable that the differences of married people should be adjusted in accordance with the laws of the country to which they belong, and dealt with by the tribunals which alone can administer these laws." 4 Every State makes it laws for, and has the right to control, the domestic status of those who make their home in it.5 When both parties are domiciled in the State where their divorce is granted there is no

v. Keerl, 34 Md. 21; Sewall v. Sewall, 122 Mass. 156 (1877); Ross v. Ross, 103 Mass. 575; People v. Dawell, 25 Mich. 247 (1872); State v. Armington, 25 Minn. 29; Gould v. Crow, 57 Mo. 200 (1874); Muth v. Muth, 19 Neb. 706 (1886); Leith v. Leith, 39 N. H. 20; Flower v. Flower, 42 N. J. Eq. 152 (1886); Doughty v. Doughty, 28 N. J. Eq. 581; 27 N. J. Eq. 315 (1877); O'Dea v. O'Dea, 101 N. Y. 23 (1886); Mellen v. Mellen, 10 Abb. N. C. (N. Y.) 320 (1882); People v. Baker. 76 (1886); Mellen v. Mellen, 10 Abb. N. C. (N. Y.) 329 (1882); People v. Baker, 76 N. Y. 78 (1879); Hunt v. Hunt, 72 N. Y. 217 (1878); Van Fossen v. State, 37 Ohio St. 317 (1881); Colvin v. Reed, 55 Pa. St. 375 (1867); Platt v. Platt, 80 Pa. St. 501, 504; Ditson v. Ditson. 4 R. I. 87 (1856); Hare v. Hare, 10 Tex. 355; Cast v. Cast, 1 Utah, 112, 114; Prosser v. Warner, 47 Vt. 667 (1875); Cook v. Cook, 56 Wis. 195 (1882); Shafer v. Bushnell. 24 Wis. 372; and cases cited infra. nell, 24 Wis. 372; and cases cited infra. 4. Wilson v. Wilson, L. R. 2 P. & D.

^{1.} Sterb v. Sterb, 2 Ill. App. 223, 227; Jenness v. Jenness, 24 Ind. 355, 361.

2. Niboyet v. Niboyet, L. R. 4 P. D. 1,

^{3.} The following are the fullest cases on this subject, and those which should be consulted primarily: Harvie v. Farnie, L. R. 5 P. D. 153; s. c., L. R. 6 P. D. 35 (1880); Niboyet v. Niboyet, L. R. 4 P. D. 1 (1878); Shaw v. Att.-Gen., L. R. 2 P. & D. 156 (1870); Shaw v. Gould, L. R. 3 H. L. 55 (1868); Dolphin v. Robins, 7 H. L. Cas. 390; Briggs v. Briggs, L. R. 5 P. D. 163; Cheever v. Wilson, 9 Wall. (U. S.) 108 (1869): Cheely v. Clayton, 110 U. S. 701 (1886); Barrett v. Failing, 111 U. S. 523 (1887); Pennoyer v. Neff, 95 U. S. 714 (1877); Turner v. Turner, 44 Ala. 437 (1070); Thompson v. State, 28 Ala. 12; Smith v. Smith, 4 Mackay, 255 (1887); House v. House, 25 Ga. 473; Roth v. Roth, 104 Ill. 35 (1882); Hood v. State, 56 Ind. 263 (1877); Van Orsdale v. Van Orsdale, 67 Iowa, 35 (1886); Litowich v. Litowich, 19 Kan. 451 (1878); Maguire v. Maguire, 7 Dana (Ky.), 181; Harding v. Alden, 9 Me. 140; Garner v. Garner, 56 Md. 127 (1880); Keerl 3 H. L. 55 (1868); Dolphin v. Robins, 7

^{435, 442.} 5. Cook v. Cook, 56 Wis. 195; Strader v Graham, 10 How. (U. S.) 82, 93; Thompson v. State, 28 Ala. 12, 18; Hunt v. Hunt, 72 N. Y. 217, 227, 239.

difficulty—the divorce is valid everywhere. In cases where the wife has a separate domicile, her status will depend on the laws of a different State from her husband atwo different States are interested in two different status arising from the same marriage.2 in such case the court of the wife's domicile dissolves the marriage on her application, not only is such divorce no bar to the husband's application for a divorce in his State,3 but if he marries again on the strength of the divorce granted to her, his courts may deem him a bigamist; 4 and such will be the effect of such a divorce. except by comity, through which its validity may be recognized by such States as, by similar legislation or in some other way, have consented to the grant of such divorces for their citizens by other States.⁵ The courts where neither party is domiciled have no jurisdiction at all; 6 and, as such suits are not merely suits between the husband and wife, but affect a public institution, their consent cannot confer jurisdiction, so that where a divorce is granted in a State, where neither party is domiciled, but in a proceeding in which both parties have appeared, though both parties may be personally bound, their married status is not affected.9 Therefore, the divorce court of any State where a husband or wife is then domiciled has jurisdiction to dissolve his or her marriage, and no court of any other country has such jurisdiction; 10 but in a few cases the jurisdiction of another country may be recognized by comity. 11 And except under unusual statutes, 12 it does not affect this rule that the parties were married, 13 or the

1. Garner v. Garner, 56 Md. 127, 128; Leith v. Leith, 39 N. H. 20, 38; Hunt v. Hunt, 72 N. Y. 217, 237; Hubbell v. Hubbell, 3 Wis. 662, 664; supra, n. 98

2. Thompson v. State, 28 Ala. 12, 18; Jenness v. Jenness. 24 Ind. 355. 359; Gould v. Crow, 57 Mo. 200. 203; People v. Baker, 76 N. V. 78, 85; Flower v. Flower, 42 N. J. Eq. 152; Colvin v. Reed, 55 Pa. St. 375, 353; Cook v. Cook, 56 Wis. 195; Dutcher v. Dutcher, 39 Wis. 651, 658; ante, II. § (4).

3. Cook v. Cook, 56 Wis. 195.

4. People v. Baker, 76 N. V. 78.

5. People v. Dawell, 25 Mich. 247, 257, 264; O'Dea v. O'Dea, 101 N. V. 23; Shafer v. Bushnell, 24 Wis. 372, 377.

6. Harvey v. Farnie, L. R. 6 P. D. 35, 44; Shaw v. Att.-Gen., L. R. 2 P. & D. 156, 162; House v. House, 25 Ga. 473, 150. 2. Thompson v. State, 28 Ala. 12, 18;

156, 162; House v. House, 25 Ga. 473, 474; Hood v. State, 56 Ind. 263, 270; Whitcomb v. Whitcomb, 46 Iowa, 437, 444; Litowich v. Litowich, 19 Kan. 451, 454; Sewall v. Sewall, 122 Mass. 156, 162; People v. Dawell, 25 Mich. 247, 254; State v. Armington, 25 Minn. 29, 36; Muth v. Muth, 19 Neb. 706; Leith v. Leith, 39 N. H. 20, 33, 37; Van Fossen v. State, 37 Ohio St. 317, 319; Platt v. Platt, 80 Pa. St. 501, 504; Hare v. Hare, IC Tex. 355, 357.

7. Harrison v. Harrison, 20 Ala. 620. 645; Maguire v. Maguire, 7 Dana (Ky.), 181, 183, People v. Dawell, 25 Mich. 247. 257, 265; Van Forsen v. State, 37 Ohio St. 317, 319.

8. Harrison v. Harrison, 25 Ala. 629,

9. See cases supra, n. 7.
10. Dicey on Dom. 225; Doughty v. Doughty, 28 N. J. Eq. 581, 385; People v. Baker, 76 N. Y. 78; Cook v. Cook, 56

Wis. 195; cases supra, n. 3, p. 757.

11. People v. Baker, 76 N. Y. 78, 85;

ante, II. § 6.

12. See Smith v. Smith, 4 Mackay, 255, in which case it was held that a statute requiring the plaintiff to be a resident in all cases where the offence was committed out of the State gave the court jurisdiction, though the plaintiff were a non-resident in all other cases; the court said. "When the bill is filed in the place where the guilty party is, where the injury has been committed, and where all the witnesses are found, it is plain that the purposes of justice are best served by a thorough examination of all the facts at that place."

13. Harvey v. Farnie, L. R. 5 P. D. 153; L. R. 6 P. D. 35, 47, 49, 57; Wilson v. Wilson, L. R. 2 P. & D. 435, 442; Cheever v. Wilson, 9 Wall. (U. S.) 108, 124; offence committed, in some other State, even though in such State it was no ground for divorce; 2 or that at the time of the marriage, 3 or the offence, 4 the parties were domiciled elsewhere; or that at the time of bringing the suit a domiciled party is temporarily abroad; 5 or that a domiciled party owes allegiance to a

foreign power.6

(9) Summary of Rules.—The following rules are based on the authorities already discussed, extracts from some of which are given in the notes: Rule 1.—A divorce granted by the court of the domicile of both parties is valid everywhere under the constitution of the United States, and under the principles of international law, although the defendant has neither been summoned nor voluntarily appeared, provided that the laws of the parties' domicile as to notice by publication or otherwise have been complied with.7

Thompson v. State, 28 Ala. 12, 16; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 411; Barber v. Root, 10 Mass. 260, 264; Clark v. ber v. Root, 10 Mass. 260, 264; Clark v. Clark, 8 N. H. 21, 22; Hubbell v. Hubbell, 3 Wis. 662, 664; Shafer v. Bushnell, 24 Wis. 372, 376. But see Solley v. Solley, 2 Clark & I. 568; Harman v. Harman, 1 Cal. 215, 216; Duke v. Fulmer, 5 Rich. Eq. (S. Car.) 121, 125.

'1. Duntze v. Levett, Ferg. 63; 3 Eng. Ec. 360, 379; Wilson v. Wilson, L. R. 2

P. & D. 435, 442; Cheever v. Wilson, 9 Wall. (U. S.) 108, 124; Hanberry v. Hanberry, 29 Ala. 719, 723; Smith v. Smith, 4 Greene, 266, 269; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 411; Harding v. Alden, 9 Me. 140, 143; Barber v. Root, 10 Mass. 260, 264; Clark v. Clark, 8 N. 10 Mass. 200, 204; Clark v. Clark, 8 N. H. 21, 22; Leith v. Leith, 39 N. H. 20, 38; Holmes v. Holmes, 57 Barb. (N. Y.) 305, 307; Hubbell v. Hubbell, 3 Wis. 662, 664; Shafer v. Bushnell, 24 Wis. 372, 376. But see Edwards v. Greene, 9 La. Ann. 317, 318; Colvin v. Reed, 55 Pa. St. 375, 380, 382.

"When the bill is filed where the guilty party is, where the injury has been committed, and where the witnesses are found, it is plain that the purposes of justice are best served by a thorough examination of all the facts at that place."

Smith v. Smith, 4 Mackay (D. C.), 255.

2. Shaw v. Att.-Gen. L. R. 2 P. & D.

156, 161; Niboyet v. Niboyet, L. R. 4 P.

D. 1. 8; Harrison v. Harrison, 19 Ala. D. I. 8; Harrison v. Harrison, 19 Ala.
499; Tolen v. Tolen, 2 Blackf. (Ind.) 407.
411; Stokes v. Stokes, 1 Mo. 320; Hubbell v. Hubbell, 3 Wis. 662, 664. But see Edwards v. Greene, 9 La. Ann. 317, 318; Duke v. Fulmer, 5 Rich. Eq. (S. Car.)
121, 125; Hare v. Hare, 10 Tex. 355, 357; People v. Baker, 76 N. Y. 78, 84.
3. Cases supra, n. 2.
4. Gleason v. Gleason 4 Wis. 64 65.

4. Gleason v. Gleason, 4 Wis. 64, 65.

But see Becket v. Becket, 17 B. Mon. (Ky.) 370; Hopkins v. Hopkins, 35 N. H. 474, 475; Prosser v. Warner, 47 Vt.

667, 671.
5. Hanover υ. Turner, 114 Mass. 227,

231.

6. Niboyet v. Niboyet, L. R. 4 P. D.
13; Shaw v. Gould, L. R. 3 H. L. 55, 84;
Thompson v. State, 28 Ala. 12, 16; Dorsey v. Dorsey, 7 Watts (Pa.), 349, 351.

7. In Cheely v. Clayton, 110 U. S.

701, a case in which a divorce was held invalid simply because the local laws as to notice had not been complied with, the court said: "The courts of the State of the domicile of the parties, doubtless, have jurisdiction to decree a divorce, in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage, or to that of the commission of the offence, and a divorce so obtained is valid everywhere. . . . If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile; and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicile, after reasonable notice to her, either by personal service or by publication, in accordance with its laws, is valid, although she never in fact resided in that State." P.

In Roth v. Roth, 104 Ill. 35. where a marriage had been annulled in Germany because it had been contracted in Illinois without the Sovereign's consent, both parties having been domiciled in Germany at the time of the decree, it is said: "The general rule unquestionably is, where it affirmatively appears the court of a foreign State has jurisdiction of the parties and subject-matter of the suit, its judgment on decree will be con-

Rule 2.—A divorce granted by the court of the defendant's domicile, or of the complainant's domicile in a case in which the defendant has been summoned or has voluntarily appeared, is probably valid as to both parties everywhere by comity.² If the defendant, though not regularly appearing or summoned, has had actual notice, or even if he has had only constructive notice by publication or otherwise, the divorce will be regarded valid as to both parties by comity in such States as have adopted the policy of such divorces by similar legislation or otherwise.3 Even when not regarded as valid as to the non-

clusive on the parties, their legal representatives and privies, in all countries where the matters litigated are again drawn in question; and this is particularly true with respects to judgments or decrees affecting the status of a person, for they are in the nature of judgments in rem, which are binding on the whole world." P. 46.

In Harvey v. Farnie, L. R. 6 P. D. 35, a very late English authority, it is said: "The parties in this case having been domiciled in Scotland at the time the sentence of dissolution was pronounced, I think that that sentence of dissolution ought to be recognized in this country (England), and by all the other countries in the world." P. 47.

in the world." P. 47.
Niboyet v. Niboyet, 4 R. L. P. D. 1, was a peculiar case, in which the English courts held they had jurisdiction, though the parties were scarcely domiciled in England. A Frenchman married an Englishwoman, and resided in England, though being a consul he retained his domicile in France. His wife sued for divorce in England, and he appeared and pleaded the court's want of jurisdic-The court granted the divorce, one of the three judges dissenting. In the United States the decision would be the same, on the ground that the wife had her separate domicile; but this doctrine is not recognized in England. See ante, 1.

If a statute prohibits a party from leaving the State to get a divorce, it means in bad faith. A party may honestly change his domicile, though his purpose be to get a divorce. "The only question in such cases is one of jurisdiction, and jurisdiction depends on domicile." Greg-

ory v. Gregory, 76 Me. 535.

1. As a usual thing, the statutes require the complainant to be domiciled; but apart from such statutes there is as much reason in the suit being brought in the domicile of the defendant as in that of the complainant, and such suits will be allowed. Smith v. Smith, 4 Mackay, 255.

2. Such a decree is not entitled under the United States constitution to recognition, except as to the party domiciled. "All the claim which it has to foreign recognition rests on the ground of comity." Doughty v. Doughty, 28 N. J. Eq. 581, 586. But when the other party has been actually summoned, the decree would seem to be an eminently just one as to both parties. See citations infra. In Van Fossen v. State, 37 Ohio St. 317, it is said: "The courts of one State have no jurisdiction over any marital offence or cause for divorce, wherever arising, unless one of the parties has an actual bona fide domicile within the State. does it alter the case that the alleged marital offence was committed within the State where the divorce is sought, or that the parties submit to the jurisdiction." P. 319.

3. "A judgment of divorce, proceed-

ing from a jurisdiction on domicile, would not contravene essential rules of natural justice, if actual notice to appear had been served on the defendant residing abroad. It is true that a notice so served on a litigant, out of the jurisdiction in which such suit is pending, may add nothing to the judicial right to take cognizance over the cause; but, nevertheless, it may impart a quality to the resulting judgment that will serve as a credential to it in a foreign jurisdiction." Doughty v. Doughty, 28 N. J. Eq. 581, 586. So that in New Jersey a divorce granted in another State on actual notice to the defendant, and on the actual domicile of the complainant, would be held valid as to both parties, but not on notice by publication. Flower v. Flower, 42 N. J. Eq. 152, 154. In New York actual notice would not be enough.—O'Dea v. O'Dea, 101 N. Y. 23:-and notice by publication certainly would not,-People v. Baker, 76 N. Y. 78;-though actual summons or voluntary appearance probably would suffice. Same cases, and Hunt v. Hunt, 72 N Y. 217,

This last notice provides that service by publication is sufficient to author-

domiciled party, such divorces will be regarded as valid as to the domiciled party everywhere by the United States constitution and the principles of international law.1

ize a judgment in personam against a domiciled party temporarily absent. Pp. 237, 239. But the courts of lowa will recognize a divorce as to both parties obtained on the domicile of one, and notice by publication to the other, because it grants such divorces itself. "The policy and laws of the two States (Indiana and Iowa) are substantially the same as to the mode of procedure that may be adopted to obtain a divorce; that is to say, it is provided by statute in both States that a divorce may be obtained by a resident from a non-resident by service of a notice by publication, or by personal service on the defendant in some other State." Van Orsdal v. Van Orsdal, 67 Iowa, 35. There is great inconvenience in the recognition of half divorces. and some courts will strain a point to make a divorce valid as to one valid as to both. "Being valid as to one, public policy demands that it should be held valid as to both parties." Hood v. State, 56 Ind. 263, 271. But others regard divorces as to persons neither domiciled nor actually in court as contrary to natural justice. "A judgment so obtained without actual notice against non-residence, has, therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are ex parte, and take place in the absence of the party affected by them." Shaw v. Att.-Gen., L. R. 2 P. & D. 156, 162.

" It is perfectly true that in some cases we do not recognize the status derived from the country of the domicile, where such status would interfere with our views of the interests of our country, or our subjects, or of morality and the highest justice." But "there seems no reason why, by the comity of nations, we should not recognize the decree of a foreign court which proceeded upon principles in accordance with the English law." Harvey v. Farnie, L. R. 5 P.

D. 153, 157.People v. Baker, 76 N. Y. 78, is a celebrated case. A wife having obtained a separate domicile in Ohio, sued in that State her husband, who was domiciled in New York, and after publication but no actual notice to the husband obtained a divorce. The husband afterwards hearing of the divorce, and relying thereupon, married again, and being tried in New York for bigamy was held guilty,

the foreign divorce being no protection to him. The court said: "It is called a proceeding in rem, but was it ever heard that the courts of one State can affect in another State the rem there, not subjected to their process, and over the person of the owner of which no jurisdiction has been got? Now, if the matrimonial relation of the one party is the res in one State. is not the matrimonial relation of the other party a res in another State? . . . And hence, if one party to a proceeding is domiciled in a State, the status of that party as affected by the matrimonial relation may be adjudged upon and confirmed, or changed, in accordance with the laws of that State. But has not the State in which the other party named in the proceedings is domiciled also the equal right to determine his status as thus affected, and to declare by law what may change it, and what shall not change it? If one State may have its policy, and enforce it in the respect of marriage and divorce, another may. . . . There is no principle of comity which demands that another sovereignty shall permit the status of its citizens to be affected by a foreign decree, when contrary to its own public policy or its standard of public morals." Pp. 85, 86.

The rule that a status acquired in the State of domicile will be recognized in any other State has its exceptions. "If, for instance, such status has been acquired, as in the present case, by a violation of an express provision of the positive law of the State in which the recognition is asked, or if it be contrary to the genius and spirit of its institutions, as a title of nobility would be here, or if it is opposed to its settled policy, or to the good order and well-being of society, or to public morality and decency,-in all such cases the status would not be and should not be recognized by the courts of the latter State." Roth v. Roth, 104 Ill.

This rule as to the necessity of summons or appearance "is in no wise a technical one, being founded on the universal concession that it is an element essential to the justice of all jurisdiction, that all persons whose rights are to be adjudged should have an opportunity of being heard." Doughty v. Doughty, 28 N. J. Doughty v. Doughty, 28 N. J. Eq. 581, 584.

1. In Turner v. Turner, 44 Ala. 437.

the court recognized a divorce granted

Rule 3.—A divorce granted by the court of a State where neither of the parties is domiciled will not be regarded as valid in any other State, although both parties have submitted themselves

to the jurisdiction of the court.1

Rule 4.—A divorce granted against a defendant who has neither appeared nor been summoned, though valid as far as it affects such defendant's married status, will not be valid as far as it deals with alimony, or costs, or a prohibition against another marriage. even in the State where it is granted.2

on behalf of a husband in Indiana, the wife not having appeared or been summoned, as valid as to the husband but invalid as to the wife, and granted the wife a divorce, saying: "If the [Indiana] divorce is valid, it unmarries him, and sets him free from his marital vows to her. He is no longer the complainant's But it does not settle her husband. right to alimony; it does not settle her right to dower in his lands, and her statutory right to distribution of his property in this State, in the event she should survive him, nor any other interest of a pecuniary character she may have against him." P. 450.

"Undoubtedly each State has the power to abolish, fix, regulate, and control such status as to each and all of its own Of course every other State has the same power. From this it logically follows that no one State has the power to fix, regulate, or control such status as to citizens of any other State." Cook v. Cook, 56 Wis. 195, 208. In that case a Michigan divorce on publication against the wife granted to the husband was recognized as valid as to the husband, but as no bar to the application by the wife, her landed interests being affected. For if the divorce granted the husband is not valid as to the wife, it does not affect her dower in another State, p. 217. Also Barrett v. Failing, of Divorce. So in Wright v. Wright, 24 Mich. 181, it is held that the wife's State may grant her a divorce, though the husband's State has granted one valid as to him, if it is important for the protection of her property rights, it being otherwise unnecessary. So if the custody of her children is involved. Stilphen v. Stilphen, 58 Me. 508, 575.

1. "Now I understand the rule to be, that to give the courts of any State jurisdiction over the marriage relation be-tween a husband and wife, one of the parties at least must have a domicile within that State. Some of the decisions make further requirements; but no court

has ever held that any less could be demanded." People v. Dawell, 25 Mich.

247, 254.

2. In Gould v. Crow, 57 Mo. 200, 204, it is said: "Every State or sovereignty has the right to determine the domestic relations of all persons having their domicile within its territory; and therefore, when a husband or wife is domi-ciled within a particular State, the courts of that State can take jurisdiction over the status, and for proper cause as on this rem, and dissolve the relation. The decree so pronounced is a judgment in rem, and when not affected by fraud it is valid everywhere, and under the constitution of the United States such decrees are entitled to full faith and credit in all the States and Territories. But such judgments, when rendered on orders of publication, can only have effect upon the thing acted on by the decree. and such rights as are dependent upon that for their existence. Therefore, if a court, on severing the marriage tie, undertakes to render a decree in personam as to alimony, it can have no extra territorial effect. But the marriage slatus being acted on and dissolved by the decree, the relation becomes severed, and continues so in all other States and Territories, and property rights dependent alone upon its continued existence must cease, not only within the State where the divorce is rendered, but in all other dominions. After such dissolution neither party can obtain right dependent upon its continued existence. The husband is no longer entitled to courtesy, and the wife's incomplete dower must cease." And so the court would not allow a wife dower who had been divorced on her husband's application on notice by publication. This case may be harmonized with the cases cited above, and with Colvin v. Reed, 55 Pa. St. 375.

In Garner v. Garner, 56 Md. 127, 128, it is said: "To render a judgment binding, the court must have jurisdiction over the person or subject matter. Jurisdiction over the person can only be

Rule 5.—A decree against a defendant who has appeared or heen summoned will bind him personally, though for want of iurisdiction over his married status it may not affect that status in other States.1

Rule 6.—The invalidity of a divorce due to want of jurisdiction may be shown in any proceeding in any court, such decree being

conclusive of no jurisdictional facts.2

III. Procedure in Divorce Cases.—(I) The Several Steps in a Divorce Suit.—Having ascertained what State has jurisdiction over his status, and which court in that State, the complaining party examines the statutes of that State and discovers what complaints he has which he can allege as causes for divorce, and also what kind of a divorce he must ask for. He then brings suit, making the proper persons parties, alleging the material facts, and praying for the divorce and such other relief as he desires. Under the practice of the court, process issues against the defendant by summons if she is in the State, and by publication or otherwise, as provided by statute, if she is beyond the jurisdiction of the court. After the expiration of the proper time, either the defendant appears and files her answer alleging such defences as she may have, or she makes default. The case then goes to proof before a commissioner or referee, or in open court before a judge or a judge and jury, and the facts and law being found, the judgment or decree is entered. The decree, besides dealing with the marriage relation, may affect the property rights and children of the parties. Moreover, during the pendency of the suit, preliminary decrees or orders may be given in the case, for alimony or for the custody of

acquired by service of process of some kind, or voluntary appearance. The process of a court cannot be served beyond the limits of the State, and non-residents are not, therefore, amenable to such process. Hence it is that judgments in personam are not binding upon persons living beyond the limits of the State, unless they voluntarily appear and answer the suit." All the cases which recognize the jurisdiction of a State to determine the matrimonial status of its own citizens, although one of the parties live in another State, limit the exercise of it to the dissolution of the marriage. The decree in such cases affects only the status or marriage relation. To go a step farther, and say the guilty party, who is a nonresident, and therefore beyond the process of the court, shall not marry again, is quite a different thing. Such a prohibition is not necessarily a part of the decree dissolving the marriage, but is in the nature of a decree in personam, affecting the rights of parties beyond the jurisdiction of the court.'

But any divorce granted in accordance with the statutory authority will be valid in the State. Doughty v. Doughty, 28 N. J. Eq. 581, 584.

1. Harrison v. Harrison, 20 Ala. 620,

647.
2. "Any judgment from a sister State, void for want of jurisdiction, may be shown to be void in any proceeding, direct or collateral, and by evidence dehors the record." Litowich v. Litowich, 19 Kan. 451, 455. So Sewall v. Sewall, 122 Mass. 156, 158; People v. Dawell, 25

Mich. 247, 256. In Reed v. Reed, 52 Mich. 117, the husband had moved into *Indiana*, and taken up a false domicile and secured a divorce. The Michigan court went behind the record, declared the divorce void, and said: 'And if the record by its recitals makes a prima facie case of jurisdiction, no one in another State or country is concluded thereby; but he may show what the real fact was, and thus disprove the authority for making such a record;" p. 121. "The jurisdiction of a foreign court is open, whatever may be the recitals relating thereto in the judgment." Gregory v. Gregory, 76 Me. 535, 539.

the children, or for the protection of some personal or pecuniary right of one of the parties. All these matters must be separately discussed.

- (2) The Practice in Divorce Suits, in General.—As has already been shown, a divorce suit is not properly a suit at law or in equity. a suit in contract or for tort, but a proceeding sui generis. 1 the United States, divorce jurisdiction is generally vested in the equity courts,2 and the pleadings and rules of evidence are the same in divorce suits as in other suits in equity, except that the process against the defendant is somewhat different.4 and the bill cannot be taken for confessed. These courts, granting divorces so far only as empowered by statute, 6 apply the principles and practice of the ecclesiastical courts so far as they are suited to our condition and the general spirit of our laws, and are not modified or limited by our statutes or rules of court." In incidental matters and in the absence of special rule the ordinary practice of the court is followed.8
- (3) The Part Taken by Judge, Jury, Referee, Master, etc.-In some of the *United States* a jury trial is a matter of right unless waived,9 and issues may be sent to the jury at the request of either partv.10 Elsewhere no jury trial can be had, and the judge must

1. Ante. II. (4). 2. See Black v. Black, 5 Mart. (La.) 15; Rev. Laws of Ala. 1876, § 2688;

Colo. 1877, § 918; Del. 1874, p. 475. etc. 3. Richmond v. Richmond, 10 Yerg. (Tenn.) 343, 345, 348; Hobart v. Hobart, 45 Iowa, 501, 503; s. c., 51 Iowa, 512, 514; Wadsworth & Wadsworth, 40 Iowa, 448, 449; Mangels v. Mangels, 6 Mo. App. 481, 483, 486. Depositions may be given in evidence as in equity cases,—Richmond v. Richmond, 10 Verg. (Tenn.) 343;—when there is a reference the duties of the referee are much like those of a master in chancery,-Rand v. Rand, 56 N. H. 516;-he reports the substance of the case and the judge decides it,-Ren-

wick v. Renwick, 10 Paige (N.Y.), 420, 422.

4. Discussed post, VII.

5. Latham v. Latham, 30 Gratt. (Va.)
307, 312; Bailey v. Bailey, 21 Gratt. (Va.)
43; Richmond v. Richmond, 10 Yerg.

(Tenn.) 343, 345; explained post, IV. (6). 6. Hopkins v. Hopkins, 39 Wis. 167, 171. All divorce jurisdiction is derived

from statute, ante, II. (2).

7. Lovett v. Lovett, 11 Ala. 763, 769; Bauman v. Bauman, 18 Ark. 320, 327; Jeans v. Jeans, 2 Harr. (Del.) 38; Finch v. Finch, 14 Ga. 364, 366; McGhee v. McGhee, 10 Ga. 477, 481; Head v. Head, McGhee, 10 Ga. 477, 481; Head v. Head, 2 Kelly (Ga.), 191, 204; Southwick v. Southwick 97 Mass. 327, 329; H. G. v. J. G., 33 Md. 401, 406; North v. North, 1 Barb. Ch. (N. Y.) 241, 245; Williamson v. Williamson, 1 Johns. Ch. (N. Y.) 487, 491; Barrere v. Barrere, 4 Johns. Ch.

(N. Y.) 187, 196; Wood v. Wood, 2 Paige (N. Y.), 108, 111; Perry v. Perry, 2 Paige (N. Y.), 505, 505; Devenbaugh v. Devenbaugh, 5 Paige (N. Y.), 554, 556; Burr v. Burr, 10 Paige (N. Y.), 20, 35; Johnson v. Johnson, 14 Wend. (N. Y.) 637, 642; Brinkley v. Brinkley, 50 N. Y. 184, 190; Gray v. Askew, 3 Ohio St. 466, 480; Wright v. Wright. 6 Tex. 421; Rogers v. Rogers, 7 Tex. 534, 544; Almond v. Almond, 4 Rand. (Va.) 662, 664; Lebarron v. Lebarron, 35 Vt. 365, 367. Some cases refuse to recognize the ecclesiastical practice at all. Parsons v. Parsiastical practice at all. Parsons v. Parsassteal practice at all. Farsons v. Fairsons v. Fairs I Kelly (Ga.), 191, 194, 204. So the word "desertion" in a divorce statute is given its ecclesiastical meaning. Southwick v. Southwick, 97 Mass. 327, 329. So alimony is granted according to the practice of the ecclesiastical courts. Brinkley v. Brinkley, 50 N. Y. 184, 190. So, in impotence cases, the court may order an inspection of the parties. Lebarron v. Lebarron, 35 Vt. 365, 369.
8. Gernon v. Hickey, 18 La. Ann. 454.

The above rules apply as well to nullity suits as to divorce suits. H. G. v. J. G., 33 Md. 401, 406; Lebarron v. Lebar-

9. See Deitz v. Deitz, 2 Hun (N. Y.), 339. 340; Black v. Black, 5 Mont. 15.

10. See statutes of the particular State;

determine the whole matter. 1 Now, in England, issues may be sent to a jury in the discretion of the judge.2 In the ecclesiastical courts there was no jury, and the judge passed upon both the law and the facts.³ And such is the case in many States where divorce suits are brought in equity; the testimony is taken before a commissioner, and is then referred to the master in chancery, who makes his report, upon which the judge enters the decree.4 Sometimes statutes provide for a reference of a case to a referee; who reports to the court, and the court decides the case. 5 Neither a judge nor a referee or master can delegate his authority. 6 Sometimes statutes provide that the case must be tried in open court.7 The different modes of trial are too much a matter of local practice to be fully discussed in an article of this kind.

(4) Miscellaneous Points of Practice.—Amendments will be allowed as in other cases. and bills of particulars may be demand-

also Morse v. Morse, 25 Ind. 156, 160; also Morse v. Morse, 25 Ind. 156, 160; Fuller v. Fuller, 17 Cal. 605, 611; Reavis v. Reavis, 2 Ill. 242, 244; Brinkley v. Brinkley, 56 N. Y. 192, 193; Richmond v. Richmond, 10 Yerg. (Tenn.) 343, 347; Miles v. Miles, 2 Jones Eq. (N. Car.) 21, 22; Harrison v. Harrison, 7 Ired. (N. Car.) 484, 489; Smith v. Smith, 72 N. Car. 139, 142; Batzel v. Batzel, 42 N. Y. Super. Ct. 561; s. c., 19 N. Y. 636. Still, after testimony has been taken before a commissioner it is too late to fore a commissioner, it is too late to demand a jury trial. Allison v. Allison,

48 Pa. St. 321, 323.

1. Simpson v. Simpson, 25 Ark. 487;
Wadsworth v. Wadsworth, 40 Iowa, 448; Hobart v. Hobart, 51 Iowa, 512, 514; Coffin v. Coffin, 55 Me. 361. Subject to exception as in other cases. Slade v.

Slade, 58 Me. 157.

Where there is a jury trial instructions are given to the jury as in other cases. are given to the jury as in other cases. See Smith v. Smith, 72 N. Car. 139, 142; Harrison v. Harrison, 7 Ired. (N. Car.) 484, 489; Richmond v. Richmond, 10 Yerg. (Tenn.) 343, 347. But the verdict is not always binding on the court, and a divorce may be denied though the issues nave been found for the complainant. Haygood v. Haygood, 25 Tex. 576, 577; Vance v. Vance, 17 Me. 203; O'Bryan v. O'Bryan, 13 Mo. 16; Ferguson v. Ferguson, 1 Barb. Ch. (N. Y.) 604; Mulock v. Mulock, 1 Edw. Ch. (N. Y.) 14; Forrest v. Forrest, 25 N. Y. 501; Richmond v. Richmond, 10 Yerg. (Tenn.) 343, 348; Moore v. Moore, 22 Tex. 237.

2. Marchmont v. Marchmont 1 Sweb have been found for the complainant.

2. Marchmont v. Marchmont, I Swab. & T. 228, 229.
3. Caton v. Caton, 13 Jur. 431, 433.
4. Rand v. Rand, 56 N. H. 421.

5. Unless authorized by law, no reference can be had by consent of the parties. Baker v. Baker, 10 Cal. 527, 528; Hobart v. Hobart, 45 Iowa, 501, 505. Or by direction of the judge. Mangels Mangels

v. Mangels, 6 Mo. App. 481, 485.
As to the duties, etc., of referees in several States, see Baker v. Baker, 10 Cal. 527; Shillinger v. Shillinger, 14 Ill. 147; Rand v. Rand, 56 N. H. 421; Moore 147; Rand v. Rand, 56 N. H. 421; Moore v. Moore, 56 N. H. 512; Stone v. Stone, 28 N. J. Eq. 409; Belton v. Belton, 26 N. J. Eq. 449; Stevens v. Stevens, 14 N. J. Eq. 374; Cook v. Cook, 13 N. J. Eq. 263; Graves v. Graves, 2 Paige (N. Y.), 62; Dodge v. Dodge, 7 Paige (N. Y.), 589; Renwick v. Renwick, 10 Paige (N. Y.), 62 (10) 474; P. Hort v. Hort of Fair Ch. 500, Keinwick, D. Reinwick, 10 Targe (N. Y.), 420, 422; Hart v. Hart, 2 Edw. Ch. (N. Y.) 207; Dobbs v. Dobbs, 3 Edw. Ch. (N. Y.) 377; Pollock v. Pollock, 71 N. Y. 137; Bacon v. Bacon, 34 Wis.

6. Stone v. Stone, 28 N. J. Eq. 409, 410; Mangels v. Mangels, 6 Mo. App.

481, 485. 7. See R. C. Miss. 1880, § 1166; Shillinger v. Shillinger, 14 Ill. 147, 151; Richmond v. Richmond, 10 Yerg. (Tenn.)

The Iowa provision (R. C. 1880, § 2222) that the trial shall be in open court, means not only that it shall not be in secret, but that it shall be entirely before the judge, and not before a referee, etc. Hobart v. Hobart, 45 Iowa, 501, 504. And see Stone v. Stone, 28 N. J. Eq.

In England, nullity suits on the ground of impotence can be tried privately, but not divorce suits proper. A. v. A., L. R. 2 P. & D. 230; C. v. C., L. R. 1 P. & D. 640; Barnett v. Barnett, 20 L. J. Mat. Cas. 28.

8. Parkinson v. Parkinson, L. R. 2 P. & D. 27, 28; Brinkley v. Brinkley, 56 N. Y. 192, 193; Miller v. Miller, 40 N. J. Eq. 475; s. c., 2 Cent. Rep. 181; post, V.

ed,1 and the court may order important papers to be produced for its inspection.2 So of its own motion the court can continue the case, that new evidence may be taken.3 The parties may by mutual consent discontinue their suit.4 So the complainant may withdraw his charges; but he cannot discontinue his suit if an answer in the nature of a cross-bill has been filed.⁵ There may be nunc pro tunc judgments as in other suits.6 New trials may be

granted as in other cases.7

IV. The Parties to a Divorce Suit.—(1) The Proper Parties, in General.—In general, the husband and the wife are the only necessary or proper parties to a divorce suit; but in cases of disability the suit may have to be brought or defended by a guardian, committee, or next friend.8 Speaking generally also, no one but the husband or wife in person can be a complainant, as the suit is purely a personal one, and the complaint must be signed by the complainant in person.9 But any third person whose pecuniary rights are involved may be made a defendant. 10 The State is always an informal party defendant though not named, for the protection of the public interests of the State and the children of the parties. and in some States is formally represented by counsel.¹¹

(2) The Effect of Coverture.—How the Wife Sues and Defends. -As a general rule, a wife brings or defends a divorce suit as though she were unmarried. 12 The practice in divorce suits, as has

(3). But a suit for divorce cannot be amended into a nullity suit. Schafberg,

2. Schafberg, 52 Mich. 429.

1. Huston v. Huston, 63 Me. 184, 187; Harrington v. Harrington, 107 Mass. 329; Realf v. Realf, 77 Pa. St. 31; post,

2. Pollard v. Pollard, 3 Swab. & T. 613, 615; Shaw v. Shaw, 2 Swab. & T.

642.
3. Foster v. Redfield, 50 Vt. 285. 291.
4. On payment of costs. Dixon v. Dixon, L. R. 2 P. & D. 253; Cooper v. Cooper, 3 Swab. & T. 392, 393; Colvin v. Colvin, 2 Paige (N. Y.). 385, 386.
5. Campbell v. Campbell, 12 Hun (N. Y.). 636; s. c., 54 How. Pr. (N. Y.) 115.
6. Mead v. Mead, 1 Mo. App. 247.
254; Webber v. Webber, 83 N. Car. 280.
7. Lee v. Lee, L. R. 2 P. & D. 499; Godrich v. Godrich, L. R. 2 P. & D. 392; Fitzgerald v. Fitzgerald, 3 Swab. & T. Fitzgerald v. Fitzgerald, 3 Swab. & T. 400; Nicholson v. Nicholson, 3 Swab. & T. 214; Matthai v. Matthai, 49 Cal. 90, 1. 214; Matthai v. Matthai, 49 Cai. 90, 93; Mercer v. Mercer, I. McArthur (D. C.), 655; Rindge v. Rindge, 22 Ind. 31, 34; Gibbs v. Gibbs, 18 Kan. 419; Hills v. Hills. 76 Me. 486; Folsom v. Folsom. 55 N. H. 78, 82; Conger v. Conger, 77 N. Y. 432; Amory v. Amory, 6 Rob. (N: Y.) 514. If the verdict is contrary to the evidence.-Alrich v. Alrich, 8 Kan. 402; -but not if the evidence was simply conflicting,-Matthai v. Muthai 49 Cal. 90.

93;-nor where the evidence which was wrongfully rejected would not have altered the result,—French v. French, 14 Gray (Mass.), 186; Pinkard v. Pinkard, 14 Tex. 356. New trials will be granted as often as justice shall seem to require. Ferguson v. Ferguson, 3 Sand. 307, 308.

8. In England if cause alleged is adultery, paramour must be a party. 20 & 21 Vict. c. 85, § 28; Quicke v. Quicke, 2 Swab. & T. 419. Unless unknown. Tollemache v. Tollemache, 28 L. J. Mat.

9. This will appear in the succeeding discussions; also in the following cases: Worthy v. Worthy, 36 Ga. 45, 46; Bradford v. Abend, 89 Ill. 79, 81: Daniels v. Daniels, 56 N. H. 219; Philbrick v. Philbrick, 27 Vt. 786; Richardson v. Richardson, 50 Vt. 119, 121. The necessity of personal signing seems to depend on

10. Post. IV. (6). 11. Post. IV. (7); Wright v. Elwood, r Curt. Ecc 662, 666.

12. Goverture.—See Barber v. Barber, 21 How. (U. S.) 582, 588, 590, 597; Sprayberry v. Merk, 30 Ga. 81, 82; Jones v. Jones, 18 Me. 308, 312; Amos v. Amos, 4 N. J. Eq. 171; Smith v. Smith, 4 Paige (N. Y.), 92, 94; Rose v. Rose, 11 Paige (N. Y.), 166, 167; Wood v. Wood, 2 Paige (N. Y.), 108, 110; Wilson v. Burr, 25 Wend. (N. Y.) 386, 388. been shown, is partly that of the ecclesiastical courts, partly that of chancery courts, and partly the result of the statutes of the particular forum. A wife sued and defended alone in the ecclesiastical courts, just as if she were not married. At equity a married woman could not be sued at all without her husband in a personal suit, and in a suit respecting her property her trustee or husband had to be joined; nor could she bring suit in equity without joining her husband, trustee, or next friend. As a matter of convenience and indeed of necessity, the ecclesiastical practice has prevailed, so that in the *United States* a wife, independently of statute, usually brings her suit for divorce or defends the same alone and in her own name: 4 though in cases where she prays for some equitable relief as to her pecuniary rights it is usual to join her next friend, as she would were she suing for the same independent of the divorce.⁵ In some States, moreover, the statutes deal with this subject, and the wife is authorized to sue alone; 6 and where she is authorized to sue her husband in her own name, she may so sue him, though there is another party joined with him as defendant.7 When the wife improperly sues alone, the objection must be made by demurrer, and cannot be made at all after the answer is filed.8 Although the wife may be authorized to sue alone, this does not necessarily imply that she may make contracts for the services of attorneys, and concerning other matters relating to the prosecution of the case, as though she were not married.9

(3) The Effect of Infancy.—How a Minor Husband or Wife Sues and Defends.-Under the ecclesiastical practice, a guardian ad litem was appointed to conduct the suit for an infant complainant or defendant.10 In ordinary suits in equity the practice is the same. 11 And it would therefore probably be proper, independently of statute, to have a guardian ad litem appointed for any infant party to a divorce suit. 12 But this is not necessary, as the courts have held that one who is old enough to marry is old enough to

1. Ante, III. (1).

2. Herbert v. Herbert, 2 Hagg. Consist. 263, 269; 4 Eng. Ecc. 534, 538;

sist. 263, 269; 4 Eng. Ecc. 534, 538; Coote Ecc. Prac. 320.

3. See Edwards v. Edwards, 30 Ala. 394, 395; Kenley v. Kenley, 2 How. (Miss.) 751, 753; Hunt v. Booth, Freem. (Miss.) 215. 316; Peltier v. Peltier, Harr. (Mich.) 19. 29; Meldora v. Meldora, 4 Sandf. (N. Y.) 721.

4. Wright v. Wright, 3 Tex. 168, 188; Feigley v. Feigley, 7 Md. 537; Wood v. Wood, 2 Paige (N. Y.), 108, 110.

5. See title Married Women.

6. See Kashaw v. Kashaw, 2 Cal. 312.

6. See Kashaw v. Kashaw, 3 Cal. 312, 321; Shore v. Shore, 2 Sandf. (N.Y.) 715, 716; Wright v. Wright, 3 Tex. 168, 188. 7. Kashaw v. Kashaw, 3 Cal. 312,

8. Kenley v. Kenley, 2 How. (Miss.)

9. She may dismiss her suit. Stones

v. Stones, L. R. 3 P. D. 42, 44; Hooper v. Hooper, 3 Swab. & T. 251, 254; Gregory'r. Gregory, 32 N. J. Eq. 424, 426; Kirby v. Kirby, I Paige (N. Y.), 565. And she may bind herself by agreements in the case which the court deems proper. Stilson v. Stilson, 46 Conn. 15; Snow v. Gould, 74 Me. 540, 544; Van Order v. Van Order, 8 Hun (N. Y.), 15. But her capacity to employ an attorney depends on other questions, and is discussed under title MARRIED WOMEN.

10. Infancy.—Barham v. Barham, I. Hagg. Consist. 5; 4 Eng. Ecc. 309; Brown v. Brown, 2 Rob. Ecc. 302, 305.

11. See Wood v. Wood, 2 Paige (N.

Y.), 108, 110.

12. "Although in a divorce suit a wife may sue as if sole, yet if she be an infant she must prosecute or defend by her guardian or next friend." Wood v.

Wood, 2 Paige (N. Y.), 108, 110.

apply for a divorce, and that one who is old enough to acquire matrimonial rights is old enough to enforce them; so that for the purposes of a divorce suit full age is the marrying age, and an infant husband or wife may sue or defend in his or her own name.1

(4) The Effect of Insanity.—Divorce Suits when One of the Parties is Insane.—Whether a divorce may be granted while one of the parties to the marriage is insane has been much disputed, as great injustice may be done an innocent party both by the refusal and by the granting of divorces in such cases.2 There is a difference between the case of an insane complainant and that of an insane defendant, and the better view seems to be that, independently of statute, no divorce will be granted on behalf of an insane complainant, but that the insanity of the defendant, which has arisen after the offence complained of, will not bar the complainant if the case is strictly proved.3

As to the Complainant.—The right to a divorce is strictly a personal right which can be waived by the innocent party, and which cannot be asserted except by his or her will; therefore, if the injured party be insane, no matter how outrageous the conduct of the other party, no matter what scandal may result, no relation or guardian or committee can bring a suit for divorce; 4 and if a

1. " If a wife is of sufficient age to enter into a marriage contract, no good reason offers itself to us why she may not maintain an action in the courts to dissolve it for any of the causes authorized by the laws of the State." Besore v. Besore,

49 Ga. 378, 379.
"If the law permits a female infant to enter into the marriage contract, does not the larger include the less power, and enable her to do any act which may be necessary to its perfection, or may arise incidentally out of it? And is it not upon this principle that she is allowed to bar herself of dower, and dispose of her property by such a contract? Will the law enable her to assume the duties and acquire the right of support and protection which that control gives, and refuse her the power of enforcing those rights?" Jones v. Jones, 18 Me. 308, 312, 313.

In a peculiar English case, the father of a minor was allowed to institute and conduct a divorce suit for the minor dur-

ing the latter's absence. Morgan v. Morgan, 2 Curt. Ecc. 679.

2. Insanity.—"My lords, it cannot be doubted that the evils are great and manifold which may result from a decision either way on this question, upon which, nevertheless, your lordships must pronounce your decision one way or the other. If a petition of this nature be dismissed for this cause [the defendant's insanity], the consequences to a petitioner may be, that although he may have

evidence incontrovertible of the adultery of his wife, and a just claim for damages against a co-respondent to a large amount. he finds himself, without any fault of his own, and from an accident which he had no power to prevent, tied and bound to an adulterous wife for the rest of his life. compelled by law to maintain her suitably to his own condition and rank and fortune, liable to the risk of spurious issue, his legitimate children and natural heirs despoiled of property to the extent of the wife's rights, and himself forever precluded from contracting marriage with another woman. On the other hand, if the petitioner be allowed to proceed, the consequences may be scarcely less calamitous to the wife, in a case in which, more than in any other judicial inquiry. evidence may be given against her which she alone may be able to contradict or explain away; and after a trial upon which, but for her insanity, she might have established a complete defence, she may recover her reason only to find herself dishonored and disgraced forever by a sentence of divorce for adultery."
Kelly, C. B., in Mordaunt v. Moncrieffe, L. R. 2 H. L. Sc. 374, 381, 382.

3. Insanity as a cause for divorce is

discussed post.

4. Worthy v. Worthy, 36 Ga. 45; Bradford v. Abend, 89 Ill. 78, 81; Birdzell v. Birdzell, 33 Kan. 433; s. c., 52 Am. Rep. 539; Mordaunt v. Moncrieffe, L. R. 2 H. L. Sc. 374. The opinion in Worthy v. Worthy, 36 Ga. 45, is so much to the point that it is

here given in full:

Dec., 1866; Harris, J.—" This is a suit instituted by the father of a female lunatic as her next friend, against the defendant, her husband, for a total divorce, on the ground of adultery; and the question is, whether a guardian or next friend can, of his own will, institute such a suit and prosecute or abandon it at his pleasure.

"Mrs. Worthy was at the institution of this suit a lunatic, and confined in the asylum near Milledgeville. It does not appear that after her affliction at any time she had a lucid interval; for if she had, and that being shown, and that during the interval she had directed suit for divorce to be brought, it should have been in her own name, without appearance by next friend. The suit is an indirect admission that she had no lucid interval, and for the purpose of this decision we will assume that the fact is so. If a guardian or next friend has the power insisted upon, we desire to learn whence it is derived. It certainly is not given by express provision of law, nor nor can it legitimately be deduced from the personal custody of the ward, which imposes certain duties upon the guardian which he must perform. We confess that, notwithstanding the very able argument of the counsel for the father of Mrs. Worthy, we are unable to regard the right to sue for a divorce in any other light than as strictly personal to the party aggrieved.

"It is solely under the control of the person injured by the infidelity of the other; it is at the volition of that party whether a suit shall be begun and prosecuted or not. 2 Kent Com. p. 100. This principle laid down by Chancellor Kent, if correct, is decisive of the case. It is clear the wife gave no assent to the beginning of this suit; she is a confirmed lunatic, and from the first was incapable of volition. What though she should continue a confirmed lunatic, and the husband should continue by repeated adulteries to violate his marriage vows and duties? The marriage cannot be dissolved at the instance and will of father, brother, or friend, whose feelings and delicacy may have been outraged by the conduct of the husband. Their will may not be her will; her will, intelligent will, only can be regarded by a court, not theirs. It may be inconvenient and greatly to be deplored that such a state of things exists. Nor can it be remedied by law, without destroying the safe foundation on which the continuance of the marriage relation

reposes—that of its being personal to the party aggrieved.

"For the crime of adultery, with which the husband is charged, the law has provided punishment, and the father or friend may prosecute at their will; but whether, after gross and repeated infidelities, the wife will continue to regard him as her husband and live with him as his wife, is for her decision only. Death only can dissolve the marriage relation without her consent, and no divorce can or ought to be had in this or any case but through the agency and will of the injured wife.

"Let the judgment be reversed, on the ground that the suit should have been dismissed, as it was improperly brought

by a prochein ami."

In Birdzell v. Birdzell, 33 Kan. 433, 435, 436, it is said: "Marriage is a personal status and relation assumed for the joint lives of the parties, and can never be created or brought into existence except with the free and voluntary consent of the parties assuming the same, and it can never be dissolved or destroyed while both parties are living, so as to affect an innocent party thereto, except for a grievous and essential wrong committed against such relation by the other party, and with the free and voluntary consent, and indeed, with the active and affirmative volition of the wronged and In other words, the innocent party. marriage status and relation of an insane person, who has given no cause for a divorce, cannot be dissolved or abrogated at all, for it cannot be dissolved or abrogated except with the voluntary consent of such insane person, and such insane person is incapable of giving any consent to such a dissolution or abrogation. How could a guardian conduct the mind of his insane ward through the ceremony that would make him or her a husband or wife, or how could he conduct such mind through a litigation that would undo the marriage relation? Marriage might be ever so beneficial to the ward, financially or otherwise, but as it depends upon the intelligent volition of the party to be married, the guardian could not effect it, or if it existed, he could not inaugurate and conduct a pro-There ceeding that would destroy it. are no wrongs that may be committed by husband or wife sufficient in and of themselves to work a dissolution of the mar-ital ties. The injured party may be willing to condone the wrong, or, for reasons satisfactory to himself or herself, may desire to continue the marriage relation, notwithstanding the wrong.

divorce is obtained during the insanity of the complainant it will be regarded as a fraud, and will be declared void by a court of equity on the application of a proper party. It has, however, been held that this reasoning does not apply to a suit for a mere legal separation, or a nullity suit, or a suit for alimony, or a suit for a share in the husband's estate after his death. In England. under the General Divorce Statute, the guardian of a lunatic may bring such a suit; 6 and in some of the United States there are similar statutes.7

As to the Defendant.—The fact that a party, after being guilty of conduct entitling the other party to a divorce, becomes insane, should not bar such other party's remedy; 8 and the court, which takes care of the public interests, will likewise protect the insane defendant from fraud and abuse, but must grant the divorce if the case is clearly made out.9 The insane defendant may appear and defend by her guardian or committee.10

(5) The Effect of Other Disabilities.—In some States, in order to preserve the property of spendthrifts, guardians may be appointed to take charge of such property. Such a guardian could not sue for divorce in behalf of the spendthrift, because, as we have

"In the present case, some of the wrongs charged against the defendant existed prior to the insanity of the plaintiff. Can the guardian say that she did not condone them? Many persons believe that marriage is a sacrament, and that to procure a divorce upon any of the ordinary grounds for which divorces are usually granted is a violation of all true religion and morality. Should such a person be divorced, though innocent himself or herself, without his or her consent? And could a guardian for such person, if he or she should become insane, give the necessary and required consent?

"Besides, insanity is often temporary, and what if such insane person should become restored to sanity immediately after the divorce, and should disapprove of the divorce and all the proceedings connected therewith? Whether a party who is entitled to a divorce shall commence to procure the same or not, is a personal matter, resting solely with the injured party, and it requires an intelligent election on the part of such party to commence the proceedings; and such an election cannot be had from an insane

1. Bradford v. Abend, 89 Ill. 78, 81.

2. Parnell v. Parnell, 2 Phillim, 158; I Eng. Ecc. 220, 221; Woodgate v. Taylor, 2 Swab. & T. 512, 513.

3. Brown v. Westbrook, 27 Ga. 102,

105; Baker v. Baker, L. R. 5 P. D. 142, 4. Minis v. Minis, 33 Ala. 98, 100.

5. Newcomb v. Newcomb, 13 Bush (Ky.), 544, 578.

6. Baker v. Baker, L. R. 5 P. D. 142, 150; s. c. L. R. 6 P. D. 12.

7. See Mass. P. Stat. 1882, p. 813, § 7; Cowan v. Cowan, 139 Mass. 377; Garnett v. Garnett, 114 Mass. 379; R. I. P. Stat. 1882, p. 427, § 13; Thayer v. Thayer, 9 R.

I. 377.

8. "But when the act was committed in a part able to see why the aggrieved party should not have The action of the courts is not arrested in civil cases, touching the rights and liberties of persons of unsound mind. Such persons are liable on their contracts and torts committed while sane.' bun v. Rathbun, 40 How. Pr. (N. Y.) 328.

And a divorce suit is a civil and not a criminal suit. Baker v. Baker, L. R. 5 P. D. 142, 149; Mordaunt v. Moncrieffe, L. R. 2 H. L. S. 374, 384, 393.

If there is a chance of the defendant's

recovery, the case will be postponed a reasonable time; if the defendant seems to be incurable, the trial will be allowed to proceed. Stratford v. Stratford, 92 N. Car. 297, 298 (1885).

9. See cases cited last note; also, Little v. Little, 13 Gray, 264, 265; Broadstreet v. Broadstreet, 7 Mass. 474; Mansfield v. Mansfield, 13 Mass. 412.

10. This was done in Mordaunt v. Moncrieffe, L. R. 2 H. L. S. 374, 384; and the other cases.

11. Spendthrift, -- See statutes of Massachusetts. Vermont, etc.

seen in the case of an insane complainant, the right to bring such a suit is strictly personal, and depends upon the decision of the complainant himself. But the fact that a guardian has been appointed for a spendthrift does not invalidate the spendthrift's power to decide for himself whether he will bring suit for divorce, and he may bring such suit in his own name as though free from disability.2 There may be other disabilities created by statute, and how they would affect the right to sue for divorce can be judged from the reasoning in the cases already discussed and from the wording of the statutes.

(6) Third Persons as Parties to Divorce Suits .-- As has already been seen, the right to bring suit for divorce is a personal right, and no one except the aggrieved husband or wife can exercise this right. even though his feelings be outraged 3 and his pecuniary interests jeopardized 4 by the continuance of the marriage. Nor can a third person have himself made a party, whether he be an alleged paramour seeking to clear himself, or a creditor seeking to secure his debt: 6 but in such cases the court will allow such persons to make suggestions in the trial of the case as amici curiæ, and to crossexamine the witnesses. Except under statutes the complainant has no right to join an alleged paramour as a party defendant; it is only so far as pecuniary rights are affected that a third person may be made a defendant.8 A wife may make any one a co-defendant who claims any rights in property to an interest in which she may be entitled in case the divorce be granted.9 She may pray an injunction against a third party to prevent the consummation of a fraudulent assignment, 10 may seek discovery against a suspected fraudulent assignee,11 and may ask to have a fraudulent deed set aside. 12 In such cases she not only may, but should, make such persons parties; for a divorce suit of itself does not create the lien of lis pendens on the husband's property. 13 But a wife cannot join with herself as complainant the guardian of her children, and seek in the same case a divorce and the settlement of property rights not connected therewith. 14 Third persons who have been made parties to a marriage settlement between a husband and wife need not be made parties to a divorce suit between them; 15 nor need

1. Winslow v. Winslow, 7 Mass. 96. 2. Richardson v. Richardson, 50 Vt.

119, 121. 3. Third Persons as Parties.—See opinion in Worthy v. Worthy, 36 Ga. 47,

given supra. 4. Cropsey v. McKinney, 30 Barb. (N.

Y.) 47, 55. 5. Clay v. Clay, 21 Hun (N. Y.), 609, 610.

6. Stearns v. Stearns, 10 Vt. 540.

7. See last two cases cited; also post, Sec. VII.

8. This is the logical result of the cases

where there is

cited, and is the practice where there is not a statute, as there is in England.

9 Kashaw v. Kashaw, 3 Cal. 312, 322;

Cain v. McHenry, 3 Bush (Ky.), 263; Feigley v. Feigley, 7 Md. 537, 539, 541, 560; Armstrong v. Armstrong, 32 Miss. 279, 292; Sackett v. Giles, 3 Barb. Ch. (N. Y.) 204, 205; Laughery v. Laughery, 15 Ohio, 404; Damon v. Damon, 28 Wis. 510, 515; Gibson v. Gibson, 46 Wis. 449, 456; Varney v. Varney, 54 Wis. 422, 423.

10. Gibson v. Gibson, 46 Wis. 449, 487.

11. Monroy v. Monroy, I Edw. Ch.

(N. Y.) 382, 383.

12. Feigley v. Feigley, 7 Md. 537,360.

13. Sapp v. Wightman, 103 Ill. 150,158;
Feigley v. Feigley, 7 Md. 537, 563.

14. Faulk v. Faulk, 23 Tex. 653, 662.

15. D'Auvilliers, v. D'Auvilliers, 32 La.

their children be made parties, deep as their interest is in the result of the suit.1

(7) The State as a Party to Divorce Suits.—Marriage is not a mere personal relation, but a public institution, on the purity and integrity of which the welfare of society depends; 2 and for this reason marriages cannot be dissolved by the consent of the parties. and it is the duty of a divorce court in all cases to see that a cause for divorce is fully proved, and that there has been no imposition upon the court.³ In this way the State through its judiciary is represented in every divorce case; ⁴ and the court will of its own motion carefully scrutinize the evidence, listen to the suggestion of outsiders as amici curiæ, call for an explanation of suspicious circumstances.5 and even postpone the case and seek to bring about a reconciliation of the parties, where this seems proper and desirable. In order to relieve the courts of the responsibility in such matters, laws have been passed in some countries and States providing that the State shall appear in divorce cases and be represented by counsel, whose duty it is to see that the divorce is granted only after being really and honestly contested.7 sense the State is always a party to divorce suits, and divorce suits are triangular.8

1. Baugh v. Baugh, 37 Mich. 50, 61;

26 Am. Rep. 495.

2. "Not alone are the personal interests of the parties to a divorce suit involved, but, the interests of the children and the interests of the public, as the public stand related to and affected by the in-stitution of marriage." Foster v. Red-field, 50 Vt. 285, 290. So in this case the court refused to grant a mandamus to compel a judge, who had continued a case to another term, hoping for a reconciliation, to go on and decide the questions involved.

chiation, to go on and decide the questions involved.

3. See Crewe v. Crewe, 3 Hagg. Ecc. 123, 5 Eng. Ecc. 45; Durant v. Durant, 1 Hagg. Ecc. 733. 3 Eng. Ecc. 310, 325; Timmings v. Timmings, 3 Hagg. Ecc. 76. 5 Eng. Ecc. 22, 23; Dillon v. Dillon, 3 Curt. Ecc. 86, 7 Eng. Ecc. 377, 390; Snow v. Snow, 2 Notes Cas. Supp. 1, 12; Elwes v. Elwes, 1 Hagg. consist 269, 4 Eng. Ecc. 401, 411; Turton v. Turton. 3 Hagg. Ecc. 338, 5 Eng. Ecc. 130. 136; Burns v. Burns, 60 Ind. 259, 260; North v. North, 5 Mass. 320; People v. Dawell, 25 Mich. 247, 257; Harper v. Harper, 29 Mo. 301, 303; Johnson v. Johnson, 1 Edw. Ch. (N. Y.) 439; Smith v. Smith, 4 Paige (N. Y.), 439; Smith v. Smith, 4 Paige (N. Y.), 55; Dismukes v. Dismukes. 1 Tenn. Ch. 266, 268; Cameron v. Cameron, 2 Coldw. (Tenn.) 375, 377; Haygood v. Haygood, 25 Tex. 576, 577. But see Jones v. Jones, 18 N. J. Eq. 32, 34;

Morrell v. Morrell, 3 Barb. (N. Y.) 236,

4. See Smith v. Smith, 4 Paige (N. Y.).

432, 434. 5. See Haswell v. Haswell, I Swab. & T. 502, 504; Elwes v. Elwes, I Hagg. Con-Bowen, 3 Swab. & T. 530; Clay v. Clay, 21 Hun (N. Y.), 609, 610; Dismukes v. Dismukes, 1 Tenn. Ch. 266, 268; Stearns, v. Stearns, 10 Vt. 540.

6. Foster v. Redfield, 50 Vt. 285, 290. 7. By statute in England, the queen's proctor intervenes in cases where collusion is suspected, and contests the suit. 23 & 24 Vict. c. 144, § 7; 24 & 25 Vict. c. 86, § 8; Lantour v. Proctor, 10 H. L. Cas. 685; Gray v. Gray, 2 Swab. & T. 263, 276. And so in Scotland does the lord advocate. Tovey v. Lindsay, 1 Dow. 117, 134. In Georgia, the court itself must look into the bona fides of the suit, or appoint the solicitor-general or other counsel to do so. Ga. Code 1873, § 1735; Creamer, 36 Ga. 618; Swearingen v. Swearingen, 18 Ga. 316, 19 Ga. 265. In Indiana, if no defence is made by the defendant, the public prosecutor must make one. Ind. public prosecutor must make one. Ind. R. Stat. 1881, § 1038; Green v. Green, 7. Ind. 113, 115. And in Kentucky, the county attorney must resist all divorce suits. Ky. G. Stat. 1881, p. 524, § 3. See also Wash Ter. Code 1881, § 2010.

8. See discussion by Judge Cooley in People v. Dawell, 25 Mich. 247, 257,

(8) The Effect of the Death of a Party During a Divorce Suit. —Upon the death of either party to a divorce suit the action abates and cannot be revived. This rule applies to the status and rights dependent solely upon it, such as counsel fees or alimony. but not necessary to other matters for which relief is prayed.² as a question regarding a marriage settlement,³ or property rights in which third persons made parties are interested,⁴ as to which matters the suit may perhaps be revived.

If a party dies after the case has been taken under advisement by the court, the court may pass a decree dated the day of the submission.⁵ So if a party dies after the case has been fully tried, but before it has been submitted to the jury, judgment may be entered as of the first day of the term; 6—such procedure being allowed

under the particular laws of the forum.

If, pending an appeal, a party dies, new considerations arise.

1. Death of Party .- See the following cases: Hawks v. Hawks, L. R. I P. D. 137; Brocas v. Brocas, 2 Swab, & T. 383; Grant v. Grant, 2 Swab. & T. 522; Pearson v. Darrington, 32 Ala. 227; Ewald v. Son v. Darnigton, 32 Ala. 227; Ewald v. Corbett, 32 Cal. 493; Wren v. Moss. 7 Ill. 72; Barney v. Barney, 14 Iowa, 189; Fornshill v. Murray, 1 Bland (Md.), 479; Thomas v. Thomas, 57 Md. 504, 507; McCurley v. McCurley, 60 Md. 185; Shafer v. Shafer, 30 Mich. 163; Mead v. Mead, 1 Mo. App. 247; Kimball v. Kimball, 44 N. H. 122; Webber v. Webber, 83 N. Car. 280; Boyd v. Boyd, 38 Pa. St. 241; Francis v. Francis, 31 Gratt. (Va.) 283; Downer v. Howard, 44 Wis. 82. 2. In the recent case of McCurley v.

McCurley, 60 Md. 185 (1883), it is said: "It is well settled that the death of either party to a divorce suit before decree, it being a personal action, abates the divorce proceedings; and this effect must extend to whatever is identified with those proceedings. The allowance of money to pay the wife's counsel fees is in furtherance of the procedure to obtain or prevent the divorce. When, therefore, the jurisdiction to pass a decree is ended, no jurisdiction can survive as to matters purely ancillary to that object. Nor do we perceive how the executor, from the nature of his special character and functions, can be substituted for the husband in a proceeding peculiar to him as husband, and where the order for an allowance contemplates his personal obligation and personal compulsion. How, too, is the executor to be informed to what extent the husband has or has not turnished his wife with necessary and appropriate means, or whether, in the intimacy of the marriage relation, he has deported himself properly or otherwise? Or how is he to be prepared with the proofs

that might demonstrate the institution of the suit, if by the wife, to have been groundless, or if by the husband, to have meritorious ?-all circumstances which enter into the determination and adjustment of alimentary allowances." Pp. 189, 190. And it was held that the court had no right after the death of the husband to make his executor a party and order him to pay counsel fees. Pearson v. Darrington, 32 Ala. 227, 254; Shafer v. Shafer. 30 Mich. 163, 164; Wren v. Moss, 7 Ill. 72, 74. 3. Pearson v. Darrington, 32 Ala. 227,

4. Wren v. Moss, 7 Ill. 72, 76; Thomas v. Thomas, 57 Md. 504. 567; Webber v. Webber, 83 N. Car. 280, 284; Downer v. Howard, 44 Wis. 82, 88.

5. Mead v. Mead, I Mo. Ap. 247, 254.
6. Webber v. Webber, 83 N. Car. 280,
284. By a fiction of law which would perhaps not be acted on everywhere.

7. In Thomas v. Thomas, 57 Md. 504. it was held: "So far as the question of the marital relation was concerned, that question was forever concluded by the death of the appellee, and no one had any longer any interest in reviving it. But the decree which granted the divorce at the same time determined the property rights of the appellant, and if unreversed, deprived her of all rights in her late hus-band's property. With respect to that question, her interest survived; and if the decree was erroneous, she was aggrieved thereby, and had a standing in court to prosecute an appeal therefrom, for the purpose of having the decree reversed. . . In such case the appeal could not be prosecuted against the deceased husband; as to him the suit had abated. But the appeal could be prosecuted only against those persons upon whom, by

If a divorce has been refused, the action abates finally.1 divorce has been granted, the suit likewise abates,2 though perhaps, as to third persons interested in the property, the suit might be revived: 3 and there are statutes in some States under which the case may be carried to its final determination.4

V. The Bill, Libel, or Complaint.—(I) The Complaint, in General; the Allegations and Prayers.—The bill or libel of complaint in a divorce suit need not be in any particular form or contain any technical expressions; it need only set forth the relief desired, and the grounds therefor clearly and briefly, so as to make out a good It should be signed by the complainant in prima facie case.5 person, not by attorney, 6 and should make the proper parties defendants.7 It need not necessarily be sworn to,8 though this is the usual practice, and is necessary in some places by statute.9

The Allegations.—The bill must allege every fact upon the existence of which the authority of the court to grant the divorce rests. 10 It must set forth substantially in the terms of the statutes of the forum¹¹ (I) all facts necessary to give the court jurisdiction over

his death, the right to his property had devolved; as the executor, heirs at-law, or devisees, and alienees. Those persons ought to have been made parties to the

proceedings."

In Downer v. Howard, 44 Wis. 82, 88, it is said: "When there is an appeal to this court from a judgment in an action for divorce, and such judgment simply denies a divorce to the party seeking it, and the appeal is taken from such judgment by the party seeking the divorce, and, pending such appeal, either the appellant or the appellee dies, we are of the opinion that the action abates, and that it cannot be revived or continued in favor of either party. . . . It is probable that in case an appeal from a judgment granting a divorce, if rights of property depended upon the affirmance or reversal of such judgment, this court would permit the appeal to be revived in favor of those whose rights were so affected." In this case order for alimony passed in court below before the party's death was af-firmed, but the rest of the case was allowed to stand by the record of the lower

1. Case last quoted from.

2. Barney v. Barney, 14 Iowa, 189, 193. In Downer v. Howard, 44 Wis. 82, the court says that if the action abates during the appeal and cannot be revived. the only order the appellate court can make is to remit the record to the court below, where the judgment will stand as if no appeal had been taken.

3. See cases cited supra.

4. See Shafer v. Shafer, 30 Mich. 163.

5. Ayl. Parer, 346; Pinkney v. Pink-

ney, 4 G. Greene (Iowa), 324, 325; Pate v. Pate, 6 Mo. App. 49, 52; Jarvis v. Jarvis, 3 Edw. Ch. (N. Y.) 462, 463; Hare

v. Hare, 10 Tex. 355, 359.
6. Daniels v. Daniels, 56 N. H. 219, 220; Gould v. Gould, I Met. (Mass.) 382; Winslow v. Winslow, 7 Mass. 96; Philbrick v. Philbrick, 27 Vt. 786; Richardson v. Richardson, 50 Vt. 119, 121. The signing by the complainant in person is probably not necessary, except by statute. Millard v. Millard, 4 Mass. 506.

7. Ante, IV.

8. McCraney v. McCraney, 5 Iowa, 252.
9. Warner v. Warner, 11 Kan. 121, 123; Dickinson v. Dickinson, 3 Murph. (N. Car.) 327, 331; Farace v. Farace, 61 How. Pr. (N. Y.) 61, 62; Kilbourne v. Field, 78 Pa. St. 194, 195.

10. Pate v. Pate, 6 Mo. App. 49, 52; Wright v. Wright, 6 Tex. 3, 19.

11. As to the importance of preparing the bill with especial reference to the statutes of the State where the suit is brought, using the terms of such statutes brought, using the terms of such statutes as far as practicable, see Rie v. Rie, 34 Ark. 37, 42; Trubee v. Trubee, 41 Conn. 40, 41; De la Hay v. De la Hay. 21 Ill. 252, 254; Pinkney v. Pinkney, 4 G. Greene (Iowa), 324, 325; Cole v. Cole, 3 Mo. App. 571; White v. White, 45 N. H. 121; Walton v. Walton, 32 Barb. (N. Y.) 203, 205; Erwin v. Erwin, 4 Jones Eq. (N. Car.) 81, 84; Everton v. Everton, 5 Jones (N. Car.), 202, 207; Morris v. Morris, 75 N. Car. 168; Schlichter v. Schlichter, 10 Phila. 11, 12; Ed ter v. Schlichter, 10 Phila. 11, 12; Edwards v. Edwards, 9 Phila. 617, 618; Brown v. Brown, 2 R. I. 381, 382; Stewart v. Stewart, 2 Swan (Tenn.), 591, 592; the parties; 1 and (2) all facts necessary to give the court jurisdiction over the subject-matter.2 to wit, the marriage 3 and the cause or causes for divorce.4 if divorce only be prayed, and such other facts as entitle the complainant to any ancillary relief that may be The allegations of the grounds of divorce must be made with all possible particularity in order that the defendant may be apprised of the nature of the charges and be able to properly prepare the defences. Whether there must be allegations negativing the defences depends largely upon the statutes and practice of the particular State; in principle there need be no such allegations, —these are for the defendant to make; but in some States they are expressly required by statute,9 and in others they have been held necessary by implication from statutes allowing a divorce only to a "party without fault," or "an injured party." 10 Moreover, any fact may be alleged which seems material, without doing any particular harm. 11

The Prayers.—The bill of complaint should pray specifically for

the relief desired, 12 and it is well to pray "for such further relief

Horne v. Horne, I Tenn. Ch. 259, 260; Hare v. Hare, 10 Tex. 355, 359. But see Shackelt v. Shackelt, 49 Vt. 195, 196.

1. Ante, II. Such as the plaintiff's domiciled residence in the State for the reclied residence in the State for the required time. Crossman v. Crossman, 33 Ala. 486, 487; Bennett v. Bennett, 28 Cal. 599, 601; Coulthurst v. Coulthurst, 58 Cal. 239, 240; Phelan v. Phelan, 12 Fla. 449, 450; Burns v. Burns, 13 Fla. 369, 376; Maxwell v. Maxwell, 53 Ind. 363, 364; Powell v. Powell, 53 Ind. 513, 516; Huston v. Huston, 63 Me. 184, 187; Pate v. Pate, 6 Mo. App. 49, 53. Or under an unusual statute, that both parties live in the State. Mix v. Mix, I Johns. Ch. (N. Y.) 204, 205. Or that the marriage took place therein. Greenlaw v. Greenlaw, 12 N. H. 200, 202; Hare v. Hare, 10 Tex. 355, 358. Or, if service by publication is desired, the non residence of the defendant. Houston v.

dence of the defendant. Houston v. Houston, 3 Mass. 159.

2. Ante, II. (4).

3. Pool v. Pool, 2 Phillim. 119, 120; 1 Eng. Ecc. 207; Leighton v. Leighton, 14 Jur. 318; Gray v. Gray, 15 Ala. 779, 782; Coulthurst v. Coulthurst, 58 Cal. 239, 240; Huston v. Huston, 63 Me. 184, 186; Brinkle v. Brinkle, 10 Phila. 1, 2; Wright v. Wright v. Property of Tev. 2, 16. Daniels Wright v. Wright, 6 Tex. 3, 16; Daniels v. Daniels, 43 Mich. 287.

4. Kimball v. Kimball, 13 N. H. 222, 223; Schlichter v. Schlichter, 10 Phila.

11, 12.

In Vermont, the practice as to allegations is very loose. Shackelt v. Shackelt, 49 Vt. 195, 196. But the mere allegation of adultery, desertion, cruelty, will not usually suffice. Such particulars as are possible must be given. Hill v. Hill, 10 Ala. 527; Rie v. Rie, 34 Ark. 37, 42; Realf v. Realf, 77 Pa. St. 31, 33; Hare v. Hare, 10 Tex. 355, 359; Sanders v. Sanders, 27 Vt. 713. 714. This is only just, as the defendant could otherwise scarcely prepare his defence. Crawford v. Crawford, 17 Fla. 180, 181. An allegation of "corporal imbecility" is not sufficient; the nature of the defect, its existence at the time of the marriage, its incurability, etc., must be averred. Ferris v. Ferris, 8 Conn. 166, 167; Kempf v. Kempf, 34 Mo. 211, 213. As so, as will be seen post, under the several heads, as to details, of Adultery, Desertion, Habit-

UAL DRUNKENNESS, etc., etc.
5. See Norris υ. Norris, 27 Ala. 519,

6. Cases supra, n. 4.

7. Young v. Young, 18 Minn. 90, 92; post, DEFENCES, IX. 8. Post, VIII. and IX.

9. Farace v. Farace, 61 How. Pr. (N. Y.)

10. Epling v. Epling, I Bush (Ky.), 74; Hare v. Hare, 10 Tex. 355, 359.

11. Casey v. Casey, 2 Barb. (N.Y.) 58. It is well always to deny present cohabitation. Burns v. Burns, 60 Ind. 259,

12. See Darrow v. Darrow, 43 Iowa, 411, 413; Edmonds v. Edmonds, 4 La. Ann. 489, 490; Zule v. Zule, 1 N. J. Eq. 96; Walton v. Walton, 32 Barb. (N. Y.) 203, 206; Morris v. Morris, 75 N. Car. 168, 169; Hansley v. Hansley, 10 Ired. (N. Car.) 506, 512; Whittington v. Whittington, 2 Dev. & B. (N. Car.) 64; Klington, 2 Dev. & B. genberger v. Klingenberger, 6 S. & R.

as the case may require." If an absolute divorce is prayed, a limited divorce may be granted under a general prayer; 2 but a prayer for divorce does not cover a decree of nullity.3 It is usual. though not necessary, to pray for alimony 4 and the custody of the children in the bill of complaint; but this is not necessary, as it may be done by subsequent petition. So prayer may be made for alimony pendente lite, 5 for counsel fees, 6 for custody of children pendente lite, for an injunction to prevent the alienation of the husband's property to the defeat of alimony, or to prevent marital interference during the suit, or for a writ ne exeat against the other party; 10 and for such other relief as may be sought.

(2) The Joinder of Several Causes of Action.—Two or more causes for the same kind of divorce may be joined in the same complaint, 11 but a cause for absolute divorce may not be joined with a cause for limited divorce. 12 A suit for other ancillary relief may be joined with the suit for divorce. 13 but not a mere collateral suit. such as the enforcing of a deed. 14 or the quieting of a title. 15 or the

settlement of an estate.16

(3) Amendments and Supplemental Complaints. — As the first principle in divorce suits, grounded on the public interests, is that the case shall be decided on its merits. 17 a court will in all cases.

(Pa.) 187, 189; Clayton v. Clayton, I Ashm. (Pa.) 52, 53; Hackney v. Hack-ney, 9 Humph. (Tenn.) 450, 453; Pillow v. Pillow, 5 Yerg. (Tenn.) 203. 1. Darrow v. Darrow, 43 Iowa, 411, 413; Walton v. Walton, 32 Barb. (N. Y.)

203, 206.
In equity, if there is a prayer for specific relief and also one for general relief, although a case for specific relief is not made out, such relief will be granted as it appears the complainant is entitled to. Tayloe v. Merchants, o How. (U.S.) 390,

2. Klingenberger v. Klingenberger, 6 S. & R. (Pa.) 187, 189; Hackney v. Hackney, 9 Humph. (Tenn.) 450, 453. But not without. Morris v. Morris, 75 N. Car. 168, 169; Hansley v. Hansley, 10 Ired. (N. Car.) 506, 512; Whittington v. Whittington, 2 Dev. & B. (N. Car.) 64; Clayton v. Clayton, 1 Ashm. (Pa.) 52. 53. Perhaps in England without. Smith v. Smith, I Swab. & T. 359,

3. Schafberg v. Schafberg, 52 Mich.

4. See title ALIMONY. Not necessary. Prescott v. Prescott, 59 Me. 146, 150; Darrow v. Darrow, 43 Iowa, 411, 413. But usual and proper. Damon v. Damon, 28 Wis. 510, 514; Clayton v. Clayton, 1 Ashm. (Pa.) 52, 53.

5. See Campbell v. Campbell, 27 Wis.

206, 211; post, XIII. 6. See title ALIMONY.

- 7. Green v. Green, 52 Iowa, 403, 405;
- 7. Green v. Green, 52 100a, 403, 403, 405, post, XIII.

 8. Feigley v. Feigley, 7 Md. 537, 560, 562; Gibson v. Gibson, 46 Wis. 449, 457.

 9. Symonds v. Hallett, L. R. 24 Ch. Div. 346, 351, 352; Wilson v. Wilson, Wright (Ohio), 129; Edwards v. Edwards, Wilson (Ohio), 129; Edwards v. Edwards, Wright (Ohio), 308. 10. Bayly v. Bayly, 2 Md. Ch. 326,329.

11. Quarles v. Quarles, 19 Ala. 363, 366; Morris v. Morris, 20 Ala, 168, 171; Young v. Young, 4 Mass. 430; Stokes v. Stokes, I Mo. 320, 323; McDonald v. McDonald, I Mich. N. P. 191, 193; Shackelt v.

i Mich. N. P. 191, 193; Shackelt v. Shackelt, 49 Vt. 195, 197.

12. McDonald v. McDonald, 1 Mich. N. P. 191, 193; Decamp v. Decamp, 2 N. J. Eq. 294, 296; Snover v. Snover, 10 N. J. Eq. 261; Pullen v. Pullen, 41 N. J. Eq. 417; Beach v. Beach, 11 Paige (N. Y.), 161; Rose v. Rose, 11 Paige (N. Y.), 165; Smith v. Smith, 4 Paige (N. Y.), 22; Mulock v. Mulock, 1 Edw. Ch. (N. Y.) 14; Pomeroy v. Pomeroy, 1 Johns. Ch. (N. Y.) 665; Johnson v. Johnson, 8 Johns. Ch. (N. Y.) 163.

13. Norris v. Norris, 27 Ala. 519, 520;

13. Norris v. Norris, 27 Ala. 519, 520; Feigley v. Feigley, 7 Md. 537, 560; Armstrong v. Armstrong, 32 Miss. 279, 282; Faulk v. Faulk, 23 Tex. 653, 666; Gibson v. Gibson, 46 Wis. 449, 457.

14. Fritz v. Fritz, 23 Ind. 388, 15 Ibbl. v. Ibbl. v. Col. 368.

15. Uhl v. Uhl, 52 Cal. 250.

16. Faulk v. Faulk, 23 Tex. 653. 17. Shay v. Shay, 9 Phila. 521, 522; ante, IV. (7).

unless marked injustice would thereby be done, allow a complainant to amend his bill of complaint. So. too, a supplemental bill of complaint may be filed at any time during the suit, covering matters which have arisen or been discovered since the filing of the original bill.2

(4) The Effect of Defects.—Most defects can, of course, be obviated before final decree by amendment or by supplemental bill: but if not thus removed more or less serious results may follow. When a jurisdictional fact does not appear on the face of the bill of complaint, the court can take no valid step; 3 and it will not enter a decree of divorce, though a good case has been proved and though the defendant makes no objection, unless the proper prayers and allegations are contained in the bill.4 No proof can be properly and effectively produced except under the allegations; 5 if these are vague they furnish no ground for proof.6 the averments are insufficient the bill will be dismissed: 7 if immaterial they will be simply ignored and treated as surplusage; 8 if scandalous and immaterial they will be stricken out; 9 if indefinite they will not support proof, and will justify a demand for a bill of particulars. 10 If the bill is not properly signed it will be dismissed. 11 And as long as the bill is defective no alimony pendente lite or counsel fees will be allowed. 12 But the answer may waive the vagueness of the allegations. 13

VI. Causes for Divorce.—(I) General Provisions.—Statutes alone create causes for judicial divorce, and to justify a divorce the ground

1. Mycock v. Mycock, L. R. 2 P. & D. 98, 99; Ashley v. Ashley, 2 Swab. & T. 388, 389; Parkinson v. Parkinson, L. R. 2 P. & D. 27, 28; Crawford v. Crawford, 17 Fla. 180; Armstrong v. Armstrong, 27 Ind. 186, 188; Errissman v. Errissman, 25 Ill. 136; Fishli v. Fishli, 2 Litt. man, 25 Ill. 136; Fishli v. Fishli, 2 Litt. (Ky.) 337; Anderson v. Anderson, 4 Me. 100; Harrington v. Harrington, 107 Mass. 329, 334; Tourtelot v. Tourtelot, 4 Mass. 506; Green v. Green, 26 Mich. 437. 439; Whipp v. Whipp, 54 N. H. 580; Mix v. Mix, 1 Johns. Ch. (N. Y.) 204, 206; Rose v. Rose, 11 Paige (N. Y.), 166, 167; Brinkley v. Brinkley, 56 N. Y. 192, 193; Miller v. Miller, 2 Cent. Rep. 181; s. c.. 40 N. J. Eq. 475; Shay v. Shay, 9 Phila. 521, 522; Grove v. Grove, 37 Pa. St. 443, 445; Hackney v. Hackney, 9 Humph. (Tenn.) 450. But the case cannot be amended into a case of a different not be amended into a case of a different kind, a divorce suit into a nullity suit. Schafberg v. Schafberg, 52 Mich. 429.

2. Steele v. Steele, 35 Conn. 48, 53; Butler v. Butler. 4 Litt. (Ky.) 201; Logan v. Logan, 2 B. Mon. (Ky.) 142: Mc-Crocklin v. McCrocklin, 2 B. Mon. (Ky.) 370; Feigley v. Feigley. 7 Md. 537, 560; Strong v. Strong, 3 Rob. (N. Y.) 669. Thus, adultery occurring after the filing of the bill could be set up in a supple-

mental bill. Fuller v. Fuller, 41 N. J. Eq. 198. Though there are cases which hold that no divorce can be granted save for grounds existing at the time of suit brought. Embree v. Embree, 53 Ill. 394, 396; post, VI. (1).

3. Pate v. Pate, 1 Mo. App. 49, 53.

4 Phelan v. Phelan, 12 Fla. 449, 453; Jarvis v. Jarvis, 3 Edw. Ch. (N. Y.) 462, 463; Schlichter v. Schlichter, 10 Phila. 11, 12; Johnson v. Johnson. 4 Wis. 135. 5 Moores v. Moores, 16 N. J. Eq. 275,

276; McQueen v. McQueen, 82 N. Car.

471; post. X.

6. Hare v. Hare, 10 Tex. 355, 359; post,

YI., X.
 Wright v. Wright, 6 Tex. 3, 16.
 Gray v. Gray, 15 Ala. 779, 782.
 Klein v. Klein, 42 How. Pr. (N. Y.)
 166, 168; Pullen v. Pullen, 41 N. J. Eq.

10. Rie v. Rie, 34 Ark. 37, 42; Harrington v. Harrington, 107 Mass. 329, 334; Hancock v. Hancock, 64 Pa St. 470, 472; Realf v. Realf, 77 Pa. St. 31, 33; Sanders v. Sanders, 25 Vt. 713, 714.

11. Daniels v. Daniels, 56 N. H. 219,

12. Rose v. Rose, 11 Paige (N.Y.), 166,

13. Huston v. Huston, 23 Ala. 777, 779.

of complaint must be a cause for divorce by the laws of the forum.1 In every State where a divorce can be granted there are divorce statutes, which should be referred to in connection with any question discussed in this article. In England and in each of the United States, with one exception, divorce is allowed, though the causes recognized are most diverse. The exception is South Carolina. where no divorce is allowed.2

As to the time of the commission of the offence alleged as a cause for divorce: It should have been committed after the passage of the statute making it a cause for divorce, and before the filing of the bill of complaint; 4 though a statute referring expressly to offences already committed would not be unconstitutional.5 and an offence committed after filing the bill of complaint can be set up in a supplemental bill.

As to the place of the commission of the offence alleged as a cause of divorce: In the absence of special statute this is imma-

1. Hopkins v. Hopkins, 39 Wis. 167, 171; ante, II. (2), cases cited.

2. Grant v. Grant, 12 S. Car. 29. Di-

vorce was allowed by the act of 1872, but this was repealed by an act of 1878. See also Matteson v. Matteson, I Strobh. (S.

Car.) 387.
3. Time.—Divorce statutes according to the general rule of interpretation are given a prospective effect only. Given v. en a prospective effect only. Given v. Marr, 27 Me. 212, 223, 224; Buckholtz v. Buckholtz, 24 Ga. 238, 243; McCraney v. McCraney, 5 Iowa, 232. 254; Head v. Ward, I J. J. Marsh. (Ky.) 280, 283; Bigelow v. Bigelow, 108 Mass. 38, 39; Stevens v Stevens, I Met. (Mass.) 270, 280; Sherburne v. Sherburne, 6 Me. 210, 280; Sherburne v. Sherburne, 6 Me. 210, 211; Giles v. Giles. 22 Minn. 348, 349; Greenlaw v. Greenlaw. 12 N. H. 200, 203; Clark v. Clark, 10 N. H. 380, 387; Jarvis v. Jarvis, 3 Edw. Ch. (N. Y.) 462, 464; Cook v. Sexton, 79 N. Car. 305, 307; State v. Denton, 65 N. Car. 496, 497; Scott v. Scott, 6 Ohio, 534; Smith v. Smith, 3 S. & R. (Pa.) 248, 249; Jones v. Jones, 2 Tenn. 2, 4; Briggs v. Hubbard, 19 Vt. 86, 88, 90; Cole v. Cole, 27 Wis. 531, 533. And so it has been held that the offence must have been committed the offence must have been committed after the passage of the act making it a cause for divorce, where the offence was cruelty,-Buckholtz v. Buckholtz, 24 Ga. 238, 243; where it was imprisonment,—Greenlaw v. Greenlaw, 12 N. H. 200, 203; where it was drunkenness,—Scott v. Scott. 6 Ohio, 534; where it was adultery, -Dickerson v. Dickerson.3 Murph. 327, 329; and where it was desertion it has been held that the desertion should have begun after the passage of the act,—Given v. Marr, 27 Me. 212, 222; Sherburne v. Sherburne, 6 Me. 210, 211; Giles v. Giles, 22 Minn. 348, 349; at

all events, that the time it continued before the passage of the act should not be counted. McCraney v. McCraney, 5

counted. McCraney v. McCraney, 5
Iowa, 232, 234.
4. Ferrier v. Ferrier, 4 Edw. Ch. (N. Y.) 296; Embree v. Embree, 55 Ill. 394, 396; Hill v. Hill, 10 Ala. 527; Milner v. Milner, 2 Edw. Ch. (N. Y.) 114.
5. Elliott v. Elliott, 38 Md. 357, 362; Magee v. Young, 40 Miss. 347, 381; Jarvis v. Jarvis, 2 Edw. Ch. (N.Y.) 462, 464; Starr v. Pease 8 Conn. Edu 546. Still the Starr v. Pease, 8 Conn. 541, 545. Still it is said that such legislation is unwise, impolitic, and unjust. Carson v. Carson, 40 Miss. 347, 351. And it has been held that a law making a past offence a cause for divorce is retrospective, and void,-Clark v. Clark, 10 N. H. 380, 387; and ex post facto, and void, -Dickerson v. Dickerson, 3 Murph. (Tenn.) 327, 329. And it is always understood that vested propit is always understood that vested property rights cannot be divested. Head v. Ward, I. J. Marsh. (Ky.) 280, 284; Given v. Marr, 27 Me. 223, 224; Curtis v. Hobart. 41 Me. 230, 232; Jarvis v. Jarvis, 3 Edw. Ch. (N.Y.) 462, 464; Jones v. Jones, 2 Tenn. 2, 5; West v. West, 2 Mass. 223, 226; Bertholemy v. Johnson, 3 B. Mon. (Ky.) 90, 91. A divorce has been granted for adultery committed been granted for adultery committed prior to the passage of the act making adultery a cause for divorce,-West v. West, 2 Mass. 223, 226; Jones v. Jones, 2 Tenn. 2, 5; and for desertion counting the period before desertion was made a cause for divorce. Cole v.Cole, 27 Wis. 531, 533.

6. Middleton v. Middleton, 2 Hol. Supp. Cons. Rep. 134; 4 Eng. Ecc. 299, 303. See Fuller v. Fuller, 41 N. J. Eq. 198, a case where a defendant after filing her answer was allowed to set up in a supplemental answer, her husband's adul-

tery committed during the suit.

terial; 1 adultery committed abroad is as good a ground of complaint as adultery committed at home. A statute making imprisonment in the State prison a cause for divorce has, however been held to refer only to imprisonment in the prison of the State of the forum.2

The division of causes for divorce is into two kinds: first, causes existing at the time of the marriage and affecting the validity thereof, rendering it void or voidable; these are not properly causes for divorce at all, but are causes for nullity of marriage; and second, those arising after the parties have become husband and wife, which are the only real causes for divorce. Both these kinds of causes are enumerated in the same statutes in many States, the statutes authorizing the same kind of divorce therefor; and the greatest confusion has been prevented only by intelligent interpretation.³

The causes for divorce recognized in the statutes of the various States are as follows: (1) The incapacity of one of the parties at the time of the marriage, including nonage, mental incapacity, physical incapacity or impotence, consanguinity and affinity, and difference of race; (2) defects in the consent of the parties to be married, arising from error, fraud, or duress. Those causes will be discussed under title MARRIAGE and sub-title NULLITY SUITS. (3) Any offence in the discretion of the court; (4) adultery; (5) abandonment or desertion; (6) cruel treatment; (7) habitual drunkenness; (8) refusal to support; (9) crime; (10) obtaining divorce in another State.

1. Place — Duntze v. Levett, Serg. 68; 3 Eng. Ecc. 360, 379; Hanberry v. Hanberry, 29 Ala. 719, 723; Clark v. Clark 8 N. H. 21, 22. Under statutes, the place where the offence was committed may be very material. — Hick v. Hick, 5 Bush (Ky.), 670; Becket v. Becket, 17 B. Mon. (Ky.) 370, 375: as where a court has jurisdiction over any case if the offence was committed in the State. Smith v. Smith, 4 Mackay (D. C.), 255. Adultery committed abroad is as much a cause for divorce as adultery committed at home. Flower v. Flower, 42 N. J. Eq. 152, 154.

2. Martin v. Martin, 47 N. H. 52, 53; Klutts v. Klutts, 5 Sneed (Tenn.), 423,

3. In Schafberg v. Schafberg, 52 Mich. 429, the distinction is recognized, and an action for divorce is not allowed to be amended into an action for nullity. In H. G. v. G. J., 33 Md. 401, 406, the cours speaks of impotence existing at time of marriage as a cause for divorce a vinculo matrimonii, but the practice of the ecclesiastical courts is followed. In Chase v. Chase, 55 Me. 21, 23, such impotence is treated as a ground of nullity, and no alimony is allowed in a suit based there-

on. In Bascomb v. Bascomb, 25 N. H. 267, 273, where impotence is a cause for divorce by statute, it is held that the impotence must exist at the time of the marriage, as under the ecclesiastical law. 'So many cases go to show that where statutes declare as grounds for divorce defects existing before marriage, which were grounds under the ecclesiastical law (such as impotence and consanguinity), or under the common law (such as insanity, fraud, etc.), these statutes are only declaratory of the common law, and their purpose is simply to establish a tribunal to take action in such cases. See title NULLITY SUITS. In Brown v. Westbrook, 27 Ga. 102, 110, the issue is fairly made. In this case a divorce was granted on the application of the guardian of an insane wife, -which application, as has already been shown, could not be entertained in a divorce could not be entertained in a divorce suit; ante, IV. (4),—on the ground of her insanity existing at the time of the marriage. The judge delivering the opinion asks whether "any such thing as a nullity suit had ever been heard of in Georgia;" and the dissenting judge asks how parties who were never married could possibly be divorced.

(2) Discretionary Causes for Divorce.—The legislatures of some States have left the grounds for granting a divorce more or less within the discretion of the courts; 1 but though their constitutional right to do this has been recognized,2 the policy of such statutes has been much questioned, and in most places the statutes

themselves have been repealed.3

When the courts are thus given a discretion, it is meant that it must be exercised upon some salutary principle, and not in such a manner as to reduce the marriage relation to a mere state of concubinage, at the mercy of the parties and the courts.4 The discretion must be exercised in conformity with the common-sense and feelings of the community, and with the principles of the existing legislation on divorce. The court should prescribe to itself such principles as sound law-givers, who allow divorce at all, would send as a rescript to a judiciary.6

When any conduct destroying the happiness of the parties, etc., is a cause for divorce, it is not enough that a party has alleged that certain conduct has destroyed the happiness and defeated the purposes of the marriage, but the court must see that the welfare of the parties and of the community demands the divorce. An appeal lies from such discretionary decision, but the decision will be reversed only in a very clear case. When the statutes of the State allow divorces both for specified causes and for general causes, in the discretion of the court, the two grants are

1. Discretionary Divorce: -- A Connecticut statute allows divorce for other causes. and for "any such misconduct as permanently destroys the happiness of the petitioner, and defeats the purposes of the marriage relation." Gen. Stat. Conn. 1875, p. 188; Trubee v. Trubee, 41 Conn. 36; Barber v. Barber (U. S.), 4 Law Reporter, 375. A Kentucky statute allows divorce for any cause "in the discretion of the court." Gen. Stat. Ky. 1881, p. 525, § 6 (limited divorce only). So in Maine a statute provides for divorce whenever the court thinks it "conducive to domestic harmony, and consistent with the peace and morality of petitioner, and defeats the purposes of the consistent with the peace and morality of consistent with the peace and morality of society." Rev. Stat. Me. 1871, p. 488; Calef v. Calef, 54 Me. 365; Elwell v. Elwell, 32 Me. 337; Molly v. Molly, 31 Me. 490. Small v. Small, 31 Me. 493; Ricker v. Ricker, 29 Me. 281; Anon., 27 Me. 568. This act was repealed by act of 1883, c. 212. § 1; Rev. Stat. 1883, p. 520, § 2 So in Washington Territory a divorce may be granted for "any cause deemed sufficient by the court." Wash. deemed sufficient by the court." Wash. Ter. Rev. Stat. 1881, p. 363. And in some States courts have it in their discretion to grant either a limited or absolute divorce for certain causes. Rev. Laws Del. 1875, p. 475; Rev. Code Tenn. 1873, § 2449; Rev. Stat. Wis. 1878, §

2357, 2358; Dutcher v. Dutcher, 39 Wis. 651. In others, courts may in their discretion prohibit the marriage of the guilty party. Md. Rev. Code 1878, art. 51, § 12; Elliott v. Elliott, 38 Md. 357.

2. Ritter v. Ritter, 5 Blackf. (Ind.) 81,

3. The Maine statute no longer exists; nor do those of Illinois, Indiana, Iowa, and North Carolina, referred to in the followng cases. Lloyd v. Lloyd, 66 Ill. 87; Birkby v. Birkby, 15 Ill. 120; Hamaker v. Hamaker, 18 Ill. 137; Ruby v. Ruby, 29 Ind. 174; Ritter v. Ritter, 5 Blackf. (Ind.) 81; Curry v. Curry, 1 Wils. 236; Inskeep v. Inskeep, 5 Iowa, 204; Scroggins v. Scroggins, 3 Dev. (N. Car.) 535; Barden v. Barden, 3 Dev. (N. Car.) 548.

4. Barber v. Barber, 4 Law Reporter, N. S. 375, 376; Inskeep v. Inskeep, 5 Iowa, 204; 214.

5. Ritter v. Ritter, 5 Blackf. (Ind.) 81, 83; Ricker v. Ricker, 29 Me. 281, 282;

83; Kicker v. Ricker. 29 Me. 281, 282; Birkby v. Birkby, 15 Ill. 120, 122. 6. Scroggins v. Scroggins, 3 Dev. (N. Car.) 535, 543; Barden v. Barden, 3 Dev. (N. Car.) 548, 549. 7. Trubee v. Trubee, 41 Conn. 36, 40; Inskeep v. Inskeep, 5 Iowa, 204, 213. 8. Ritter v. Ritter, 5 Blackf, (Ind.) 81,

9. Ruby v. Ruby, 29 Ind. 174. 177.

distinct; 1 the court cannot in its discretion refuse to grant a divorce for a specified cause, nor can a specified cause be proved under a general allegation and appeal to the court's discretion:2 nor can the court grant a divorce for an offence of the nature of the specified cause, but lacking some essential element; 3 but if there is a · combination of circumstances bearing on several distinct causes, but not quite sufficient to establish any one, the discretion may be exercised.4 Under a statute enumerating certain causes and leaving further causes in the discretion of the court, the latter provision was held to cover only such causes as were known at common law, and were not named in the statute, and not therefore insanity.⁵ When a statute says that for certain causes a court grant a divorce, it does not mean "shall," but leaves the matter in the sound discretion of the court.6

(3) Adultery.—As a cause for divorce, adultery is almost universally recognized; but not always simple adultery, for aggravating circumstances, such as bigamy, cruelty, or desertion, or scan-

dalous or repeated adulteries, are sometimes required.

Adultery may be defined as the voluntary sexual intercourse of a wife with a man not her husband, or of a husband with a woman not his wife. (See title ADULTERY, Vol. I., p. 209.) It makes no difference whether the other party is married or single, is free or a slave.9 A bona fide belief of a husband that his wife is divorced from him does not save his intercourse with another woman from being adultery for the purpose of divorce, 10 but a bona fide belief that she is dead, it seems, does. 11 To constitute the offence the act must be voluntary, and it is not adultery if a woman is ravished, or is insane at the time of the intercourse.12 When to be a ground for divorce, adultery must be accompanied by bigamy; the adultery and bigamy must be with the same person; 13 if cruelty is required in addition to the adultery, it must be legal cruelty; 14 if desertion, it must be legal desertion, 15 and must be

1. Birkby v. Birkby, 15 Ill. 120, 123; Hamaker v. Hamaker, 18 Ill. 139, 140; Lloyd v. Lloyd, 66 Ill. 87, 88; Ricker v. Ricker, 29 Me. 281, 282; Molly v. Molly,

31 Me. 490, 492; cases infra.

2. Trubee v. Trubee, 41 Conn. 36, 40.

3. If "extreme cruelty" is required in one act, the court cannot, under another general act, allow divorce for something Elses than extreme cruelty. Elsell v. Elwell v. Elwell, 32 Me. 337, 338; Trubee v. Trubee, 41 Conn. 36, 40. So of "permanent desertion." Small v. Small, 31

Me. 493; Anon., 27 Me. 563.

4. Mólly v. Molly, 31 Me. 490, 492.

5. Hamaker v. Hamaker, 18 Ill. 139, 140; Lloyd v. Lloyd, 66 Ill. 87, 88.

6. Dutcher v. Dutcher, 39 Wis. 651,

7. Adultery. - For definitions, see Gibbs v. Gibbs, r H. L. Cas. r; State v. Hinton, 6 Ala. 864; Hood v. State, 56 Ind. 263; ante, title Adultery.

- 8. Com. v. Call, 21 Pick, (Mass.) 509, 511, 513.
- 9. Mosser v. Mosser, 29 Ala. 313, 316. 10. Simonds v. Simonds, 103 Mass. 572, 574; Leith v. Leith, 39 N. H. 20, 30. 45; McGiffert v. McGiffert, 31 Barb. (N. Y.) 69, 70. But see Orem v. Orem, 3 Redf. (N. Y.) 300, 301.

 11. Ayl. Parer. 226; Valleau v. Valleau,

11. Ayl. Farer. 220; Valleau v. Valleau, 6 Paige (N. Y.), 207, 209.
12. Wray v. Wray, 19 Ala. 522, 525; Morris v. Morris, 33 Ala. 98, 101; Wray v. Wray, 33 Ala. 187, 190; Broadstreet v. Broadstreet, 7 Mass. 474; Nichols v. Nichols, 31 Vt. 328, 331. But see Matchin v. Matchin, 6 Pa. St. 332.

13. Horne v. Horne, 2 Swab. & T. 48,

49.
14. Waddell v. Waddell, 2 Swab. & T. 584. 587; Milford v. Milford, 37 L. J. Mat. Cas. 77; post, (5).

15. Post, 4; Oliver v. Oliver, 5 Jur. N.

S. 606.

voluntary, without the other party's consent, or justifying conduct.³ When living in adultery is required, a single or concealed act will not suffice,⁴ though the intercourse need not continue to the time of bringing the suit.⁵ In Kentucky, lewd and lascivious conduct without proof of the act amounts to adultery.6

As already shown, the place of the commission of the adultery is immaterial; and so is the time, provided that the adultery took place before the filing of the bill or supplemental bill, and after

the passage of the act making it a cause for divorce.8

It is with regard to the allegation and proof of adultery that

most questions arise.

The Allegations.—Adultery must be alleged as adultery; 9 and the particulars of time, place, person, and circumstances, as far as known, should be alleged, 10—the allegation of place and person being the most important. 11 And the complainant must know enough to make a specific charge, and he cannot allege adulterv generally with the intention of picking up the evidence as he goes along; 12 nor can he seek to find out facts showing adultery by a bill of discovery against the defendant. 13 General allegations are, however, sufficient when founded on the defendant's pregnancy without access of complainant, 14 or venereal disease, 15 or habitual adultery. 16 And so the allegation that the defendant is a prosti-

1. Townsend v. Townsend, L. R. 3 P. D. 129, 131.

2. Smith v. Smith, I Swab, & T. 359,

- 3. Tew v. Tew, 80 N. Car. 316, 318; Morris v. Morris, 75 N. Car. 168, 169. 4. Miller v. Miller, 78 N. Car. 102, 105; Long v. Long, 2 Hawks (N. Car.), 189, 192; ante, title ADULTERY.
 - 5. Adams v. Hurst, 9 La. 243, 244.
 - 6. Gen. Stat. Ky. 1881, p. 522.

7. Ante, VI. (1). 8. Ante, VI. (1).

9. It could not be proved under a different cause for divorce, such as vicious conduct or cruelty. Trubee v. Trubee,

41 Conn. 36, 39.

10. Allegation of Adultery.-" A suit for divorce cannot be sustained unless founded on some specific offence known to the complainant, and specifically charged in the bill. If the name of the adulterer is known, it must be stated; if it is unknown, that fact must be stated in excuse for the omission, and proved at the hearing. His person may be described, or the time, place, and the circumstances which show that the offence was committed may be stated, and the complainant must prove the offence, or one offence specified in the bill. The precise time is not necessary, provided the variance is not so great as to mislead the defendant. Proof of adultery with A will not sustain a charge of adultery

with B; nor will proof of adultery with a person whose name is known sustain a charge of adultery with a person whose name is unknown. And a divorce can never be granted on a general charge of adultery with divers persons whose names are unknown, within a specified period of time. Such charge is bad pleading, and no bill or petition should contain it. A bill for divorce should not be filed upon general suspicions, nor until the discovery of some specific act, or of the facts from which such act must be inferred, and these should be sufficiently stated to identify the act upon which the suit is founded." Miller v. Miller, 20 N. J. Eq. 216, 217.

11. Black v. Black, 27 N. J. Eq. 664,

665; s. c., 26 N. J. Eq. 431, 433. 12. Wood v. Wood, 2 Paige (N. Y.),

108. 113; supra, n. 10.

18. Marsh v. Marsh, 16 N. J. Eq. 391, 397; Mack v. Mack, 26 N. J. Eq. 431,

14. Durant v. Durant, 1 Hagg. Ecc. 733;

Eng. Ecc. 310, 315.
Clark v. Clark, 7 Rob. (N. Y.) 276, 277; Johnson v. Johnson, 14 Wend. (N. Y.) 637.

If it arises some time after marriage, it is prima facie evidence of adultery. Popkin v. Popkin, I Hagg. Ecc. 733; I Eng. Ecc. 310, 326, n.

16. Graves v. Graves, 3 Curt. Ecc. 235,

tute is a sufficient allegation of adultery, but this allegation must be proved if made, and will not support proof of a single act of adultery; 1 and the same may be said of an allegation that the defendant has been living in adultery.² In regard to these allegations, the practice of different States is more or less strict, as will appear in the notes; 3 and too general allegations may be waived by the defendant if he files his answer without objecting.4 Fuller allegations may be obtained by a bill of particulars. fects may be obviated by amendment.6

The Proof.—The chief importance of the allegations lies in their sufficiency to support the proof that may be offered; the proof must correspond with them. Proof of adultery with A. will not support an allegation of adultery with B;8 nor will proof of adultery at A sustain an allegation of adultery at B.9 particular offence alleged must be proved; 10 if several offences are

alleged, all need not be proved.11

1. Dismukes v. Dismukes, I Tenn. (Ch.) 266, 267.

2. Marble v. Marble, 36 Mich. 386,

- 3. The necessity of strict allegations seems to depend very much upon the practice of the particular court. lowing cases show how they are required: Holston v. Holston, 23 Ala. 777, 779; Christianbury v. Christianbury, 3 Blackf. (Ind.) 202, 204: Church v. Church, 3 Mass. 391, 392; Shoemaker v. Shoemaker, 20 Mich. 222, 223; Marsh v. Marsh, 16 N. J. Eq. 391, 394; Miller v. Miller, 20 N. J. Eq. 217; Mansfield v. Mansfield, Wright (Ohio), 284; Garrat v. Garrat, 4 Yeates (Pa.), 244; Wright v. Wright, 6 Tex. 3, 16; Sanders v. Sanders lowing cases show how they are required: Wright, 6 Tex. 3. 16; Sanders v. Sanders, 25 Vt. 713, 714; Freeman ν. Freeman, 31 Wis. 235, 238. But in Mitchell ν. Mitchell, 61 N. Y. 398, 401, the court, after reviewing the authorities, holds that no particulars need be alleged; allege adultery and prove the act. But if specific allegation is made, it must be proved. Hawes v. Hawes, 33 Ill. 286, 288; Farr v. Farr, 34 Miss. 597. 601, present similar views. And many other cases hold that as a bill of particulars can be demanded, no injustice is done by general allegations. Hunt v Hunt, 2 Swab. & T. 574, 575; Porter v. Porter, 3 Swab. & T. 596; Coddington v. Coddington, 4 Swab. & T. 63; Adams v. Adams. 16 Pick. (Mass.) 254; Harrington v. Harrington, 107 Mass. 329, 334; Realf v. Realf, 77 Pa. St. 31, 33; Hancock v. Hancock, 64 Pa. St. 470. The New Jersey decisions, which are the strictest, are much influenced by a rule of court. Black v. Black, 26 N. J. Eq. 431, 432.
- 4. "All the authorities agree that in making an allegation of this nature the

name of the woman should be given, or an excuse rendered for not doing so by the averment that the name is unknown. Had the objection been made, it must have been sustained; but by answering the bill, and failing to raise the question below, it has been waived." Holston v. Holston, 23 Ala. 777, 779.
Cases supra, n. 52.
Ante, III. (2). If a bill be dismissed

for this cause, a new bill may be filed making proper allegations. Miller v. Miller, 20 N. J. Eq. 216, 218.
7. Proof.—Fay v. Fay, 13 Ired. (N.

Car.) 90, 95; cases infra.

8. Miller v. Miller, 20 N. J. Eq. 216; Washburn v. Washburn, 5 N. H. 195, 196; Adams v. Adams, 20 N. H. 299, 301; Prince v. Prince, 25 N. J. Eq. 310, 311. 9. Green v. Green, 26 Mich. 437, 438.

10. Bennett v. Bennett, 24 Mich. 482, 483; Germond v. Germond, 6 Johns. Ch. (N. Y.) 347, 350.

11. "It cannot be essential, and conse-

quently it would not be proper, to examine into all the adulterous connections alleged. If there is full proof of a few of the facts, particularly of the birth of the child, of her identity, and of her husband's absence in India, as pleaded—this is all that can be essential." Richardson v. Richardson, I Hagg. Ecc. 6; 3 Eng. Ecc. 13, 15.

It seems that proof need be exact only as to the person. Bokel v. Bokel, 3 Edw. Ch. 376, 377. "It is not necessary to prove the fact of adultery in time and place. Circumstances need not be so specially proved as to produce the conclusion that the fact of adultery was committed at that particular hour or in that particular room; general cohabitation has been deemed enough." Loveden v. Love-

As to the nature of the proof, adultery may be established either by the evidence of parties who saw the act committed, or by proof of facts from which intercourse may be inferred.1 On account of the secret and private nature of the offence, direct proof by witnesses who saw the act committed is very rare: 2 and the best

den. 2 Hagg. Consist. 1: 4 Eng. Ecc. 461. It is sufficient to show that the parties lived together in domestic intimacy and had opportunities. "It is not necessary to prove the fact of adultery at any certain time or place, modo et forma, loco et tempore. It will be sufficient if the court can infer that conclusion, as it has often done between persons living in the same house, though not seen in the same bed, or in any equivocal situation." Burgess v. Burgess, 2 Hagg. Consist. 223;

4 Eng. Ecc. 527, 529.

1. Nature of Proof.—"It is a fundamental rule, that it is not necessary to prove the direct fact of adultery, because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable. It is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by a fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books. At the same time it is impossible to indicate them universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have the most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a harsh and intemperate judgment, moving up appearances that are equally capable of two interpretations; neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper

office of giving protection to the rights of mankind, if they let themselves loose to subtleties, and remote and artificial reasonings upon such subjects. Upon such subjects the rational and legal interpretation must be the same." Loveden z. Loveden, 2 Hagg. Consist. 1; 4 Eng. Ecc. 461, 462. A most valuable and interesting case, in which evidence of all kinds showing adultery is weighed and dis-

"What, then, are the proofs in the libel of actual adultery? for the court cannot separate (i.e., divorce) on im-Such conduct may lead up to the proof of guilt; and it is true that the law does not require direct evidence of the very fact committed at a specific time and place, but it does require the court to be satisfied that actual adultery has been That is the principle laid committed. down and admitted by the counsel on both sides, 'that there must be a surrender of her person to the embraces of the party with whom the offence is charged," Hamerton v. Hamerton, 2 Hagg. Ecc. 8: 4 Eng. Ecc. 13, 16. See also, generally, Evans v. Evans, 41 Cal. 103, 108; Larrison v. Evans, 41 Cal. 103, 108; Larrison v. Larrison, 20 N. J. Eq. 100, 101; Burchet v. Burchet, Wright (Ohio), 161; Pollock v. Pollock, 71 N. Y. 137, 141.

2. "They are living in the same house,

though under the bare appearance of separate beds. What is this state of co-habitation? I am not afraid to say that separation might justly follow from this alone, and that this might be the legal proof from which the court will presume guilt, for courts of justice must not be duped. They will judge of facts, as other men of discernment, exercising a sound and sober judgment, on circumstances that are duly proved before them. a young woman, estranged from her husband, and a young officer, should be living together for months, and at different places, though under the flimsy disguise of separate beds, and that courts of justice should not put upon such intimacy the construction which everybody else would put upon it, would be monstrous. Chambers v. Chambers, I Hagg. Consist. 439; 4 Eng. Ecc. 445, 448. See also Mosser v. Mosser, 29 Ala. 313, 317; Inskeep v. Inskeep, 5 Iowa, 204, 208; Freeman v. Freeman, 31 Wis. 235, 240.

proof that can be expected is evidence that the parties were seen in the same bed, 1 or occupied at night the same room in which there was but one bed,2 or lived together in the same house as husband and wife; 3 equally good is evidence that the defendant gave birth to a child without access of the complainant,4 or had a venereal disease too long after marriage to have been the result of intercourse before marriage. But in the mass of divorce cases adultery is proved by circumstantial evidence of a great number of details in the life and conduct of the defendant; and the circumstances from which adultery may be inferred must be such as to satisfy a reasonable and just man almost beyond reasonable doubt: 6 that is to say, that while the same amount of evidence is not required as in criminal cases, adultery is in fact a crime, and is the most serious of all offences against marriage, and can be

1. "If the fact is proved, either directly or presumptively, which is the general case, the court is bound to grant the sentence. Ocular proof is seldom expected; but the proof must be strict, satisfactory. and conclusive. Keeping company with a stranger privately, as Mrs. Rix did, there arises from such clandestinity the strongest presumption; and where there are to that clandestinity additional circumstances in proof, the court can have no doubt. A single witness with circumstances is sufficient in cases of this kind. The man was frequently seen alone in the lady's bed-chamber; this is a very strong circumstance of criminality: he was more than once seen on her bed; and the witness heard them conversing after the family had gone to bed. The law presumes what passed, though the witness has declined to mention it. There is evidence of those indicia which in law are proofs—marks of two persons on the bed. The witness says, 'she has no doubt of the criminal conversation.'" Rix v. Rix, 3 Hagg. Ecc. 74; 5 Eng. Ecc. 21, 22. Practically living in the same house

seems to be sufficient. In a case where the man and woman were constantly together at her house, though he had his room and slept at an inn, it was said: "It may be possible that persons of peculiar and eccentric dispositions or habits may live together in such manner without actual criminal connection, and it is physically possible that persons may be in the same bed together without criminal intercourse. Courts of justice, however, cannot proceed upon such ground: finding persons in such position as presumes guilt generally, they must presume it in all cases attended with these circumstances." Cadogan v. Cadogan, 2 Hagg. Consist. 1, 4Eng. Ecc. 463, note. See also Van Epps v. Van Epps, 6 Barb. 320, 323.

2. Cases supra; Scroggins v. Scroggins, Wright (Ohio), 212; Langstaff v. Lang-

staff, Wright (Ohio), 148, 149.
3. "If parties have gone so far as to perform the ceremony of marriage in a church, and they have since lived together ostensibly as man and wife, that fact, so assisted by the subsequent cohabitation, is strong presumptive evidence of an adulterous intercourse, and will fix it." Nash v. Nash, I Hagg. Consist. 140; 4 Eng. Ecc. 357, 358. See also Masten v. Masten, 15 N. H. 159, 161. But the mere fact of a marriage ceremony is not enough. Reemie v. Reemie, 4 Mass. 586; Wilson v. Wilson, Wright (Ohio), 128, 129.

4. Richardson v. Richardson, 1 Hagg. Ecc. 6, 11; 3 Eng. Ecc. 13, 15; Coton v. Coton, 13 Jur. 431, 434; Com. v. Shepherd, 6 Binn. (Pa.) 283, 286.

5. "Whether this disease is evidence

of adultery may depend upon circumstances, such as length of time since the marriage." Popkin v. Popkin, I Hagg. Ecc. 765; 3 Eng. Ecc. 325, note. This disease, though acquired during the marriage, may have been acquired by accident, from the spouse, or in adultery. Collett v. Collett, I Curt. Ecc. 678, 686;

Collett v. Collett, I Curt. Ecc. 678, 686; Stone v. Stone, 3 Notes Cas. 278; Cook v. Cook, 32 N. J. Eq. 475, 477, 478.

6. See quotations supra; Mosser v. Mosser, 29 Ala. 313, 317; Inskeep v. Inskeep, 5 Iowa, 204, 208; Thayer v. Thayer, 101 Mass. 111, 113; Berckmans v. Berckmans, 16 N. J. Eq. 122, 140; Mulock v. Mulock, I Edw. Ch. (N. Y.) 14; Ferguson v. Ferguson, 3 Sand. 307; Van Epps v. Van Epps, 6 Barb. (N. Y.)

320, 323.
7. Chestnut v. Chestnut, 88 Ill. 548, 551; Carter. v. Carter, 62 Ill. 439, 449; Whitenack v. Whitenack, 36 N. J. Eq. 474, 477; Smith v. Smith, 5 Oreg. 186, 187.

proved only by the clearest, most positive, and most satisfactory evidence, and will not be held as proved if the facts on which the

charge is based are consistent with innocence.1

The proof should be twofold. It should show a criminal attachment between the parties involving a mutual intention or desire to indulge in intercourse and opportunities to gratify that criminal desire.2 If the criminal intention is shown, and opportunities have been ample, adultery will be presumed.3 Opportunities alone are not enough: 4 nor are opportunities with mere suspicious circumstances: but a number of suspicious circumstances, none of which alone would be sufficient, may, combined, justify the conclusion of guilt.6 If a man goes to a house of ill-fame and shuts himself up with a prostitute, there can be little doubt of his guilt: 7

1. Loveden v. Loveden, 2 Hagg. Consist. I; 4 Eng. Ecc. 461; Freeman v. Freeman, 31 Wis. 235, 241; Jeter v. Jeter, 36 Ala. 391; Clear v. Reason, 29 Iowa, 327; Blake v. Blake, 70 Ill. 618, 625; cases supra.

2. Dunham v. Dunham, 6 Law R. 139, 141; Berckmans v. Berckmans, 16 N. J. Eq. 122, 143; Blake v. Blake, 70 Ill. 618, 625; Black v. Black, 30 N. J. Eq. 228,230; Freeman v. Freeman, 31 Wis. 235, 242.

"It is then in evidence that not merely was there a criminal attachment, but also that this attachment was not rejected; that Jeffery admitted his familiarity; received his correspondence; that opportunities were constant; and there is nothing to show on her part resistance nor repudiation, nor that she at all discountenanced his passion. To doubt from such circumstances that the consummation followed, would be to presume that the effect was not consequent on the natural cause, and that this was a case of extraordinary exception and singular innocence." Bramwell v. Bramwell, 3 Hagg. Ecc. 618; 5 Eng. Ecc. 232, 238.

3. Derby v. Derby, 21 N. J. Eq. 36, 60; McClury v. McClury, 40 Mich. 493.

4. "From the disposition of the cabins, or, indeed, from any disposition of the cabins that could have been made, no one can doubt that there must have been ample facilities for the commission of such an offence. But then, before the court can affix guilt on Captain Harris, it must be satisfied that there was something more than opportunity. There must be some overt acts, or some circumstances to show that he was disposed to avail himself of the opportunity to commit adultery, and that he absolutely did so. Harris v. Harris, 2 Hagg. Ecc. 376; 4 Eng. Freeman, 31 Wis. 235. 242; Larrison v. Larrison, 20 N. J. Eq. 100. 101.

5. Blake v. Blake, 70 Ill. 618, 621;

Mayer v. Mayer, 21 N. J. Eq. 246, 248; Smelser v. State, 31 Tex. 95, 96. Mere scandal or suspicion is not evidence. State v. Crowley, 13 Ala. 172, 174! Soper v. Soper, 29 Mich. 305, 306; Oversheet v. State, 4 Miss. 328, 329. Nor an opinion. Cox v. Whitfield, 18 Ala. 738,

6. "These statements, taken together, are sufficient to establish a high and undue degree of familiarity between these parties. It has been argued that one was an isolated and detached fact, that another was so likewise, and that none of them led to a conclusion of crime; but this is not the proper way to consider such evidence: the facts are not to be taken separately only, but in conjunction; they mutually interpret each other; their constant repetition gives them a determined character; and such habits continuing to be persevered in in public, it is to be inferred that the parties would go to greater lengths if opportunities of privacy occurred." Burgess v. Burgess, 2 Hagg. Consist. 223; 4 Eng. Ecc. 527, 530. See also Grant v. Grant, 2 Curt. Ecc. 16; 7

Eng. Ecc. 316.
7. "The act of going to a house of illfame is characterized by our old saying, that people do not go there to say their paternoster; that it is impossible that they can have gone there for any but improper purposes; and that is universally held a proof of adultery." Loveden v. Loveden, 2 Hagg. Consist. 1, 24; 4 Eng. Ecc. 461, 472. Also, Richardson v. Richardson, 4 Port. (Ala.) 467. 474; Evans v. Evans, 41 Cal. 103, 107; Daily v. Daily, 6 Barb. (N. Y.) 320, 322; Langstaff v. Langstaff, Wright (Ohio), 148, 149. But the fact was considered of little weight where a man went into a house of ill-fame and went into a room with one of the inmates, but left the door open. Platt v. and his entering such a house is strong evidence against him which he must explain,—for example, by showing that he was employed as agent of a vice society to go there; ¹ so it is almost conclusive against a woman when she goes to such a house with a man not her husband, or unattended; ² but she may explain that she did not know the nature of the house, and was induced to go there by agents and spies of her husband's.³ If criminal intercourse is shown to have taken place between two parties, it is presumed to continue as long as they live under the same roof.⁴ A judge must decide on the evidence as a jury would.⁵ The admissibility of various facts as evidence of adultery is further discussed in the notes.⁶

1. Ciocci v. Ciocci, 26 Eng. L. & Eq. 604, 625: That the presence of the party in such a place may be explained, see also Latham v. Latham, 30 Gratt. (Va.) 307, 312; Edward v. Edward, 5 Sess. Cas. Sc. (4th Ser.) 1255; Cave v. Cave, 39 N. J. Eq. 148.

Eq. 148.

2. "The question comes to this: Does the visit of a married woman to a single man's lodging or house in itself prove the act of adultery? There is no authority mentioned for such an inference. It would be almost impossible that a woman should go to a house of ill-fame but for a criminal purpose; but in the case of a private house, I am yet to learn that the law has affixed the same imputation on such a fact." Williams v. Williams, I Hagg. Consist. 299; 4 Eng. Ecc. 415, 417. See also Best v. Best, I Add. Ecc. 411; 2 Eng. Ecc. 158. 170; Wood v. Wood, 4 Hagg. Ecc. 138, n.

3. Cave v. Cave, 39 N. J. Eq. 148. 4. Carotte v. State, 42 Miss. 334, 343; Becky v. Becky, I Hagg. Ecc. 789; 3 Eng. Ecc. 338, 342; Turton v. Turton, 3 Hagg. Ecc. 338, 350; 5 Eng. Ecc. 130, 136; Armstrong v. Armstrong, 32 Miss. 279, 285; Smith v. Smith, 4 Paige (N. Y.), 432,

436.

5. Alexander ν. Alexander, 2 Swab. &

T. 95, 101.

6. After a foundation has been laid, the probability of the offence may be shown by the fact that the husband and wife were on bad terms; such as the want of affection of the accused party for his wife or her husband,—Caton v. Caton, 13 Jur. 431, 432; Richardson v. Richardson, 4 Port. (Ala.) 467, 474; the expressed dislike towards the other party,—Croft v. Croft, 3 Hagg. Ecc. 310; 5 Eng. Ecc. 120, 122; the expressed desire to be rid of the other party,—Bray v. Bray. 6 N. J. Eq. 506, 509, 510, 628, 630; desertion of the other party,—Kenwick v. Kenwick, 4 Hagg. Ecc. 114, 138; Caton v. Caton, 13 Jur. 421, 432; cruelty towards the other

party,-Cocksedge v. Cocksedge, I Rob. Ecc. 90, 94, 95; Beach v. Beach, 11 Paige (N. Y.), 161. So the complainant's disbelief in his charges of adultery may be shown, as by his delay after a knowledge of all the facts,—Berckmans v. Berckmans, 16 N. J. Eq. 122, 140; or his continued amiable terms with her after suit brought. Dillon v. Dillon, I Curt. Ecc. 86; 7 Eng. Ecc. 377, 381. So the defendant's familiarities with the alleged paramour prior to the act to be proved. State v. Wallace, o N. H. 515, 517; Alsabrooks v. State, 52 Ala. 24, 26; Flavell v. Flavell, 20 N. J. Eq. 211, 215; cases heretofore cited. passim; concurrent therewith, State v. Marvin, 35 N. H. 22, 28, 29; Thayer v. Thayer, 101 Mass. 111, 114. It is from such acts that adultery is most commonly proved, cases supra; or subsequent thereto, and even after suit brought. Thayer v. Thayer, 101 Mass. 111, 112; Fuller v. Fuller, 17 Cal. 605, 612; ante, Vol. I., title ADULTERY. So it may be shown as evidence of the adultery charged, that the party solicited others to com-mit adultery, and had an adulterous mind,-Forster v. Forster, 1 Hagg. Ecc. 144; 4 Eng. Ecc. 358, 362; Soilleux v. Soilleux, 1 Hagg. Const. 273; 4 Hagg. Ecc. 434; Derby v. Derby, 21 N. J. Eq. 36, 60 (there are cases which seem to look the other way,—Washburn v. Washburn, 5 N. H. 195, 196; McDermott v. State, 13 Ohio St. 332, 334); or consorted with prostitutes,—Ciocci v. Ciocci, 26 Eng. L. & Eq. 604; Cook v. Cook, 32 N. J. Eq. 475, 481. Some cases hold that a woman's bad character for chastity may be proved as evidence of her adultery in the particular case. Clement v. Kimball, 98 Mass, 535, 537. Other cases hold the contrary. Miller v. Miller, 20 N. J. Eq. 216, 217; Washburn v. Washburn, 5 N. H. 195, 196; Thomas v. Thomas, 51 Ill. 162, 164; Carter v. Carter, 52 Ill. 439, 448. There is a corresponding difference of opinion as to evidence of her good

The witnesses in a divorce suit for adultery constitute an important factor, as the evidence is so largely circumstantial, and slight variations may change the whole significance of doubtful situations. The husband or wife cannot, in general, testify; 1 and even where the bill and answer are taken as evidence, a divorce will not be granted without other evidence.2 Confessions of adultery are, however, admissible, if not made for the purposes of the suit, 4 and if not obtained by fraud. The witnesses usually called to prove adultery are servants, neighbors, children, the paramour, the paramour's husband or wife, detectives, and prostitutes. evidence of young children is not entitled to much weight. The testimony of the paramour should be listened to with caution, and should always be corroborated.7 And prostitutes, while not wholly unworthy of belief, cannot be much relied upon.8 The court is not bound to believe any witness.9 More will be said as to witnesses later on in this article.

The defences in suits for adultery are either in the nature of absolute denial. 10 or of confession and avoidance. Under the latter

character to rebut a presumption of adultery: that it may be proved, see O'Brien v. O'Brien, 13 Mo. 16, 19; that it may not, see Humphrey v. Humphrey, 7 Conn. 116, 118. But ante-nuptial unchastity cannot be proved as evidence of postnuptial unchastity,—Graves v. Graves, 4 Curt. Ecc. 225; 7 Eng. Ecc. 425. 427; Hedden v. Hedden, 21 N. J. Eq. 61, 66; Devall v. Devall, 4 Desaus. Eq. (S. Car.) 79; unless it were with the same person,
—Weatherby v. Weatherby, I Spinks, 193, 195. A verdict in an action of crim. con. seems admiss ble in England. Loveden v. Loveden, 2 Hagg. Consist. 1; 4 Eng. Ecc. 461, 484; Jenkyn v. Jenkyn, Dea. & Sw. 268; but not in the *United* States,—Williams v. Williams, 3 Barb. Ch. (N. Y.) 628, 629. A criminal conviction of adultery is, however, evidence. Burgess v. Burgess, 47 N. H. 395; Anderson v Anderson, 4 Me. 100.

1. Discussed post, X.; Anon., 58 Miss.

15, 18.

15, 18.
2. Rie v. Rie, 34 Ark. 37, 38; Pullen v. Pullen, 29 N. J. Eq. 541; Schmidt v. Schmidt. 29 N. J. Eq. 496, 497.
3. Discussed post, X; Hughes v. Hughes, 19 Ala. 307, 312; Matchin v. Matchin, 6 Pa. St. 332, 337.
4. Evans v. Evans, 41 Cal. 103, 107;

5. Derby v. Derby, 21 N. J. Eq. 36, 47; Callender v. Callender, 53 How. Pr. (N. Y.) 364.

6. Kneale v. Kneale, 28 Mich. 344, 345; Crowner v. Crowner, 44 Mich. 180, 181; s. c., 38 Am. Rep. 360.
7. Hunt v. Hunt, Dea. & Sw. 121;

State v. Crowley, 13 Ala. 172, 175;

Moulton v. Moulton, 13 Me. 110; Mayer v. Mayer, 21 N. J. Eq. 246, 248; Wood v. Wood, 2 Paige (N. Y.), 108, 112; Thompson v. Thompson, 10 Rich. (S. Car.) 416, 424.

"In re lupanari, testes lupanores admittentur." Best v. Best, i Add. Ecc. 411; 2 Eng. Ecc. 170. Such testimony should always be corroborated. Mayo v. Mayo, 119 Mass. 290, 293; Hedden v. Hedden, 21 N. J. Eq. 61, 65. The denial of a paramour is worthy of consideration. Pollock v. Pollock, 71 N. Y. 137, 152; Reid v. Reid, 17 N. J. Eq. 101, 102. But the admission of a paramour, 15 the other parameters. amour made out of the other party's presence is not evidence. Matchin v. Matchin, 6 Pa. St. 332, 338; Lawson v.

ness is both the paramour and a prostitute, double care must be taken. Case

last cited; Payne v. Payne, 42 Ark. 235.
9. Alexander v. Alexander, 2 Swab. & T. 95, 102; Lipwith v. Lipwith, 4 Swab. & T. 243.

10. It can be shown that the alleged paramour of the husband is still a virgin intacta, and that therefore no adultery could have been committed. Hunt v. Hunt, Dea. & Sw. 121. Or that the man, being impotent, could not have committed adultery. Clapp v. Clapp, 97 Mass. 531, 532. So insanity at the alleged time is a good defence. Wray v. Wray, 19 Ala. 522, 525. But a deed of separation head are CONNIVANCE; COLLUSION; CONDONATION; RECRIMINATION: and LIMITATIONS, which we shall find discussed hereafter.

(4) Cruelty.—Next to adultery, cruelty is the most common cause for divorce. Like adultery, it was a cause for limited divorce in the English ecclesiastical courts; and in the United States it is now found as a cause for absolute divorce, and for limited divorce, according to the various statutes.¹

is not a defence. Kremelberg v. Kremel-

berg, 52 Md. 553, 557.

1. Gruelty.—In general, in construing the statutes of the various States, the rules of the ecclesiastical law, as laid down in the Ecclesiastical Reports, are followed as far as possible. Morris v. Morris, 14 Cal. 76, 79; Shaw v. Shaw, 17 Conn. 189, 193. In this law Evans v. Evans, I Hagg. Consist. 35; 4 Eng. Ecc.

310, is the leading case.

The statutes in the different States are differently expressed. Thus, the cause for divorce in Alabama is "actual violence to person, attended with danger to life or health, or conduct causing reasonable apprehension of such violence;" in California, it is "cruelty, or the infliction of grievous bodily injury or grievous mental suffering upon the other, by one party to a marriage;" in *Illinois*, "extreme and repeated cruelty;" in *Louisiana*, "cruel treatment of such a nature as to render their living together insupportable;" in Massachusetts, "extreme cruelty, or cruel and abusive treatment;" in Missouri, "such cruel and barbarous treatment as to endanger the life of the other, or indignities rendering the condition intolerable;" in Maryland, New Jer-sey, and Ohio, "extreme cruelty;" in Vermont. "intolerable severity in either party;" in Pennsylvania, "or when the husband shall have by cruel and barbarous treatment, endangered the wife's life, or offered such indignities to her person as to render her condition intolerable and life burdensome, and thereby force her to withdraw from his house and family." The citations are from the latest Revised Statutes of the several States. As will be seen in the discussion in the text, most of these statutory descriptions of cruelty are partial, and are in harmony with each other and the ecclesiastical law. Consult in the various States the following cases: Hughes v. Hughes, 44 Ala. 698; Smedley v. Smedley, 30 Ala. 714; Moyler v. Moyler, 11 Ala. 620; Powelson v. Powelson, 22 Cal. 358. 360; Mahone v. Mahone, 19 Cal. 626; Morris v. Morris, 14 Cal. 76; Ward v. Ward, 14 Cal. 572; Shaw v. Shaw, 17 Conn. 189; Collins v. Collins, 29 Ga. 517; Hender

son v. Henderson, 88 Ill. 248; Farnham v. Farnham, 73 Ill. 497; Smail v. Small, 57 Ind. 568; Cole v. Cole, 23 Iowa, 433; Wheeler v. Wheeler, 53 Iowa, 511; Gibbs v. Gibbs, 18 Kan. 419; Tourne v. Tourne, 9 La. 452; Finley v. Finley, 9 Dana (Ky.), 52; Briggs v. Briggs, 20 Mich. 34; McClufg v. McClurg, 40 Mich. 493; Ford v. Ford, 104 Mass. 198; Lyster v. Lyster, 111 Mass. 327; Kenly v. Kenly, 3 Miss. 751; Bowers v. Bowers, 19 Mo. 351; Cheatam v. Cheatam, 10 Mo. 296; Allen v. Allen, 31 Mo. 479; Tayman v. Tayman, 2 Md. Ch. 393; Harding v. Harding, 22 Md. 337; Hoshall v. Hoshall, 51 Md. 72; Harratt v. Haratt, 7 N. H. 196; Melvin v. Melvin, 58 N. H. 569; Close v. Close, 24 N. J. Eq. 338; 25 N. J. Eq. 579; Kennedy v. Kennedy, 73 N. Y. 369; Perry v. Perry, 2 Paige (N. Y.), 501; Davies v. Davies, 55 Barb. (N. Y.) 130; Everton v. Everton, 5 Jones (N. Car.), 202; Taylor v. Taylor, 76 N. Car. 433; Miller v. Miller, 78 N. Car. 102; Smith v. Smith, 8 Oreg. 100; Dunlap v. Dunlap, Wright (Ohio), 559; Threewits v. Threewits, 4 Desaus. Eq. (S. Car.) 560; Taylor v. Taylor, 4 Desaus. Eq. (S. Car.) 167; Sharman v. Sharman, 18 Tex. 521; Latham v. Latham, 30 Gratt. (Va.) 307; Carr v. Carr, 22 Gratt. (Va.) 168; Eshbach v. Eshbach, 23 Pa. St. 343; Gordon v. Gordon, 48 Pa. St. 226; Shackelt v. Shackelt, 49 Vt. 195; Freeman a. Freeman, 31 Wis. 235; Pillar v. Pillar, 22 Wis. 658; Beyer v. Beyer, 50 Wis. 254; s. c., 36 Am. Rep. 848.

S. c., 30 Am. Kep. 848.

Some statutes make one particular phase of cruelty a special cause for divorce, such as an attempt on the life of the other party. Ill. Rev. St. 1880. p. 422. Or contracting a loathsome disease. Ky. Rev. Stat. 1881, p. 522. Or endangering the other's reason. N. H. Gen. St. 1878. p. 432. Or publicly defaming the other. La. Civ. Code 1875, arts. 138, 139; Homes v. Carrier, 16 La. Ann. 94: Bienvenu v. Bienvenu, 14 La. Ann. 386, 387. As will be seen in the discussion, such act. may be cruelty, independent of statutes;

Indignities may be a cause for divorces they are a species of cruelty, but rather to the mind than to the body, and of a

Definition.—Cruelty, as a cause for divorce, is the wilful 1 and persistent 2 causing of unnecessary suffering, whether in realization³ or in apprehension,⁴ whether of body⁵ or of mind,⁶ in such a way as to render cohabitation dangerous⁷ or unendurable.⁸ Cruelty under the civil law is called savitia. Lord Stowell's exposition of cruelty is probably the most celebrated. Cruelty may

lighter character than the orthodox cruelty. Haley v. Haley, 44 Ark. 429; Lewis v. Lewis, 5 Mo. 278; Cheatam v. Cheatam, 10 Mo. 206; Hooper v. Hooper, Cheatam, 10 Mo. 290; Hooper v. Hooper, 19 Mo. 355; Kempf v. Kempf, 34 Mo. 212; Taylor v. Taylor, 76 N. Car. 433; Coble v. Coble, 2 Jones Eq. (N. Car.) 392; Erwin v. Erwin, 4 Jones Eq. (N. Car.) 82; Gordon v. Gordon, 48 Pa. St. 226; May v. May, 62 Pa. St. 206; Miles

v. Miles, 76 Pa. St. 357.
An indignity is "unmerited contemptuous conduct towards another; any action towards another which manifests contempt for him, contumely, incivility, or injury, accompanied with insult." Coble v. Coble, 2 Jones Eq. (N. Car.) 392, 395. A malicious charge of adultery may be an indignity. Lewis v. Lewis, 5 Mo. 278, 279. Or a refusal to occupy the same bed. Coble v. Coble, 2 Jones Eq. 392, 395. But a husband's advertise-392, 395. ment not to trust his wife is not. Hooper v. Hooper, 19 Mo. 355, 358. Nor a mere unfeeling and insulting letter, if Case last cited; Shell v. Shell, 2 Sneed (Tenn.), 716, 721. An indignity need not be of a sort or degree to endanger life. May v. May, 62 Pa. St. 206, 210, Or consist of personal violence. Haley v. Haley, 44 Ark. 429. When habitual drunkenness is a cause for divorce, a single act or two of drunkenness is not an indignity. Kempf v. Kempf, 34 Mo. 211, 214; Brown v. Brown, 38

Ark. 324.

1. Cruelty Defined.—Compare Kennedy v. Kennedy, 60 How. Pr. 151; 73 N. Y. 369, with Simons v. Simons, 13 Tex. 468, 475, in which cases the same acts were held cruel and not cruel, according as they were done intending and not intending to injure. See infra.

2. Hoshall v. Hoshall, 51 Md. 72, 75.

- See infra.
 3. Wheeler v. Wheeler, 53 Iowa, 511, 513; s. c., 36 Am. Rep. 240.
 - 4. Morris v. Morris, 14 Cal. 76, 79.
- 5. Johns v. Morris, 14 Cal. 70, 79.

 5. Johns v. Johns, 57 Miss. 530, 532.

 6. Pidge v. Pidge, 3 Met. (Mass.) 257, 261; Rice v. Rice, 6 Ind. 100, 105.

 7. Beyer v. Beyer, 50 Wis. 254, 257; s. c.. 36 Am. Rep. 848; Poor v. Poor, 8 N. H. 307, 316.
 - 8. Elmes v. Elmes, 9 Pa. St. 166, 167.

9. Holden v. Holden, I Hagg. Consist. 453; 4 Eng. Ecc. 452, 454; Cheatam v. Cheatam, 10 Mo.206.

10. Sir John Nicoll, in Westmeath v. Westmeath, 2 Hagg. Sup. 1; 4 Eng. Ecc. 238, 270, says: "In respect to the law, the question naturally occurs, what constitules cruelty in the view of the law. It is difficult and hardly safe, and at the same time it is unnecessary, to define it affirmatively with precision. It can only be described generally, and rather by effects produced than by acts done." He then proceeds to quote from Lord Stow-

Lord Stowell, in Evans v. Evans, 2 Hagg. 35; 4 Eng. Ecc. 310, says: "That the duty of cohabitation is released by the cruelty of one of the parties is admitted, but the question occurs, What is cruelty? In the present case it is hardly necessary for me to define it, because the facts here complained of are such as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health and even the life of the party. I shall therefore decline the task of laying down a direct definition. This, however, must be understood, that it is the duty of the courts, and consequently the inclination of the courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. See also Childs v. Childs, 49 Md. 509, 514; Close v. Close, 25 N. J. Eq. 526, 529; Latham v. Latham, 30 Gratt. (Va.) 307, 321. In a state of personal danger no duties can be discharged, for the duty of self-preservation must take place before the duties of marriage. See also Beebe v. Beebe, 10 Iowa, 133, 135; Johnson v. Johnson, 4 Wis. 135, 141. What merely wounds the mental feelings is in few cases to be admitted, where not accompanied with bodily injury, either actual or menaced. See also Rice v. Rice, 6 Ired. (N. Car.) 100, 105; Beebe v. Beebe, 10 Iowa, 133, 136; Close v. Close, 25 N. J. Eq. 526, 527, 529. Mere austerity of temper, petu-lance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, be of a husband to his wife¹ or of a wife to her husband.² must consider, in judging whether any particular conduct has been cruel, the intent of the conduct, its persistence, and its effect on

the other party's body or mind.

The Intent.—The injury must be done deliberately: it must be wilful.3 Vices, gaming, gross extravagance, might occasion great suffering and bodily ill-health; yet this would not be cruelty.4 And the same may be said of a disagreeable temper, and rudeness, and want of affection, and neglect, and ignorant mistakes. If a husband in good faith charges his wife with crime it is not cruelty.8 but if he does it to make her suffer, it is; 9 so if he maltreats the children, it is not cruelty; but if he does this to annoy her and make her suffer, it is. 10 And as the conduct must spring from a free will, the acts of a person while insane, 11 or suffering from a brain fever, 12 are not cruelty: but if the conduct results from an insane delusion. 13

if they do not threaten bodily harm, do not amount to legal cruelty. See also Knight v. Knight, 31 Iowa, 451, 456; Turbitt v. Turbitt, 21 Ill. 438; Vignos v. Vignos, 15 Ill. 186; Hill v. Hill, 2 Mass. 150; Cutter v. Cutter, 2 Brewst. (Pa.) 511; Shell v. Shell, 2 Sneed (Tenn.), 716. I have heard no one case cited, in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. See also Hughes v. Hughes, 44 Ala. 698, 699. I say apprehension, because assuredly the court is not to wait till the hurt is actually done: but the apprehension must be reasonable; it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind."

"There must be something that renders cohabitation unsafe, or is likely to be attended with injury to the person or to the health of the party. Words of menace may warrant the court to interpose, and prevent the actual mischief; but when such violence of language is accompanied with blows it is a more aggravated case." Harris v. Harris, 2 Phill.

III; I Eng. Ecc. 204.

It is not mere disagreement or incompatibility; the parties take each other for better or worse. Knight v. Knight, 31

Iowa, 451, 456.
1. "The definition of legal cruelty is, that which may endanger the life or health of the party. It generally proceeds from the wife, as the weaker person, but it may come from the man, and has done so in several cases; but generally the wife complains of what is daugerous to her." Waring v. Waring, 2 Phill. 136; 1 Eng. Ecc. 210, 211. 2. Prichard v. Prichard, 3 Swab. & T.

523; Furlonger v. Furlonger, 5 Notes

Cas. 422; Kirkman v. Kirkman, I Hagg-Consist. 409; 4 Eng. Ecc. 438; White v. White, I Swab. & T. 591; David v. Dav. id, 27 Ala. 222, 226; Small v. Small, 57 Ind. 568, 569; Beebe v. Beebe, 10 Iowa, 133, 138; Lynch v. Lynch, 33 Md. 328, 331; Kempí v. Kempí, 34 Mo. 211, 214; Doyle v. Doyle, 26 Mo. 545; Jones v. Jones, 66 Pa. St. 494, 497; Perry v. Perry, 2 Barb. Ch. (N. Y.) 311; McNamara v. McNamara, 2 Hilt. (N. Y.) 547, 540; Dunlan v. Dunlan Wright (Ohio) 549; Dunlap v. Dunlap, Wright (Ohio), 559; Harvey v. Harvey (N. J. 1886), 6 Cent. Rep. 102.

3. Neeld v. Neeld, 4 Hagg. Ecc. 263, 270; Ford v. Ford, 104 Mass. 198, 206;

Shaw v. Shaw, 17 Conn. 180, 106; cases

infra.

4. Chesnutt v. Chesnutt, 1 Spinks, 196, 198; Scott v. Scott, 29 L. J. Mat. Cas. 64. 5. See quotations given above, notes 3.4.

6. Carr v. Carr, 22 Gratt. (Va.) 168,

75. Shaw v. Shaw, 17 Conn. 189, 195, 196. In this case the husband successfully resisted a charge of cruelty through excessive intercourse, by showing he did not know its ill effects on his wife's health.

8. Small v. Small, 57 Ind. 568, 569; Homes v. Carrier, 16 La. Ann. 94; Cheatam v. Cheatam, 10 Mo. 296, 298; Simons v. Simons, 13 Tex. 468, 475.

9. Kennedy v. Kennedy, 60 How. Pr. (N. Y.) 151; s. c., 73 N. Y. 369, 374.

10. See Wallscourt v. Wallscourt, 11

Jur. 134, 135; Smith v. Smith, 2 Phillim. 207, 212; I Eng. Ecc. 232, 234; Perry v. Perry, I Barb. Ch. (N. Y.) 516.

11. Wertz v. Wertz, 43 Iowa, 534,536.

12. Curtis v. Curtis, 27 L. J. Mat. Cas.

76, 86.

13. Smith v. Smith, 40 N. J. Eq. 566.

or from madness caused by drink, it may constitute cruelty.1 The intent is generally shown by the persistence of the party in the course of conduct complained of, and the intent to injure arising suddenly under great provocation would not perhaps fill the re-

quirements as to deliberateness.2

The Persistence and Repetition.—Generally, a divorce will not be granted for a single act of cruelty.³ But acts of cruelty need not become a fixed habit before relief can be had.4 It is presumed that a single act standing by itself will not be repeated; but if the single act is simply one step in a course of conduct, and the court is satisfied that similar acts are likely to occur, the single act will be sufficient.5 In such cases the reasonable apprehensions of the injured party, and the mental suffering thereby occasioned, constitute the cruelty. 6 So that under different circumstances a single act or an entire course of life may constitute cruelty.

1. Marsh v. Marsh, 28 L. J. Mat. Cas. 13, 14; Martin v. Martin, 29 L. J. Mat.

Cas. 106, 107.

2. A great provocation may justify a certain amount of violence. Dysart v. Dysart, I Rob. Ec. 106, 140. But jealousy does not. Smith v. Smith, 33 N. J. Eq. 458, 461; Kirkman v. Kirkman, I Hagg. Consist. 400; 4 Eng. Ecc. 438. In Holden v. Holden, I Hagg. Consist.

sist. 453; 4 Eng. Ecc. 452, 454, it is said: "Everything is in legal construction sævitia which tends to bodily harm, and in that manner renders cohabitation unsafe. Wherever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected; be-cause it is unsafe for her to continue in the discharge of her conjugal duties, and to enforce that obligation upon her might endanger her security, and perhaps her life. It is not necessary, in determining this point, to inquire from what motive such treatment proceeds. It may be from turbulent passion, or sometimes from causes which are not inconsistent with affection, and are, indeed, often connected with it, as the passion of jealousy. If bitter waters are flowing, it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own control as that it is inconsistent with the personal safety of his wife to continue in his society, it is immaterial from what provocation such violence originated.

"Secondly, the law does not require that there should be many acts. The court has expressed an indisposition to interfere on account of one slight act, particularly between persons who have been under long cohabitation; if only one such instance of ill-treatment, and that of a slight kind, occurs in many years, it

may be hoped and presumed it will not be repeated. But it is only on this supposition that the court forbears to interpose its protection, even in the case of a single act, because if one act should be of that description which should induce the court to think that it is likely to occur again, and likely to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorize its interference. Thirdly, it is not necessary that the conduct of the wife should be entirely without blame; for the reason which would justify the imputation of blame to the wife, will not justify the ferocity of the husband,'

3. Hoshall v. Hoshall, 51 Md. 72, 75. See Embree v. Embree, 53 Ill. 394, 395; Henderson v. Henderson, 88 Ill. 248, 250; Kempf v. Kempf, 36 Mo. 211, 214; Cook v. Cook, 11 N. J. Eq. 195, 196; Richards v. Richards, 37 Pa. St. 225, 227. A case where a single act was sufficient. Huilker v. Huilker, 64 Tex. 1.

4. Mahone v. Mahone, 19 Cal. 626, 628.

5. Holden v. Holden, I Hagg. Consist. 453; 4 Eng. Ecc. 452; Lockwood v. Lockwood, 2 Curt. Ecc. 281, 7 Eng. Ecc. 114, 125; Dysart v. Dysart, 1 Rob. Ecc. 103, 121, 470, 533, 540; French ν. French, 4 Mass. 587, 588; Beyer ν. Beyer, 50 Wis. 254, 257; s. c., 36 Am. Rep.

6. Johns v. Johns, 57 Mo. 530, 531. Throwing a bucket of water on the wife's head, with a threat of further violence if she did not leave the house, was in one case held sufficient. Moyler v. Moyler, 11 Ala. 620. "As to spitting on her, nothing can be more gross cruelty; and there is a case in Hetley in which a prohibition was denied, the only act of cruelty

The Bodily Injury .- Personal violence or maltreatment of the person, to the injury of health, is legal cruelty. 1 So is conduct endangering life, limb, or health.² So is personal violence, such as whipping the wife.³ So is wilfully or recklessly ⁴ communicating to her a disease, such as the itch,⁵ or a venereal complaint,⁶ or impairing her health by excessive intercourse.⁷ But every slight touching is not a bodily injury.⁸ What is really injurious may depend upon the party's constitution; and a gentle, fragile woman might be granted a divorce where an amazon would not. 10 So acts may be cruel to a woman who is pregnant or otherwise ill, which would not be cruel to one in good health.11

The Mental and Moral Injury.—It has been repeatedly decided that the infliction of mental suffering is not cruelty, unless the suffering be occasioned by reasonable apprehensions of bodily harm. But in cases where cohabitation and life itself almost in

being spitting on the face; and that was adjudged sufficient." D'Aguilar v. D'Aguilar, 1 Hagg. Ecc. 773, 776; 3 Eng. Ecc. 329, 331. A single kick or punch would not suffice. Henderson v. Henderson, 88 Ill. 248, 250; Shorediche v. Shorediche, 115 Ill. 102. And persistence in indecent acts severally not sufficient, may be cruelty. Briggs v. Briggs,

20 Mich. 34, 45. 1. Bodily Injury.—"It may be sufficient to state that personal violence is charged; blows-blows repeated and severe and aggravated by the high rank and station of the parties. The acts imputed, if proved by credible evidence, come directly within the strictest definition of cruelty-of aggravated cruelty. A blow between parties in the lower conditions and in the highest stations of life bears a very different aspect. Among the lower classes blows sometimes pass between married couples who in the main are very happy, and have no desire to part; amidst very coarse habits, such incidents occur almost as freely as rude or re-proachful words; a word and a blow go together. Still, even among the very lowest classes there is generally a feeling of something unmanly in striking a woman; but if a gentleman, a person of education, the discipline of which emollit mores and tends to extinguish ferocity; if a nobleman of high rank and ancient family uses personal violence to his wife, his equal in rank, the choice of his affec-tion, the friend of his bosom, the mother of his offspring-such conduct in such a person carries with it something so degrading to the husband, and so insulting and mortifying to the wife, as to render the injury itself far more severe and in-supportable." Westmeath z, Westmeath,

2 Hagg. Ecc. Sup. 1; 4 Eng. Ecc. 238,

See also Graham v. Graham, 5 Ses. Cas. Sc. (4th Ser.) 1003, 1005; Ford v. Ford, 104 Mass. 198; and quotations supra.

2. Odom v. Odom, 36 Ga. 286, 317; Beebe v. Beebe, 10 Iowa, 133, 135; Caruthers v. Caruthers, 13 Iowa, 266; Beyer v. Beyer, 50 Wis. 254, 257; s. c., 36 Am. Rep. 848. Impairing health is endangering life. Cole v. Cole, 23 Iowa, 433, 438.

3. Johns v. Johns, 57 Miss. 530, 532; Taylor v. Taylor, 76 N. Car. 433. As to bruises, see Briggs v. Briggs, 20 Mich.

34. 44-46. 4, Knight v. Knight, 31 Iowa, 450, 456. 7. Chesnutt v. Chesnutt, 28 Eng. L. &

Eq. 603, 606; I Spinks, 196.

5. Cook v. Cook, 32 N. J. Eq. 475, 479. And see N. v. N., 3 Swab. & T. 234; Brown v. Brown, 35 L. J. Mat. Cas. 13; L. R. 1 P. & D. 46; Boardman v. Boardman, L. R. 1 P. & D. 233; Collett v. Collett, 1 Curt. Ecc. 678; Ciocci v. Ciocci, 26 Eng. L. & Eq. 604, 611; 1 Spinks, 121; Long v. Long. 2 Hawks (N. Car.), 189;

Canfield v. Canfield, 34 Mich. 519.
6. Melvin v. Melvin, 58 N. H. 569, 571;
English v. English, 27 N. J. Eq. 71, 74,
579; Shaw v. Shaw. 17 Conn. 189, 196;
Gibbs v. Gibbs. 18 Kan. 419, 422, 424.

8. Knight v. Knight, 31 Iowa, 450, 456. 9. Bennett v. Bennett, 24 Mich. 482, 484; Briggs v. Briggs, 20 Mich. 34.

10. Knight v. Knight, 31 Iowa, 450, 455, 456; David v. David, 23 Ala. 222, 224,

11. Dysart v. Dysart, 1 Rob. Ecc. 106, 109; Fleytas v. Pigneguy, 9 La. 419.

12. Evans v. Evans, I Hagg. Ecc. 35; 4 Eng. Ecc. 310. 327; Kirkman v. Kirkman, 1 Hag. Ecc. 409; 4 Eng. Ecc. 438; Oliver v. Oliver, 1 Hagg. Ecc. 361; 4 Eng. unbearable, the old rule should certainly be relaxed.¹ Many of the statutes by their terms cover such mental suffering as renders the party's condition intolerable.² So it is that in many States, foul, obscene, and disgusting language, calculated to degrade a wife and wound her feelings, may constitute legal cruelty.³ So of foul and indecent conduct, as where a husband makes a brothel of his own house.⁴ But the mental suffering, as we have seen, must result from acts intentionally directed towards the sufferer.

Ec. 429; Harris v. Harris, 2 Phillim. III; I Eng. Ecc. 204; Barlee v. Barlee, I Add. Ecc. 301, 305; Chesnutt v. Chesnutt, I Spinks, 196; Hughes v. Hughes, 19 Ala. 307, 309; Moyler v. Moyler, II Ala. 620; Shaw v. Shaw, 17. Conn. 189; Henderson v Henderson, 88 Ill. 248; Boggess v. Boggess, 4 Dana (Ky.), 307; Helms v. Franciscus. 2 Bland (Md.), 544; Daiger v. Daiger, 2 Md. Ch. 335; Bowie v. Bowie, 3 Md. Ch. 51; Kenley v. Kenley, 3 Miss. 751, 754; Close v. Close, 24 N. J. Eq. 338. 339; Cook v. Cook, 11 N. J. Eq. 195; Ruckman v. Ruckman, 58 How. Pr. (N. Y.) 278; quotations supra.

1. See Paterson v. Paterson, 7 Bell App. C. 337, 366; I2 Eng. L. & Eq. 19, 30; Powelson v. Powelson, 22 Cal. 358, 360; McKeever v. McKeever, 11 Ir. R.

1. See Paterson v. Paterson, 7 Bell App. C. 337, 366; 12 Eng. L. & Eq. 19, 30; Powelson v. Powelson, 22 Cal. 358, 360; McKeever v. McKeever, 11 Ir. R. Eq. 26; Goodman v. Goodman, 26 Mich. 417, 418; Shell v. Shell. 2 Sneed (Tenn.), 716, 728; Freeman v. Freeman, 31 Wis. 235, 248. "Conduct which produces perpetual social sorrow, although physical food be not withheld, may well be classed as cruel, and entitle the sufferer to relief." Rice v. Rice, 6 Ind. 100, 105.

Apprehensions.—As above shown, from the case of Evans v. Evans, a reasonable apprehension of injury is sufficient; the court is not to wait until the hurt is actually done. See also Beebe v. Beebe, 10 Iowa, 133, 135–137; Odom v. Odom, 36 Ga. 286, 317; Tomkins v. Tomkins, 1 Swab. & T. 168, 172. Threats and menaces from which danger to health and life may be apprehended, constitute cruel and inhuman treatment. Kennedy v. Kennedy, 60 How. Pr. (N. Y.) 151; s. c., 73 N. Y. 369; Powelson v. Powelson, 22 Cal. 358, 360. But meaningless threats not intended to be executed, and so understood by the party threatened, are not sufficient. Coursey v. Coursey, 60 Ill. 186, 190; Close v. Close, 24 N. J. Eq. 338, 339; Breinig v. Meizler, 23 Pa. St. 156, 161; Shell v. Shell, 2 Sneed (Tenn.), 716, 728; Uhlman v. Uhlman, 17 Abb. N. Cas. (N. Y.) 236.

Cas. (N. Y.) 236.
"Words of abuse and of reproach create only resentment, and are not legal cruelty; but words of menace, intimating

a malignant intention of doing bodily harm, and even affecting the security of life, are legal cruelty. The court is not to wait till the threats are carried into execution; but is to interpose where the words are such as might raise a reasonable apprehension of violence, and excite such fear and terror as make the life of the wife intolerable. If rendering the life intolerable be the true criterion of cruelty, what can have that effect more than continual terror, and the constant apprehension of bodily injury. It may be shown that these were mere words of heat, but prima facie it is to be understood that a man means what he says." D'Aguilar v. D'Aguilar, I Hagg. Ecc. 773; 3 Eng. Ecc. 329, 331.

2. See extracts from statutes, supra.
3. See Goodrich v. Goodrich, 44 Ala.
670; Farnham v. Farnham, 73 Ill. 497,
499; Gibbs v. Gibbs, 18 Kan. 419, 424;
Briggs v. Briggs, 20 Mich. 34, 45; Johns
v. Johns, 57 Miss. 530, 532; Thomas v.
Thomas, 20 N. J. Eq. 97; Kennedy v.
Kennedy, 73 N. Y. 369, 374; Freeman v.
Freeman, 31 Wis. 235. 249.
This is especially true of malicious

This is especially true of malicious charges of unchastity. Powelson v. Powelson, 22 Cal. 358, 360; Kennedy v. Kennedy, 60 How. Pr. (N. Y.) 151; Wheeler v. Wheeler, 53 Iowa, 511, 513. And even of impotence. See Van Arsdalen v. Van Arsdalen, 30 N. J. Eq. 357, 362. So cruelty to the children may be cruelty to the mother, if directed against her. Bramwell v. Bramwell, 3 Hagg. Ecc. 618; 5 Eng. Ecc. 232, 242; Wallscourt v. Wallscourt, 11 Jur. 134, 135; Everton v. Everton, 6 Jones Eq. (N. Car.) 202; Perry v. Perry, 1 Barb. Ch. (N. Y.) 516.

4. "The attempt to debauch his own women servants was a strong act of cruelty; perhaps not alone sufficient to divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife's feelings. The attempt to make a brothel of his own house was brutal conduct, of which the wife had a right to complain." Popkin v. Popkin, I Hag. Ecc. 733; 3 Eng. Ecc. 325, 327.

Instances.—The cruel conduct must be such as to render the cohabitation of the parties unsafe or unendurable. Thus a husband frequently drunken, who chokes his wife, coarsely accuses her of unchastity, locks her up and threatens to smash her head with a brick, is guilty of such inhuman conduct as endangers her life.² repeated application of coarse epithets to a wife, accompanied once by actual bodily harm and once by a threat to take her life, was held to be cruelty.3 But mere smashing of dishes, threats to kick the wife out of doors, and grossly improper language were held insufficient to constitute legal cruelty.4 Pulling the hair out of a wife's head is not only extremely cruel, but evidence of delibera-Mere disregard of the marriage obligations is not cruelty;6 nor is want of affection; nor are slight differences and quarrels; nor is desertion; nor is failure to support; nor is refusal of sexual intercourse,11 though this may be an indignity;12 but excessive intercourse may be cruelty. 13 or intercourse when the wife's health is delicate.14 or where the husband has a venereal disease.15 immoral conduct is not; 16 nor is masturbation in the presence of the wife;17 but openly consorting with loose females may help to make out a case of cruelty. 18 Adultery and habitual intemperance are not;19 though drunkenness causing ill-treatment may be.20 Whipping a wife is cruelty,²¹ and so may be maliciously charging her with crime,22 or with unchastity,23 or maltreating her children.24

1. Quotations and cases supra, CRUELTY; Childs v. Childs, 49 Md. 509, 513-515; Poor v. Poor, 8 N. H 307, 316; Close v. Poor v. Poor, 8 N. H. 307, 316; Close v. Close, 25 N. J. Eq. 526, 529; Elmes v. Elmes, 9 Pa. St. 166, 167; Latham v. Latham, 30 Gratt (Va.) 307, 321.

2. Wheeler v. Wheeler, 53 Iowa, 511.

3. Freeman v. Freeman, 31 Wis. 235.

4. Close v. Close, 25 N. J. Eq. 526, 529.

5. Tyrrell v. Tyrrell (N. J. 1886), 2

Cent. Rep. 219.

6. Miller v. Miller, 43 Iowa, 325, 327. 7. Brainard v. Brainard, Brayt. (Vt.)

8. Fuller v. Fuller, 10 Neb. 144, 145.

9. Haskell v. Haskell, 54 Cal. 262, 263. 10. Haskell v. Haskell, 54 Cal. 262;

Peabody v. Peabody, 104 Mass. 195, 197. Cowles v. Cowles, 112 Mass. 298; D'Aguilar v. D'Aguilar, 1 Hagg. Ecc. 776; J. Steele v. Steele, 1 McArthur (D. C.), 505, 506; Southwick v. Southwick, 97 Mass. 327; Reid v. Reid, 21 N. J. Eq. 331, 332; Magill v. Magill, j Pittsb. (Pa.) 25; Gordon v. Gordon, 48 Pa. St. 226, 228; Eshbach v. Eshbach, 23 Pa. St. 343, 345.

12. Coble v. Coble, 2 Jones Eq. (N.

Car.) 392, 395.
18. Melvin v. Melvin, 58 N. H. 569, 571; cases supra, n. 29.

14. Shaw v. Shaw, 17 Com. 189, 196;

English v. English, 27 N. I. Eq. 71, 74.

579. 15. Popkin v. Popkin, 1 Hagg. Ecc. 733; 16. Popkin v. Popkin, I Hagg. Ecc., 735; 3 Eng. Ecc. 325, 327; Anon., 17 Abb. N. Cas. (N. Y.) 231; Holthoeffer v. Holthoeffer, 47 Mich. 259, 260; Canfield v. Canfield, 34 Mich. 519.

16. Miles v. Miles, 76 Pa. St. 357, 358.

17. W. v. W., 141 Mass. 495.

18. McClurg v. McClurg, 40 Mich. 493,

19. Haskell v. Haskell, 54 Cal. 262, 263;

Anon., 17 Abb. N. Cas. (N. Y.) 231. 20. See Marsh v. Marsh, 1 Swab. & T. 20. See Marsh v. Marsh, I Swab. & T. 312, 315; Power v. Power, 4 Swab. & T. 173; Waddell v. Waddell, 2 Swab. & T. 584; Hughes v. Hughes, 19 Ala. 307, 309; Coursey v. Coursey, 60 Ill. 186, 187; Lockridge v. Lockridge, 3 Dana (Ky.), 28; Bowie v. Bowie, 3 Md. Ch. 51; Allen v. Allen, 31 Mo. 479, 480; Mason v. Mason, I Edw. Ch. (N. Y.) 278.

21. Taylor v. Taylor, 76 N. Car. 433, 425, 438

435. 438. 22. Avery v. Avery, 33 Kan. 1; Nogees

v. Nogees, 7 Tex. 538, 545.

23. Kennedy v. Kennedy, 73 N.Y. 369, 374; Smith v. Smith, 40 N. J. Eq. 566; Bahn v. Bahn, 62 Tex. 518; Kelly v. Kelly, 18 Neb. 49.
24. Wallscourt v. Wallscourt, 11 Jur.

134, 135; supra, 11.7.

But mere provoking and exasperating conduct is not.1 cruelty necessarily for a husband to forbid his wife from going to church,2 or visiting her family or relatives.3 Nor is a bona fide groundless charge of crime4 or suit for divorce.5

Justifiable Conduct.—A party charged with cruelty may justify himself or herself by showing that the other party was equally to blame. But a husband cannot justify himself on the ground that

he was exercising his marital rights.

A husband has no right to whip his wife. By the old law he could give his wife "moderate correction;" but the rule now seems to be that he can use force for prevention, but never for correction.8

The law is for the relief of an oppressed party, and the courts will not interfere in quarrels where both parties commit reciprocal excesses and outrages.9 Violence inflicted in a mutual contest is not legal cruelty, 10 as in a case where a wife refused to give up to her husband his keys, and was thrown against the wall and bruised in the scuffle that ensued. 11 There is certain conduct that may be justified by the provocation; 12 but groundless or unreasonable

1. Coles v. Coles, 32 N. J. Eq. 547.

2. Lawrence v. Lawrence, 3 Page

(N. Y.), 267, 272. 3. Neeld v. Neeld, 4 Hagg. Ecc. 263, 269; D'Aguilar v. D'Aguilar, I Hagg. Ecc. 773; 3 Eng. Ecc. 329; Friend v. Friend, 33 Mich. 543; Shaw v. Shaw, 17 Conn. 189, 195; Fulton v. Fulton, 36 Miss. 517. "Another charge is, that her husband

for some years forbade her intercourse with her own family; it was not without hesitation that the court admitted the pleading this fact, for, though it may be a harsh exercise of a husband's authority, yet he may be justified in such a prohibition; though a woman may be amiable, her connections may not be so, and there may be many reasons to justify a husband in denying such an intercourse-though it may be harsh, it would be going too far for the court to interfere." Waring v. Waring, 2 Phillim. 132; 1 Eng. Ecc. 211,

4. Small v. Small, 57 Ind. 568.

5. Simons v. Simons, 13 Tex. 468, 475. 6. Knight v. Knight, 31 Iowa, 451, 459. See Prichard v. Prichard, 3 Swab. & T. 523; Kelly v. Kelly, L. R. 2 P. & D. 31, 523, Relly A. Relly, E. R. 11, G. 31, 59; Fulgham v. State, 46 Ala. 143, 145; Gholston v. Gholston, 31 Ga. 625, 635; Poor v. Poor, 8 N. H. 307, 313; Perry v. Perry, 2 Paige (N. Y.), 501, 503; Shackett

v. Shackett, 49 Vt. 195, 197.
7. See Bradley v. State, Walk. (Miss) 156, 157; Adams v. Adams, 100 Mass. 365, 370; Richards v. Richards, I Grant's

Cas. (Pa.) 389, 392.

8. Pearman v. Pearman, I Swab. & T.

601, 602.
"The old doctrine that the husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina." State v. Oliver, 70 N. Car. 60, 61; Taylor v. Taylor, 75 N. Car. 433, 435.

9. Durand v. Durand, 4 Mart. (La.) 14. See Latham v. Latham, 30 Gratt: 174. See Lath (Va.) 307, 321.

10. Soper v. Soper, 29 Mich. 305, 306.11. "There is no reason to impute any malignant intention, or any other intention, than that-of obtaining what he had a right to possess, and which was illegally withheld. A husband is not to be deprived of his marital rights because a wife pertinaciously resists them and in the course of that resistance encounters accidental injuries, which were never meant to be inflicted." Oliver v. Oliver, I Hagg.

to be inflicted. Onver v. Onver, 111488. Consist. 361; 4 Eng. Ecc. 429, 434.

12. Knight v. Knight, 31 Iowa, 451. 456; Hughes v. Hughes, L. R. 1 P. & D. 219; Waring v. Waring, 2 Phillim. 132, 133; I Eng. Ecc. 210, 211; Best v. Best, 1 Add. Ecc. 411, 423; 2 Eng. Ecc. 158, 163; Ecc. 411, 423; 2 Eng. Ecc. 158, 103; Johnson v. Johnson, 14 Cal. 459, 460; Von Glahn v. Glahn, 46 Ill. 134, 140; Lelande v. Jore. 5 La. Ann. 32; Childs v. Childs. 49 Md. 509, 513; Daiger v. Daiger, 2 Md. Ch. 335; Harper v. Harper, 29 Mo. 301; Coles v. Coles, 32 N. J. Eq. 547, 556; Poor v. Poor, 8 N. H. 307; Davisiones v. Davisiones v. Coles, 140; P. 144; Devaisones v. Devaisones, 3 Code R. 124; Bedell v. Bedell, 1 Johns. Ch. (N. Y.) 604; Reed v. Reed, 4 Neb. 335; Moulton jealousy is not sufficient provocation for bodily injury, 1 nor is bad temper.² And nothing could justify a husband in kicking his pregnant wife in the side,³ or in attempting to burn his wife alive,⁴ or in occasioning by his violence a premature delivery, or in refusing to his wife the common use of air, 6 or, in fact, in any acts which involve imminent danger to health or life.7 The discussion of iustifying conduct is in reality a branch of the subject of Recrimination, which is treated further on in this article.

The Allegations.—The charge of cruel conduct should be set forth in the bill of complaint substantially in the words of the statutes of the forum, and the material facts relied on should be set forth. in some States with considerable minuteness as to time, place, and circumstances, 10 in others quite generally, according to the practice of the court. 11 There should be a general allegation, as of cruel conduct during a certain time, 12 and special allegations of particular facts, such as infection with venereal disease. 13 If the bill is too

v. Moulton, 2 Barb. Ch. (N. Y.) 309; Richards v. Richards, 37 Pa. St. 225; Anon., 4 Desaus. Eq. (S. Car.) 04; Boyd v. Boyd, Harp Ch. (S. Car.) 144; Skinner v. Skinner, 5 Wis. 449. Otherwise the wife would have to do

nothing but misconduct herself, provoke ill treatment, and then complain. Waring v. Waring, 2 Phillim, 132, 133; 1 Eng. Ecc. 210, 211; Childs v. Childs, 49 Md. 509, 513.

In such case her remedy lies in her own hands: she must reform her ways. Knight

v Knight, 31 Iowa, 451, 456. 1. Holden v. Holden, 1 Hagg. Consist. 453; 4 Eng. Ecc. 452; Kirkman v. Kirk-

man, I Hagg. Consist. 409. 2. Eidenmuller v. Eidenmuller, 37 Cal.

364, 365; Coles v. Coles, 32 N. J. Eq.

304, 505, 557.
3. Westmeath v. Westmeath, 2 Hagg. Ecc. Sup; 1, 4 Eng. Ecc. 238, 274.
4. Best v. Best, 1 Add. Ecc. 411, 423; 2 Eng. Ecc. 158, 163, 164.
5. And see Waring v. Waring, 2 Phil-

lim. 132; I Eng. Ecc. 210.
6. Evans v. Evans, I Hagg. Consist.

35; 4 Eng. Ecc. 310, 316. 7. David v. David, 27 Ala. 222, 224;

Albert v. Albert, 5 Mont. 577.

"Though misconduct may authorize a husband in restraining a wife of her personal liberty, no misconduct of hers could authorize him in occasioning a premature delivery, or refusing her the use of common air." Evans v. Evans, I Hagg. Consist. 35; 4 Eng. Ecc. 310, 316. See also, on this point, Severn v. Severn,

3 N. C. Chanc. 431; Jackson v. Jackson, 8 N. C. Chanc. 499; King v. King, 28 Ala. 315; Gholston v. Gholston, 31 Ga. 625, 635; Shores v. Shores, 23 Ind. 546.

547; Thomas v. Taillen, 13 La. Ann. 127; Doyle v. Doyle, 26 Mo. 545; Gordon v. Gordon, 48 Pa. St. 226; Rutledge v. Rutledge, 5 Sueed (Tenn.), 554; Taylor v. Taylor, 11 Oreg. 303.

8. Horne v. Horne, 1 Tenn. Ch. 259,

260; Pennington v. Pennington, 10 Phila. 22; Schlichter v. Schlichter, 10 Phila. 11; Edwards v. Edwards, 9 Phila. 617; Gordon v. Gordon, 48 Pa. St. 226; Jones v. Jones, 66 Pa. St. 494; White v.

White, 84 N. Car. 340, 342.

9. A mere general allegation employing the words of the statute will not suffice. David v. David, 27 Ala. 222, 223; Hill v. Hill, 10 Ala. 527, 528; Lewis v. Lewis, 5 Mo. 278; Fellows v. Fellows, 8 N. H. 160; Harrison v. Harrison, 7 Ired. (N. Car.) 484; Wilson v. Wilson, 2 Dev. & B. Eq. 377; White v. White, 84 N. Car. 340. 342; Conn v. Conn, Wright Car. 340. 342; Conn v. Conn, Wright (Ohio), 563; Brown v. Brown, 2 R. I. 381; Wood v. Wood, I Tenn. Ch. 262, 263; Horne v. Horne, I Tenn. Ch. 265, 260; Hare v. Hare, 10 Tex. 355; Nogees v. Nogees, 7 Tex. 538, 542; Byrne v. Byrne, 3 Tex. 336; Wright v. Wright, 3 Tex. 168.

10. This is necessary in New Hampshire. Smith v. Smith, 43 N. H. 234; K. v. K., 43 N. H. 164, 165. See Walton v. Walton, 32 Barb. (N. Y.) 203.

11. Little particularity seems necessary in Vermont. Sanders v. Sanders, 25 Vt.

713. 714.
12. If there be simply a particular allegation, nothing else can be proved. Ford v.

Ford, 104 Mass, 198, 205, 206.

13. If there be a general allegation of cruelty, many particulars going to show the general conduct of the parties towards each other may be proved, but not all. K. v. K., 43 N. H. 164, 165. So that general the defect must be taken advantage of by special demurrer in some States: 1 though of course the generality of the bill may be waived and particulars demanded.² And the bill may generally be amended.3

The Proof.—The proof must correspond with the allegations general and specific: 4 under a general allegation, such as habitual cruelty, special facts besides those alleged may be proved. When only special facts are alleged, it is doubtful how far proof of general conduct is admissible. All the facts alleged need not be proved. but only sufficient to constitute a ground for divorce. The parties can testify by virtue of statutes, but not otherwise, and their confessions may be given in evidence. and declarations made at the time of the cruelty may be proved as part of the res gestæ. 10 bruises may be shown if connected with the defendant's conduct as evidence of its violence, 11 and drunkenness, abusive language, etc., may be shown to prove the intent.12

The Defences.—The defendant may deny that he was guilty of cruel conduct, or plead justification, recrimination, or condonation,

which are hereafter discussed. 13

proof of cruelty by infecting with a venereal disease was held inadmissible under a general allegation, and a particular allegation of cruelty by blows. Squires v. Squires, 3 Swab. & T. 541, 542. "In cases of such kind the attention cannot be confined to the particular act or acts alleged as a ground for a divorce, but the inquiry must necessarily involve the conduct of the parties to each other for the period during which it is alleged the cruelty took place." Doyle v. Doyle, 26 Mo. 545. 546, 547. See Briggs v. Briggs, 20 Mich. 34.

1. Hill v. Hill, 10 Ala. 527, 528; Breinig v. Breinig, 26 Pa. St. 161, 164; Butler v. Butler, I Pars. Cas. (Pa.) 329;

Steele v. Steele, 1 Dall. (Pa.) 409.

2. Leete v. Leete, 2 Swab & T. 568, 572; Squires v. Squires, 3 Swab. & T. 541, 542.

3. Bunyard v. Bunyard, 32 L. J. Mat.

Cas. 176; ante, V. (3).

4. David v. David, 27 Ala. 222, 223;

Miller v. Miller, 43 Iowa, 325, 327;

Edmond v. Edmond. 57 Pa. St. 232;

Whispell v. Whispell, 4 Barb. (N. Y.)

5. Reese v. Reese, 23 Ala. 785. 787; Wallscourt v. Wallscourt, II Jur. 134,

6. The cases last cited show a certain latitude, but in New Jersey the proof is Graecen v. Graecen, 2 N. J. Eq. 459.
7. Lockwood v. Lockwood, 2 Curt.
Ecc. 281; 7 Eng. Ecc. 114; David v.

David, 27 Ala. 222, 224; Coles v. Coles. 23 Iowa, 433.

8. Matthai v. Matthai, 49 Cal. 90. Not without statute. Manchester v. Manchester, 24 Vt. 649; post, X.
9. Saunders v. Saunders, I Rob. Ecc.

549, 558. Confessions not alone enough.

King v. King, 28 Ala. 316, 319.

10. See Lockwood v. Lockwood, 2 Curt. Dysart, I Rob. Ecc. 114, 121; Dysart v. Dysart, I Rob. Ecc. 106, 114, 470, 497; Goodrich v. Goodrich, 44 Ala. 670, 676; Phillips v. Kelley, 29 Ala. 628; Berdell v. Berdell, 80 Ill. 604, 606; Johnson v. Sherwin, 3 Gray (Mass.), 374, 375; Palmora, Cook, a Gray (Mass.), 474, 375; Palmora, Cook, a Gray (Mass.), 474, 1876b. er v. Crook, 7 Gray (Mass.), 418; Jacobs v. Whitcomb, 10 Cush. (Mass.) 225; Lamv. Whitcomb, 10 Cush. (Mass.) 225; Lambert v. People, 29 Mich. 71; Cattison v. Cattison, 22 Pa. St. 275; Gilchrist v. Bale. 8 Watts (Pa.), 355, 356, 357; McGowen v. McGowen, 52 Tex. 657; State v. Howard, 32 Vt. 380.

11. Dysart v. Dysart, 1 Rob. Ecc. 166, 120 Conduit v. Gordina Ale 606.

118; Goodrich v. Goodrich, 44 Ala. 670, 676; Berdell v. Berdell, 80 Ill. 604, 606. Even where the bruises were not seen on v. Jackson. 8 Grant (N. C.). 499, 502, 504.

12. Goodrich v. Goodrich, 44 Ala, 670, 676; Coursey v. Coursey; 60 Ill. 186, 187; Close v. Close, 25 N. J. Eq. 526, 529.

18. Party must allege and prove justified in the desirest except of the second course.

fication, if he desires to avail of it. Lockwood v. Lockwood, 2 Curt. Ecc. 281; 7 Eng. Ecc. 114; Williams v. Williams, L R. 1 P. & D. 178; Shaw v. Shaw, 2 Swab. & T., 515, 516.

(5) Desertion or Abandonment.—Abandonment or desertion of one party by the other to a marriage is quite commonly a cause for divorce under statutes in the United States and Great Britain. In some States it is a cause for both absolute and limited divorce;

in others, only limited divorces can be granted.1

Definition.—Desertion is a husband's or a wife's wilfully and wrongfully ceasing to cohabit with his wife or her husband. To establish desertion three things must be shown: 2 (1) Cessation from cohabitation continuing the necessary time; (2) the intention in the mind of the deserter not to resume cohabitation; and (3) the absence of the other party's consent to the separation, or conduct justifying the same. The mere fact that parties are living apart does not even raise a presumption of desertion,4 but voluntary living apart is in some States a separate cause for divorce.5

1. Desertion.—There was no divorce for desertion under the ecclesiastical law. Godol. Abr. 494. The statutes in the different States are differently expressed. They require the desertion to have continued from one to five years, and define the ground for divorce more or less fully. Thus the cause for divorce is in Alabama "voluntary abandonment from bed and board for two years next preceding the filing of the bill;" in California, "wilful desertion, or the voluntary separation of one of the married parties from the other, with intent to desert;" in Illinois, "when · one of the parties has wilfully deserted and absented himself or herself from the husband or wife without any reasonable cause for the space of two years;" in Louisiana, "abandonment;" in Maryland, "abandonment continued uninterruptedly for at least three years if it is deliberate and final, and if the separation of the parties be beyond any reasonable expectation of reconciliation;" in Massachusetts, "utter desertion continued for three consecutive years next prior to the filing of the libel;" in *Missouri*, "when a party shall have absented himself or herself without reasonable cause for the space of one year;" in New Jersey, "wilful, continued, and obstinate desertion for the term of three years;" in Ohio, "wilful absence;" in Pennsylvania, "wilful and malicious desertion and absence from the habitation of the other without a reasonable cause for and during the term of two years;" in Vermont, "wilful desertion for three consecutive years, and when either party has been absent and not heard of during that time." In *England*, "desertion without cause for two years and upwards." The quotations are taken from the latest revised laws. The effect of these statutes will be found to be substantially the same, except in such cases as that of the last

clause in the Vermont provision; for generally absence which raises a presumption of death is not desertion, because not wilful. Bodwell v. Bodwell, 113 Mass. 314. In Tennessee, the word "malicious" has been held to mean malicious in fact,-Rutledge v. Rutledge, 5 Sneed (Tenn.), 554, 556; Majors v. Majors, I Tenn. Ch. 264, 265; (enmity of heart,—Stewart v. Stewart, 2 Swan (Tenn.), 591. But in *Pennsylania*, merely malicious in law, or wilful. McClurg v. McClurg, 66 Pa. St. 366, 370. But in alleging desertion the cause for divorce should be set forth in the terms of the statute.

2. Sergent v. Sergent, 33 N. J. Eq. 204, 205; Thompson v. Thompson, I Swab. & T. 231, 234; Smith v. Smith, I Swab. & T. 359, 361; Benkert v. Benkert, Swab. & 1. 359, 301; Benkert v. Benkert, 32 Cal. 467, 470; Bennett v. Bennett, 43 Conn. 313, 318; Fulton v. Fulton, 36 Miss. 517, 525; Meldowney v. Meldowney, 27 N. J. Eq. 226, 229; Jennings v. Jennings, 13 N. J. Eq. 38, 39; McGowen v. McGowen, 52 Tex. 657, 666; Latham v. Latham, 30 Gratt. (Va.) 307, 322.

3. "Desertion is a breach of matrimonial duty, and is composed first of the actual breaking off of the matrimonial cohabitation, and secondly an intent to desert in the mind of the offender." Bailey v. Bailey, 21 Gratt. (Va.) 43, 47. As to the third requisite, see Cox v. Cox, 35 Mich.

461, 463. See also cases supra.
4. Jennings v. Jennings, 13 N. J. Eq. 38, 39; Cook v. Cook, 13 N. J. Eq. 263, 264. And separation begins to be desertion when the intent to desert arises. Reed v. Reed, Wright, 224; Pinkard v. Pinkard v. 266, 267.

Finkard, 14 Tex. 356, 357.

5. Living apart by consent is not a ground for divorce as desertion. Crow v. Crow, 23 Ala. 583. But if continued for five years is a cause for divorce in Kentucky and Wisconsin. Ky. G.S. 1881, So with refusal of marriage intercourse. Absence unheard of is not desertion unless the absent party's intent to desert is shown.2 and it is sometimes made a separate cause for divorce also. So a separation caused by a party's imprisonment is not desertion, because it may be involuntary; 4 and it has been made a separate cause for divorce.⁵ The above definition should be qualified by the statement that one who wrongfully drives his or her spouse

away is the deserter.6

The Separation or Cessation of Cohabitation.—One of the elements of desertion is that the parties must have separated; there must be a cessation of cohabitation. Ceasing to cohabit means ceasing to live together as husband and wife—ceasing to have a common home.7 It does not mean ceasing to have sexual intercourse.8 For an absolute and unjustified refusal to allow such intercourse has been held not to constitute desertion.9 and the fact that there was a single night of intercourse during the period of the wife's persistent refusal to make her home with her husband has been held not to break the continuity of her desertion. 10 But, on the other hand, an offer by a husband to take his wife

p. 522; Wis. R. S. 1878, s. 2356; Phillips

v. Phillips, 22 Wis. 256.

1. Refusing to have sexual intercourse is not desertion, as will be seen. Southwick v. Southwick, 97 Mass. 327, 329. Nor is it cruelty as has been seen. Cowles v. Cowles, 112 Mass. 298. But joining a society which believes such intercourse unlawful is a cause for divorce in Kentucky, Massachusetts, and New Hamp-shire. Ky. G. S. 1881, p. 522; Mass. G. S. 1882, p. 813; N. H. R. L. 1878, p. 432; Dyer v. Dyer, 5 N. H. 271; Fitts v. Fitts, 46 N. H. 184, 185. The Shakers are such a society. Dyer v. Dyer, 5 N. H. 271, 273.

2. Bodwell v. Bodwell, 13 Mass. 314,

3. Absence unheard of for seven years 8. Absence unneard of for seven years is a cause for divorce in Connecticut and Vermont, and for three years in New Hampshire. Conn. R. S. 1871, p. 188; Trubee v. Trubee, 41 Conn. 36, 39; Benton v. Benton, 1 Day, 111; Vt. R. S. 1880, s. 2362; N. H. R. L. 1878, p. 432; Fellows v. Fellows, 8 N. H. 160, 161. Under such statute it does not suffer to show that a statute it does not suffice to show that the absent party has not been heard from.

Fellows v. Fellows, 8 N. H. 160, 162.
4. Wolf v. Wolf, 38 N. J. Eq. 128;
Townsend v. Townsend, L. R. 3 P. & D. See Ahern v. Easterly, 42 129, 131.

Conn. 546.

5. Imprisonment.—See 19 Cent. Law J. 13, citing cases. Imprisonment is no cause for divorce, as desertion, supra, or as cruelty. Sharman v. Sharman, 18 Tex. 521, 525, 526. Though it may revive adultery after condonation. Hoffmire v. Hoffmire, 3 Edw. Ch. (N. Y.) 173, 175. But in many States it is a cause for divorce. (It is found as a cause for divorce in the statutes of thirty-one States.) some statutes mere conviction of felony is enough; under others the imprisonment must be for years, under others for life. "State prison" in a statute means the prison of that particular State. Masten v. Masten, 47 N. H. 52, 53. And unless the statute expressly so declares, imprisonment in another State is no cause for divorce. Klutts v. Klutts, 5 Sneed (Tenn.), 423, 424. The conviction must be final, the appeal waived or decided. Vinsant v. Vinsant, 49 Iowa, 639, 641. But see Cone v. Cone, 58 N. H. 152. The identity of the imprisoned party with the alleged husband or wife must be proved. Utsler v. Utsler, Wright (Ohio), 627. The statute does not apply when the imprisonment took place before its passage. Greenlaw v. Greenlaw, 12 N. H. 200, 203.

6. Discussed farther on.

7. Cudlipp v. Cudlipp, I Swab. & T. 229, 230; Hardenbergh v. Hardenbergh, 14 Cal. 327, 329; Belden v. Belden, 33 N. J. Eq. 94, 98, 99. 8. On this point see Southwick v.

Southwick, 97 Mass. 327, 329; Reid v. Reid, 21 N. J. Eq. 331, 333; Steele v. Steele, 1 McArthur (D. C.), 505, 506. As to the right and duty of intercourse. See post, HUSBAND AND

9. Southwick v. Southwick, 97 Mass.

327, 329. 10. Kennedy v. Kennedy, 87 III. 250, 254.

back into his house but not to his bed has been held not an offer to renew cohabitation.1

The question of support is not involved in the questions relating to desertion.² unless under the provisions of some particular statute.3 For if a husband refuses to live with his wife, he does not, by supporting her, prevent his separation from being desertion: 4 and his refusal to support her is not in itself desertion,5

nor does it change the character of a separation.6

The separation must continue uninterruptedly for the necessary time. 13 This time begins the separation existing when the intent to desert is formed. and runs on, no matter where the parties may be, so long as they are apart; 9 but it does not run during the complainant's consent to separation, 10 or while this is due to the complainant's fault.11 If cohabitation is renewed for a time and then the parties separate again, the periods before and after the renewal cannot be added together. 12 But though the parties are apparently together for a time, this is not a renewal of cohabitation if the intent to desert continues.7 Thus, a wife's return to the family home from time to time to look after the children and to attend to certain household duties, she intending all the while not to resume cohabitation, does not break the course of the desertion; 14 nor, under similar circumstances, does sexual intercourse. 15 On the other hand, a mere offer to resume cohabitation made by the deserting party in good faith and unconditionally and before the full statutory

1. Fishli v. Fishli, 2 Litt. (Ky.) 338, 341. 2. See McDonald v. McDonald, 4 Swab. & T. 242; Messenger v. Messenger, 56

Mo. 329, 335. 337.

3. As already shown, some statutes allow divorce only when the desertion is accompanied by refusal to support. Weigand v Weigand, 41 N. J. Eq. 202.

4. Magrath v. Magrath, 103 Mass. 577,

5. See Palmer v. Palmer, 22 N. J. Eq. 88, 90; Skean v. Skean, 33 N. J. Eq. 148, 151; Lewis v. Lewis, 6 N. J. Eq. 22, 26.

6. Bennett v. Bennett, 43 Conn. 313, 318. See Bourquin v. Bourquin, 33 N. J. Eq. 7, 8; Belden v. Belden, 33 N. J. Eq.

94, 98.
7. Holmes v. Holmes, 44 Mich. 555, 557; Gaillard v. Gaillard, 23 Miss. 152, 153; Meldowney v. Meldowney, 27 N. J.

Eq. 328, 329.

8. Hardenbergh v. Hardenbergh, 14 Cal. 654, 657, 658: Bennett v. Bennett, 43 Conn. 318; Fellows v. Fellows, 31 Me. 342, 343; Pinkhard v. Pinkhard, 14 Tex. 356, 357; Bailey v. Bailey, 21 Gratt. (Va.) 43, 47; Latham v. Latham, 30 Gratt. (Va.) 307, 322.

When parties had separated, the deser-

tion was held to have begun from the time when the husband wrote a letter, in which he said: "When, therefore, I now

cease to give you any further means, it is only done until such time as you are ready for such settlement, which is to fix a sum for your entire maintenance and expenses all in all, payable to you weekly by a third person. . . . Finally, I wish whatever settlement is made between us to be done by a legal divorce. The tie is broken and happiness can never be restored between us, for which reason it is much better to live as happy as possible together, and show a bad example to our children." Ahrenfeldt v. Ahrenfeldt separate, than to lead an unhappy life children." Ahrenfeldt v. Ahrenfeldt, I Hoffman (N. Y.), 47. 9. Ashbaugh v. Ashbaugh, 17 Ill. 476,

477; Fishli v. Fishli, 2 Litt. (Ky.)

10. Atkinson v. Atkinson, 67 Iowa, 364; Crow v. Crow, 23 Ala. 583, 583, 584; discussed infra.

11. Bowlby v. Bowlby, 25 N. J. Eq.

406, 407, 409.
12. Aldridge v. Aldridge, I Swab. & T. 88, 89; McCraney v. McCraney, 5 Iowa, 232; Gaillard v. Gaillard, 23 Miss. 152,

153.

13. See cases in next two notes, and infra, under Intent.

 Rie v. Rie, 34 Ark. 37, 39.
 Kennedy v. Kennedy, 87 Ill. 250, 254.

period of the desertion has elapsed, stops the desertion and prevents a divorce for this cause.1

The husband's home is the matrimonial home and the home of the wife.2 He has the right to say where they shall both live: and he may change his residence as often as his business, health. or pleasure demands.3 and she must follow: 4 if she does not, she deserts him,5—presupposing, of course, that the husband is not in fault, as hereafter shown. So, if the wife undertakes to change the family residence and the husband will not follow, she deserts him.6 It is not, however, an entirely arbitrary power which the husband may exercise in this matter; his acts must be reasonable and in good faith.7

The Intent.—The second element of desertion is the intent to desert: the defendant's absence must be wilful.8 it must be in-

1. The offer must be made in good faith. McClurg v. McClurg, 66 Pa. St. 366. 373. It must be unconditional. Messenger v. Messenger, 56 Mo. 329, 335. It must be made before the desertion has lasted long enough to constitute a cause for divorce. Cargill v. Cargill, I Swab. & T. 235, 237; Basing v. Basing, 3 Swab. & T. 516; Murray v. Murray, I Ses. Cas. S. (2d Ser.) 294; Muir v. Muir, 6 Ses. Cas. S. (4th Ser.) 1353; v. Muir, o Ses. Cas. S. (4th Ser.) 1353; Hanberry v. Hanberry, 29 Ala. 719, 721; Benkert v. Benkert, 32 Cal. 467; Fishli v. Fishli, 2 Litt. (Ky.) 337. That in such cases the desertion ceases, see Brookes v. Brookes, I Swab. & T. 326, 327; Gaillard v. Gaillard, 23 Miss. 152, 153; Walker v. Laighton, 31 N. H. 111, 117; Friend v. Friend, Wright (Ohio), 639, 640.

It is possible for a husband to live in the same house with his wife and yet so seclude himself from her as to desert her. Anshutz v. Anshutz, 16 N. J. Eq. 162, 163. See Van Arsdalen v. Van Arsdalen, 30 N. J. Eq. 359, 360, 363.

2. Firebrace v. Firebrace, L. R. 4

P. D. 63, 67; Hanberry v. Hanberry, 29 Ala. 719, 724; Davis v. Davis, 38 Ill. 180, 184; Williams v. Saunders, 5 Coldw. (Tenn.) 60, 79; ante, II. (7); also, Hus-BAND AND WIFE.

3. Cutler v. Cutler, 2 Brewst. (Pa.),

511, 513.

4. Hair v. Hair, 10 Rich. Eq. (S. Car.)

163, 175.

5. Hardenbergh v. Hardenbergh, 14 Cal. 654, 656; Kennedy v. Kennedy, 87 Ill. 250, 252; Babbitt v. Babbitt, 69 Ill. 277, 279; Walker v. Laighton, 31 N. H. 111, 116; Hunt v. Hunt, 29 N. J. Eq. 96, 97; Mayer v. Mayer, 30 N. J. Eq. 411, 412; cases cited last two notes.

6. See Frost v. Frost, 17 N. H. 251,

253.

7. "While we recognize fully the right of the husband to direct the affairs of his own house, and to determine the place of the abode of the family, and that it is in general the duty of the wife to submit to such determination, it is still not an entirely arbitrary power which the husband exercises in these matters. must exercise reason and discretion in regard to them. If there is any ground to conjecture that the husband requires the wife to reside where her health or her comfort will be jeopardied, or even where she seriously believes such results will follow which will almost necessarily produce the effect, and it is only upon that ground that she separates from him, the court cannot regard her desertion as continued from mere wilfulness." v. Powell, 29 Vt. 148, 150. See also Hardenbergh v. Hardenbergh, 14 Cal. 654, 656; Boyce v. Boyce, 23 N. J. Eq. 337, 338; Bishop v. Bishop, 30 Pa. St. 412, 415; Gleason v. Gleason, 4 Wis, 64, 66.

This is why he cannot compel his wife to go where her health and comfort will be jeopardized. Powell v. Powell, 29 Vt. 148; Gleason v. Gleason, 4 Wis. 64. And why a wife was held justified in refusing to live with her husband's relatives. Powell v. Powell v. And in refusing to follow him to a foreign country. Bishop

v. Bishop, 30 Pa. St. 412.

A husband's ante-nuptial promise that he will live with or near his wife's family is a nullity, and his wife must nevertheless follow him if he moves away. Hair v. Hair, 10 Rich. Eq. (S. Car.) 163, 175.

8. See McKay v. McKay, 6 U. C.

Chan. 380, 382; Orr v. Orr, 8 Bush (Ky.), 156, 159; Rudd v. Rudd, 33 Mich. 101, 102; Rogers v. Rogers, 18 N. J. Eq. 455; Goldbeck v. Goldbeck, 18 N. J. Eq. 42; Ruckman v. Ruckman, 58 How. Pr. (N. Y.) 278, 283; Thorpe v. Thorpe, 9 tended to be permanent, 1 and this intent must continue the statutory time. By "wilful." it is not meant that the desertion must be malicious in fact,3 but something more than mere indifference must be shown.4 The separation must be deliberate; and a separation where the husband's absence is due to imprisonment, or to sickness, or under circumstances where a presumption of death is raised.7 is therefore not desertion.

Again, if the party who has left, the other is looking forward to a renewal of cohabitation, as where he or she is absent on business.8 or where there are pending treaties for a renewal of cohabitation.9

there is no desertion.10

So, if the intent to desert does not exist when the separation takes place, the desertion begins only from the time that such intent is formed.11 So it usually ceases when the intent to desert stops. 12 But if it exists when the separation takes place, the desertion does not cease because the deserting party becomes insane 13 or is imprisoned.14

In the case of a separation, that party is the deserter who has the intent to desert, no matter which one leaves the matrimonial home. 15 A party who drives the other away is the deserter; 16 and

R. I. 57; McClurg v. McClurg, 66 Pa. St. 366 371; Besch v. Besch, 27 Tex.

390, 392.
1. Bennett v. Bennett, 43 Conn. 313, 318; Fulton v. Fulton, 36 Miss. 518, 525;

Orr v. Orr. 8 Bush (Ky.), 156; Ruckman v. Ruckman, 58 How. Pr. (N. Y.), 278. 2. Meldowney v. Meldowney, 27 N. J. Eq. 328, 329.

3. Benkert v. Benkert, 32 Cal. 467, 470; McClurg v. McClurg, 66 Pa. St.

4. Majors v. Majors, I Tenn. Ch. 264,

265. 5. Townsend v. Townsend, L. R. 3 P. & D. 129, 131; Porritt v. Porritt, 18 Mich. 420, 424; Wolf v. Wolf, 38 N. J. Eq. 128; Sharman v. Sharman, 18 Tex.

6. See Keech v. Keech, L. R. r P. & D. 641, 642.

7. Bodwell v. Bodwell, 113 Mass. 314,

315. 8. Aldridge v. Aldridge, 1 Swab. & T. 88, 89; Williams v. Williams, 3 Swab. & T. 517.

9. Rudd v. Rudd, 33 Mich. 101, 102. 10. See also Fulton v. Fulton, 36 Miss.

Still, a woman's refusal to cohabit "under existing circumstances," her husband being poor, is a permanent enough intent. See Messenger v. Messenger, 56 Mo. 329,

335-337. 11. Reed v. Reed, Wright, 224, 225. See Holston v. Holston. 23 Ala. 777; Conger v. Conger, 13 N. J. Eq. 286; Brinkerhoff v. Brinkerhoff, 30 N. J. Eq. 132; Ahrenfeldt v. Ahrenfeldt, I. Hoff. Ch. (N. Y.) 47; Pinkhard v. Pinkhard, 14 Tex. 356, 357. In England, this does not seem to be the law; there the separation must originally be wrongful. Fitzgerald v. Fitzgerald, L. R. 1 P. & D. 694, 698. See also, to the contrary, Cooper v. Cooper, 17 Mich. 205, 210.

In such cases, it generally dates from some refusal of a request for cohabitation. See Crossman v. Crossman, 33 Ala. 486, 487. And once shown, it is presumed to continue. Bailey v. Bailey.

21 Gratt. (Va.) 43, 47.

12. Mallinson v. Mallinson, L. R. I P. D. 93, 94.

13. Douglas v. Douglas, 31 Iowa, 421,

14. Hews v. Hews, 7 Gray (Mass.), 279, 280.

15. Palmer v. Palmer, 22 N. J.Eq. 88,

16. A wife may drive her husband away. See Gray v. Gray, 15 Ala. 779, 784; Hesler v. Hesler, Wright (Ohio), 210, 221. A husband who gets his wife to go off on a visit, and then disappears, deserts her, though she has apparently left him. Cossan v. Cossan, Wright, 147. So if he gets rid of her by force. Harding v. Harding, 22 Md. 337, 344; Skean v. Skean, 33 N. J. Eq. 148, 151. So if she has to leave on account of his bad conduct. Warner v. Warner, 54 Mich. 492. See also Fera v. Fera, 98 Mass. 155, 158; Lea v. Lea, 99 Mass. 493, 495; Levering so is the party who refuses to receive back one whose desertion has begun, but who has repented and asked to be taken back.1

Effect of Consent.—A separation by the mutual consent of the parties is not desertion in either.² But either party may revoke such consent; and if the other party when applied to refuses to renew cohabitation, it is from the time of such refusal desertion on the part of such party.3 The consent need not be expressed; it may be inferred from conduct.4

v. Levering, 16 Md. 213, 219; Starkey v. Starkey, 21 N. J. Eq. 135, 136; Marker v. Marker, 11 N. J. Eq. 256, 258; Sandford v. Sandford, 32 N. J. Eq. 420; Grove v. Grove, 37 Pa. St. 443, 447. But see Sowers v. Sowers, 88 Pa. St. 173, 178. As where he brings his mistress into his house. Morris v. Morris, 20 Ala. 168, 172. Or falsely charges her with infidelity. Kinsey v. Kinsey, 37 Ala. 393, 395. Or by other improper conduct. Shrock v. Shrock, 4 Bush (Ky.), 682, 684.

1. Cargill v. Cargill, I Swab. & T. 235, 237; McClurg v. McClurg, 66 Pa. St. 366, 373; Messenger v. Messenger, 56 Mo. 329, 335; Hanberry v. Hanberry, 29 Ala. 719, 721; Benkert v. Benkert, 32 Cal. 467, 470; Gaillard v. Gaillard, 23 Miss. 152, 153; Hankinson v. Hankinson, 33 N. J. So if the separation has Eq. 66, 90. been for cause, and the cause has been removed, the party who refuses to renew cohabitation deserts the other,—a case where a husband having been a drunk-ard reformed. Hills v. Hills, 6 Law

Reporter, 174, 175.
2. Thompson v. Thompson, I Swab. & T. 231, 234; Ward v. Ward, I Swab. & T. 185; Townsend v. Townsend, L. R. 3 P. & D. 129, 131; Buckmaster v. Buckmaster, L. R. 1 P. & D. 713; McKay v. McKay, 6 U. C. Chan. 380; Crow v. Crow, 23 Ala. 583, 584; Gray v. Gray, 15 Crow, 23 Ala. 583, 584; Gray v. Gray, 15 Ala. 779; Benkert v. Benkert, 32 Cal. 467, 470; Morrison v. Morrison, 20 Cal. 431; Secor v. Secor, 1 McArthur (D. C.), 630, 631; McCoy v. McCoy, 3 Ind. 555; Lynch v. Lynch, 33 Md. 328; Lea v. Lea, 8 Allen (Mass.), 418; Cox v. Cox, 35 Mich. 461, 463; Rudd v. Rudd, 33 Mich 101, 102; Cooper v. Cooper, 17 Mich. 205; Fulton v. Fulton, 36 Miss. 517, 525; Simpson v. Simpson, 31 Mo. 24, 26; Goldbeck, v. Goldbeck, 18 N. I. 24, 26; Goldbeck v. Goldbeck, 18 N. J. 24, 20, Gothelet v. Gothelet, 18 N. J. Eq. 42; Hankinson v. Hankinson, 33 N. J. Eq. 66, 70; Moores v. Moores, 16 N. J. Eq. 275; Ingersoll v. Ingersoll, 49 Pa. St. 249; Van Leer v. Van Leer, 13 Pa. St. 211, 213; Smith v. Smith, 3 Phila. 489; McGowen v. McGowen, 52 Tex. 657, 666; Latham v. Latham, 30 Gratt. (Va.) 307, 322; McCormick v. McCormick, 19 Wis. 172. 3. Crow v. Crow, 23 Ala. 583, 584; Hankinson v. Hankinson, 33 N. J. Eq. 66, 70; Schanck v. Schanck, 33 N. J. Eq. 363, 367; Conger v. Conger, 13 N. J. Eq. 286; Walker v. Laighton, 31 N. H.

111, 117. 4. See Gray v. Gray, 15 Ala. 779, 784; Gillinwaters v. Gillinwaters, 28 Mo. 60, Thus, consent may be inferred when the husband has acted as one would act who wished his wife to stay away long enough to get a divorce for desertion. Cornish v. Cornish, 23 N. J. Eq. 208, 209. And a wife was refused a divorce because she had expressed a wish to be rid of her husband, who had left her. Hesler v. Hesler, Wright, 210, 211. In this case the court thought that by refusing to support her husband she had driven him off but if one party does not do anything to induce the other to leave, and is simply glad of the desertion, there is not such consent as would prevent a divorce. Guembell v. Guembell, Wright, 226, 227. And see Farrell v. Farrell, Wright (Ohio), 455. But see 5m. & T. 359, 360, 361. But see Smith v. Smith, I Swab.

When a wife in anger told her husband to go his way and she would go hers, but immediately retracted and begged him to stay, she was held not to have consented to his desertion. Schanck v.

Schanck, 33 N. J. Eq. 363, 367.

Consent to separation is proved by an executed deed of separation. master v. Buckmaster, L. R. I P. & D. 713, 714; Crabb v. Crabb, L. R. I P. & P. & D. 176, 177; Parkinson v. Parkinson, L. R. 2 P. & D. 25, 26. But even in such cases either party may demand a renewal of cohabitation, and the party refusing deserts the other. See Hills v. Hills, 6 Law Reporter, 174, 175; Miller v. Miller, 1 N. J. Eq. 386, 390, 391. But by merely accepting support from her separated husband a wife does not consent. McDonald v. McDonald, 4 Swab. & T. 242, 243; Yeatman v. Yeatman, L. R. 1 P. & D. 489, 490. Nor does a husband by supporting a separated wife. See Magrath v. Magrath, 103 Mass. 577, 579; Goldbeck v. Goldbeck, 18 N.

Justified Separation.—One party to a marriage is justified in leaving the other (1) by the latter's consent, express or implied: 1 (2) by such conduct on the part of the other as is, as against such other, a cause for divorce; 2 and perhaps (3) by such conduct on the part of the other as is cruel and outrageous, though not amounting to a cause for divorce.3

The allegations must set forth the desertion substantially in the phraseology of the particular statute; 4 and the circumstances of the desertion must also be stated with some particularity. But the law is not as strict in regard to desertion as it is with regard to

adultery and cruelty.

The proof must substantially conform with the allegations, and

J. Eq. 42, 43; Sargent v. Sargent, 36 N.

J. Eq. 644. 645.

1. Justification.—See note 4, page 804.

2. Yeatman v. Yeatman, L. R. r P. & D. 489, 491; Grove v. Grove. 37 Pa. St.

443, 447; cases infra; post, IX.
3. Lyster v. Lyster, 111 Mass. 327.
See Hardin v. Hardin, 17 Ala. 250, 253, 254; Kinsey v. Kinsey, 37 Ala. 393, 395; Naulet v. Dubois, 6 La. Ann. 403, 404; Gillinwaters v. Gillinwaters, 28 Mo. 60, 61; Laing v. Laing, 21 N. J. Eq. 248; Cornish v. Cornish, 23 N. J. Eq. 208, 209; People v. Mercein, 8 Paige (N. Y.), 47, 68. Bishop considers that this is bad law. I Mar. & Div. §§ 796-799. The solution of the difficulty seems to lie in limiting this rule to conduct from which the husband's desire to be rid of her may be inferred, as above discussed.

But the usual and correct rule is, that in the absence of consent, express or implied, one party is justified in leaving the other only by conduct which would justify a suit for divorce. Grove v. Grove, 37 Pa. St. 443. 447. See Bryan v. Bryan, 34 Ala. 516, 519: Pierce v. Pierce, 33 Iowa, 238, 240; Childs v. Childs, 49 Md. 509. 514; Weigand v. Weigand, 41 N. J. Eq. 202; Eshbach v. Eshbach, 23 Pa. St. 343, 345; Gordon v. Gordon, 48 Pa. St. 220. Thus one party may leave the other for such other's adultery or cruelty. Yeatman v. Yeatman, L. R. I P. & D. 489, 491. Likewise during a suit for divorce. Doyle v. Doyle, 26 Mo. 545, 550. A wife need not live with her husband's mistress. Weigand v. Weigand, 41 N. J. Eq. 202. But one party cannot leave the other because such other has fits,-Neff v. Neff, 20 Mo. App. 182; or will not support,—Skean v. Skean, 33 N J. Eq. 148. 151; Bennett v. Bennett, 43 Conn. 313, 318; or will not occupy the same bed,—Reid v. Reid, 21 N. J. Eq. 331, 333; Eshbach v. Eshbach, 23 Pa. St. 343,

345; or gambles,-Sandford v. Sandford. 32 N. J. Eq. 420, 422; or is poor,—Palmer v. Palmer, 22 N. J. Eq. 88, 90; or is a drunkard,—Hesler v. Hesler, Wright (Ohio), 210, 211; or is charged with being guilty of crime (this being no cause for divorce), -Foy v. Foy, 13 Ired. (N. Car.) 90, 96; or, in case of a wife, because her husband will not make the servants mind her, -- Harris v. Harris, 31 Gratt. (Va.) 13, 22; or will not live with her father, -- see Mayer v. Mayer, 30 N. J. Eq. 411, 412; or allow her son to visit her,—Fulton v. Fulton, 36 Miss. 517, 528; or allow her to go to church,—Lawrence v. Lawrence, 3 Paige (N. Y.), 267, 272; or because she fears having children,—Leavitt v. Leavitt, Wright (Ohio), 719; or because he alone cannot satisfy her sexual desires, -Milli-

ner v. Milliner, Wright (Ohio), 138.
4. Allegations.—See Gray v. Gray, 15 Ala. 779, 782; Pinkney v. Pinkney, 4 G. Greene (Iowa), 324; Phelan v. Phelan, 12 Fla. 449; Huston v. Huston, 63 Me. 189; Freeland v. Freeland, 19 Mo. 354; Hancock v. Hancock, 5 N. H. 239, 240; Kimball v. Kimball, 13 N. H. 222; Stone v. Stone, 25 N. J. Eq. 445; Cass v. Cass, 31 N. J. Eq. 626; Schlicter v. Schlicter, 10 Phila, 11; Stewart v. Stewart, 2 Swan, 591; Hare v. Hare, 10 Tex. 355, 359; Ward v. Ward, 20 Wis. 252.

Thus, an allegation of "wilful desertion for wards the same and the same a

tion for more than one year" is not sufficient, under a statute requiring "wil-

ful, obstinate, and continued desertion "

Phelan v. Phelan, 10 Fla. 449.

Nor is "unnecessarily and without sufficient cause" sufficient for "without sufficient cause and without the assent.

Hare v. Hare, 10 Tex. 355, 359.
Nor is abandonment "more than three years ago" abandonment "for three years together." Hancock v. Hancock,

5 N. H. 239, 240. 5. See Hare v. Hare, 10 Tex. 355; Stewart v. Stewart, 2 Swan, 591.

a good prima facie case of legal desertion must be made out. The separation² and the intent to desert ³ must therefore always be shown by the complainant, but under the more prevalent view the justification for the separation is a matter of defence, and must be made out by the defendant.4 The desertion may be proved by a great variety of circumstances,5 and under statutes the parties may in general testify themselves.6

The Defences.—The defendant may deny the separation or the intent to desert, or, confessing these, may make pleas which are substantially those of connivance, collusion, condonation, or re-

crimination.10

- (6) Habitual Drunkenness.—As has already been shown, drunkenness is not in itself a cause for divorce as cruelty, 11 but by special statutes it is in itself, if habitual, a separate ground for divorce, in some States justifying absolute divorce and in some only limited divorce.12
- 1. Proof. See Carter v. Carter, 62 Ill. 13. Frool.—See Carter v. Carter, v. 2 III. 439, 447; Rudd v. Rudd, 33 Mich. 101, 102; Bodwell v. Bodwell, 113 Mass. 314; Stone v. Stone, 25 N. J. Eq. 445; Leaning v. Leaning, 25 N. J. Eq. 241; Turney v. Turney, 4 Edw. Ch. (N. Y.) 566; see

post, IX.
 2. See Cook v. Cook, 13 N. J. Eq.
 263; Morrison v. Morrison, 20 Cal. 431,

3. See Friend v. Friend, Wright (Ohio). 639; Brainard v. Brainard, Wright

(Ohio), 634.
4. See Thompson v. Thompson, I Swab. & T. 231; Smith v. Smith, I Swab. & T. 359; Crossman v. Crossman, 33 Ala. 486; Jennings v. Jennings, 13 N. J. Eq. 38; McGowen v. McGowen, 52 Tex. 657; Benkert v. Benkert, 32 Cal. 467. 470; Orr v. Orr, 8 Bush (Ky.) 156; Taydov. 470; Orr. Bush (Ny.) 150; 12y-lor v. Taylor, 28 N. J. Eq. 207; Meldowney v. Meldowney, 27 N. J. Eq. 328; Besch v. Besch, 27 Tex. 390.

The intent being once proved, its continuance is presumed. Gray v. Gray, 15

Ala. 779, 784; Bailey v. Bailey, 21 Gratt.

(Va.) 43, 47.

5. Gregory v Pierce, 4 Met. (Mass)

478.
"A husband's desertion may be proved by a great variety of circumstances leading with more or less probability to that conclusion; as, for instance, leaving his wife with the declared intention never to return (see also Guembell v. Guembell, Wright, 226); marrying another woman or otherwise living in adultery abroad (see also Smith v. Smith, 1 Swab. & T. 357, 360); absence for a long time, not being necessarily detained by his occupation or business, or otherwise (Ahrenfeldt v. Ahrenfeldt, I Hoff. Ch. (N. Y.)

47); making no provision for his wife or 47); making no provision for his whe of family, being of ability to do so (see also Amsden v. Amsden, Wright, 66); James v. James, 58 N. H. 266; providing no dwelling or home for her (see also Cudlipp v. Cudlipp, I Swab. & T. 229, 230); or prohibiting her from following him (see also Palmer v. Palmer, 22 N. J. Eq. 88, 91); and many other circumstances." Gregory v. Pierce, 4 Met. (Mass.) 478, per Shaw, C. J.

6. See post, X. The declarations of the parties at the time of the separation are evidence as part of the res gestæ to show the intent. Fulton v. Fulton, 36 Miss. 517, 527. So are subsequent admissions of the parties evidence. Ward v. Ward, 29 Ga. 281; McCoy v. McCoy, 3 Ind. 555. 7. Defences.—See post, IX.

Corruptly consenting to or securing the desertion. Cox v. Cox, 35 Mich. 461, 463; Cassan v. Cassan, Wright (Ohio), 147.
8. Complainant's assenting to the de-

sertion for the purpose of securing a divorce. Smith v. Smith, I Swab. & T.

359, 360. 9. An

An intermediate pardon and renewal of cohabitation. Gaillard v Gail-

lard, 23 Miss. 152, 153

10 A cause for divorce against the complainant. Grove v Grove, 37 Pa. St 443, 447

11. Drunkenness. - Note under CRU-

ELTY, ante
12. Most of the statutes state the cause simply as "habitual drunkenness;" some require it to have been acquired after marriage; some to continue one, two, or three years. The Kentucky statute connects it with "wasting of estate," which includes wasting of time and Definition.—There must be both drunkenness and a habit. Drunkenness is in this sense the effect of alcoholic liquors, not of opium¹ or chloroform.² A habit is the frequent and regular occurrence of excessive indulgence,³ or getting drunk whenever exposed to temptation,⁴ or being usually drunk in business hours,⁵ or being drunk for twelve and fifteen days at a time, four or five times each year for fifteen years, and being driven to drink by any excitement.⁶ Sometimes the statute requires the habit to have continued for a certain number of years.⁷ If the statute is silent in this respect, it perhaps makes no difference whether the habit was formed before or after marriage, though this proposition is open to grave doubt.⁸ But the habit must, it seems, be of such a character as to render the marriage state intolerable.⁹

The allegations need not contain particular facts; it is sufficient, when the statutory clause is "habitual drunkenness," to allege it in those words without amplification. Still, it is always better to

make the allegations too full than too general.

The *proof* in such cases does not involve any particular difficulties. ¹¹ What is habitual drunkenness is a question of law. ¹² Witnesses can testify only to particular facts. ¹³ So that expert testimony is inadmissible. ¹⁴ And the proof should correspond with the allegations. ¹⁵

(7) Refusal to Support.—As has already been shown, refusal to support is not a cause for divorce, as cruelty, ¹⁶ or as desertion; ¹⁷ but it is made a separate ground for divorce in many States, sometimes alone and sometimes connected with desertion or bad treat-

health, when that is the man's capital. McKay v. McKay, 18 B. Mon. (Ky.) 8, 9; Shuck v. Shuck, 7 Bush (Ky), 806; the Kentucky statute with cruelty. In other respects the same results are found under the different statutes. See Rose v. Rose, 9 Ark. 507, 516; Mahone v. Mahone, 19 Cal. 627, 628; Burns v. Burns, 13 Fla. 369, 376; Harmon v. Harmon, 16 Ill. 85, 89; Richards v. Richards, 19 Ill. App. 435; McKay v. McKay, 18 B. Mon. (Ky.) 8, 9; Leake v. Linton, 6 La. Ann. 262; Werner v. Kelly, 9 La. Ann. 60; Walton v. Walton, 34 Kan. 195; Blaney v. Blaney, 126 Mass. 205, 206; Magobay v. Magobay, 35 Mich. 210; Porritt v. Porritt, 16 Mich. 140, 141; Golding v. Golding, 6 Mo. App. 602; Ryan v. Ryan, 9 Mo. 539, 543; Kempf v. Kempf, 34 Mo. 211, 214; Batchelder v. Batchelder, 14 N. H. 380, 381; Stevens v. Stevens, 8 R. I. 557, 559.

1. Barber v. Barber, 14 Law Reporter,

375.
2. This is a natural inference from case last cited.

Golding v. Golding, 6 Mo. App.
 See also Brown v. Brown, 38 Ark.
 324-

4. Walton v. Walton, 34 Kan. 195; Magobay v. Magobay, 35 Mich. 210.

5. Mahone v. Mahone, 19 Cal. 627, 628. But a man may be a habitual drunkard and yet not be drunk except out of business hours. Richards, 19 Ill. App. 435.

6. Blaney v. Blaney, 126 Mass. 205, 206,

7. Rose v. Rose, 9 Ark. 507, 516; also supra n. 12, page 806.

8. See Porritt v. Porritt, 16 Mich. 140,

9. Rose v. Rose, 9 Ark. 507, 516.

Burns v. Burns, 13 Fla. 369, 376;
 Golding v. Golding, 6 Mo. App. 602.
 See post, XI.

12. See cases cited supra, nn. I-9

13. Batchelder v. Batchelder. 14 N. H.
180, 381.
14. Golding v. Golding, 6 Mo. App.

15. Batchelder v. Batchelder, 14 N. H.

- 15. Batchelder v. Batchelder, 14 N. H. 380, 381.
- 16. Refusal to Support.—Peabody v. Peabody, 104 Mass. 195, 197; ante, VI. (4).
- 17. Mandigo v. Mandigo, 15 Vt. 786 ante, VI. (5).

ment. In some States it is a cause for absolute and in some for limited divorce.

Definition.—The refusal or neglect to support must be wilful,² and must be such as leaves the wife destitute of the common necessaries of life, or such as would leave her so destitute but for the charity of others.³ And the refusal must be of something which the husband has or might get;⁴ mere honest ability to support could never be a ground for divorce.⁵

The allegation may be in the general terms of the statute.

The proof of particular facts may be made under the general allegation. The husband's ability to provide must be affirmatively shown

1. The statutes create a distinct cause for divorce. Washburn v. Washburn, 9 Cal. 475, 477. They read in various ways. Thus, in California, "wilful neglect is the neglect of the husband to provide for the wife the common necessaries of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy, or dissipation;" in Indiana, it is "neglect to support his wife and family for two years;" in Kansas, "gross neglect of duty;" in Massachusetts, "when a husband, being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her;" in New Hampshire, "when a husband has left his wife without support for three years."

"Gross, wanton, or cruel" must be given effect; and under statutes using these words mere failure to support, though able, seems not sufficient to justify a divorce. "The facts were in substance, that the petitioner was in feeble health, and had two children, of whom the petitioner was the father. The petitioner was without property, but was able, by his labor, to support his family;" but he left them, and did nothing for them. Yet a divorce was refused. Lennings of Jennings of Jen

Jennings v. Jennings, 16 Vt. 607.

And so where, though the husband does nothing, his family gets along nicely by their own efforts, his conduct is not wanton or cruel. Peabody v. Peabody, 104 Mass. 195, 197; Holt v. Holt, 117

Mass. 202.

The effect of the various statutes is, however much the same, as the following cases will help to show: Washburn v. Washburn, 9 Cal. 475; Devoe v. Devoe, 51 Cal. 543; Baker v. Baker, 82 Ind. 146; Smith v. Smith, 22 Kan. 699; Peabody v. Peabody, 104 Mass. 195; Holt v. Holt. 117 Mass. 202; Brown v. Brown, 22 Mich. 242; James v. James, 58 N. H. 266; Davis v. Davis. 37 N. H. 191; Fellows v. Fellows, 8 N. H. 160; Cram v. Cram, 6 N. H. 87; Ahrenfeldt v. Ahrenfeldt, 1 Hoff. Ch. (N. Y.) 47; Thrope v.

Thrope, Wright (Ohio), 763; Hurlburt v. Hurlburt, 14 Vt. 561, 562; Mandigo v. Mandigo, 15 Vt. 607; Farnsworth v. Farnsworth, 55 Vt. 555; Keeler v. Keeler, 24 Wis. 522; and cases cited below.

2. Cram v. Cram, 6 N. H. 87, 88;

Cram v. Cram, 6 N. H. 87, 88;
 Smith v. Smith, 22 Kan. 699, 701, 702;
 Peabody v. Peabody, 104 Mass. 195, 197.
 Washburn v. Washburn, 9 Cal. 475,

476. The court says: "The parties were married several years ago, and lived together until about eleven months preceding the application. The defendant is an able-bodied man, a seaman by occupation, of idle habits, and an occasional tippler; he has not made any provision for the support of his wife for the last four years, but during this period she has supported herself by her own earnings; and in the opinion of witnesses, he might have obtained employment as a first or second officer of a ship, at wages from forty to eighty dollars per month." no divorce was allowed, because she had been able to support herself nicely.

4. The husband must be of sufficient ability to support his wife. Washburn v. Washburn o, Gal. 475; Davis v. Davis, 37 N. H. 191, 194. He must have property or means; capacity to work and make money is not enough, except under the California civil code. Washburn v. Washburn, 9 Cal. 475; F. v. F., I N. H. 198; Fellows v. Fellows, 8 N. H. 160, 162.

When a husband decamped with all his wife's property, leaving her not even a day's support, and refused for months to support her, she was granted a divorce. Hurlburt v. Hurlburt. 14 Vt. 561, 562.

5. If husband's failure be due to mental or physical weakness, it is no cause for divorce. Baker v. Baker, 82 Ind. 146.

6. Brown v. Brown, 22 Mich. 242, 244. 7. Case last cited. But neglect to provide, being of ability, was held no proof of neglect to provide on account of idleness. Devoe v. Devoe, 51 Cal. 543,

8. James v. James, 58 N. H. 266.

(8) Crime and Imprisonment.—The effect of imprisonment has been already discussed. But some statutes make crime of various degrees a separate cause for divorce.2 These statutes do not seem to have given rise to any questions, though it has been held, under one of them, that it is not "gross misbehavior" for a husband to have a deep platonic affection for a woman other than his wife.3

(9) Insanity.—Insanity existing at the time of a marriage is a ground for the invalidity thereof, but insanity arising after marriage is not a cause for divorce under any other head, in the absence of special statute; and such a statute seems to exist in only

one State.6

(10) Obtaining a Divorce in Another State.—As has been shown, one person may be divorced by a decree and the other still be married.7 To obviate this condition of things by statute in some States, a divorce may be granted any person whose spouse has ob-

tained a divorce in another State.8

VII. The Notice To or Process Against the Defendant.—(1) The Kinds and Necessity of Notice, Generally.—As has already been somewhat fully shown, it is considered contrary to natural justice to proceed to the determination of a suit without giving both sides an opportunity to be heard, and therefore the statutes of all States provide for process to be issued to summon resident defendants into court, and for some kind of notice to be given to non-residents.9 We have also seen that if the statutes of the State on this subject are not conformed to, a decree of divorce will be void:10 and if they are conformed to, the decree will be valid within the State. 11 but valid or void without the State, in accordance with the

1. Ante, under DESERTION, n. 5, page

2. "Extremely vicious conduct" in Maryland; "gross misbehavior and wickedness" in Rhode Island; "a crime against nature" in Alabama; "sodomy and bestiality" in England; "an infamous crime involving the violation of conjugal duty, and punishable by imprisonment" in Connecticut; "fleeing from a charge of crime, the guilt being proved." in Louisiana.

3. Stevens v. Stevens, 8 R. I. 557, 559.

4. Rawdon v. Rawdon, 28 Ala. 565, 567; Ward v. Dulany, 23 Miss. 410, 414. See ante I. (4); post, NULLITY SUITS. 5. Hamaker v. Hamaker, 18 Ill. 139,

149; Baker v. Baker, 82 Ind. 146.

6. Arkansas Dig. 1874, s. 2195.
It is often called a cause for divorce, though only a cause for nullity. Miss. R. S. 1880, \$ 1155, 10; Ga. R. L. 1878, s. 1711; ante, I. (4), notes. Westbrook, 27 Ga. 102, 106. Brown v.

7. Ante, under JURISDICTION, II. (9),

notes.

8. See R. S. Ohio, 1880. § 5689; Cook, 9, 12, 13; Ditson v. D v. Cook, 14 N. W. Rep. 33, 37; s. c., 56 108, 109; ante, II. (9).

Wis. 195; Wright v. Wright, 24 Mich,

480, 481.

9. Process and Notice.—Ante, under JURISDICTION; see notes under II. (9).

10. "If a wife is living apart from her husband without sufficient cause, his domicile is in law his domicile; and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicile, after reasonable notice to her, either by personal service or by publication in accordance with its laws, is valid, although she never in fact resided in the State. But in order to make the divorce valid, either in the State in which it is granted or in another State, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first State requires." Cheely v. Clayton, III U. S. 701. See also Townsend v. Townsend, 21 Ill. 540.

But no notice need be given in the case of legislative divorces. Maynard

v. Hill, 2 Wash. 3. 321. 11. Niboyet v. Niboyet, L. R. 4 P. D. 1, 9, 12, 13; Ditson v. Ditson, 4 R. I. 87.

rules of international and interstate law.1 There are thus two kinds of notice:2 (1) Notice by actual service of process within the jurisdiction of the court, which gives the court jurisdiction over the person of the party so served; and (2) notice by publication, advertisement, through the post-office, etc., which gives the court no jurisdiction in personam, but serves only to make the proceeding public, and to satisfy the demands of natural justice, in order that the court may pass a decree in rem respecting things within its jurisdiction.4 But each kind of notice is appointed for a special class of cases, and cannot be used for other cases.⁵ questions of notice are waived by voluntary appearance.6

(2) Service of Process, Summons, etc.—Under the statutes, if the defendant be a resident or within the State, there must be actual service of process in strict compliance with the law. The service must be made by the proper party,8 and in the proper manner.9 Service is good though the party when served be in prison. 10 there are proper allegations and affidavit that the defendant is about to leave the State, a writ ne exeat may be served on him, 11 or,

in New York, he may be arrested.12

(3) Publication, Advertisement, Sending Notice by Mail. etc.— Under the statutes, if the defendant be a non-resident, notice by advertising the suit, or by publication, or by mailing a copy of the complaint to his address or his last address, or by some similar proceeding, is required. 13 And legislatures have power to allow divorces to be granted though no actual notice be given.14 Many States expressly allow notice of this kind by their divorce statutes. and a statute referring to all suits will be held to include divorce suits. 15 Under the statutes, the bill must allege that the defendant

 Ante, II. (9).
 See Spafford v. Spafford, 16 Vt. 511, 512.

3. Harrison v. Harrison, 20 Ala. 629,

4. Garner v. Garner, 56 Md. 127, 128. 5. Labotiere v. Labotiere, 8 Mass. 383;

Harter v. Harter, 5 Ohio, 318, 320.
6. Cheever v. Wilson, 9 Wall. (U. S.)

108, 110, 111, 124; Garner v. Garner, 56 Md. 127, 128; Gould v. Crow, 57 Mo. 200, 202; Kinnier v. Kinnier, 45 N. Y. 535, 539; People v. Baker, 76 N. Y. 78,

83, 84.
7. See Welch v. Welch, 16 Ark. 527, 528;
7. See Welch v. Welch, 16 Ark. 527, 528; Hotchkiss v. Hotchkiss, I Root (Conn.), 355; Townsend v. Townsend, 21 Ill. 540; Brown v. Brown, 59 Ill. 315; Randall v. Randall, 7 Mass. 502; Smith v. Smith, 9 Mass. 422; Brown v. Brown, 15 Mass. 389; Shetzler v. Shetzler. 2 Edw. Ch. (N. Y.) 584; Phelps v. Phelps, 7 Paige (N. Y.) 584; Phelps v. Phelps, / Lug. (N. Y.), 150, 151; Rochester v. Rochester, r. Oreg. 307; Wanamaker v. Wanan Oreg. 307; Wanamaker v. Wanamaker, 10 Phila. 466. 467; Spafford v. Spafford, 16 Vt. 511, 512.

8. Spafford v. Spafford, 16 Vt. 511,

9. Reading the bill to the party summoned will not suffice if a copy is directed to be left. Welch v. Welch, 16 Ark. 527, 528; Smith v. Smith, 9 Mass. 422. Nor will leaving a copy at the last place of abode be service on one who has ceased to be a resident. Labotiere v. Labotiere, 8 Mass. 383.

10. Phelps v. Phelps, 7 Paige (N. Y.).

150, 151; Bland v. Bland, L. R. 2 P. &

D. 233.

11. See Bayly v. Bayly, 2 Md.Ch. 326, 329; Peltier v. Peltier, Harr. (Mich.) 19,

12. Boucicault v. Boucicault, 21 Hun (N.Y.), 431, 432, 436; Jamieson v. Jamieson, II Hun (N. Y.), 38; Gardiner v. Gardiner, 3 Abb. N. C. (N. Y.) I.

13. Examine the particular statutes.

14. King v. King. 84 N. Car. 32, 35.
15. Lewis v. Lewis, 15 Kan. 181, 189;
Hare v. Hare, 10 Tex. 355, 357. So where publication is a part of the equity practice, and jurisdiction in divorce is a non-resident, 1 as temporary absence on a voyage will not suffice,2 nor will the fact that the defendant is in prison.3 And this must appear by affidavit or other proof; 4 a return of non est from two counties is not enough. If publication has been duly made. the court must proceed to a decree. If it has been obtained by false affidavits, it is of no effect, and the judgment will be set aside for fraud.7 These statutes are construed as similar statutes relating to other suits are.8 It is disputed whether in the case of an amendment to the complaint after publication a new publication is necessary.9

(4) Effect of Summons and Publication.—The defendant having been duly summoned, or publication having been duly made, if there is no appearance or defence, the court may enter a default, 10 take testimony *ex parte*, ¹¹ and grant a divorce in accordance with the statutes. ¹² Such divorce will be valid within the State, ¹³ and extra-territorially so far as it is in accordance with international and interstate law,—as already discussed.¹⁴ Whether a decree of divorce obtained by publication may, as other equity decrees, be subsequently reopened by a defendant who had no actual notice, is disputed.15

cases is given to equity courts, it may be had as in other equity cases. Lawrence v. Lawrence, 73 Ill. 577, 580. See also McJunkin v. McJunkin, 3 Ind. 30, 31; Gilruth v. Gilruth, 20 Iowa, 225, 226; Lewis v. Lewis, 15 Kan. 181, 189; Phranner v. Phranner. 37 Miss. 185, 194; Smith v. Smith, 20 Mo. 166, 167; O'Congell v. Neb. 200, 202 nell v. O'Connell, 10 Neb. 390, 392.

1. Homston v. Homston, 3 Mass. 159;

Choate v. Choate, 3 Mass. 391.

2. Mace v. Mace, 7 Mass. 212. The wording of the statute may cause this result.

3. Bland v. Bland, L. R. 2 P. & D. 233, 234; Phelps v. Phelps, 7 Paige (N.

Y.), 150, 151.

4. Green v. Green, 7 Ind. 113; Godfrey v. Godfrey, 27 Ga. 466, 467; Pinkney v. Pinkney, 4 G. Greene (Iowa), 324, 327; O'Connell v. O'Connell, 10 Neb. 390, 392. 5. Godfrey v. Godfrey, 27 Ga. 466,

6. Standridge v. Standridge, 31 Ga. 223, 224; Rogers v. Rogers, 18 N. J. Eq. 445.

7. Adams v. Adams, 51 N. H. 383, 393; Johnson v. Coleman, 23 Wis. 452,

455; post, XV.

8. Thus publication in a newspaper "three weeks successively" need not be made at intervals of a week; but if made in three successive weeks it is Bachelor v. Bachelor, 1 sufficient.

Mass. 256. See Gary v. May. 16 Ohio.

So where a statute requires forty days notice by publication, a decree entered after thirty-five only was held void. Tuckle v. People, (Ill. 1887) 11 West. Rep. 765.

See also Early v. Homans, 16 How. (U. S.) 610; Richardson v. Tobin, 45 Cal. 30; Fry v. Bidwell, 74 Ill. 381; Meredith v. Chancey, 59 Ind. 466; Dexter v. Sheppard, 117 Mass. 480; Gillett v. Needham, 37 Mich. 143; Smith v. Wells, 69 N. Y. 600.

9. See Smith v. Smith, 3 Swab. & T. 216; Huckaboy v. Huckaboy, 35 Tex.

10. Welch v. Welch, 16 Ark. 527, 528. 11. See Viser v. Bertrand, 14 Ark. 267, 278, 282,

12. Rogers v. Rogers, 18 N. J. Eq.

13. Standridge v. Standridge, 31 Ga. 223, 224; McFarland v. McFarland, 40 Ind. 458, 460.

14. See fully, ante, II. (9), notes. 15. The following cases hold that it may: Lawrence v. Lawrence, 73 Ill. 577, 581; Smith v. Smith, 20 Mo. 166, 167. The following hold the contrary: McJunkin v. McJunkin, 3 Ind. 30, 31; Gilruth v. Gilruth. 20 Iowa, 225, 227; Lewis v. Lewis, 15 Kan. 181, 194; O'Connell v. O'Connell, 10 Neb. 390, 392. See

VIII. The Answer. Plea, or Demurrer,—(1) In General.—When a bill has been filed, and the defendant has been notified by summons or publication, he should appear and file his answer, plea, or demurrer. The answer need not usually be sworn to, 2 and is not in itself effective as evidence.3 In the answer the defendant may deny the charges and set up the several defences, or he may admit the charges and confess the bill. As many defences as he desires to make may be joined in the same answer.4 The answer may be amended and new defences set up.5 And a general denial has sometimes been held to cover all the defences. The answer may take the form of a cross-bill. The answer of a third party defendant8 should confine itself entirely to the charges against such third party.9 The practice of the ecclesiastical and the equity courts should be followed.10

(2) Effect of Default.—If the defendant does not answer, but allows the case to go by default, the suit is settled as against him, 11 but not as against the State, 12 and it does not entitle the complainant to a divorce. 13 The court may take off a default and allow the defendant to answer. 14 But while a default exists, the defendant can take no part in the suit, save as an amicus curiæ. 15 The default being entered the case goes on, and proof must be taken; 16 and a divorce will be granted only if a good cause is made out and

no defence appears.17

(3) Effect of Consent.—If the defendant answers but simply confesses the bill and consents to a decree, the case must nevertheless proceed just as if there had been a default, 18 for the State is a party,

1. Orrok v. Orrok, I Mass. 341.

2. Mosser v. Mosser, 29 Ala. 313, 317; Hughes v. Hughes, 19 Ala. 307. 312; Muller v. Muller, 1 N. J. Eq. 386, 388; Smith v. Smith, 4 Paige (N. Y.), 92. 93. This, of course, depends on the practice of the different courts, and the statutes, such as Colo. R. S. 1877, s. 918; Neb.

C. L. 1881, p. 253, s. 10.

3. Richmond v. Richmond, 10 Yerg. (Tenn.) 343, 348; Latham v. Latham, 30 Gratt. (Va.) 307, 314. See Kilbourne v. Field, 78 Pa. St. 194, 195.

4. All the defences are deemed consistent. Forster v. Forster, 1 Hagg. Consist. 144; 4 Eng. Ecc. 358, 359; post, IX.
5. Strong v. Strong, 28 How. Pr. (N.

Y.) 432, 434; ante, III. (4).

6. Backus v. Backus, 3 Me. 136; post, IX.

7. Infra, (4).
8. See ante, IV., as to parties.
9. Monroy v. Monroy, 1 Edw. Ch. (N. Y.) 382, 385. 10. Ante. III. (2).

11. Default. -Scott v. Scott, 17 Ind, 309,

12. Viser v. Bertrand, 14 Ark. 267, 278, 282

13. Phelan v. Phelan, 12 Fla. 449, 453. Thus, after default, the defendant cannot claim alimony or costs. Scott v. Scott, 17 Ind. 300, 311; Rouse v. Rouse, 47 Ch. (N. Y.) 285, 288. Or oppose alimony or costs. Graves v. Graves, 2 Paige (N. Y.), 62, 63.

14. See Strong v. Strong, 28 How. Pr. (N. Y.) 432, 434; Warner v. Warner, 31 N. J. Eq. 225, 226.

15. See Lewis v. Lewis, 9 Ind. 105, 107. The defendant may even after default be present at the taking of the testimony, and may cross-examine the wit-Perry v. Perry, 2 Barb. Ch. nesses. (N. Y.) 285, 288. 16. Welch v. Welch, 16 Ark. 527, 528;

Shillinger v. Shillinger, 14 Ill. 147, 150;

post, X.

17. Powell v. Powell, 53 Ind. 513, 516; Smith v. Smith, 4 Paige (N. Y.) 432, 434.

18. Consent.—No decree of divorce can

be granted pro confesso. Welch v. Welch, 16 Ark. 526, 527. 528; Kilbourne v. Field, 78 Pa. St. 194, 195; post, X. Or by the consent of the defendant. Palmer v. Palmer, I Paige (N. Y.). 276, 277; Williamson v. Williamson, I Johns. Ch. and a marriage cannot be dissolved by consent of the husband and The parties may, however, dismiss the suit by consent,² as the complainant has the right to pardon all and any offences.³

- (4) Answers as Cross-bills.—Cross-bills have already been somewhat discussed. The cross-bill may set up a cause for divorce against the complainant, but the charges of the original bill must be at the same time denied. The answer thus plays a double part, and the case made out by the cross-bill may be prosecuted even after the original bill has been dismissed. The cross-bill in its turn should be answered.8
- IX. The Defences.—(I) General Provisions.—Besides the denial of the acts complained of, there are five recognized defences to an action for divorce, as follows: I. Connivance, or the complainant's consent to the acts complained of; 2. Collusion, or the agreement of the parties to make up the case for the purpose of obtaining a divorce; 3. Condonation, or the complainant's forgiveness of the acts complained of; 4. Recrimination, or the fact that the defendant has a cause for divorce against the complainant; 5. Delay or Limitation, or that the complainant has suffered an unreasonable time, or a time limited by statute, to elapse since the occurrence of the acts complained of. These defences are all consistent with a general denial.9

(N. Y.) 488, 490; Mansfield v. Mansfield, Wright (Ohio), 284, 285; Richmond v. Richmond, 10 Yerg. (Tenn.) 343, 345; Latham v. Latham, 30 Gratt. (Va.) 307.

1. Ante. IV. (7). Lapp v. Lapp, 43

Mich. 287, 288.

2. Wilson v. Wilson, 14 Wis. 405;

McCarthy v. McCarthy, 36 Conn. 177.

3. See particularly ante, IV. (4), as to the right of the complainant to decide whether or not a divorce shall be gotten. The parties, however, while they cannot stipulate for the granting of a divorce, may make contracts relating to inci-dental matters, and if there be no imposition or collusion the court will give their agreements effect, especially as to alimony and the children. See Stanes v. Stanes, L. R. 3 P. D. 42, 44; Hooper v. Hooper, 3 Swab. & T. 251; Stilson v. Stilson, 46 Conn. 15; McCarthy v. McCarthy, 36 Conn. 177; Moon v. Baum, 58 Ind. 194; 30 Conn. 177; Moon v. Baulin, 55 Ind. 194; Snow v. Gould, 74 Me. 540, 544; Adams v. Adams, 25 Minn. 72; Speck v. Daus-mon, 7 Mo. App. 165; Daggett v. Dag-gett, 5 Paige (N. Y.), 509; Van Order v. Van Order, 8 Hun (N. Y.), 315. See post, IX., COLLUSION.

4. Cross-bill. - Ante, V. (3). 5. See Allen v. Allen, I Hemp. (U. S.) 58, 59; Coulthurst v. Coulthurst, 58 Cal. 239, 240; Owen v. Owen, 54 Ga. 526, 527; Chestnut v. Chestnut, 88 Ill. 548, 549; Armstrong v. Armstrong, 27 Ind.

186, 188; Wilson v. Wilson, 40 Iowa, 230, 233; Moores v. Moores, 16 N. J. Eq. 275, 276; Lesener v. Lesener, 31 Barb. (N. Y.) 330, 333. 6. Allen v. Allen, 1 Hemp. (U. S.) 58,

It may set up matters occurring the filing of the bill. Wilson v. after the filing of the bill.

Wilson, 40 Iowa, 230, 233.
7. Owen v. Owen, 54 Ga. 526, 527;
Musselman v. Musselman, 44 Ind. 106, 115. This is also denied. Stoner, 9 Ind. 505, 506.

8. Leslie v. Leslie, 11 Abb. Pr. N. S.

(N. Y.) 311, 317.

The cross-bill must allege the grounds of complaint, with all the particularity required in a bill. Moores v. Moores, 16

Collthurst, v. Coulthurst, v. Coulthurst, v. Coulthurst, v. Coulthurst, v. Coulthurst, v. Coulthurst, 58 Cal. 239, 240. Though this has been denied. Lesener v. Lesener, 31 Barb. (N. Y.) 330, 333. And in some States a non-resident defendant may on a crossbill obtain a divorce. Sterl v. Sterl, 2 Ill. App. 223, 227; Jenness v. Jenness, 24 Ind. 355, 361.

9. "I think it possible that a denial

may be given, and yet connivance be pleaded at the same time. Undoubtedly, if the wife admit in one part of the defence a fact, or even a proximate act of adultery, it is not open to her to say in another part that she is not guilty; but

These defences existed under the old ecclesiastical law, and are recognized in the divorce courts of the *United States* independently of statute. But now in *England* and in many States statutes wholly or partially cover the subject. The trouble about the matter is, that so many new causes for divorce have been introduced that it is hard to know how far these defences will apply to them, as they originally wholly applied only to Adultery, and partially to Cruelty. It will be found, however, that the principles underlying these defences are nearly everywhere applicable, which principles must now be explained.

In Explanation: Connivance and collusion both involve the prior consent of the complainant to the acts complained of, and are defences upon the general principle, volenti non fit injuria.2 Collusion differs from connivance in being confined to cases where the consent is mutual, and where the purpose is to obtain a divorce by the pretence or the act agreed upon. Condonation is forgiveness or subsequent consent, and if too readily given may amount to connivance to future offences.4 Recrimination is a defence because the courts will not give relief to a guilty party,5 and because endless complications would arise if the husband and wife could both be entitled to a divorce at the same time. 6 Lapse of time is a defence because it raises a presumption of acquiescence or consent.

it is competent to her to say there may have been suspicious appearances, though I deny criminality, and those appearances into which I have been betrayed have occurred by the contrivance of my husband, or have been produced by an insidious project on his part; but I have not completed his intention; as, in a case of recrimination, the party may deny her own guilt, but at the same time say that even if she had been guilty, yet the conduct of her husband was a bar to his prayer," Moorsom v. Moorsom, 3 Hagg. Ecc. 87; 5 Eng. Ecc. 28, 30. And also Forster v. Forster, 1 Hagg. Consist. 144; 4 Eng. Ecc. 358, 359; Verelst v. Verelst, 2 Phillim. 145; I Eng. Ecc. 216. 217; Dillon v. Dillon. 3 Curt. Ecc. 86; 7 Eng. Ecc. 377, 380; Smith v. Smith. 4 Paige (N.Y.), 432; Wood v. Wood, 2 Paige (N. Y.), 108.

Condonation would seem to be inconsistent with connivance. Elwes v. Elwes. I Hagg. Consist. 269; 4 Eng. Ecc. 403,

1. These statutes are declaratory of the common law. Christianberry v. Christianberry, 3 Blackf. (Ind.) 202, 204; Phillips v. Phillips, 4 Blackf. (Ind.) 131, 132; McCafferty v. McCafferty, 8 Blackf. (Ind.) 218; Horne v. Horne, 72 N. Car. 530,

When they refer to one defence only, they do not exclude and negative the others. Nagel v Nagel 12 Mo. 53, 55. See Hale v. Hale, 47 Tex. 336, 342.

"The statute expressly declares that when it appears that both parties have been guilty of adultery no divorce shall be decreed. This would be the rule in the absence of statutory regulation. husband who seeks a divorce from his wife on the ground that she is an adulteress has no right to have his marriage dissolved if he himself is guilty of the same crime of which he accuses her." Fuller v. Fuller, 41 N. J. Eq. 198.

2. Hedden v. Hedden, 21 N. J. Eq.

61, 75; infra, (2).
3. Crewe v. Crewe, 3 Hagg. Ecc. 123; 5 Eng. Ecc. 45, 48; infra, (3).
4. Timmings v. Timmings, 3 Hagg. Ecc. 76; 5 Eng. Ecc. 22, 23; Rogers v. Rogers, 122 Mass. 423; infra, (4).

5. Beeby v. Beeby, I Hagg. Ecc. 789; 3 Eng. Ecc. 338, 339; Wood v. Wood, 2 Paige (N. Y.), 108, 111; Mattox v. Mattox, 2 Ohio, 380; Horne v. Horne, 72

N. Car. 530, 533; infra, (5).

6. Cooper v. Cooper, 7 Ohio (2d pt.), 238, 239; Dejarnet v. Dejarnet, 5 Dana (Ky.), 499. But, as we have seen, some States by statute allow a party who has been divorced in another State, which divorce was invalid as to him, to obtain a divorce. Tarbell v. Tarbell, 32 Me. 380; Stilphen v. Hondlette, 60 Me. 447, 452; Stilphen v. Stilphen, 58 Me. 508,

513; infra, (5).
7. Clark v. Clark, 97 Mass. 331, 332; Cummings v. Cummings, 15 N. J. Eq.

136, 142.

Other so-called defences can all be brought under these heads. For example, an agreement to withdraw or compromise a suit is no defence, unless it amounts to condonation or collusion. So a deed of separation, while a defence to a suit for desertion,4 is no defence to a suit for adultery, unless made with a view to future intercourse, in which case it amounts to connivance.6

The fact that a party has become insane after committing the offence is no defence, but no divorce can be granted against a

party who is dead.8

The Allegations.—As a general rule, the defences should be set up in the answer with all the particularity required of allegations in a complaint; but there are two exceptions to this rule. First, the bill of complaint (and indeed the proof) must not exhibit that there is a good defence, or the divorce will be refused though the defences be not pleaded; 10 and, second, there is an unusual prac-

1. Hayward v. Hayward, I Swab. & T. 333; Gipps v. Hume, 31 L. J. Chanc. 37. But see Sterbini v. Sterbini, 39 L. J. 37. But see : Mat. Cas. 82.

2. Rawley v. Rawley, L. R. I H. L.

Cas. 63.

- 3. Hope v. Hope, 8 De Gex. M. & G.
- 731. 4. Buchmaster v. Buchmaster, L. R. 1 P. & D. 713.

5. Stokes v. Stokes, 1 Mo. 228, 230.

6. Barker v. Barker, 2 Add. Ecc. 285; 2 Eng. Ecc. 307, 308. In this case the deed gave the wife the right to live wherever and with whomever she pleased as if unmarried, free from her husband's molestation for any cause; and the court held that the burden of proof lay on the husband to show that he had not licensed her adultery.

7. Mordaunt v. Moncrieffe, 43 L. J.

Mat. Cas. 49; ante, IV. (4). 8. Grant v. Grant, 2 Swab. & T. 522;

ante, IV. (8).
9. "It has been said, that not having been propounded by the party, it is excluded from the notice of the court. Undoubtedly, in fairness, it ought to have been stated, because, being a plea in bar, it is a plea which the plaintiff ought to have had an opportunity of contradicting. At the same time the court is not precluded from noticing it, at least to this effect, that if the fact appeared clearly and distinctly upon the face of the depositions that there had been cohabitation, subsequent to the knowledge and detection of the guilt of the wife, it might ex officio call upon the husband to disprove it." Elwes v. Elwes, 1 Hagg. Consist. 269; 4 Eng. Ecc. 403, 411.

"I know not of any case where condonation has been held to estop a party where it has not been pleaded. . . . Without, therefore, advancing as a clear rule that condonation to deprive a wife of redress must actually be pleaded, yet I may venture to say that, in order to be a bar, it must be clearly and distinctly proved." Durant v. Durant, I Hagg.

Ecc. 733; 3 Eng. Ecc. 310, 319.
In Fuller v. Fuller, 41 N. J. Eq. 198; s. c., 3 Cent. Rep. 357, it is said: "The court, in actions for divorce can exercise no greater power than it can exercise in any other class of actions. It can only pronounce judgment on the issues presented by the pleadings. In the language of Chancellor Zabriskie, it cannot lay hold of any matter not properly put in issue, on the ground that public policy and public morals require it.' Jones v. Jones, 3 C. E. Greene, 33." So that in New Jersey the idea that the State is an informal party [ante, IV. (8)] does not v. Jessop, 2 Swab. & T. 301, 303; Jeans v. Jeans, 2 Harr. (Del.) 38; Sullivan v. Sullivan, 34 Ind. 368, 370; Lewis v. Lewis, Sulinvan, 34 ind. 300, 370; Lewis v. Lewis, 9 Ind. 105, 107; Adams v. Hurst, 9 La. 343; Pastoret v. Pastoret, 6 Mass. 276; Warner v. Warner, 31 N. J. Eq. 225, 226; Reid v. Reid, 21 N. J. Eq. 331, 333; Jones v. Jones, 18 N. J. Eq. 32, 34; Smith v. Smith, 4 Paige (N. Y.), 432, 434; Wood v. Wood, 2 Paige (N. Y.), 108, 113.

10. "If the wife does not take the objection, the court will. The husband must lay his case before the court in such a manner as not to give occasion to an inference of collusion or connivance." Crewe v. Crewe, 3 Hagg. Ecc. 123; 5

Eng. Ecc. 45, 46:

"In cases of this nature it is incumbent on the husband to make such strict proof of the fact charged as shall not involve himself or create a legal bar; for if, by evidence which he brings to estabtice in some States by which the complainant is required in his bill to negative the defences and if this is not done the defendant

may have the bill dismissed.1

The proof of the defences does not involve special difficulties. It should correspond with the allegations: 2 and though in some States any defences could be proved under the general issue,³ generally the defences should be specially alleged.⁴ When the defendant must allege the defences he must prove them. 5 Connivance and collusion are disgraceful, and must be strictly proved; 6 condonation may be even commendable, and such strictness is not required.7 In recrimination the counter-charge must be proved just as it would if a charge.8

(2) Connivance.—Defined: Connivance is the complainant's consent to the commission of the acts complained of.9 It may be

lish adultery, he at the same time involves and implicates himself, the wife has the full benefit of this evidence, nor can he avail himself of a case in which he does not appear with clean hands." Timmings v. Timmings, 3 Hagg. Ecc. 76; 5 Eng. Ecc. 22, 23.

As already shown [ante, IV, (7)], the State is a party to every divorce suit, and is interested in having no improper divorce granted; and this is why, if a defence appears or is brought to the knowledge of the court, no divorce will be granted. But the court will of course allow, any facts from which one of the defences may be inferred to be explained by fur-

ther proof, before dismissing the libel. Turton v. Turton, 3 Hagg. Ecc. 338; 5

Eng. Ecc. 130, 137.

While it is quite clear that the court will ex officio take notice of connivance and collusion,—see cases supra; Dismukes v. Dismukes, I Tenn. Ch. 266, 268, —and condonation,—Beeby v. Beeby, I Hagg. Ecc. 789; 3 Eng. Ecc. 338,—it seems very doubtful whether a court would take judicial notice of recrimina-tion,—Jones v. Jones, 18 N. J. Eq. 32, 34; Fuller v. Fuller, 41 N. J. Eq. 198; Morrell v. Morrell, 3 Barb. (N.Y.) 338, 341,—or limitations. 2 Bish. Mar. & Div. § 242.

In England, when collusion, etc., are suspected, the Queen's proctor interferes and contests the suit. Ante, III. (7).

1. See Burns v. Burns, 60 Ind. 259, 260; McCafferty v. McCafferty, 8 Blackf. (Ind.) 218; Lewis v. Lewis, 9 Ind. 105; Epling v. Epling, 1 Bush (Ky.), 74; Emmons v. Emmons, Walk. Ch. (Mich.) 532; Pastoret v. Pastoret, 6 Mass. 276; Young v. Young, 18 Minn. 90; Fellows v. Fellows, 8 N. H. 160, 162; Kane v. Kane, 3 Edw. Ch. (N. Y.) 389; Rose v. Rose, II Paige (N. Y.), 166; Hoffman v. Hoffman, 46 N. Y. 30. 34; Hanks v. Hanks, 13 Edw. Ch. (N. Y.) 469; Dismukes v. Dismukes, I Tenn. Ch. 266, 268.

2. Hopkins v. Hopkins, 39 Wis. 167,

169. 3. Backus v. Backus, 3 Me. 136.

4. Supra, n. 9, page 815.

An amendment will readily be allowed Warner, 31 N. J. Eq. 225, 226; Strong v. Strong, 28 How. Pr. (N. Y.) 432, 434; ante, III. (4). And if the proofs show a defence, no divorce will be granted, whatever the state of the pleadings. supra; ante, IV. (8).

5. Hopkins v. Hopkins, 30 Wis. 167.

6. Phillips v. Phillips, I Rob. Ecc. 144, 156, 157; infra, (2), (3).
7. Turton v. Turton, 3 Eng. Ecc. 388;

5 Eng. Ecc. 130, 136; infra, (4). 8. Pollock v. Pollock, 71 N. Y. 137, 141; infra, (5).

9. Connivance .- "It is not mere imprudence or error of judgment which the law deems connivance; where a man takes a step for the best, which turns out otherwise, it is not such an error which is to be laid to his charge. . . . Conduct to bar must be directed by corrupt intention." Hoar v. Hoar, 3 Hag. Ecc. 137; 5 Eng. Ecc. 51, 53. "Active procure 5 Eng. Ecc. 51, 53. "Active procure ment or passive toleration of his own dishonor." Crewe v. Crewe, 3 Hagg. Ecc. 123; 5 Eng. Ecc. 45, 48.

"Another ground of objection is, the

connivance or toleration of the husband: he may have an insensibility to his own honor, and, from a conformity to the corrupt manners of the world, may have no wish to pursue a legal remedy, or may not think it worth pursuing; and if active, as where the complainant has brought about the act; or passive, as where the complainant, after due notice or warning, has taken no steps to prevent it. An extreme case of connivance was where a husband sold a night with his wife for a scythe and a snath.

The defence of connivance is based on the maxim *Volenti non* fit injuria, and on the principle that to one who consents, no wrong is done and no redress is due.⁴

such a person, after a long continuance of toleration, of himself awakes, or is compelled by the clamor and outcry of the world to awake, he awakes too late. If the adultery has gone on for a length of time, he does not stand before the court in the favorable light of a person acting on the spur of honest feeling, whom the law delights to succor: he has made up his mind to some other satisfaction. I do not mean by this to say. that the husband is immediately to rush into court upon suspicion; he must wait for adequate proof, but he is to show his vigilance; he is not to lay by longer than to obtain proof: if he does, his lethargy will be fatal to any application that he may make; whatever his motives may be for coming afterwards, if it be proved that there has been a long course of criminal conduct of which he was cognizant, or which, by law and by presumption, he must be supposed to have been cognizant, he cannot receive relief." Crewe v. Crewe, 3 Hogg. Ecc. 123; 5 Eng.

Ecc. 45.
1. Illustrative cases: Myers v. Myers, 41 Barb. (N. Y.) 114, 119, 120; Hedden v. Hedden, 21 N. J. Eq. 61, 66, 67.

2. "The defence which in law and reason is available to the party as the full-est contradiction of fact is, that the husband himself was the author and accomplice of the crime; that he has practised a train of conduct which led to her guilt, and which he foresaw and intended should lead to it; that he is, therefore, not the object of relief which the law gives to the innocent only. The conduct, then, upon which the wife relies for her defence is of a passive and permissive kind, to be proved therefore by circumstances. Active conspiracy appears in overt acts, but unless there are declarations to establish it, connivance must in general depend upon circumstances, and is to be gathered from a train of conduct which the court is to interpret as well as it can." Moorsom v. Moorsom, 3 Hagg. Ecc. 87; 5 Eng. Ecc. 29, 37.

3. Masten v. Masten, 15 N. H. 159,

Hedden, 21 N. J. Eq. 61, 75; Austin v. Austin, 10 Conn. 221, 223; Barber v. Barber, 4 Law Reporter, N. S. 375, 377; Cochrane v. Cochrane, 35 Iowa, 477, 479; Pierce v. Pierce, 3 Pick. (Mass.) 299; Cairns v. Cairns, 109 Mass. 407; Herrick v. Herrick, 31 Mich. 298, 300; Bray v. Bray, 6 N. J. Eq. 628, 629; Myers v. Myers, 41 Barb. (N. Y.) 114, 120.

It is a case of connivance where a husband introduces a notorious debauchee to his wife, intending that she may be seduced, and the mere fact of such introduction by him raises a presumption of such intent. See Moorsom v. Moorsom, 3 Hagg. Ecc. 87; 5 Eng. Ecc. 28, 31, 38.

4. Reeves v. Reeves, 2 Phillim. Ecc. 125; I Eng. Ecc. 208, 210; Dunn v. Dunn, 2 Phillim. Ecc. 403, 411; I Eng. Ecc. 281, 284; Barker v. Barker, 2 Add. Ecc.

285; 2 Eng. Ecc. 307, 309; Forster v. Forster, I Hagg. Consist. 144; 4 Eng. Ecc.

358, 360; Harris v. Harris, 2 Hagg. Ecc.

376, 414; 4 Eng. Ecc. 160, 178; Clowes v. Clowes, 9 Jur. 356, 358; Gipps v. Gipps, 11 H. L. Cas. 1, 25; Hedden v. Hedden, 21 N. J. Eq. 61, 75; Austin v.

38.
"A husband who consents to the adultery of his wife cannot make her criminal act a ground of divorce. His consent bars his right to a decree of divorce. The statute so declares. And a husband who endeavors to procure his wife to be hired into the commission of adultery will be regarded as consenting to all subsequent acts of adultery which she may commit, whether they be committed with the person selected by him or with others." Woodward v. Woodward, 3 Cent. Rep. 368; s. c., 41 N. J. Eq. 224. But in this case the subsequent connivance of the husband at other offences did not bar his remedy for an offence committed while his heart was true. The agent employed to entrap his wife was his brother in this case.

So it is when the husband gets a friend or agent to lead or entrap his wife into adultery. Gower v. Gower, L. R. 2 P. & D. 428, 431; Picken v. Picken, 34 L. J. Mat. Cas. 22; Hedden v. Hedden, 21 N.

Connivance as a defence is particularly applicable to a charge of adultery; 1 so it has been applied to charge of drunkenness, when the complainant had supplied the liquor. 2 In principle, if not in name, it is applicable to desertion, as no divorce will be granted for this cause if it appears that the apparently guilty party has left the other with the other's consent or through the other's fraud or force; 3 so, too, to cruelty, as where a wife intentionally provokes her husband to misconduct.4

The allegation of connivance is not strictly required; 5 the public is a party, and the court would make the objection though the defendant does not, if the facts are brought to its notice. Still it is better to allege it, except in those States where the complainant is required to negative it in the complaint. A plea of conniv-

ance is consistent with a general denial.8

J. Eq. 61, 70; Myers v. Myers, 41 Barb. (N. Y.) 114, 119.

And the husband's consent is presumed if he knowingly allows familiarities such as usually lead to sexual intercourse. See Phillips v. Phillips, I Rob. Ecc. 144,

162, 163.

But the husband's conduct must be the result of his depraved morals, and not simply of his innocence or bad judgment, or his blindness resulting from trusting affection. Burgess v. Burgess, 2 Hagg. Ecc. 223; 4 Eng. Ecc. 527, 529; Hoar v. Hoar, 3 Hagg. Ecc. 137; 5 Eng. Ecc. 51, 53; Ross v. Ross, L. R. 1 P. & D. 734; Glennie v. Glennie, 32 L. J. Mat. Cas. 17, 20.

And acts of the husband not intended to lead his wife to adultery are not connivance. See Phillips v. Philips, I Rob. Ecc. 144, 161. Such as gross inattention. Rix. v. Rix 3 Hagg. Ecc. 74; 5 Eng. Ecc. 21, 22. Or coarse and brutal language. Stone v. Stone, I Rob. Ecc. 99, 101; 3 Notes Cas. 278, 308. Or desertion, though it drive the wife to prostitution for support. Clowes v. Clowes. 9 Jur. 356, 358.

"If a husband see what a reasonable man could not see without alarm, if he see what a reasonable man would not permit, he must be supposed to see and mean the consequences; dulness of perception and the like, which exclude intention, are not connivance; there must be intention." Moorsom v. Moorsom, 3 Hagg. Ecc. 87; 5 Eng. Ecc. 29, 37; Hedden v. Hedden, 21 N. J. Eq. 61, 66.

Laving a trap to discover his wife's adultery is not connivance, though laying a trap to make her commit adultery and be caught, would be. Robbins v. Robbins, 140 Mass. 528; s. c., 54 Am.

Rep. 488.

If one, after a knowledge of an act of acultery, easily passes it by, he not only

consents to it, but he cannot complain of subsequent acts with the same or a different person. Phillips v. Phillips, 1 Rob. Ecc. 144, 164; Dunn v. Dunn, 2 Phillim. Ecc. 493, 411; 1 Eng. Ecc. 280, 284; Stone v. Stone, 1 Rob. Ecc. 99; 3 Notes Cas. 278, 282; Gipps v. Gipps, 11 H. L. Cas. 1, 27.

If a man accepts pay from his wife's paramour for past adultery, he cannot complain of subsequent acts. Gipps v. Gipps, 11 H. L.Cas. 1.

And a wife may barter away her rights for her husband's adultery by accepting an allowance or money in any other way Ross, L. R. 1 P. & D. 734, 737; Thomas v. Thomas, 2 Swab, & T. 113, 118.

Still, as in the case of condonation, a

difference is made between a husband and a wife in favor of the wife. Westmeath v. Westmeath, 2 Hagg. Ecc. 1; 4

Eng. Ecc. 238, 290.

Articles of separation may be so framed as to license adultery. Barker v. Barker, 2 Add. Ecc. 285; 2 Eng. Ecc. 307, 308; Studdy v. Studdy, 1 Swab. & T. 321.

1. As may be seen from the quotations and citations, supra.

2. Barber v. Barber, 4 Law Reporter, N. S. 375, 377.

Discussed, ante, VI. (5).
 Discussed, ante, VI. (4).
 See Elwes v. Elwes, I Hagg. Consist.

260; 4 Eng. Ecc. 401, 411; ante, IX. (1). 6. Turton v. Turton 2 Hagg. Ecc. 338;

- 5 Eng. Ecc. 130, 137; Crewe v. Crewe, 3 Hagg. Ecc. 123; 5 Eng. Ecc. 45, 46; Smith v. Smith, 4 Paige (N. Y.), 432, 434; supra, n. 17. 7. See Hoffman v. Hoffman, 46 N. Y.
- 30. 34; supra, n. 19.

8. Moorsom v. Moorsom, 3 Hagg. Ecc. 87; 5 Eng. Ecc. 28, 30.

The proof of connivance, especially in cases of adultery, must be very strict. as every presumption is against a husband being so debased as to consent to his wife's adultery.2 The proof need not be of connivance at the special acts complained of; general connivance will suffice.3 There must be proof of knowledge of adultery or of improper familiarities.4

(3) Collusion.—Defined: Collusion is the agreement of the parties to make up a case for the purpose of obtaining a divorce.5 It may be active, as where a husband agrees that he will commit adultery, that his wife may apply and get a divorce from him; 6 or passive, as where the understanding is that the defendant shall

suppress facts which might constitute a good defence.

1. Croft v. Croft, 3 Hagg. Ecc. 310; 5 Eng. Ecc. 120, 121; Rogers v. Rogers, 3 Hag. Ecc. 57; 5 Eng. Ecc. 13, 20; Phillips v. Phillips, I Rob. Ecc. 144, 156.

2. "It cannot be readily presumed that any husband would act so contrary to the general feelings of mankind as to be a consentical party to his own dishonor, the effect of which would be to leave him legally bound for life to a corrupt and adulterous wife." Rogers v. Rogers, 3 Hagg, Ecc. 57; 5 Eng. Ecc.

13. 16
3. Supra, end of note preceding 1, page 818; also Moorsom v. Moorsom, 3 Hag. Ecc. 87; 5 Eng. Ecc. 28; Hedden v. Hedden, 21 N. J. Eq. 61; Gipps v. Gipps, 11 H. L. Cas. 1; Hodges v. Hodges, 3 Hag. Ecc. 118; 5 Eng. Ecc 42, 43.

4. Phillips v. Phillips. 1 Rob. Ecc.

144. 164; supra, n. 31.

What amounts to proof of actual knowledge and concurrence is a question which depends on the circumstances of each particular case. Phillips v. Phillips, I Rob. Ecc. 144. Indifference, ill-behavior, or cruelty, is not evidence of connivance. Moorsom v. Moorsom. 3 Hagg. Ecc. 87; 5 Eng. Ecc. 28, 30. But want of attention to a wife's morals, to her conduct and associates, may be. Gilpin v. Gilpin, 3 Hagg. Ecc. 150; 5 Eng. Ecc. 58. As where a husband with perfect indifference allowed his wife to live with another man, and have children by him. Michelson v. Michelson, 3 Hagg. Ecc. 147; 5 Eng. Ecc. 56, 57.

5. Collusion. - In addition to the cases v. Gray, 2 Swab. & T. 554, 557; Shaw v. Gray, 2 Swab. & T. 554, 557; Shaw v. Gould. L. R. 3 H. L. 55, 77; Hunt v. Hunt, 47 L. J. Mat. Cas. 22, 23; Harris v. Harris. 4 Swab. & T. 232; Todd v. Todd, L. R. 1 P. & D. 121, 124; Barnes v. Barnes, L. R. 1 P. & D. 505, 507; McCarthy v. McCarthy, 36 Conn. 177, 181: Stilson v. Stilson, 46 Conn. 15: 181; Stilson v. Stilson, 46 Conn. 15; Sterling v. Sterling, 12 Ga. 201; Moon

v. Baum, 58 Ind. 194; Dalton v. Dalton, 30 Ind. 139; Leavitt v. Leavitt, 13 Mich. 452, 456; Émmons v. Emmons, Walker Ch. (Mich.) 532; Adams v. Adams, 25 Ch. (Mich.) 532; Adams v. Adams, 25 Minn, 72; Speck v. Dausmon, 7 Mo. Ap. 115; Sickles v. Carson, 26 N. J. Eq. 440, 442; Hanks v. Hanks, 3 Edw. Ch. (N. Y.) 469, 470; B. v. B., 28 Barb. (N. Y.) 299, 306; Friend v. Friend, Wright (Ohio), 639, 640; Smith v. Smith, Wright (Ohio). 643; Stoutenburg v. Lybrand, 13 Ohio St. 228; Hopkins v. Hopkins, 39 Wis. 167, 169; Donville v. Donville, 25 Wis. 688.

"Collusion, as applied to this subject, is an agreement between the parties for one to commit or appear to commit a fact of adultery in order that the other may obtain a remedy at law as for a real injury. Real injury there is none, where there is a common agreement between the parties to effect their object by fraud in a court of justice. If such conduct were permissible, it would authorize parties to violate their marriage vow, and would encourage profligate and dissolute manners. The law, therefore, requires that there shall be no co-operation for such a purpose, and does not grant a remedy where the adultery is committed with any such view. fraud difficult of proof, since the agreement may be known to no one but the two parties in the cause, who alone may be concerned in it, for the adulterer may be ignorant of the understanding. However, it is no decisive proof of collusion that after the adultery has been committed both parties desire a separation: it would be hard that the husband should not be released because the offending wife equally wishes it; it would be un-just that the husband should depend on her inclinations for his release: he has a right to it." Crewe v. Crewe, 3 Hagg. Ecc. 123; 5 Eng. Ecc. 45, 48.

6. Todd v. Todd, L. R. 1 P. & D. 121, 123. 7. Hunt v. Hunt, 47 L. J. Mat. Cas.

Making up a fictitious case of any kind is a contempt of court.1 Divorces are granted on public grounds, and not to suit the desires of individuals.2 To constitute collusion, however, the parties must be acting in concert, and some imposition upon the court must be the purpose or result. Thus, while it is not collusion for a husband to support his wife during the suit, or for the wife to help along the proofs against herself, it is if the husband allows his wife support for her silence as to certain matters which might injure his case.7

Collusion as a defence does not materially differ from conniv-

ance, and is a defence applicable to any case.

As to the allegation of collusion, the same rules apply as those referred to under connivance.9

The proof of collusion must be clear; it cannot be assumed from mere suspicious circumstances; 10 and the defendant's confession of

the charge is no proof of collusion. 11

(4) Condonation.—Defined: Condonation is the forgiveness by the complainant of the act complained of, 12 on conditions per-

22, 23; Jessop v. Jessop, 2 Swab. & T.

301, 302. 1. See Smith v. Brown, 3 Tex. 360.

2. Smith v. Smith, Wright (Ohio), 644 See Hawks v. Hawks, 3 Edw. Ch. (N.

- Y.) 469, 470; ante. IV. (7).
 3. Shaw v. Gould, L. R. 3 H. L. 55, 77; Gray v. Gray, 2 Swab. & T. 554, 557; Todd v. Todd, L. R. 1 P. & D. 121,
- 4. Hunt v. Hunt, 47 L. J. Mat. Cas.
- 5. Barnes v. Barnes, L. R. I P. & D.
- 505, 507.
 6. Harris v. Harris, 4 Swab. & T. 232,
- 233.7. Barnes ν. Barnes, L. R. 1 P. & D.

So that friendliness in carrying on the suit or even mutual assistance in proving the actual facts is not collusion. Hunt v. Hunt, Harris v. Harris, supra. the parties have made up a false case, or kept back evidence which might be a good defence, it is collusion. Jessop v. Jessop, 2 Swab. & T. 301, 302. And likewise if one of the parties has committed the act complained of on the understanding that it should be made a ground for Todd v. Todd, L. R. I P. & D. 121, 124.

'If a party to a suit by agreement with the other party procures the withdrawal from the notice of the court of facts relevant to the charge which is imputed to him or her, that is collusion." Hunt v. Hunt, 47 L. J. Mat. Cas. 22, 23.

8. It has by some statutes been made

a general defence, and it has been held a defence even in nullity suits for impo-tence. B. v. B., 28 Barb. (N. Y.) 299, 309, And for fraud. Sickles v. Carson, 26 N. J. Eq. 440, 442.

9. Crewe v. Crewe, 3 Hagg. Ecc. 123;

5 Eng. Ecc. 45, 46.
10. See Pollard υ. Wyburn, I Hagg. 10. See Pollard v. Wyburn, I Hagg. Ecc. 725; 3 Eng. Ecc. 308, 310. Suspicious circumstances will, however, be carefully scrutinized by the court. Williams v. Williams, I Hagg. Consist. 299; 4 Eng. Ecc. 415. See Wolf v. Wolf, Wright (Ohio), 243

11. Gray v Gray, 2 Swab. & T. 554.

12. Condonation. — "But condonation has been set up in order to take off the

has been set up in order to take off the effect of the compensatio criminis. Now condonation is forgiveness legally releasing the injury: it may be express; or implied, as by the husband cohabiting with a delinquent wife, for it is to be presumed that he would not take her to his bed again unless he had forgiven her; but the effect of cohabitation is justly held less stringent on the wife: she is more sub patestate, more inops consilii; she may entertain more hopes of recovery and reform of her husband, her honor is less injured and is more easily healed. would be hard if condonation by implication was held a strict bar against the wife. It is not improper she should for a time show a patient forbearance; she may find a difficulty either in quitting his house or withdrawing from his bed. The husband, on the other hand, cannot be compelled to the bed of his wife. A woman may formed by the defendant.1 Condonation thus involves an act on the part of both parties.2

The Forgiveness.—The forgiveness (1) may be express or implied; (2) it must be accepted; (3) it must be freely given; (4) it must be given with knowledge of the delinquent's guilt.

The forgiveness may be express,3 as "I forgive you;"4 or implied.5 as from sexual intercourse after knowledge of the offence.6

submit to necessity. Here no condonation is pleaded; it is only taken up in argument from a passage in the evidence; if clearly proved, though not pleaded, I will not say it may not be sufficient, but the court will never help it out, as it would operate as a surprise on the other party." Beeby v. Beeby, I Hagg. Ecc. 780; 3 Eng. Ecc. 338, 340.

See also Quarles v. Quarles, 19 Ala. 363, 366; Turnbull v. Turnbull, 23 Ark. 615, 621; Johns v. Johns. 29 Ga. 718, 722; Phillips v. Phillips, 4 Blackf. (Ind.) 131; Burns v. Burns, 60 Ind. 259, 260; Gardner v. Gardner, 2 Gray (Mass.), 434, Gardner v. Gardner, 2 Gray (Mass.), 434, 440; Harper v. Harper, 29 Mo. 301, 303; Quincy v. Quincy, 10 N. H. 272, 274; Stevens v. Stevens, 14 N. J. Eq. 374, 375; Marsh v. Marsh, 13 N. J. Eq. 281, 285; Pitts v. Pitts, 52 N. Y. 593, 595; Barnes v. Barnes, Wright (Ohio), 475; Bronson v. Bronson, 7 Phila. 405, 406; Phillips v. Phillips, 27 Wis. 252, 254.

1. Condonation Conditional. — "Some

propositions seem to be admitted: Firstly, that condonation is accompanied with an implied condition. Secondly, that the condition implied is that the injury shall not be repeated. Thirdly, that a repetition at least of the same injury does away with the condonation and revives the former injury. So far the propositions are clear; but must the injury be of the same sort, be proved in the same clear manner, be sufficient per se to found a separation? If nothing but clear proof of actual adultery will do away with condonation of adultery, the rule of revival becomes nearly useless, for the revival is unnecessary. . . . The plainer reason and the good sense of the implied condition is that 'you shall not only abstain from adultery, but shall in future treat me—in every respect treat me (to use the words of the law) with conjugal kindness;'-on this condition I will overlook the past injuries you have done me." Durant v. Durant, I Hagg. Ecc. 733; 3 Eng. Ecc. 310, 323.
"This condonation has been termed

conditional; but all condonations are impliedly conditional, though it seldom happens the conditions are so expressly declared as in the present instance." Westmeath v. Westmeath, 2 Hagg. Sup. 1; 4 Eng. Ecc. 238, 280.

If this acquiescence is a condonation, still it is only conditional. She must have had promises that no ill-treatment should take place; indeed, all condonations, by operation of law, are expressly or impliedly conditional, for the effect is taken off by repetition of misconduct. Condonation is not an absolute and unconditional

forgiveness." D'Aguilar v. D'Aguilar, I Hagg. Ecc. 773: 3 Eng. Ecc. 329, 334. See also Dent v. Dent, 4 Swab. & T. 105, 107; Turner v. Turner, 44 Ala. 437, 449; Harrison v. Harrison, 20 Ala. 629, 646; Ozmore v. Ozmore, 41 Ga. 46, 48; Odom v. Odom, 36 Ga. 286, 318; Kennedy v. Kennedy, 87 Ill. 250, 254; Farnham v. Farnham, 73 Ill. 497, 500; Sullivan v. Sullivan, 34 Ind. 368, 369; Armstrong v. Armstrong, 27 Ind. 186, 189; Verholf v. Houwenlengen, 21 Iowa, 429, 432; Sewall v. Sewall, 122 Mass. 156, 158; Robbins v. Robbins, 100 Mass. 150, 152; Armstrong v. Armstrong, 32 Miss. 279, 289; Masten v. Masten, 15 N. H. 159, 162; Warner v. Warner, 31 N. J. Eq. 225, 227; Johnson v. Johnson, 4 Paige (N. Y.), 460, 470; McDwire v. McDwire, Wright v. Wright (Ohio), 454, 455; Threewits v. Threewits, 4 Desaus. Fq. (S. Car.) 560, 572; Wright v. Wright. 6 Tex. 3, 21; Nogees v. Nogees, 7 Tex. 538, 543; Langdon v. Langdon. 25 Vt. 678, 679; Phillips v. Phillips, 27 Wis. 252, 253.

2. See particularly, Quarles v. Quarles, 19 Ala. 363, 366; Armstrong v. Armstrong, 27 Ind. 186, 189; Betz v. Betz. 2 Rob. (N. Y.) 694, 696; Johns v. Johns.

29 Ga. 718. 722.

3. The Forgiveness.—Beeby v. Beeby, I Hagg. Ecc. 789; 3 Eng. Ecc. 338; Snow v. Snow, 2 Notes Cas. Sup 1, 12; Quincy v. Quincy, 10 N. H. 272, 274. As in a letter. Turner v. Turner, 44 Ala. 437, 446. Or a formal agreement. West-meath v. Westmeath, 2 Hagg. Ecc. Sup. 1; 4 Eng. Ecc. 238, 288, 289. 4. Turner v. Turner, 44 Ala. 437, 445.

5. Supra, n. 12, page 820.

6. Cases supra, note 12, 820, note I, page 821; Harper v.

The forgiveness must be accepted, for a mere rejected proposal to forgive, or willingness to, would not suffice. There must be an acceptance on the part of the delinquent showing repentance and an intention to "sin no more." 4

The forgiveness must be freely given, and not obtained by force,

or fraud and misstatements, or false promises.⁵

The forgiveness must be given advisedly; the conduct alleged to have been forgiven must have been known. Suspicion without

Harper, 20 Mo. 301, 303. Thomas v. Thomas, 2 Coldw. (Tenn.) 123, 128,

In other words, from the admission of the delinquent once more to conjugal society and embraces. Bronson v. Bronson, 7 Phila. 405, 406. Or from continued cohabitation, especially if for a long time. Buckholtz v. Buckholtz, 24 Ga. 238, 243; Twyman v. Twyman, 27 Mo. 383, 385; Davies v. Davies, 55 Barb. (N.Y.) 130, 133.

So a divorce is never granted to parties while cohabiting, as from cohabitation sexual intercourse, and from sexual intercourse forgiveness, is implied. Burns v. Burns, 60 Ind. 259, 260; Harper v.

Harper, 29 Mo. 301, 303.

Occupying the same house but a different apartment, while getting ready to move out, is not condonation. Jacobs v.

Tobelman, 36 La. Ann. 842.

A man cannot at once hold his wife to his bosom as a wife and be at liberty to cast her off when his pleasure dictates an application for divorce. Quincy v. Quincy, 10 N. H. 272, 274; Williamson v. Williamson, I Johns, Ch. (N. Y.) 487,

Being once in bed with a wife after knowledge of her offence, is presumptive proof of forgiveness. Marsh v. Marsh, 13 N. J. Eq. 281, 285. And is even said to be conclusive. Anon., 6 Mass. 147. But this is questioned. Gardner v. Gardner, 2 Gray (Mass.), 434, 442. And in one case one night's intercourse during desertion, the intent being unbroken, was held not to be condonation. Kennedy v. Kennedy, 87 Ill. 25% 254.

So forgiveness may be implied from long acquiescence without intercourse. Williamson v. Williamson, 1 Johns. Ch.

(N. Y.) 487, 492. 1. See Betz v. Betz, 2 Rob. (N. Y.) 694, 696; Johns v. Johns, 29 Ga. 718,

 Quarles v. Quarles, 19 Ala. 363, 366.
 Betz v. Betz, 2 Rob. (N. Y.) 694, 696. Nor is mere continued affection. Quincy v. Quincy, 10 N. H. 272, 279, 280.

4. Armstrong v. Armstrong, 27 Ind.

186. 180: Threewits v. Threewits. 4 De Saus. Eq. (S. Car.) 560, 572.

5. Farnham v. Farnham, 73 Ill. 497,
500; Betz v. Betz, 2 Rob. (N. Y.) 694,
696; Threewitts v. Threewits, 4 Desaus.
Eq. (S. Car.) 560, 572.
And this is why a wife's forgiveness is

less readily presumed than a husband's. Supra, n. 12, page 820. What with him might mean forgiveness, with her might show only patient endurance. Reese υ. Reese, 23 Ala. 785, 787.

"A wife who admits her husband to

conjugal embraces, after she knows that he has committed adultery, is pitied rather than blamed; and, especially where she has no separate estate, is presumed to yield to circumstances beyond her control, and hide her shame in patience, with the hope of reclaiming him. Otherwise as to a husband who condones his wife's adultery." Horne v. Horne, 72 N. Car. 531. In this case the jury found that both parties had been guilty of adultery, and that the wife had not con-doned her husband's fault, and so the husband's complaint was dismissed, and both were refused divorce. See also, as to difference between husband and wife, Ferrers v. Ferrers, I Hagg. Consist. 130; 4 Eng. Ecc. 354, 356; Turner v. Turner, 44 Ala. 437, 449; Delliber v. Delliber, 9 Conn. 233, 235; Perkins v. Perkins, 6 Mass. 69; Gardner v. Gardner, 2 Gray (Mass.), 434, 441; Bowic v. Bowic, 3 Md. Ch. 51, 55; Wood v. Wood, 2 Paige (N. Y.), 108, III; Hollister v. Hollister, 6 Pa. St. 439, 453; Wright v. Wright, 6 Tex. 3, 22.

6. Phillips v. Phillips, r Ill. App. 245. 248: Ellis v. Ellis, 4 Swab. & T. 154, 157; Brown v. Brown, L. R. 7 Eq. 185, 193; Delliber v. Delliber, 9 Conn. 233, 235; Odom v. Odom, 36 Ga. 286, 318; Burns v. Burns, 60 Ind. 259, 260; Rogers v. v. Burns, 60 fild, 259, 200; Rogers v. Rogers, 122 Mass. 423, 424; Quincy v. Quincy, 10 N. H. 272, 274; Stevens v. Stevens, 14 N. J. Eq. 374, 375; Hofmire v. Hofmire, 7 Paige (N. Y.), 60, 61; Pitts v. Pitts, 52 N. Y. 593, 595.

"Condonation by a husband of his

proof is not sufficient knowledge; 1 and forgiveness of one act is not forgiveness of others not known or suspected.2

The Condition.—The forgiveness is always conditional. The condition may be express, as that the delinquent shall cease all correspondence with his paramour; 4 or it may be implied—for the law always implies the condition that there shall be no just cause for complaint in the future, or, as commonly stated, that the delinquent shall treat the condoning party with conjugal kindness.5

If, therefore, after forgiveness of the offence charged, the defendant has given the complainant no just cause for complaint, the for-giveness will be a good defence, but if the condition is broken it

will be no defence.

As a defence, condonation is applicable to a charge of adultery,8 and of cruelty, and, in principle, to other causes for divorce. 10

The allegation of the defence of condonation, like that of other defences, should properly be made by the defendant, 11 though in

wife's adultery may be presumed from his knowledge of facts likely to put him on inquiry and afford him knowledge. Maglathlin v. Maglathlin, 138 Mass. 299.

1. Quincy v. Quincy, 10 N. H. 272,

And even knowledge without sufficient proof to justify separation in other eyes is not enough. Hofmire v. Hofmire, 7 Paige, 60, 61; Uhlmann v. Uhlmann, 17 Abb. N. Cas. (N. Y.) 236.

2. Rogers v. Rogers, 122 Mass. 423,

3. The Condition. - The condonation is always conditional. Supra. n. I, page 821. Farnham v. Farnham, 73 Ill. 497, 500; Lassiter v. Lassiter, 92 N. Car. 129.

4. Bramwell v. Bramwell, 3 Hagg. Ecc.

Or that the defendant shall reform. Harrison v. Harrison, 20 Ala. 629, 646, Or "be true to one in love and duty. Newsome v. Newsome, L. R. 2 P. & D.

306, 312; s. c., 1 Eng. Rep. 241.

In a case where a husband had maltreated his wife and she had sued him for a divorce, which suit was dismissed on his agreement that if he treated her badly afterwards she should receive \$10,-000, it was held that the agreement was valid and not against public policy; but that the further stipulation that she should be the sole judge as to whether he treated her badly was void, because it tended to break up their future harmoni-ous relations, and was against public policy. Reamey v. Bayley (Penn. 1887), 9 Cent. Rep. 640,

5. Cases supra, n. 1, page 821. Farnham v. Farnham, 73 Ill. 497. 500; Gardner v. Gardner, 2 Gray (Mass.), 434, 441; Quincy

v. Quincy, 10 N. H. 272, 274.

So cruelty will revive adultery. Odom v. Odom, 36 Ga. 286, 318; Warner v. Warner, 31 N. J. Eq. 225, 227; Langdon v. Langdon, 25 Vt. 678, 679; D'Aguilar v. D'Aguilar, 1 Hagg. Ecc. 773; 3 Eng. Ecc. 329, 335. So will desertion and other improper

conduct. Johnson v. Johnson, 14Wend. (N. Y.) 637, reversing 4 Paige (N. Y.),

460, 470.

And opprobrious epithets and conduct not legally cruel will revive cruelty. Farnham v. Farnham, 73 Ill. 497, 500; Gardner v. Gardner, 2 Gray (Mass.), 434, 442; Aldridge v. Aldridge, 1 Swab. & T. 88, 89; Robbins v. Robbins, 100 Mass. 150, 152; Hofmire v. Hofmire, 3 Edw. Ch. (N. Y.) 173; 7 Paige (N. Y.), 60, 61.

A cause for limited divorce will revive a cause for absolute divorce. Dent v. Dent, 4 Swab. & T. 105. 107; Palmer v. Palmer, 2 Swab. & T. 61, 62; Warner v.

Warner, 31 N. J. Eq. 225, 227. 6. McDwire υ. McDwire,

(Ohio). 354, 355; cases supra.
7. Bramwell v. Bramwell, 3 Hagg.

Ecc. 518; 5 Eng. Ecc. 232, 238.

8. See especially cases quoted from, supra. n. 12, page \$20, n. 1, page \$21.

9. Gardner v. Gardner, 2 Gray (Mass.), 434, 441; Sullivan v. Sullivan, 34 Ind. 368; 369; Phillips v. Phillips. 27 Wis.

252, 253. 10. This does not seem to have been

11. Ante. IX. (1); supra, n. 12, page 820; Durant v. Durant, I Hagg. Ecc. 733, 752; 3 Eng. Ecc. 310, 319; Timmings v. Timmings, 3 Hagg. Ecc. 76; 5 Eng. Ecc. 22. 26; Sullivan v. Sullivan, 34 Ind. 368, 370; Warner v. Warner, 31 N. J. Eq. 225, 226; Jones v. Jones, 18 N. J. Eq. 32, 34. some States it must be negatived in the bill of complaint. and if it is made known to the court, no divorce will be granted in spite

of its not appearing on the pleadings.2

The proof of condonation need not be as strict as the proof of connivance, as the former is not a base and criminal but often a generous and noble act. Still it must be clearly shown that the complainant freely forgave the offence,4 and knew of the offence,5 Such knowledge may be circumstantially proved. Condonation is a fact for the jury to find under instructions.7 It may be proved under the general issue.8

(5) Recrimination.—Defined: Recrimination is a counter-charge by the defendant of a cause for divorce against the complainant. When each party has a cause for divorce neither can obtain relief. 10

Any cause for divorce is generally a good defence against any other. Under the ecclesiastical law, recrimination, as such, was applied only in a case of adultery against adultery: 11 but, as has

Smith v. Smith, 4 Paige (N. Y.), 432,

1. Bill of complaint need not deny condonation. Earp v. Earp, I Jares, Eq.(N. Car.), 239; Young v. Young, 18 Minn. 90.

2. See Popkin v. Popkin, I Hagg, Ecc.

733; 3 Eng. Ecc. 310, 326 n.; Snow v. Snow, 2 Notes Cas. Sup. 1, 12; North v. -North, 5 Mass. 320; Johnson v. Johnson, I Edw. Ch. (N. Y.) 439. As to the public being a party, see ante IV. (7).

So that no divorce will be granted if it appears that the parties have cohabited since the institution of the suit. Burns v. Burns, 60 Ind. 259, 260; Harper v. Harper, 29 Mo. 301, 303; Bronson v. Bronson, 7 Phila. 405, 406.

And though the offence has been derived, the suit must be begun de novo. Thelin v. Thelin, 8 Ill. App. 421, 424.

Defect of allegation can be cured by Warner v. Warner, 31 amendment,

N. J. Eq. 225, 226.
3. Turton v. Turton, 3 Hagg. Ecc. 388;

5 Eng. Ecc. 130, 136. 4. Popkin v. Popkin. I Hagg. Ecc. 733; 3 Eng. Ecc. 310, 325 n.; supra, n. 69.

5. Supra, n. 6, page 822.

6. Magathlin v. Magathlin, 138 Mass.

7. Peacock v. Peacock, I Swab. & T. 183; Keats v. Keats, I Swab. & T. 334,

8. Backus v. Backus, 3 Me. 136.
9. Recrimination.—"Recrimination is a showing by the defendant of any cause of divorce against the plaintiff in bar of the plaintiff's cause of divorce." Civ. Code 1881, s. 122.

10. See on this point, Brodie v. Alexander, 8 Ses. Cas. Sc. (3d. Ser.) 854, 856;

Hope v. Hope, I Swab. & T. 94. 106, 107; Lempriere v. Lempriere, L. R. I P. & D. 509, 571; Lantour v. Proctor, 10 H. L. Cas. 685; Holston v. Holston, 23 Ala. 777, 779; Johns v. Johns, 29 Ga. 718, 723; Christianberry v. Christianberry, 3 Blackf. (Ind.) 202, 204; Wilson v. Wilson. Blackf. (Ind.) 202, 204; Wilson v. Wilson, 49 Iowa, 230, 232; Dupont v. Dupont, 10 Iowa, 112, 114; Dejarnet v. Dejarnet, 5 Dana (Ky.), 499, C. v. E., 5 Rob. (La.) 135, 138; Handy v. Handy, 124 Mass. 394, 395; Clapp v. Clapp, 97 Mass. 531, 532; Hall v. Hall, 4 Allen (Mass.), 39, 40; Holmes v. Holmes, Walker Ch. (Mich.), Holmes v. Holmes, Walker Ch. (Mich.), 475; Hoffman v. Hoffman, 43 Mo. 547, 549; Nagel v. Nagel, 12 Mo. 53, 55; Duncan v. Duncan, 12 Mo. 157; Masten v. Masten, 15 N. H. 159, 162; Cummings v. Cummings, 15 N. J. Eq. 138, 142; Adams v. Adams, 17 N. J. Eq. 324, 327; Jones v. Jones, 18 N. J. Eq. 33, 34; Reid v. Reid, 21 N. J. Eq. 331, 333; Pollock v. Pollock, 71 N. Y. 137, 141; Wood v. Wood, 2 Paige (N. Y.), 108, 110; Smith v. Smith, 4 Paige (N. Y.), 432, 437; Morrell v. Morrell, 1 Barb. (N. Y.) 318, 321; 3 Barb. (N. Y.), 236, 241; Mattox v. Mattox, 2 Ohio, 375, 377; Dismukes v. Mattox, 2 Ohio, 375, 377; Dismukes v. Dismukes, r Tenn. Ch. 266, 268; Cameron v. Cameron, 2 Coldw. (Tenn.) 375, 377; Hale v. Hale, 47 Tex. 336, 342; Shackett v. Shackett, 49 Vt. 195, 197. 11. See Chambers v. Chambers, 1 Hagg.

Consist. 449; 4 Eng. Ecc. 445. 451; Astley v. Astley, 1 Hagg. Ecc. 714; 3 Eng. Ecc. 303, 307; Harris v. Harris, 2 Hagg. Ecc. 376; 4 Eng. Ecc. 160, 176; Forster υ. Forster, 1 Hagg. Consist. 144; 4 Eng. Ecc. 358, 560; Cocksedge v. Cocksedge, 1 Rob. Ecc. 90, 92; Scrivener v. Scrivener,

1 Rob. Ecc. 92.

been seen, separation was no cause for divorce as desertion if instified by adultery or cruelty. and cruelty was no cause for divorce if both parties were equally to blame.2 So that in effect the then known causes for divorce destroyed each other. And statutes upon this subject have been held to be declaratory of the common law.3 but whether they abolish adultery as a defence in other cases by making it a defence when the charge is adultery, is disputed:4 and a statute making a "like offence" a defence, means thereby an offence which is likewise a cause for divorce.⁵ So that generally under the statutes any cause for divorce is a defence against any other, 6 even though they be causes for different kinds of divorce. 7 And the defence of recrimination is thus an almost universal one.

The allegation of the countercharge in recrimination should be

Not cruelty against adultery. Moorsom v. Moorsom, 3 Hagg. Écc. 87; 5

Eng. Ecc. 28, 30.

1. Ante, VI. (5).

2. Ante, VI. (4).

3. Horne v. Horne, 72 N. Car. 530,

532.
4. That this is not the effect. Nagel v. Nagel, 12 Mo. 53, 55. That it is. Buerfening v. Buerfening, 23 Minn. 563, 564; Bast v. Bast, 82 Ill. 584, 585.

5. Johns v. Johns, 29 Ga. 718, 723. See also Conant v. Conant, 10 Cal. 219, 256; Handy v. Handy, 124 Mass. 394, 395; Clapp v. Clapp, 97 Mass. 531, 532; Nagel v. Nagel, 12 Mo. 53, 55; Ryan v. Ryan, 9 Mo. 539, 543; Hale v. Hale, 47 Tex. 336, 342.

6. Nagel v. Nagel, 12 Mo. 53, 55; Hale

v. Hale, 47 Tex. 336, 342. But the following cases question this: Ryan v. Ryan, 9 Mo. 539, 543; C. v. E., 6 Rob. (La.) 135, 138; Thomas v. Taillen, 13 La. Ann. 127. And the following deny it: Richardson v. Richardson, 4 Port. (Ala.) 467, 478; Bast v. Bast, 82 Ill. 584, 585; Buerfening v. Buerfening, 23 Minn. 563, 564; Ristine v. Ristine, 4 Rawle (Pa.), 460, 461.

Divorce is a remedy provided for an innocent party. Brodie v. Alexander, 8 Ses. Cas. S. (3d Ser.) 854, 856. That both parties can be entitled to a divorce is an anomaly. Dejarnet v. Dejarnet, 5 Dana, 499. So that when each party has committed a cause for divorce neither can complain of the other. Hoffman v. Hoffman, 43 Mo. 547, 549; Mattox v. Mattox, 2 Ohio, 380. "The parties being in pari delicto must be left to themselves; they are two miserable wretches, to be dismissed summarily from the consideration of the court." Horne v. Horne, 72 N. Car. 530, 533.

In fact, a party guilty of a breach of the marriage vow should not have the

assistance of the court to enforce any marriage right. Hope v. Hope, 1 Swab. & T. 94, 107; Ryan v. Ryan, 9 Mo, 539.

543. The following causes therefore have

been held to offset each other:

Adultery against adultery. Wood v. Wood, 2 Paige (N. Y.), 108, 111; and all the cases.

Adultery against desertion. Clapp v. Clapp. 97 Mass. 531; Reid v. Reid, 21 N. J. Eq. 331, 333; supra, first par., preceding col.

Adultery against cruelty. Johns v. Johns, 20 Ga. 718, 722; Holmes v. Holmes, Walk. (Miss.) 475; Shackett v. Shackett, 49 Vt. 195, 197.

Adultery against drunkenness. Ryan v. Ryan, 9 Mo. 539, 543.
Adultery against refusal to support. Shackett v. Shackett, 49 Vt. 195, 197.

Desertion against adultery. Hall v. Hall, 86 Mass. 39, 40; Adams v. Adams, 17 N. J. Eq. 324, 327.

Cruelty against adultery. Reading v.

Reading (N. J. 1886), 4 Cent. Rep., 134. Cruelty against cruelty. Beck v. Beck,

63 Tex. 34. Imprisonment against adultery. Handy

v. Handy, 124 Mass. 394, 395.

7. "It is true the acts set up by way of defence are not such as the acts of the wife that are complained of in the bill: bill says the wife committed adultery; the answer says the husband committed various acts of cruelty. Under our statute both are grounds for divorce-one from the bonds of matrimony, the other from bed and board; and it seems most plain to me that, the legislature having placed these offences so nearly on the same level, the one can be pleaded by way of recrimination as well as the other." Reading v. Reading as the other." Reading v. (N. J. 1886), 4 Cent. Rep. 134.

made with the same particularity required of the same cause as a ground for divorce. And it may be alleged consistently with a general denial.2 And this plea may be put in at any stage of the case: 3 if the offence has occurred after the filing of the answer it may be set up in a supplemental answer.4

The proof of the countercharge in recrimination must be the same as that required to prove the charge; and the proof must make

out what as a charge would be a valid ground for divorce.

(6) Limitations, Laches, or Delay.—Lapse of time between the commission of the offence complained of and the institution of the suit may constitute a defence independently of statute or by virtue of statute. In the former case it is prima facie evidence of connivance, collusion, or condonation; in the latter it is the defence of limitations.8

Unreasonable Delay as a Defence.—Lapse of time is not in itself a bar to an application for divorce, independently of statute; but if unreasonable, it raises a presumption of consent or acquiescence, 10

1. Jones v. Jones, 18 N. J. Eq. 33, 34; Reid v. Reid, 21 N. J. Eq. 331, 333; Wood v. Wood, 2 Paige (N. Y.), 108, 113. But if it appear in the complainant's allegations, this is sufficient; and in Vermont no particularity of allegation is necessary. Jones v. Jones, 18 N. J. Eq. 33; Shackett v. Shackett, 49 Vt. 195, 196. And in one case a court held that the complainant had to deny recrimination, though the statutes of the State did not require it. Dismukes v. Dismukes, I Tenn. Ch. 266, 268.

Whether the court can intervene of its own motion, as in cases of connivance and collusion, is disputed. Dismukes v. Dismukes, I Tenn.Ch. 266; Cameron v. Cameron, 2 Coldw. (Tenn.) 375, 377; Smith v. Smith, 4 Paige (N. Y.), 432, 436, hold the affirmative; and Jones v. Jones, 18 N. J. Eq. 33; Morrell v. Morrell, 3 Barb. (N. Y.) 236,

241, hold the negative. See ante, IX. (1).
2. Forster v. Forster, I Hagg. Consist.
144; 4 Eng. Ecc. 358, 359; Verelst v.
Verelst, 2 Phillim. 145; I Eng. Ecc. 216,

3. Brisco v. Brisco, 2 Add. Ecc. 259; 2 Eng. Ecc. 294, 298. Adultery is a bar, though committed after the act complained of. Haines v. Haines, 62 Tex. 216. After the bringing of the suit. Smith v. Smith, 4 Paige (N. Y.), 432, 438. And even after a decree nisi. Moors v. Moors. 121 Mass. 232, 233; Edgerly v. Edgerly, 112 Mass. 53.

4. Fuller v. Fuller (N. J. 86), 3 Cent.

Rep. 357; 41 N. J. Eq. 178.
5. Pollock υ. Pollock, 71 N. Y. 137,
141. See also Derby υ. Derby, 21 N. J. Eq. 36, 40; Reid υ. Reid, 21 N. J. Eq. 331, 333.

6. Derby v. Derby, 21 N. J. Eq. 36; Wilson v. Wilson, 40 Iowa, 230, 232.

Thus adultery committed by an insane party is no defence. Menis v. Menis, 33 Ala. 98, 101. Nor is refusal to have sexual intercourse. Reid v. Reid, 21 N. J. Eq. 331, 332. Nor is desertion which has not lasted long enough to be a ground for divorce. Wilson v. Wilson, 40 Iowa, 230; Holston v. Holston, 23 Ala. 777, 779; Dupont v. Dupont, 10 Iowa, 112, 114; Hall v. Hall, 4 Allen (Mass.), 39, 40; Adams v. Adams, 17 N. J. Eq. 324, 328. Nor is an offence which has been condoned. Cummings v. Cummings, 15 N. J. Eq. 138, 142; Masten v. Masten, 15 N. H. 159, 162; Jones v. Jones, 18 N. J. Eq. 33, 34, 36.

Recrimination against a wife suing for divorce on account of cruelty was established by the fact that in one of the altercations she had knocked her husband down and beaten him severely.

Peck, 63 Tex. 34.
7. Limitations.—Mortimer v. Mortimer, 2 Hagg: Consist. 310; 4 Eng. Ecc. 543, 545; Clark v. Clark, 97 Mass. 331, 332.
8. Valleau v. Valleau, 6 Paige (N. Y.),

8. Valleau v. Valleau, 6 Paige (N. x.), 207, 211.
9. Cooke v. Cooke, 3 Swab. & T. 126, 138; Clark v. Clark, 97 Mass. 331, 332.
10. Mortimer v. Mortimer, 2 Hagg. Consist. 310; 4 Eng. Ecc. 543; Dysart v. Dysart, 1 Rob. Ecc. 470, 541; Angle v. Angle, 1 Rob. Ecc. 634, 640; Pellew v. Pellew, 1 Swab. & T. 553, 555; Clark v. Clark, 97 Mass. 331; Stokes v. Stokes, 1 Mo. 228, 229; Smith v. Smith, 43 N. H. 234. 235; Fellows v. Fellows, 8 N. H.

234, 235; Fellows v. Fellows, 8 N. H. 160, 162; Williamson v. Williamson, I Johns. Ch. (N. Y.) 488, 491; Whittington which presumption must be rebutted. Unreasonable delay is such delay as makes it appear that the petitioner is insensible to the injury of which he complains.² Two years' unexplained delay has been held a bar,³ and nineteen years' delay has been satisfactorily explained.4

Statutes of Limitations.—In many States there are statutes requiring a suit for divorce to be brought within specified times after the accrual of the cause. Such statutes apply only to the causes named.⁵ The time begins to run when the cause for divorce is first known, 6 and runs on though the offence is repeatedly committed. 7

X. The Proof in Divorce Suits.—(1) The Necessity of Proof.—No divorce can be granted on the mere pleadings,8 by default,9 or by consent, 10 but only after full and satisfactory proof of all the essential allegations on which the right to relief is founded.¹¹ In this respect a divorce suit differs from the great majority of actions, and is like proceedings in equity relating to the lands of infants or insane persons. Proof was thus required by the unwritten law, 12 and is in most States also required by the statutes. 13

v. Whittington, 2 Dev. & Bat. (N. Car.) 64, 72; Schonwald v. Schonwald, Phill. Eq. 215, 221; Doan v. Doan, 3 Pa. L.

J. R. 7.
1. Fellows v. Fellows, 8 N. H. 160;

Stuart v. Stuart, 47 Mich. 566, 567.

2. Pellew v. Pellew, I Swab. & T. 553, 555; 29 L. J. Mat. Cas. 44.

Thus, where a man returned home and found his wife living in adultery with another man, and made no complaint for twenty years afterwards, he was held barred. Williamson v. Williamson, I

barred. Williamson v. williamson, a Johns. Ch. (N. Y.) 481, 492.

The delay may be explained by showing that it was due to want of funds.

Ratcliffe v. Ratcliffe, I Swab. & T. 467, Wilson v. 474. Or to want of proof. Wilson v. Wilson, L. R. 2 P. & D. 435, 441. Or to want of knowledge of the act. Harrison v. Harrison. 3 Swab. & T. 362, 364; Clark v. Clark, 97 Mass. 331, 332. Or perhaps to fear of public scandal. Newman v. Newman, L. R. 2 P. & D. 57, 58.

3. Nicholson v. Nicholson, L. R. 3 P. & D. 53, 54.

4. Harrison v. Harrison, 3 Swab. & T

362, 364. 5. Smedley v. Smedley, 30 Ala. 714, 716.

6. McCafferty v. McCafferty, 8 Blacks. (Ind.) 211, 218; Kaiser v. Kaiser, 23 N.

Y. Sup. Ct. 602, 604.7. Valleau v. Valleau, 6 Paige (N. Y.),

207, 211. 8. Proof.—Schmidt v. Schmidt, 29 N.

J. Eq. 496, 497.
9. Welch v. Welch, 16 Ark. 527, 528.

10. Stafford v. Stafford, 41 Tex. 111, 118.

11. Williams v. Williams, L. R. 1 P. & D. 29, 31; Evans v. Evans, 1 Swab. & T. 328, 329; Moyler v. Moyler, 11 Ala. 620, 628; Hughes v. Hughes, 11 Ala. 307, 312; Welch v. Welch, 16 Ark. 527; Viser v. vertil v. welch, 10 Ark. 527, visel v. Evans, 41 Cal. 103, 107; Phelan v. Phelan, 12 Fla. 449, 453; Shillinger v. Shillinger, 14 Ill. 147, 150; Hawes v. Hawes, 33 Ill. 286, 289; Scott v. Scott, 14 July 14 Cal. 147, 150; Cal. 147, 150; Hawes v. Hawes, 33 Ill. 286, 289; Scott v. Scott, 25 Cal. 147, 150; Hawes v. Hawes, 33 Ill. 286, 289; Scott v. Scott, 25 Cal. 147, 150; Hawes, 26 Cal. 147, 150; Hawes, 25 Cal. 147, 150; Hawes, 33 Ill. 286, 289; Scott v. Scott, 17 Ind. 309, 311; Stibbins v. Stibbins, 1 Met. (Ky.) 476, 478; Robinson v. Robinson, 16 Mich. 79; True v. True, 6 Minn. 458, 463, 465; Tate v. Tate, 26 N. J. Eq. 55, 56; Palmer v. Palmer, 1 Paige (N.Y.), 276, 277; Mansfield v. Mansfield, Wright (Ohio), 284, 285; Kilbourne v. Field, 78 Pa. St. 194, 195; Richmond v. Richmond, New York, Theory 244; Sheffeld v. To Yerg. (Tenn.) 343, 345; Sheffield v. Sheffield, 3 Tex. 79, 82; Matthews v. Matthews, 41 Tex. 331, 333; Latham v. Latham, 30 Gratt. (Va.) 307, 312; Bailey v. Bailey, 21 Gratt. (Va.) 43, 90.

The proof must be satisfactory. mond v. Edmond, 57 Pa. St. 232, 234. And the grounds of divorce must be clearly proved. Fox v. Fox, 25 Cal. 587, 590. So must the facts which give the court jurisdiction. Majors v. Majors, I Tenn. Ch. 264, 265. So must the marriage. Zule v. Zule, I N. J. Eq. 96, 99; infra, X. (5).

12. Common Law: Collet's Case, 2 Mod. 314. Canon Law: Gibs. Cod. 445; Gabbe v. Garston, Milw. 529, 537; Burgess v. Burgess, 2 Hagg. Consist. 223; 4 Eng. Ecc. 527, 529; Betts v. Betts, 1 Johns. Ch. (N. Y.) 197, 199.

13. Consult the statutes of the particu-

lar State.

- (2) The Sufficiency of the Proof.—A suit for divorce is a proceeding sui generis. 1 It is partly a suit in equity, 2 partly a suit in the ecclesiastical courts, 3 partly a civil suit, 4 and partly a criminal prosecution. 5 The rules of evidence are therefore somewhat obscured. But the general principles of civil suits rather than those of criminal proceedings apply. The party charged with the offence must be presumed innocent until proved guilty; and the burden of proof is on the complainant to prove his case by a pre-ponderance of evidence; and the graver the offence charged, the stricter is the proof required. The proof should correspond with the allegations; 11 proof without allegations is in many matters worth no more than allegations without proof.12
- (3) Confessions and Admissions.—As already stated, a divorce cannot be granted by consent: 13 and as will be explained farther on, in most States the parties to a divorce suit cannot themselves testify: 14 but the confessions and admissions of the parties are often admissible as evidence, 15 though in some States by statute, 16 and in some by the settled practice, 17 no divorce will be granted on such confessions or admissions alone. 18 But when a confession is
- 1. Mangels v. Mangels, 6 Mo. App. 481, 484; Phelan v. Phelan, 12 Fla. 449, 455; Stafford v. Stafford, 41 Tex. 111, 118; ante, III. (2).

2. Latham v. Latham, 30 Gratt. (Va.) 307, 312; ante, III. (2).
3. Head v. Head, 2 Kelly (Ga.), 191,

194; ante, III. (2).

4. Musselman v. Musselman, 44 Ind. 106, 111.

5. Chestnut v. Chestnut, 88 Ill. 548,

50: Smith v. Smith, 5 Ores. 186, 188.
6. "To take such opinions then, and to apply them to the proof of controverted facts, and those facts, too, of a criminal nature, does seem to be extremely unsafe. The case indeed is civil, as has been repeatedly observed, but the facts undoubtedly are criminal." Evans v. Evans, 1 Hagg. Consist. 35; 4 Eng.

Ecc. 310, 313.
7. Wagoner v. Wagoner (Md. 1887), 9

7. Wagoner v. Wagoner (Md. 1887), 9
Cent. Rep. 85; cases infra, n. 9.
8. N. v. W., 3 Swab. & T. 234, 238;
Pollock v. Pollock, 71 N. Y. 137, 142.
9. Chestnut v. Chestnut, 88 Ill. 548, 550; Henderson v. Henderson, 88 Ill. 248, 251; Carter v. Carter, 62 Ill. 439, 449; Smith v. Smith. 5 Oreg. 186, 188; Wagoner v. Wagoner (Md. 1887). 9 Cent. Rep. 82; Allen v. Allen v. Cent. Rep. Rep. 85; Allen v. Allen, 2 Cent. Rep. 390; s. c., 101 N. Y. 658.

In one case adultery was required to be proved beyond a reasonable doubt. Berckmans v. Berckmans, 17 N. J. Eq. 453, 454. On the principle that "if the commission of a crime is directly in issue in any proceeding, civil or criminal, it

must be proved beyond a reasonable doubt." Steph, Evid. art. 94.

10. N. v. W., 3 Swab. & T. 234, 238.

11. Mills v. Mills, 18 N. J. Eq. 444, 445; Wright v. Wright, 6 Tex. 3, 19; ante, under each cause for divorce and each defence.

12. McQueen v. McQueen, 82 N. Car. 471, 473; Foy ω. Foy, 13 Ired. (N. Car.)

No cause for divorce not charged in the bill is in issue or may be proved. Johnson v. Johnson, 4 Wis. 135, 140.

"It is not sufficient that the court should be morally convinced of the guilt of the defendant; it must be satisfied that such conviction is founded on legal evidence applicable to legal charges." Caton v. Caton, 13 Jur. 431, 432, 13. Confessions.—Supra, X. (1), n. 10,

page 827.

14. Infra, X. (5), n. 14, page 829. 15. Williams v. Williams, L. R. 1 P. & D. 29. 31; Robinson v. Robinson, I Swab. & T. 362; Tippet v. Tippet, L. R. 1 P.& D. 54: Le Marchant v. Le Marchant, 45 L. J. Div. D. 43; Johns v. Johns, 29 Ga. 718, 722; Robbins v. Robbins, 100 Mass. 150, 151; Lyon v. Lyon, 62 Barb. (N. Y.) 138, 141;

Matchin v. Matchin, 6 Pa. St. 332, 337.

16. See Md. R. C. 1878, p. 481, § 16.

17. See Betts v. Betts, I Johns. Ch. (N. Y.) 197, 199; True v. True, 6 Minn. 458,

18. Hughes v. Hughes, 44 Ala. 307, 312; Woolfolk v. Woolfolk, 53 Ga. 661; Billfull, confidential, reluctant, free from suspicion of collusion, and corroborated, it is the safest kind of evidence.1 A confession ob-

tained by fraud will not be given any weight.2

(4) Indecent Evidence.—Evidence, if relevant, will not be excluded on account of its indecency.3 Although courts may not refuse to consider details. however offensive and disgusting, if they become necessary in the course of investigation, yet they should always require the witnesses to be examined in a spirit of due delicacy, avoiding vulgar and obscene language. So, if competent to testify at all, a wife may prove excessive intercourse; 5 it is public policy which prevents a husband or wife from proving non-access, and not motives of decency.6

(5) Witnesses in Divorce Cases.—The witnesses must testify to facts, and not to opinions and conclusions,7 though the court may ask them their opinions.8 The opinions of experts are admissible in cases of impotence 9 and insanity, 10 but not in cases of habitual drunkenness. 11 The widest latitude is allowed in cross-examining

witnesses in divorce cases.12

The Husband and Wife as Witnesses.—At common law the husband or wife could not testify for or against the other in any case, 13 and this law prevails in the United States, so far as not modified by statute. 14 It is not affected by statutes destroying the incapacity arising from interest, for this incapacity depends on public policy. 15

ings v. Billings, 11 Pick. (Mass.) 461, 462; ings v. Billings, II Pick. (Mass.) 461, 462; Armstrong v. Armstrong, 32 Miss. 279, 288; White v. White, 45 N. H. 121, 122; Clutch v. Clutch, I N. J. Eq. 474; Miller v. Miller, I N. J. Eq. 386, 388; Miller v. Miller, 2 N. J. Eq. 139, 142; Roe v. Doe, I Johns. Cas. (N. Y.) 25, 26; Latham v. Latham, 30 Gratt. (Va.) 307, 312; Richardson v. Richardson, 50 Vt. 110, 122. Any other practice is very dangerous. Williams v. Williams, L. R. I P. & D. 29, 31.

Matchin v. Matchin, 6 Pa. St. 332, 337.
 Derby v. Derby, 21 N. J. Eq. 36, 47;

Miller v. Miller, 2 N. J. Eq. 139, 142.

3. Indecent Evidence.—Melvin v. Melvin, 58 N. H. 560, 570; Da Costa v. Jones, Cowp. 729, 734.

4. Abernathy v. Abernathy, 8 Fla. 243,

259. **
5. Melvin v. Melvin, 58 N. H. 560.

6. Corson v. Corson, 44 N. H. 587, 588; Chamberlain v. Chamberlain, 23 N. Y.

7. Witnesses.—Cameron v. State, 14 7. Witnesses.—Cameron v. State, 14
Ala. 546, 551; Cox v. Whitfield, 18 Ala.
738, 741; Leaning v. Leaning, 25 N. J.
Eq. 241, 242; Edmond v. Edmond, 57
Pa. St. 232, 234; Richards v. Richards. 37
Pa. St. 225, 228; Bishop v. Bishop, 30 Pa. St. 412, 415; Sheffield v. Sheffield, 3 Tex.

8. Crewe v. Crewe, 3 Hagg. Ecc. 123, 5 Eng. Ecc. 45, 47: 'The court, though it cannot rely on the opinion of the witnesses, has a right to know their impression and belief, whether the crime was committed or not; and it is material that the examiner should understand that it is necessary the witnesses should be re-

quired to give this information."

9. See G. v. G., 33 Md. 401, 405; Devanbagh v. Devanbagh, 5 Paige (N.Y.), 554; 6 Paige N.Y.), 176; Newell v. Newell, 9 Paige (N. Y.), 25. See NULLITY

SUITS.

10. See Dexter v. Hall, 15 Wall. U.S. 14, 26; NULLITY SUITS.

11. Batchelder v. Batchelder, 14 N. H. 380, 381.

12. Pullen v. Pullen (N. J. 1886), 4 Cent.

Rep. 71.
13. Husband and Wife could not testify for or against each other in any case,-Miller v. Williamson, 5 Md. 219, 232; and therefore not in divorce cases,—Morse v. Morse, 25 Ind. 156, 163; Dwelly v.

Dwelly, 46 Me. 377, 380.

14. Anon., 58 Miss. 15, 18; Turpin v.
State, 55 Md. 462, 475-477.

15. Anon., 58 Miss. 15; Dwelly v. Dwel. ly, 46 Me. 377; Byrd v. State. 57 Miss. 243; Corson v. Corson, 44 N. H. 587, 588; Stafford v. Stafford, 41 Tex. 111,

But express statutes remove this incapacity wholly or partially in many States. Still it must be noted that this rule excluding the husband does not to apply nullity suits, because they are a proceeding between parties not legally husband and wife.2

Children as Witnesses.—The testimony of young children is admissible, but is not entitled to much weight.3 In some States there are statutes controlling the testimony of young persons.4

Relatives, Servants, and Friends as Witnesses.—As divorce cases arise out of domestic troubles, the witnesses most likely to testify are the parties, their children, their connections, friends, and servants; all of whose testimony is admissible, but very likely to be

colored by prejudice.5

Detectives, Prostitutes, and Accomplices.- Especially in cases of adultery, the complainant depends very often largely on the testimony of detectives, whose evidence must be received with great caution; 6 of prostitutes, who, it is said, will sell their word as readily as their bodies; 7 and of accomplices, whom a false feeling of honor justifies saying anything to clear the accused.8 The testimony of such persons is admissible, but of no great weight without corroboration.9

118; Manchester v. Manchester, 24 Vt. 649, 650.

But some cases hold a contrary view. Merriam v. Hartford, 20 Conn. 354, 363;

Berlin v. Berlin, 52 Mo. 151. 153.

1. Thus, some statutes allow the parties to testify in divorce cases; or in such cases if corroborated; or in cases in which the complainant has been actually summoned; or in cases where the causes are cruelty and desertion; or in all cases where adultery is not charged.

But even when such testimony is admissible, the courts require corroborav. Evans, 41 Col. 103. 107, 108; Lorenz v. Lorenz, 93 Ill. 376, 379; Sandford v. Sandford, 32 N. J. Eq. 420, 422; Winter v. Winter, 7 Phila. 369, 371; Flattery v. Flattery, 88 Pa. St. 27, 28.

Flattery, 88 Pa. St. 27, 28.

2. Lebrun v. Lebrun, 55 M. 496, 503;
Shafto v. Shafto, 28 N. J. Eq. 35, 36....

3. Children.—See Lockwood v. Lockwood, 2 Curt. Ecc. 281, 289; 7 Eng. Ecc. 114, 118; Tobev v. Leonards, 2 Wall. (U. S.) 423, 438; Fox v. Fox, 25 Cal. 588, 591; Blake v. Blake. 70 Ill. 618, 623; Jenkins v. Jenkins, 86 Ill. 340, 342; Kneale v. Kneale, 28 Mich. 344, 345; Crowner v. Crowner, 44 Mich. 180, 181; Crowner v. Crowner, 44 Mich. 180, 181; s. c., 38 Amer. Rep. 138.

"It is exceedingly unsafe to grant a divorce on the testimony of a young child, and courts are not disposed to encourage the blameworthy practice of call-

ing children to testify against a parent." Kneale v. Kneale, 28 Mich. 344. 345. See Tobey v. Leonards, 2 Wall. (U. S.)

423, 438.

Not only is it wrong to the child to examine it as to its parent's chastity, but owing to its immaturity, its evidence is apt to be given without understanding, and with bias. Crowner v. Crowner, 44 Mich. 180.

4. See Minn, R. S. 1878, p. 792, § 9. 5. A lady's maid can hardly be expected to testify against her mistress. Dysart v. Dysart, 1 Rob. Ecc. 106, 127. v. Nash, 8 Ired. (N. Car.) 35, 36. See also Ciocci v. Ciocci, 26 Eng. L. & Eq. 604, 613; Hüghes v. Hughes, 44 Ala. 698, 704; Edmond v. Edmond, 57 Pa. St. 232, 234.

6. Anon., 17 Abb. Pr. (N. Y.) 48, 50. 7. Ciocci v. Ciocci, 26 Eng. L. & Eq. 604, 618; Platt v. Platt, 5 Daly, 295, 297; Turney v. Turney, 4 Edw. Ch. (N. Y.)

566, 567. 8. Burgess v. Burgess, 2 Hagg. Consist. 223; Fox v. Fox, 25 Cal. 588, 590; Doughty v. Doughty, 32 N. J. Eq. 32, 34; Hobby v. Hobby, 64 Barb. (N. Y.) 277; Simons v. Simons, 13 Tex. 558. The positive denial of a respectable person charged as paramour should have its weight. Mayer v. Mayer, 21 N. J. Eq. 246. 248.

9. Cases supra.

Number of Witnesses.—Courts rarely are willing to grant a divorce on the testimony of one person; 1 but there is no rule in the *United States*, 2 nor now in *England*, 3 like that of the ecclesiastical courts, which required at least two witnesses to every fact.4

(6) Proof of Specific Allegations.—The proof of each of the causes for divorce, and of each of the defences, has been shortly discussed under each of those heads, and there are no special rules relating to the proof of the jurisdictional facts; the only remaining subject of importance to be discussed is therefore the proof of

marriage in divorce cases.

Generally, just as a marriage must be alleged 5 it must be proved. Still, the object of statutes and rules requiring full proof in divorce cases is to prevent collusion in making out the grounds of divorce; and as marriage is not a ground for divorce, the reason does not apply to the proof of marriage, and many cases seem to hold that while all other matters must be proved marriage may be admitted,7 though this is also denied.8 If there be a default.9 or if the marriage be denied, 10 it must be proved. If there has been no marriage there can be no divorce, but only a decree of nullity.11

Marriage in divorce cases may be proved by direct evidence of the celebration. 12 or the contract. 13 as the case may be; and it may

1. Supra, n. 18, p. 828, n. 1, p. 830; Hughes v. Hughes, 44 Ala. 698, 704; Evans v. Evans, 41 Cal. 103, 107; Reid v. Reid, 21 N. J. Eq. 331, 333; Anon., 17 Abb. Pr. (N. Y.) 48, 54.

 Moyler v. Moyler, 11 Ala. 620, 627.
 20. 21 Vict. c. 85, § 48.
 2 Burn. Ecc. Law, 238; Evans v. Evans, 1 Rob. Ecc. 165; Best v. Best, 2 Phillim. 161, 169; Dalrymple v. Dalrymple, 2 Hagg. Consist. 54, 127.

5. Proof of Marriage. -Ante, V. (1).

See MARRIAGE.

6. Best v. Best, I Add. Ecc. 411; 2
Eng. Ecc. 108, 160; Guest v. Shipley, 2
Hagg. Ecc. 321; 4 Eng. Ecc. 548, 549;
Hamerton v. Hamerton, 2 Hagg. Ecc.
81; 4 Eng. Ecc. 13, 16; D'Aguilar v.
D'Aguilar, I Hagg. Ecc. 773; 3 Eng. Ecc.
220, 230; Maybey v. Maybey v. Phillim 329, 330; Mayhew v. Mayhew, 2 Phillim. II; I Eng. Ecc. 166; 3 Maule & S. 266, 267; Catterall v. Sweetman, I Rob. Ecc. 580, 581, 583; Evans v. Evans, I Swab. & T. 328, 329; Harman v. Harman. 16 Ill. 85, 86; Williams v. Williams, 3 Me. 135, 136; Hill v. Hill, 2 Mass. 150; Mangue v. Mangue, I Mass. 240, 242; Zule v. Zule, I N. J. Eq. 96, 99; Schmidt v. Schmidt, 29 N. J. Eq. 496, 497; Davis v. Davis, I Abb. N. C. (N. Y.) 140, 141. 149; Cooper v. Cooper, 7 Ohio (2d pt.) 239, 241; Wright v. Wright, 6 Tex. 3, 16. 7. Fox v. Fox, 25 Cal. 587, 590; Harman v. Harman, 16 Ill. 85, 87; Finn v. 267; Catterall v. Sweetman, I Rob. Ecc.

Finn, 12 Hun (N. Y.), 339, 340; Hitch-cock v. Hitchcock, 2 W. Va. 435, 439.

8. Schmidt v. Schmidt, 29 N. J. Eq.

496, 497. 9. Williams υ. Williams, 3 Me. 135,

 Zule v. Zule, I N. J. Eq. 96, 99.
 Davis v. Davis, I Abb. N.C. (N.Y.) 140. 141. 149; Allen v. McCullough, 2 Heisk. (Tenn.) 174, 185; NULLITY SUITS. An agreement to marry will not suffice to base a divorce suit on. Brinkle v. Brinkle, 10 Phila. 1, 2. Nor will a marriage which has been dissolved by death. Downer v. Howard, 44 Wis. 32, 37. Nor one which has been dissolved by a valid and total divorce. Kirrigan v. Kirrigan, 15 N. J. Eq. 146, 149; Cooper v. Cooper, 7 Ohio (2d pt.) 238, 239. But those divorces which have no extra-territorial effect over one of the parties do not so far destroy the marriage as to that party as to prevent a divorce. Cook v. Cook, 56 Wis. 396; Doughty v. Doughty, 28 N. J. Eq. 581; 27 N. J. Eq. 315; Webster v. Webster, 54 Iowa, 153; Tarbell v. Tarbell, 32 Me. 589; Stilphen v. Stilphen, 58 Me. 508, 513, 515; Stilphen v. Hondlette, 60 Me. 447, 452; Wright v. Wright, 24 Mich. 180, 181; ante, II. (9). 12. Mellin v. Mellin, 2 Moore P. C. C.

493. 495. See MARRIAGE.

13. Goldbeck v. Goldbeck, 18 N.J. Fq. 42, 43; Trimble v. Trimble, 2 Ind. 76. 78.

also, except in certain cases be proved by cohabitation and repute. The exceptional cases are those in which the proof of marriage would render acts which would not otherwise be so, criminal, as suits where adultery is the ground alleged.² Another exceptional case is that in which a marriage celebrated at a certain time and place is alleged, in which case no evidence can be introduced of a marriage by contract, or a marriage celebrated at some other time and place.3

XI. Disposition of Property in Divorce Suits. See ALIMONY.

XII. Disposition of Children in Divorce Suits.—(1) The Jurisdiction of Divorce Courts Over the Children of the Parties.—Provision is made by statutes in most States conferring upon the courts before which an application for divorce is pending authority to make such decree as they may deem beneficial and expedient for the care and custody of the minor children of the parties; 4 but such power would seem to arise upon the institution of the suit for divorce or separation in a court of chancery, independently of such statutes, as being embraced in that broad and comprehensive jurisdiction with which courts of chancery are vested over the persons and estates of infants,5 and which attaches whenever their aid is invoked with reference to an infant, although such aid be invoked only incidentally to some other matter which is the principal subject of controversy.6

1. Morris v. Morris, 20 Ala, 168, 172; Burns v. Burns, 13 Fla. 369, 380; Harman v. Harman, 16 Ill. 85, 88; Trimble v. Trimble, 2 Ind. 76, 78; Finn v. Finn, 12 Hun (N. Y.), 339, 340; Vreeland v. Vreeland, 18 N. J. Eq. 43, 45; Houpt v. Houpt, 5 Ohio, 539, 540; Wright v. Wright, 6 Tex. 3, 19; Mitchell v. Mitchell, 11 Vt. 134; Hitchcock v. Hitchcock, 2 W. Va. 435, 438. Sometimes statutes provide for such proof. provide for such proof.

2. Jones v. Jones, 48 Md. 391, 393.
3. Redgrave v. Redgrave, 38 Md. 93, 98; Barnum v. Barnum, 42 Md. 251,

4. Stimson Stat. L. §§ 6154, 6243-46,

5. 2 Bishop Mar. & D. § 531; Miner v. Miner, 11 Ill. 43; Draper v. Draper, 68 Ill. 17, 20; Hansford v. Hansford, 10 Ala. 561; Bryan v. Bryan, 34 Ala. 516; Anonymous, 55 Ala. 428; Stebbins v. Anthony, 5 Colo. 348; McGill v. McGill. 19 Fla. 341; Pittman v. Pittman, 3 Oreg. 543. But see Hopkins v. Hopkins, 39 Wis. 167; Whipp v. Whipp, 54 N. H.

6. By the very circumstance of the institution of a proceeding affecting the person or property of an infant, the court acquires jurisdiction; and the infant, whether plaintiff or defendant, imme-

diately becomes a ward of the court, and as such falls under its special cognizance and protection, and no act can be done affecting the person, property, or state of such infant, unless under the express or implied direction of the court itself. or implied direction of the court itself. 2 Story, Eq. Jur. § 1353; Butler v. Freeman, Ambler, 302; Eyre v. Countess of Shaftsbury, 2 P. Wms. 112; Johnstone v. Beattie, 10 Clark & Fin. 42, 84; Stuart v. Marquis of Bute, 9 H. L. C. 440; Miner v. Miner, 11 Ill. 43; Rivers v. Durr, 46 Ala. 418; Lee v. Lee, 55 Ala. 590; Cowes v. Cowes, 8 Ill. 435; Helms v. Franciscus v. Bland (Md), 545, 578; v. Franciscus, 2 Bland (Md.), 545, 578; Jenkins v. Whyte, 62 Md. 426, 432; Hutson v. Townsend, 6 Rich. Eq. (S. Car.) 249; In re Van Houten, 3 N. J. Eq. 220. In the case of Snover v. Snover, 10 N.

I. Eq. 261, a bill for divorce a mensa and alimony was filed by the wife against the husband, and the same were granted. The bill contained no prayer in relation to the children of the parties, and the defendant's counsel objected to any interference with them by the court; but provision was made for their care and custody in the decree. "It is true," said the court, "the bill does not pray any decree in reference to their provision or disposition. But their situation is before me, and the decree to be made in

When once this jurisdiction attaches, it is ample, effectual, and far-reaching, so that occasion can rarely, if ever, arise for the interposition of any other court in relation to the custody of the children. 1 Courts of common law will ordinarily decline to entertain jurisdiction upon habeas corpus, if it appear that there are proceedings in chancery relative to the custody, 2 and it would seem that

the chancery courts may even restrain such proceedings.3

(2) Award of Custody Pendente Lite.—Whenever the custody of an infant is the subject of suit, the courts of chancery have full power to make *interim* arrangements for such custody.4 power is to be exercised primarily for the benefit of the child: and such custody may be committed to either parent or to a third party, 5 upon such conditions and under such restrictions as the court, in the interests of justice and public policy, shall deem fit to impose.6

(3) Award of Custody upon Determination of Suit—The Welfare of the Infant Controls.—Upon the dissolution of the marriage by

this case respecting the parents affects their welfare. It is the duty of the court to protect such of them as require its care."

1. Pending the trial of such suit affecting its custody, the child is, in legal con-templation, in the custody of the court, and at all times subject to its order from day to day. Joab v. Sheets, oo Ind. 328.

2. Wellesley v. Wellesley, 2 Bligh N.

S. 124, 142.

Where a suit for divorce and the custody of the children was pending in equity, a writ of habeas corpus issued during the pendency of such suit was discharged, and the parties remitted to the chancery court for directions. In re De

Edm. Sel. Cas. (N. Y.) 476.

3. Wellesley v. Duke of Beaufort, 2
Russ. I. 8; Warde v. Warde, 2 Phil. Ch.
786, 792; Ellis v. Jessup, II Bush (Ky.),

4. Boynton v. Boynton, I Swab. & T. 324; Codd v. Codd, 2 Johns. Ch. (N. Y.)
141; In re Welch, 74 N. Y. 299; Scoggins
v. Scoggins, 80 N. Car. 318; Hutson v.
Townsend, 6 Rich. Eq. (S. Car.) 249.

5. Thus, if it be made to appear that its morals would be corrupted, if it remained in the custody of either parent pending a suit for divorce, it is held to be not only in the power but the duty of the court to so change the custody as to remove the child from such corrupting influence—" not because it is asked by either parent, but because the best interests of the child so require; to which may be joined the additional reason, that public policy so demands." Green v. Green,

52 İowa, 403.

6. Thus, the courts ordinarily provide for access, at suitable times, to the children by the parent not having the custody, and will carefully guard such privilege, going to the extent, if necessary, of restraining the parent to whom the custody has been awarded pending the suit from removing the child beyond the jurisdiction of the court. People v. Paulding, 15 How. Pr. (N. Y.) 167. But access will be altogether denied

to a parent whose visits would be highly prejudicial to the child. Upon an application by the wife (respondent) for access to her child pending a suit for judicial separation on the ground of cruelty, it appeared that the child, a daughter, who was about seven years of age and very delicate, had been placed by the peritioner under the charge of a medical man, and it was essential to her recovery that she should be kept free from all excitement. The respondent, who had been under restraint in a lunatic asylum, had not seen her child for a considerable time, and it was alleged that further separation from the child would exercise a prejudicial effect on her health. court, being satisfied that the visits of the mother to the child would lead to excitement and be prejudicial to its recovery, refused to grant an order of access, notwithstanding the probable ill effects of the refusal upon the mother's own health. Philip v. Philip, 41 L. J. Mat. Cas. 89; s. c., 27 L. T. 592.

absolute or limited divorce, the courts, looking mainly to the welfare and interest of the children, in their award of the custody should place them where such interest will be best promoted and their happiness secured. No certain rule for the government of the courts in such cases can be laid down, except this, that the best interests of the children must be consulted. The courts in such cases do not act to enforce the rights of either parent, but to protect the interests of the children.¹

If the child has arrived at an age of discretion to choose for itself, the general rule is that no restraint will be placed upon its determination, and it will not be taken from one parent and given to another against its wishes.² If the child has not arrived at such age of discretion, the courts, in their award of the custody, look primarily to the fitness of the parties and their adaptability to the task of caring for the children, taking into consideration the age, sex, state of health, and other circumstances in the lives of the children,³ and excluding no sources of information or methods of

1. 2 Bishop Mar. & Div. § 532; Adams v. Adams, I Dew. 167; Prather v. Prather, 4 Desaus. (S. Car.) 33, 44; Ahrenfeldt v. Ahrenfeldt, Hoff. Ch. (N. Y.) 497; s. c., 4 Sandf. Ch. (N. Y.) 493: Barrere v. Barrere, 4 Johns. Ch. (N. Y.) 187; Cook v. Cook, I Barb. Ch. (N. Y.) 639; McBride v. McBride, I Bush (Ky.), 15; Cole v. Cole. 23 Iowa, 433; McShaw v. McShaw, 56 Miss. 413; Goodrich v. Goodrich. 44 Ala. 670; State v. English, 31 N. J. Eq. 543; s. c., non. English v. English, 32 N. J. Eq. 738; McKim v. McKim, 12 R. I. 462; Cowes v. Cowes, 8 Ill. 435; Hewitt v. Long, 76 Ill. 399; Draper v. Draper, 68 Ill. 17; Messenger v. Messenger, 56 Mo. 329; Helden v. Helden, 7 Wis. 296; Wand v. Wand, 14 Cal. 512; Pittman v. Pittman, 3 Oreg. 553.

While the principle making the welfare of the children the paramount consideration in the determination of all questions relating to their custody, no matter in what form arising, is one of universal application, the pendency of a suit for divorce is said to be a circumstance requiring a more than ordinarily free application of such principle. Green v. Green, 52 Iowa. 403; Anonymous, 55 Ala. 428 But see Hunt v. Hunt, 4 Greene (Iowa), 216; Conn v. Conn, 57 Ind. 323.

v. English, 31 N. J. Eq. 543; s. c., nom. English v. English, 32 N. J. Eq. 738, 748; Voullaire v. Voullaire, 45 Mo. 602.

The "age of discretion" is ascertained

The "age of discretion" is ascertained not merely by the years of the child (there being, strictly speaking, no definite

time between birth and majority that can be designated as such), but by its capacity, information, intelligence, and judg-ment. If, in any proceeding touching its custody, an infant is able to make a proper choice, the court is, in a large measure, relieved from responsibility; and, with advanced years, approaching to majority, the choice allowed to an infant should increase and, to the largest fant should increase and, to the largest extent, determine the custody. In re Lyons, 22 L. T. 770; State v. Bratton, 15 Am. Law Reg. N. S. 359; Maples v. Maples, 49 Miss. 393; Woodruff v. Conley, 50 Ala. 304; Brinster v. Compton, 68 Ala. 299; Comm. v. Ashton, 8 Week. N. Cas. (Pa.) 563; Curtis v. Curtis, 5 Gray (Mass.), 535; Hewitt v. Long, 76 Ill. 99; State v. Baird. 18 N. J. Eq. 194; s, c., 21 N. J. Eq. 384; State v. Paine, 4 Humph. (Tenn.) 523; Gishwiler v. Dodez, 4 Ohio St. 615; Clark v. Bayer, 32 Ohio St. 299. But see In re Goodnough, 19 Wis. 274; State v. Richardson, 40 N. H. 272; Bowell v. Berryhill, 2 Ind. 40 N. H. 272; Bowell v. Berryhill, 2 Ind. 613: Henson v. Watts, 40 Ind. 170; Shaw v. Nachtwey, 43 Iowa, 563; Armstrong v. Stone, 9 Gratt. (Va.) 102; Rust v. Van Wader, 9 W. Va. 600. In rare instances the choice of a child of advanced years, fully capable of exercising it, has been overruled upon rather technical grounds, without reference to the question of its welfare. Ex parte Williams, 11 Rich. (S. Car.) 452; Moore v. Christian, 56 Miss.

3. Campbell v. Campbell, 37 Wis. 206; Cowes v. Cowes, 8 Ill. 435; Draper v. Draper. 68 Ill. 17; Cole v. Cole, 23 Iowa, 433; Messenger v. Messenger, 56 Mo.

investigation that are likely to aid in making a proper selection.1

Custody is ordinarily awarded to the innocent and successful party to a divorce suit; but there is no absolute rule upon the subject. The guilt or innocence of the respective parties, according to the reason and weight of the authorities, is material to the question of custody only so far as it relates to the fitness of the parties for the task of caring for the children.³ The leading principle here, as upon other points, is to consult the good of the children rather than the gratification of the feelings and wishes of the parents: 4 therefore the fact of either party's guilt is not sufficient to prevent an award of the custody to such party, if the interests of the children would be thereby subserved and their welfare promoted.5

The entire matter of the award is one largely of judicial discretion, and, in the exercise of their discretion, the courts often award some children to one parent and some to the other, having regard to age, sex, state of health, and other circumstances. Thus children of a near age will, as a rule, be kept together,7 and the general inclination and tendency of the courts are in the direction of giving the younger children and female children of all ages to

329; English v. English, 32 N. J. Eq. 738; Anonymous. 55 Ala. 428; McShaw v. McShaw, 56 Miss. 413.

1. In the leading case of Cowes v. Cowes, 8 Ill. 435, it is held that the court in such cases is bound by no particular form of proceeding; it may be either referred to a master to inquire and report as to who will be a fit person, or that may be inquired of in open court; and the court may determine from its own knowledge alone.

So it was held that, while admissions of the parties cannot be the foundation for a divorce, they are yet competent evidence on the question of the custody of the children. Cornelius v. Cornelius,

31 Ala. 470, 481.

31 Ala. 479, 481.

2. Suggate v. Suggate, I Swab. & T. 492; Boyd v. Boyd, I Swab. & T. 562; Boynton v. Boynton, 2 Swab. & T. 275; Seddon v. Seddon, 2 Swab. & T. 640; Barrere v. Barrere, 4 Johns. Ch. (N. Y.) 187; Ahrenfeldt v. Ahrenfeldt. Hoff. Ch. (N. Y.) 497; s. c., 4 Sandf. Ch. (N. Y.) 493; Bascom v. Bascom, Wright, Ohio, 632; Noel v. Noe 632; Noel v. Noel, 24 N. J. Eq. 137;

Cole v. Cole, 23 Iowa, 433.

3. Helden v. Helden, 7 Wis. 296; English v. English, 32 N. J. Eq. 738, 745; Hewitt v. Long, 76 Ill. 399, 408. But see Carr v. Carr, 22 Gratt. (Va.) 168; Latham v. Latham, 30 Gratt. (Va.) 307.

Upon a proceeding by habeas corpus, it

was held that evidence of cruel treatment by the husband of the wife is relevant to the question of fitness for the custody of their child, since a father who is cruel to his wife is likely to be so towards his children. In re Pray, 60 How. Pr. (N.

4. 2 Bishop Mar. & Div. § 532; Cook v. Cook, I Barb. Ch. (N.Y.) 639; Lusk v. Lusk, 28 Mo. 91; Brandon v. Brandon, 14 Kan. 342: Pittman v. Pittman, 3 Oreg.

Even though there be an agreement between the parties as to the custody, such circumstance will not have a controlling influence upon the decision of the court. Cook v. Cook, I Barb. Ch, (N. Y.) 639; Hunt v. Hunt, 4 Greene (Iowa),

10. 33; Hunt v. Hunt, 4 Greene (Iowa),
216; Thorndyke v. Rice, 24 L. R. 19.
5. Anonymous, 55 Ala. 428; Dailey v.
Dailey, Wright (Ohio), 514; Messenger v. Messenger, 56 Mo. 329.
6. Conn. v. Conn, 57 Ind. 323; Prather v. Prather, 4 Desaus. (S. Car.) 33; Cowes v. Cowes, 8 Ill. 435, 440; Dailey v. Dailey,
Wright (Ohio)

Wright (Ohio), 514.
7. Warde v. Warde, 2 Phil. Ch. 786, 791; English v. English, 32 N. J. Eq. 738, 748; Lusk v. Lusk, 28 Mo. 91; Goodrich v. Goodrich, 44 Ala. 670. See, further, Comm. v. Addicks, 2 S. & R. (Pa.) 174; Comm. v. Dougherty J. Leg. 6. R. 62. Comm. v. Dougherty, I Leg. G. R. 63;

State v. Baird, 18 N. J. Eq. 194; s. c., 21 N. J. Eq. 384.

the mother.1 If the interest of the infant demands such a course. the custody may be awarded to a third party.2 Questions in regard to the religious education of the children are sometimes considered in the award of the custody upon the separation of the parents by the English courts; 3 but the American courts universally repudiate the notion that the question of religious belief can enter into the determination of the custody. 4 Yet upon grounds connected with the temporal interests of the children, the courts may confide the custody to a particular person with a view to having them brought up in a certain religious belief.5

(4) Effect of Decree.—The question of custody is not necessarily dependent upon the action of the court in regard to the divorce or separation of the parents. The courts may dispose of the custody upon a bill for alimony only, or upon a bill for divorce even though the divorce be denied. But when a divorce merely has been applied for and the court's action in relation to the children has not been called into aid, the custody may afterwards be adjudicated in a separate proceeding by habeas corpus.9 But when the court has passed upon the question of custody in a divorce suit, its decree is res adjudicata, and cannot be collaterally impeached or inquired into. 10 The important distinction must, however, be noted that while such decree binds the parties inter sese, the children themselves are not bound or concluded by the decree; so that if a question in relation to their custody subsequently arise upon

1. Prather v. Prather, 4 Desaus. (S. Car.) 33; Helms v. Franciscus, 2 Bland (Md.), 33; Heims v. Franciscus, 2 bland (Md.), 544, 563; Hawkins v. Hawkins, 65 Md. 104, 112; Dailey v. Dailey, Wright (Ohio), 514; Leavitt v. Leavitt, Wright (Ohio), 719; Wand v. Wand, 14 Cal. 512; Goodrich v. Goodrich, 44 Ala. 670; Anonymous, 55 Ala. 428; English v. English, 32 N. J. Eq. 738, 749; Draper v. Draper, 68 Ill. 17, 20; Wagner v. Wagner, 6 Mo. App. 572.

2 Adams v. Adams, I Dew. 167; Rice v. Rice. 21 Tex. 58, 67; McKenzie v. State, 80 Ind. 547; Cocke v. Hannum, 39 Miss. 423, 439; Jackson v. Jackson, 8 Oregon, 402; Deringer v. Deringer, 10 Phila. 190; Voullaire v. Voullaire, 15 Mo. 602 But see Hopkins v. Hopkins, 39

Wis. 167.

Wis. 107.

3. Shelley v. Westbrooke, Jac. 266; Thomas v. Roberts, 3 De G. & Sm. 758; In re Besant, 11 Ch. D. 508; Talbot v. Earl of Shrewsbury, 2 My. & Cr. 672; In re Agar — Ellis, 10 Ch. D. 49; Andrews v. Salt, L. R. 8 Ch. 622; In re Meade, 5 Ir R. Eq. 8; In re Grimes, 11 Ir.R. Eq. 465.

4. State v. Bratton, 15 Am. Law Reg. N. S. 359; People v. Gates, 43 N. Y. 40; Desribes v. Wilmer, 69 Ala. 25; In re Doyle. 16 Mo. App. 159; Voullaire v.

Voullaire, 45 Mo. 602.

- 5. As where the relatives of a child were of a particular denomination, the court, considering that it would be a temporal disadvantage to the child to be brought up in a religion which would tend to separate it from those of its own blood, and conforming to the spirit and policy of a statute bearing upon a kindred case, took the matter of religious education into consideration in determining the custody. In re Doyle, 16 Mo. App. 159. But see Voullaire v. Voullaire, 45 Mo. 602.

 6. Welch v. Welch, 43 Conn. 342, 350; Plaster v. Plaster, 47 Ill. 290.

7. Prather v. Prather, 4 Desaus. (S. Car.) 33; Cowes v. Cowes, 8 Ill. 435.

8. Bennett v. Bennett, 43 Conn. 313, 320; Latham v. Latham, 30 Gratt. (Va.) 307, 331; Anonymous, 55 Ala. 428.
9. Cocke v. Hannum, 39 Miss. 423,

10. Hoffman v. Hoffman, 15 Ohio St. 427; Wakefield v. Ives, 35 Iowa, 238; Shaw v. McHenry, 52 Iowa, 182; Wilkinson v. Deming, 80 Ill. 342; Williams v. Williams, 13 Ind. 523; Sullivan v. Learned, 49 Ind. 252; Dubois v. Johnson, 96 Ind. 6; Bennett v. Bennett, Deady (U. S.), 299. But see Kline v. Kline, 57 Iowa, 386; Thorndyke v. Rice, 24 L. R. 19; In re Vetterlein, 14 R. I. 378. habeas corpus, the award in the divorce proceedings cannot overbear the requirements of the good of the children which may necessitate a determination without reference to the mere claim of the custody arising out of the decree. The extra-territorial effect of the decree as to the custody of the children has been upheld on the one hand,2 and denied on the other,3 and qualified in still another instance.4

Scope of the Decree.—A decree in relation to the custody of the infant children of the parties to a divorce suit has been held to have the effect of constituting such infants wards of the court; 5 and the courts may require the infants to be kept within the jurisdiction.6 The courts generally make provision in the decree for access by the party not having the custody to such infants at reasonable times and places, but may restrain such party by injunction from interfering with such custody.8 The decree in such cases terminates the mere legal rights of the parent deprived of the custody, but not necessarily the liabilities. 10

(5) Amendment of Decree.—The power to amend or modify the decree in relation to the custody of the children is provided for by statute in a number of the States. 11 As to the power of the courts independently of such provisions, a conflict of ruling obtains. On the one hand it is affirmed that the infant children of the divorced parties are, in some sense, the wards of the court, and that the decree in relation to the custody may from time to time be modified or altered, as the circumstances may require, under the general chancery powers. 12 On the other hand, the power

is denied, and strictly construed even when given by statute. 13

- 1. In re Bort, 25 Kan. 308; People v. Allen, 40 Hun, 611. See also People v. Brady, 56 N. Y. 182; State v. Lembke (Minn.), 34 N. W. Rep. 334.

 2. People v. Allen, 40 Hun (N. Y.), 611.

In re Bort, 25 Kan. 308.
 Kline v. Kline, 57 Iowa, 386; In re

Vetterlein, 12 R. I. 378.

5. Hewitt v. Long, 76 Ill. 399; Miner v. Miner, 11 Ill. 43. See also Hill v.

Hill, 49 Md. 450.

6. Hewitt v. Long, 76 Ill. 399; Miner v. Miner, 11 Ill. 43; Campbell v. Campbell, 37 Wis. 206; Deringer v. Deringer, 10 Phila. 190; Ryce v. Ryce, 52 Ind.

64.
7. Hewitt v. Long, 76 Ill. 399; Miner v. Miner, 11 Ill. 43; Campbell v. Campbell, 37 Wis. 206; Wand v. Wand, 14 Cal. 512, 518; Hill v. Hill, 49 Md. 450, 454; Burge v. Burge, 88 Ill. 164; Lusk v. Lusk, 28 Mo. 91, 94; Voullaire v. Voullaire, 45 Mo. 602; McKim v. McKim, 12 R. I. 462; State v. English, 31 N. J. Eq. 543, 548; Sherwood v. Sherwood, 56 Iowa, 608.

8. Cornelius v Cornelius, 31 Ala. 479;

Goodrich v. Goodrich, 44 Ala. 670.
9. Cocke v. Hannum, 39 Miss. 423, 438; Wilkinson v. Deming, 80 Ill. 342; Hill v. Hill, 49 Md. 450. Contra: Succession of Pinniger, 25 La. Ann. 53.

10. Plaster v. Plaster, 47 Ill. 290; Welch's App., 43 Conn. 342. But see Brow v. Brightman, 136 Mass. 187.

11. Bennett v. Bennett, Deady (U. S.),

299. 304; Draper v. Draper, 68 Ill. 17; Burge v. Burge, 88 Ill. 164; Ryce v. Ryce, 52 Ind. 64; Campbell v. Campbell, 37 Wis. 206, 212; Chandler v. Chandler, 24 Mich. 176; Hunt v. Hunt, 4 Greene (Iowa), 216; Boggs v. Boggs, 49 Iowa, 190; Harvey v. Lane, 66 Me. 536.

12. Hoffman v. Hoffman, 15 Ohio St. 427, 435; Miner v. Miner, 11 III. 43; Cowes v. Cowes, 8 III. 435; Thorndyke v. Rice, 24 L. R. 19, 22; Cornelius v. Cornelius, 31 Ala. 479; McGill v. McGill, 19 Fla. 341. See also Hill v. Hill, 49 Md.

13. Sullivan v. Learned, 49 Ind. 52; Dubois v. Johnson, 96 Ind. 6.

XIII. The Decree of Divorce.—(1) The Different Kinds of Decrees. -A divorce suit may be terminated by a decree dismissing the bill of complaint, which, unless made "without prejudice." bars another action for the same cause. 1 Or by a decree of divorce α vinculo matrimonii; or by a decree a mensa et thoro; or by a decree of nullity of marriage; or the decree may entitle the party to relief, unless within a certain time some reason to the contrary appears (decree nisi). And the decree may grant other relief with the divorce; or grant a divorce without giving the guilty party the right to marry again.2

(2) Nisi Decrees.—In some States the court does not, after hearing, immediately divorce the parties, but passes a decree nisi,3 and which can be made absolute only after the expiration of a certain time.4 and provided no cause to the contrary is meanwhile shown.5

1. Decree Dismissing Complaint —The bill may be dismissed on application of the defendant if the complainant does not rest v. Desmarest, 31 L. J. Mat. Cas. 34; Round v. Round, 20 L. T. N. S. 87,—or abandons the suit,—Symons v. Symons, z. I. Mat. Cas. 84; or if the parties pendente lite resume cohabitation,— Cooper v. Cooper, 33 L. J. Mat. Cas. 71,—or if both parties desire it,—Seddon v. Seddon, 31 L. J. Mat. Cas. 31; or if a valid defence has been established .-Gipps v. Gipps, 32 L. J. Mat. Cas. 179, 181; or if there has been a verdict for the defendant and the time for asking a new trial has elapsed .-- Hill v. Hill, 30 L. J. Mat. Cas. 198. But the complainant cannot have his bill dismissed if a cross-bill has been filed. Schira v. Schira, L. R. I. P. & D. 466. The decree may dismiss the complaint "without prejudice," when the merits of the controversy have not been determined,—Brown v. Brown, 37 N. H. 536, 538; Edwards v. Edwards, 30 Ala. 394, 395; but not otherwise.—Ashmead v. Ashmead, 23 Kan. 262, 263. Unless, dismissed "without prejudice," no action can afterwards be Burton, 58 Vt. 414; Rivers v. Rivers, 65 Iowa, 568; post, XIV. (5).

2. Contents of the Decree. - The decree should state specifically the kind of divorce granted; and in a case in which either an absolute or a limited divorce could be granted, the word "divorce" alone means absolute divorce. Miller v.

Miller, 33 Cal. 353, 355.

The decree should make express provision for all such relief as is dependent on the court's action. Thus, if a statute provides that the court shall decree an

innocent wife one third of her husband's estate, if the decree contains no provision the wife gets no title. Barnford v. Barnford, 4 Oreg. 30, 35. So the existence of dower after divorce may depend on the wording of the decree. Barker v. Cobb, 36 N. H. 344, 348. See also, on those points, Gleason v. Emerson, 51 N. H. 405, 406; Porter v. Porter, 27 Gratt. (Va.) 500, 601, 607.

It seems also that it should state the ground upon which the divorce is granted or refused--whether the charge has been proved or has failed, or a defence has been established. Gipps v. Gipps, 32 L. J. Mat. Cas. 179, 180.

There is no object in stating matters which are not dependent on the decree, as that the parties can or cannot marry again. 2 Bish. Mar. Div. § 745.

With the pleadings it should make a complete record, but no proofs need appear in it. Hawes v. Hawes, 33 lll. 286. 289.

Unauthorized and superfluous provisions may on motion be stricken out. Hardy v. Kirtland, 34 Ind. 365, 367. And mistakes may be corrected. Adams v. Adams, 51 N. H. 388, 397.

The date of the decree should be of the day it is signed, though decrees may in some cases be antedated, and nunc protunc judgments rendered. Ambler v. Ambler, 32 L. J. Mat. Cas. 6; Mead v. Mead, I Mo. App. 245, 284; Master v. Master, 53 Mo. 326, 327; Webber v. Webber, 83 N. Car. 280.

3. Nisi Decrees.—Stoate v. Stoate, 32 L. J. Mat. Cas. 120; Moors v. Moors, 121 Mass. 233.

4. Walton v. Walton, L.R. 1 P.& D. 227. 5. Masters v. Masters, 34 L. J. Mat. Cas. 7.

If any cause is shown, the decree nisi may be reversed: 1 if not, it may be made absolute.2 Until the decree is made absolute the

marriage is in full force.3

(3) Decrees of Nullity.—As already stated, nullity suits, or suits to have a marriage declared void, are not discussed in this article. Such decrees do not properly dissolve a marriage, but declare that no valid marriage ever existed.4

(4) Decrees of Divorce a Vinculo Matrimonii.—When the court grants a divorce, dissolving absolutely the mutual rights and .obligations of the husband and wife, the decree is known as a decree

of divorce from the marriage bond, or a vinculo matrimonii.

Such a decree absolutely dissolves all marriage ties, and destroys the relation of husband and wife. After the date of the decree. the husband has no wife and the wife has no husband,6 and the woman is a feme sole. Even if one of the parties is prohibited from marrying again,8 a marriage in defiance of such prohibition is not bigamy; 9 not even in such case is sexual intercourse with another person adultery, 10 or any matrimonial offence. 11 So after such a divorce the man and woman are as strangers to each other; 12 they may contract with each other 13 and sue each other; 14 and the one surviving does not represent the other as widow, widower,

1. Hulsey v. Hulsey, 41 L. J. Mat. Cas. 19. This application in some places may be made by the attorney for the State. Ante, IV. (7).

2. Boddy v. Boddy, 30 L. J. Mat.

Cas. 5.

3. Noble v. Noble, L. R. I P. & D.

691. Such a nisi decree does not dis-R. 3 Ch. App. 220, 225; Wales v. Wales, 119 Mass. 89, 90. Until made absolute, neither party can marry,—Moors v. Moors, 121 Mass. 232, 233; Norman v. Villars, L. R. 2 Exch. Div. 359. 361; and the wife is still a married woman under all the disabilities of coverture, —Fox v. Davis, 113 Mass. 255, 258, 259; Norman v. Villars, supra; and the husband should still be joined on his wife's suits. Norman v. Villars, supra; Stephenson v. Sterrett, 20 Week. R. 745.

The legislature cannot make a decree nisi absolute, unless it can grant a legislative divorce. Sparhawk v. Sparhawk,

116 Mass. 315, 320.

The decree nisi stops alimony pendente lite. Latham v. Latham, 2 Swab. & T.

When made absolute, the decree takes effect from the date of the passage of the decree nisi. Prole v. Soady, L. R. 3 Ch. App. 220. But see Norman v. Villars, L. R. 2 Exch. Div. 359.

4. Nullity Decrees.—Ante, I. (4). NULLITY SUITS.

5. Divorce a Vinculo.-Clark v. Lott. 11 Ill. 105, 114: Whitsell v. Mills, 6 Ind. 229, 230; McCrarey v. McCrarey, 5 Iowa, 232, 238; State v. Weatherby, 43 Me. 252, 253, State 7. Weatherby, 43 Me. 258, 263; People v. Hovey, 5 Barb. (N. Y.) 117, 118; Hull v. Hull, 2 Strobh. Eq. (S. Car.) 174, 178; Porter v. Porter; 27 Gratt. (Va.) 599, 601.

6. Phillips v. Barnet, L. R. I Q. B. Div. 426, 441; Dickson v. Dickson, I

McCrarey, 5 Iowa, 232, 238; People v. Hovey, 5 Barb. (N. Y.) 117.

Still, word "wife" may be applied to

the woman as descriptio persona. Bullock v. Zilley, 1 N. J. Eq. 489.
7. See Piper v. Moy, 51 Ind. 283, 284.

See MARRIED WOMEN.

8. Infra, XIII. (6) n. 13, p. 841, et seq. 9. State v. Weatherby, 43 Me. 258; People v. Hovey, 5 Barb. (N. Y.) 117; Dickson v. Dickson, 1 Yerg. (Tenn.) 110.

10. State v. Weatherby, 43 Me. 258; Com. v. Putnam, 1 Pick. 26.

11. Forrest v. Forrest, 3 Bosw. (N. Y.) 661, 671,

12. One can refuse admittance to the other, etc. Brown v. Smith, 83 Ill. 291,

13. See Merrill v. Merrill, 38 Mich. 707, 708.

14. See Blake v. Blake, 64 Me. 177, 183.

heir, or personal representative. With such divorce, courtesv.2 and dower, 3 and all marriage estates during coverture cease, 4 as does a provision made for a woman "during coverture." 5 Such a divorce dissolves the marriage as absolutely as death does. 6 If the parties have different domiciles at the time of the decree, beyond the State granting the divorce, one may be divorced while the other is not.7

(5) Decrees of Divorce a Mensa et Thoro.—When the court grants a divorce which does not absolutely destroy the relation of husband and wife between the parties, but provides for their living apart, the decree is known as a legal separation, or a divorce from bed and board, or a mensa et thoro. Such a divorce does not put an end to the marriage ties or destroy the relation of husband and wife,8 but simply suspends certain of the mutual rights and obligations of the parties, indefinitely or for a limited time, or till they become reconciled and live together again. Such a divorce does not enable the parties to marry again, 10 nor does it affect their

1. Whitsell v. Mills, 6 Ind. 229, 231; Wiggin v. Smith, 54 N. H. 213, 220.

In the case of an absolute divorce, the woman after the man's death is not his widow. Burr v. Burr, 11 Opin. Atty.-Gen. 1, 2; Clarke v. Lott, 11 Ill. 105, 115; Gen. 1, 2; Clarke v. Lott, 11 III. 105, 115; Whitsell v. Mills, 6 Ind. 229, 231; Chenowith v. Chenowith, 14 Ind. 2, 3; Billan v. Hercklebrath, 23 Ind. 71, 72; Hunt v. Thompson, 61 Mo. 148, 153; Dobson v. Dobson, 17 Mo. 87; Reynolds v. Reynolds, 24 Wend. (N. Y.) 193, 196; Rice v. Lumby, 10 Ohio St. 596, 598; Lamkin v. Knapp, 20 Ohio St. 590, 593; Lainkii v. Knapp, 20 Ohio St. 454, 457. But this is questioned. Wait v. Wait, 4 N. Y. 95, 107; Allen v. McCullough, 2 Heisk. (Tenn.) 174, 188. And the contrary has been held. Highley v. Allen, 3 Mo. App. 521, 526; Wood v. Simmons, 20 Mo. 363, 366; Mansfield v. McIntyre, Ohio, 27, 31.
 Courtesy.—See title Courtesy.
 Dower.—See title Dower.
 Flory υ. Becker, 2 Pa. St. 470, 472.

The husband's estate ceases. Howey v. Goings, 13 Ill. 95, 108; Porter v. Porter, 27 Gratt. (Va.) 599, 602, 604.
5. Harvard v. Head, 111 Mass. 209.212.

6. See Boykin v. Rain, 28 Ala. 332, 343; McCrarey v. McCrarey, 5 Iowa, 232, 239, 246, 253; Hays v. Sanderson, 7 232, 230, 246, 253; Hays v. Sanderson, 7 Bush (Ky.). 489, 490; Webster v. Webster, 58 Me. 139, 145; Barber v. Root, 10 Mass. 260, 268; Hunt v. Thompson, 61 Mo. 148, 152; Wood v. Simmons, 20 Mo. 363, 366; Highley v. Allen. 3 Mo. App. 521, 526; Miltimore v. Miltimore, 40 Pa. St. 161, 156; Flory v. Becker, 2 Pa. St. 470, 472; Kintzinger v. Kintzinger, 2 Ashm. (Pa.) 445, 463; Hull v. zinger, 2 Ashm. (Pa.) 445, 463; Hull v.

Hull, 2 Strobh. Eq. (S. Car.) 174, 178; Browning v. Headley, 2 Rob. (Va.) 340, 371. But see Ames v. Norman, 4 Sneed (Tenn.), 683, 694; Allen v. McCcullugh, 2 Heisk. (Tenn.) 174, 183, 189; Gillespie v. Warford, 2 Coldw. (Tenn.) 632, 644.

A provision for husband and wife during their "joint lives" has been held to mean "joint married lives," and to cease with absolute divorce. Hays v. Sander-

son, 7 Bush, 489, 490.

7. See Flower v. Flower, 42 N. J. Eq. 152; People v. Baker, 76 N. Y. 78; ante,

IĬ. (9).

8. Divorce a Mensa.—Does not destroy marriage relation, etc. Cassel v. Powell, marriage relation, etc. Cassel v. Powell, 17 Com. B. N. S. 743, 748; Moore v. Barber, 5 Giff 43, 46; Barber v. Barber, 21 How. (U. S.) 582, 601; Ellison v. Mayor, 53 Ala. 558, 561; Gee v. Thompson, 11 La. Ann. 657, 658; Kriger v. Day, 2 Pick. (Mass.) 316, 317; Dean v. Richmond, 5 Pick. (Mass.) 461, 465; Barber v. Barber, 1 Chand. (Wis.) 280, 282; Bartere v. Barrere v. Lohns Ch. (N. V.) 187. rere v. Barrere, 4 Johns. Ch. (N. Y.) 187,

9. Clark v. Clark, 6 W. & S. (Pa.) 85, 87; Barrere v. Barrere, 4 Johns. Ch. (N. Y.) 187, 192. Resumption of cohabitation absolutely annuls a divorce a mensa. Liddell v. Liddell, 22 La Ann. 9, 10; Gee v, Thampson, 11 La.Ann. 657, 658; Hokamp v. Hagaman, 36 Md 511, 517; Kriger v. Day 2 Pick. (Mass.) 316, 317; Dean v. Richmond, 5 Picg. (Mass.) 461, 468; Nathans v. Nathans, 2 Phila. 393, 394; McKarracker v. McKarracker, 3 Yeater (Pa.), 56; Tiffin v. Tiffin, 2 Binn. (Pa.) 202.

10. Barber v. Barber, 21 How. (U.S.)

marriage property rights, or estates dependent upon coverture; 2 but it may put an end to their common concerns, 3 give the wife a standing as a *feme sole*, ⁴ and otherwise change their legal condition. ⁵ The survivor is a widow or widower. ⁶

(6) Decree with Prohibition Against Marriage.—When the court is so authorized by statute,7 it may, in granting an absolute divorce, prohibit the guilty party from marrying again during the other party's lifetime, or until some further decree; but a decree of this kind entered against a party who had not appeared or been summoned would have no effect. 10 So it would be improper because unnecessary to enter such a decree with a divorce a mensa et thoro, or when the prohibition is directly created by statute. 11 Whether the prohibition is contained in the decree or in a statute, the effect is the same. 12 Whether such a prohibition has any effect outside of the State where the divorce has been granted is much disputed. In most States such a prohibition is regarded as a penalty, 13 and is therefore deemed to have no extraterritorial effect. 14 But in Maryland 15 and North Carolina 16 it is

582, 601; Savoie v. Ignogoso, 7 La. 281, 285; Wait v. Wait, 4 N. Y. 95, 105.

Still a marriage after a divorce a mensa is not bigamy, being expressly excepted in the old English statute in force. ber v. State, 50 Md. 161, 167,

1. Clark v. Clark, 6 W. & S. (Pa.) 85,

- 2. Smoot v. Lecott, I Stew. (Ala.) 500,
- 3. Gee v. Thompson, II La. Ann. 657, 658; Ford v. Kittredge, 26 La. Ann. 190,
 - 4. Dean v. Richmond, 5 Pick. (Mass.)

- 461, 465.
 5. See Husband and Wife.
 6. Liddell v. Liddell, 22 La. Ann. 9, ro; Hokamp v. Hagaman, 36 Md. 511, 517.
 - 7. Barber v. Barber, 16 Cal. 378.
- 8. Elliott v. Elliott, 38 Md. 357, 361. 9. Cochrane v. Cochrane, 10 Allen (Mass.), 276, 277; Peck v. Peck, 8 Abb. N. C. (N. Y.) 400. 401.
 10. Garner v. Garner, 56 Md.; 127, 128;

ante, II. (9).

11. Though something of this kind was done in Barrere v. Barrere, 4 Johns. Ch.

(N. Y.) 187.

12. An examination of the cases will show that there is no reason for any distinction, and that no distinction has been made. A statute containing such a prohibition may be applied to existing marriages and causes for divorce. Elliott v. Elliott, 38 Md. 357, 361.

But a statute passed after a decree with prohibition had been entered relieving the prohibited party might be held void.

Sparhawk v. Sparhawk, 116 Mass. 315.

A statute providing in general terms that the guilty party shall not marry again applies only to divorces granted in the State. Bullock v. Bullock, 122 Mass.

13. Van Voorhis v. Brintnall, 86 N.Y. 18, 28; s. c., 40 Am. Rep. 505, citing most of the cases decided prior to 1881. In such States the marriage is entirely dissolved, and the incapacity to marry depends entirely on the prohibition. People v. Hovey. 5 Barb. (N. Y.) 117, 119; Moore v. Hegeman, 27 Hun (N. Y.), 68, 70; Dickson v. Dickson, I Yerg. (Tenn.) 110, 114, 115.

A penal incapacity has no extra-territorial force; question discussed. Van Voorhis v. Brintnall, S6 N. Y. 18; s. c., 40

Am. Rep. 505.

14. Fuller v. Fuller, 40 Ala. 301, 306; Stevenson v. Gray, 17 B. Mon. (Ky.) 193; Com. v. Lane, 113 Mass. 458; Putnam v. Putnam, 8 Pick. (Mass.) 433; West v. Lexington, I Pick. (Mass.) 506; Thorp v. Thorp, 17 Am. Law Reg. N. S. 166; s. c., 90 N. Y. 602; 43 Am. Rep. 189; Van Voorhis v. Brintnall. 86 N. Y. 186; van voornis v. Dintilain. co A. 18; s. c., 40 Am. Rep. 505; Kerrison v. Kerrison, 8 Abb. N. C. (N. Y.) 68, 70; People v. Chase, 28 Hun (N. Y.). 310, 313; Moore v. Hegeman, 27 Hun (N. Y.), 68; Webb v. Webb, 1 Tuck. (N. Y.) 372; Van Storch v. Griffin, 71 Pa. St. 240, 244; Dickson v. Dickson, I Yerg. (Tenn.) 110.

Elliott v. Elliott, 38 Md. 358, 363.
 Williams v. Oates, 5 Ired. (N. Car.)

535, 538.

held not to be a penalty, but a denial of relief, and a continuance of the incapacity to marry which existed before the divorce. these last States, therefore, as capacity to marry depends upon domicile. the prohibition would be held to have equal effect wherever the party tried to marry, as long as such party retained his or her domicile; but in the other States the prohibition can be easily evaded.2 A New Yorker, prohibited by a New York court, has but to step into New Jersey to be married, and the New York courts will recognize the marriage. When such prohibition is recognized, a marriage in disregard thereof would be invalid.4 though it would not constitute bigamy or adultery.5

(7) Decree with Other Relief.—As already shown, the decree may dispose of the custody of the children of the parties, and also of their property; and it may likewise give relief connected with such property. So in many States the courts have the power to restore to the wife her original name, though this is unnecessary, as a woman after divorce may assume any name she pleases.7

XIV. The Conclusiveness of the Decree.—(I) General Statement.— After the final decree of divorce has been entered in proper form and the right of appeal has been lost or exhausted,8 its determination, if it is valid, is conclusive upon the parties, and to a cer-

1. See MARRIAGE.

Thorp v. Thorp, 90 N. Y. 602.
 Van Voorhis v. Brintnall, 86 N. Y.

18; s. c., 40 Am. Rep. 505. 4. Cropsey υ. Ogden, II N. Y. 228,

235.
5. Supra, XIII. (4) nn. 9, 10, page 839.
6. See ante, IV. (6).
7. Name. — Except in trade-mark cases,
Acceptive in a name; and a there is no property in a name; and a person may with honest intent assume any name that he or she pleases without v. Converse, 9 Rich. Eq. (S. Car.) 535, 570; Snook v. Snook. 2 Hilt. (N. Y.) 566; Linton v. Bank, 10 Fed. Rep. 895.

A wife need not assume her husband's name if she does not wish to, and many actresses and literary women do not; and a woman may assume the name of a man who is not her husband. Clark v. Clark,

19 Kan. 522.

Since a name is thus merely a matter of reputation or personal choice, no decree is necessary to establish or change it. Snook v. Snook, 2 Hilt. (N. Y.) 566. But in some States, in order that sanction and publicity may be given to a party's assumed name, the power to change a name is vested in some court, and the power to change the names of the parties or to restore to the wife her ante-nuptial name is often given to divorce courts.

Still, it has been said that a woman is remitted "to her former name and station" by an absolute divorce. Capel v. Powell, 17 C. B. N. S. 743, 748. That the name she acquires by her marriage becomes "her real name, and that she can acquire a new name after divorce only by reputation." Fendall v. Goldsmith, L. R. 2 P. D. 263, 264. And that there "cannot be two women entitled to the name of the same husband. Mc-Crarey v. McCrarey, 5 Iowa, 232, 253. 8. Appeal — Pending an appeal, a de-

cree of divorce has much the effect of a decree nisi. Allen v. McClellan, 12 Pa. St. 228, 232; ante, XIII. (2).

As to appeals in divorce cases, see

Street v. Street, 2 Add. Ecc. 1; 2 Eng. Ecc. 195, 196; Hanberry v. Hanberry, 29 Ala 719; Simpson v. Simpson, 25 Ark. 487; Jeans v. Jeans, 3 Harr. (Del.) 136; Underwood v. Underwood, 12 Fla. 434; Bergen v. Bergen, 22 III. 187: Stephens v. Stephens, 51 Ind. 542; Ruby v. Ruby, 29 Ind. 174; Sherwood v. Sherwood, 44 Iowa, 192; Meyar v. Meyar, 3 Met. (Ky.) 208; Pence v. Pence, 6 B Mon. (Ky.) 496; Stilphen v. Stilphen, 58 Me. 508; Shaw v. Shaw, 9 Mich. 164; Fulton v. Fulton, 36 Minn. 517; Hoffman v. Hoffman, 30 Pa. St. 417; Hofmire v. Hofmire, 7 Paige (N. Y.), 60.

9. Greene v. Greene, 2 Gray (Mass.),

361, 363; infra cases.

tain extent upon third parties: 1 but though a formal decree is prima facie valid,2 it may be shown to be void3 and of no effect. or to be voidable and be set aside.4

(2) Void and Voidable Decrees .- The first distinction must therefore be made between such decrees as are void and such as are merely voidable. A void decree is one that is of no effect, and the invalidity of which may be made to appear in any proceeding between any parties; while a voidable decree is one the validity of which cannot be questioned collaterally, but only in a special proceeding before the proper court, instituted by the proper party

for the purpose of having it avoided.6

- (3) Void Decrees.—Want of jurisdiction in the court passing it is the only cause which renders a decree of divorce absolutely void: fraud does not.8 nor does irregularity.9 As has been shown in discussing jurisdiction, a court may have no jurisdiction at all to enter a decree, or it may have jurisdiction only as to one of the parties; or it may have jurisdiction over the status of one of the parties, and not over the person of such party; and a decree may therefore be wholly or only partially void. 10 And the record is only prima facie evidence of the jurisdictional facts that Any person may therefore show in any kind of a pro-
- 1. Gouraud v. Gouraud, 3 Redf. (N. Y.) 262, 265; infra cases.

2. Bowman v. Bowman, 64 Ill. 75, 79; Ayers v. Harshman, 66 Ind. 291, 295; Kerrigan v. Kerrigan, 15 N. J. Eq. 146, 149. But see Com. v. Blood, 97 Mass. 238, 240.

3. Miltimore v. Miltimore, 40 Pa. St.

151, 155; infra cases. 4. Adams v. Adams, 51 N. H. 388, 397;

5. Discussed fully infra, nn. 7 et seq.

6. Discussed fully infra, XIV. (4) nn. 9 et seq., p. 844.

7. DeGraw v. DeGraw, 7 Mo. App. 121.

126: cases infra.

Void and Voidable Decrees .- A decree passed by a court which has no jurisdiction to pass it, is void. Cavanaugh v. Smith, 84 Ind. 380, 382; Miltimore v. Miltimore, 40 Pa. St. 151. 155. But if the court has jurisdiction, but has acted irregularly, the decree is voidable. ers v. Harshman, 66 Ind. 291, 295. if it has been imposed upon. Boyd v. Boyd, 38 Pa. St. 241, 245; Adams v. Adams, 57 N. H. 388, 389.
It is a usurpation for a court which

has no jurisdiction to decree a divorce: the decree in such a case is but a form and similitude, and has no substance, force, or authority. Miltimore v. Miltimore, 40 Pa. St. 151. But a decree passed by a court which has jurisdiction over the parties and the subject-matter is voidable at most. Ayers v. Harshman, 66 Ind. 291; Cavanaugh v. Smith, 84 Ind. 380.

If there has been no notice to the defendant (see ante, VII.), the decree is void. Doughty v. Doughty, 27 N. J. Eq. 315, 325. But if there has been simply an irregularity in the notice, the decree is voidable. See Isaacs v. Price, 2 Dill. (U. S.) 347, 351.

8. Greene v. Greene, 2 Gray (Mass.), 301, 364; Edson v. Edson, 108 Mass. 500, 596; Plummer v. Plummer, 37 Miss. 185, 201; Adams v. Adams, 51 N. H. 388, 399; Ruger v. Heckel, 21 Hun (N. Y.), 489, 492; Parish v. Parish, 9 Ohio St. 534, 537; Miltimore v. Miltimore, 40 Pa. St. 151, 155.

9. Ayers v. Harshman, 66 Ind. 291, 295; Roth v. Roth, 104 Ill. 35, 46; De Graw v. De Graw, 7 Mo. App. 121, 126; Miltimore v. Miltimore, 40 Pa. St. 151,

10. JURISDICTION, ante, II.—A decree may be wholly void for want of jurisdiction. Litowich v. Litowich, 19 Kan. 451, 454; ante, II. (9). Or void only so far as it is in personam. Garner v. Garner, 56 Md. 127, 128; ante, II. (9). Or void only as to the status of one of the parties.

Cook v. Cook, 56 Wis. 195.

11. Ante, II. (9), Rule VI., citations and quotations. Though the record recite that the complainant was a bona fide resident of the State, it may be shown that this is not true, and that complainant had never even been in the State. Leith v. Leith, 39 N. H. 20, 30. And this may be shown of a domestic decree. Cavanaugh

ceeding at law or in equity that a divorce, the existence of which is pertinent to the inquiry, was granted by a court which had not the proper jurisdiction, and is therefore of no effect whatever.1 Though such a decree need not be declared void, on proper application the court granting it would set it aside, as in the case of a voidable decree, and a court of equity would probably declare it void, under its general jurisdiction.3 As above stated, fraud does not render a decree void, but only voidable; still, as the proceedings to have a decree set aside for fraud are not open to third persons, it has been said that third party may collaterally. question a fraudulent decree, which thus becomes, as far as they are concerned, a void decree. If a party has joined in obtaining a void divorce, he cannot set up its invalidity against the other party if such other party has married again, relying on the divorce.7

(4) Voidable Decrees.—Generally, a voidable decree can be avoided only by the court which entered it,8 though some cases hold that courts of equity may declare a divorce void on the ground of fraud. The power to vacate its judgments is the common-law power of all courts, 10 and extends fully to judgments of divorce. 11

v. Smith, 84 Ind. 380, 382. Or of a foreign decree. Doughty v. Doughty, 27 N. J. Eq. 315, 325; Baker v. Baker, 21 Hun (N. Y.), 179, 189. See Waldo v.

Waldo, 52 Mich. 94.

1. The invalidity may be set up where the decree is offered as a defence in another divorce case. Leith v. Leith, 30 N. H. 20, 30; Visher v. Visher, 12 Barb. (N. Y.) 640, 644; Gettys v. Gettys, 3 Lea (Tenn.). 260, 262. Or in a prosecution for bigamy. People v. Baker, 76 N. Y. 78. Or in an action by a father against a man who, pretending to be divorced, went through a form of marriage with his daughter. Borden v. Fitch, 15 Johns. 121, 141, 143. Or in an application for alimony. Cavanaugh v. Smith, 84 Ind. 380, 382. 2. See Edson v. Edson, 108 Mass. 590,

3. Johnson v. Coleman, 23 Wis. 452, See Cavanaugh v. Smith, 84 Ind. 380; Doughty v. Doughty, 27 N. J. Eq. 315; Adams v. Adams, 51 N. H. 388, 399.

4. See Plummer v. Plummer, 37 Miss.

185, 201; cases supra, n. 8, page 843.

5. Infra, XIV. (4) n. 3, page 845.
6. Freeman on Judgments, § 132, 334;
Atkinson v. Allen, 12 Vt. 619, 624; 2
Bish. Mar. & Div. § 760.

7. Coddington v. Coddington, 10 Abb, Pr. (N. Y.) 450, 451; infra, XIV. (4) nn. 5, 6, page 845.

8. Ayers v. Harshman, 66 Ind. 291, 295; Greene v. Greene, 2 Gray (Mass.),

361, 364; Edson v. Edson, 108 Mass. 500, 597; Plummer v. Plummer, 37 Miss. 185, 201; De Graw v. De Graw, 7 Mo. App. 121, 126; Ruger v. Heckel, 21 Hun (N. Y.), 489, 491; Parish v. Parish, 9 Ohio St. 534, 537; Miltimore v. Miltimore, 40 Pa. St. 151, 155.

9. See Smith v. Smith, 34 Ala. 455; Harrison v. Harrison, 19 Ala. 499; Sandford v. Head, 5 Cal. 497; McQuigg v. McQuigg, 13 Ind. 294; Cavanaugh v. Smith, 84 Ind. 280, 283, 284; McCrarey. v. McCrarey, 5 Iowa, 222; Adams v. Adams, 51 N. H. 388, 399; Doughty v. Doughty, 27 N. J. Eq. 315, 320; Johnson v. Coleman, 23 Wis. 452, 455.

10. Freeman on Judgments, \$ 90; Kemp

v. Cook, 18 Md. 130; title JUDGMENTS.

11. Adams v. Adams, 51 N. H. 386, 396–398; Gechter v. Gechter, 51 Md. 187, 189; Whitcomb v. Whitcomb, 46 Iowa, 437, 445; Holmes v. Holmes, 63 Me. 420, 422; Edson v. Edson, 108 Mass. 590, 597; Brown v. Brown, 58 N. Y. 609, 610; Allen v. McClellan, 12 Pa. St. 328, 332; R. v. R., 20 Wis. 331, 334. By statute. Rush v. Rush, 46 Iowa, 648.

Unless this power is taken away or limited by statute (see McQuigg v. McQuigg, 13 Ind. 295, 296). it is unlimited during the term at which the decree is entered. Carley v. Carley, 7 Gray, 545, 546; R. v. R., 20 Wis. 331, 335. And may be exercised after the term in cases of want of jurisdiction, irregularity, and fraud. Weatherbee v. Weatherbee,

And in some States the divorce courts have fuller and special

powers given them. 1

The Person Who Can Apply.—The injured party can apply to have the decree avoided, but a third party cannot. The husband and wife can probably apply jointly. But the party who has committed the fraud cannot; 5 nor can one who has acquiesced in the decree. But the death or marriage of one party does not bar the application of the other.

The Causes for Avoidance.—Within the term during which the divorce is granted, the court may vacate its decree for any cause. within its discretion.9 But after the term the decree may be vacated only for irregularity, 10 want of jurisdiction, 11 or fraud, 12 A

20 Wis. 499, 501; R. v. R., 20 Wis. 331, 334; Contra: Parish v. Parish, 9 Ohio St.

534. 539; infra. nn. 9-11.

1. Sometimes the statutes as to vacating decrees apply in terms to divorce decrees. Smith v. Smith. 3 Oreg. 363, 364. If they do not do so, some cases hold that they do not do so, some cases not that they are applicable to such suits by implication. Lawrence v. Lawrence, 73 Ill. 577. 579-581; Smith v. Smith, 20 Mo. 166, 167. Other cases hold the contrary. Ewing v. Ewing, 24 Ind. 468, 474; Gilruth v. Gilruth, 20 Iowa, 225, 227; Whitamb. Whitsonb. ruth v. Gilruth, 20 10wa, 225, 227; Whit-comb v. Whitcomb, 46 Iowa, 437, 444; Lewis v. Lewis, 15 Kan. 181, 192; O'Con-nell v. O'Connell, 10 Neb. 390, 392; Owens v. Sims, 3 Coldw. (Tenn.) 544,

2. Holmes v. Holmes, 63 Me. 420, 424; Edson v. Edson, 108 Mass. 590, 596; Adams v. Adams, 51 N. H. 388, 398;

R. v. R., 20 Wis. 331, 334.

3. See Walton v. Walton, 80 N. Car. 26, 30; Atkinson v. Atkinson, 12 Vt. 619,

624, which are not divorce cases.

A parent cannot apply. B. v. B., 28 Barb. (N. Y.) 299. Nor can a child. Baugh v. Baugh, 37 Mich. 59, 61. Though in a sense a party to the suit. Foster v. Redfield, 50 Vt. 285, 290; ante,

IV. (7).
4. Colvin v. Colvin, 2 Paige (N. Y.), 385, 386, a case in which the complainant after divorce became convinced of the in-

nocence of his wife.

5. Simons v. Simons, 47 Mich. 253; 5. Simons v. Jamons, 4/ Mich. 203.
 De Graw v. De Graw, 7 Mo. App. 121, 127;
 Adams v. Adams, 51 N. H. 388, 397;
 Ruger v. Heckel, 21 Hun (N. Y.), 489,
 491; s.c., 85 N. Y. 483; Coddington v.
 Coddington, 10 Abb. Pr. (N. Y.) 450, 451; Miltimore v. Miltimore, 40 Pa. St. 151, 156. 6. Stephens v. Stephens, 51 Ind. 542,

543; Garner v. Garner, 38 Ind. 139, 140; Bourn v. Simpson, 9 B. Mon. (Ky.) 454; Nichols v. Nichols, 25 N. J. Eq. 60, 64.

In Singer v. Singer, 41 Barb. (N. Y.) 139, 140, three years was held an unreasonable delay, and held a bar. And in Miltimore v. Miltimore, 40 Pa. St. 151, seven years. But in Fidelity v. Fidelity, 93 Pa. St. 242, a decree was avoided after twelve years.

7. Boyd v. Boyd, 38 Pa. St. 241, 243.

See ante, IV. (8).

8. Stephens v. Stephens, 62 Tex. 337; infra, XIV. (5) n. 6, page 847.

9. Doss v. Tyack, 14 How. (U. S.)

297; supra, n. 1.

10. Irregularity .- "The passage of the decree contrary to the practice and course of the court." Freeman on Judgments, § 97. See Ayers v. Harshman, 66 Ind. 291, 295; De Graw v. De Graw, 7 Mo. App. 121, 126; Miltimore v. Miltimore, 40 Pa. St. 151, 155.
11. Want of Jurisdiction.—Holmes v.

Holmes, 63 Me. 420, 424; Edson v. Edson, 108 Mass. 590, 599; True v. True, 6 Minn. 458, 465; Wortman v. Wortman, 17 Abb. Pr. (N. Y.) 66, 71; Allen v. Mc-Clellan, 12 Pa. St. 328, 331; Crouch v. Crouch, 30 Wis. 667, 669; Weatherbee v. Westherbee v. Westherbee v. Westherbee v. Westherbee v. Weatherbee, 20 Wis. 499, 501.

As where jurisdiction has been assumed on the perjured affidavit of the complainant. Holmes v. Holmes, supra.

Especially where want of jurisdiction is combined with false evidence of a cause for divorce,-Whitcomb v. Whitcomb, 46 Iowa, 437, 444; and the proceedings have been concealed from the defendant. Crouch v. Crouch, 30 Wis.

defendant. Crouch v. Crouch, 30 Wis. 667, 670.

12. Fraud.—Whitcomb v. Whitcomb, 46 Iowa, 437, 444; Rush v. Rush, 46 Iowa, 648, 649; Comstock v. Adams, 23 Kan. 513, 523; Harding v. Alden, 9 Me. 140, 151; Gechter v. Gechter, 51 Md. 187, 189; Edson v. Edson, 108 Mass. 590, 596; True v. True, 6 Minn. 458, 465; Young v. Young, 17 Minn. 181, 185; Adams v. Adams, 51 N. H. 388, 397;

mistake will not warrant the vacating of a decree, but may be corrected.2

The Proceedings.—In vacating the decree the court follows its own practice, or, which is usually the same thing, the practice of the chancery courts.³ The application is duly made by petition or motion,4 the other party is notified, if possible,5 and proof in the shape of affidavits or in other form is considered. Before granting the petition the court will use great circumspection, and will not act, probably, if the divorce does not affect property or chil-

The Effect.—When a decree of divorce is avoided it is rendered void ab initio: 9 the marriage relations of the parties exist as if never interrupted; 10 a second marriage by either of the parties is void, 11

Borden v. Fitch, 15 Johns. (N. Y.) 121, 141; Boyd v. Boyd, 38 Pa. St. 241, 245; Allen v. McClellan, 12 Pa. St. 328, 331; cases supra. n. II; cases infra.

If the questions on which the allega-tion of fraud is based have been determined in the suit itself, they will not be reheard: a new attack on controverted testimony, which was charged as fraudulent during the trial, cannot be made. Adams v. Adams, 51 N. H. 388, 397; Folsom v. Folsom, 53 N. H. 78, 82. Decree can be set aside for fraud when

the court has been deceived by false affidavits,-Holmes v. Holmes, 63 Me. 420, 424; Bryant v. Austin. 36 La. Ann. 808; Stephens v. Stephens, 62 Tex. 337; Everett v. Everett, 60 Wis. 200; or where v. Graves, 36 Iowa, 310; Baker v. Baker, 21 Hun (N. Y.), 179, 189; or the case has been concealed from the defendant,— Whitcomb v. Whitcomb, 46 Iowa, 437, 444; Doughty v. Doughty, 27 N. J. Eq. 315, 325.

But if the defendant has had a full hearing the decree will not be set aside for fraud and perjury. Folsom v. Folsom, 55 N. H. 78, 80. Nor if there has been proper publication, and this has not been obtained by perjury. Lord v. Lord,

66 Me. 265, 266, 270.

1. Freeman on Judgments, § 101.
2. Ante, XIII. (1), notes.
3. Bowman v. Bowman, 64 Ill. 77, 81;

ante, III. (2).
4. See Webster v. Webster, 54 Iowa,

152; cases infra.

5. Ingram v. Belk, 2 Rich. (S. Car.) III, II2. There was no notice in Allen

v. McClellan, 12 Pa. St 328, 331.
6. Gechter v. Gechter, 57 Md. 187, 189;
Bowman v. Bowman, 64 Ill. 77, 81, 82; Smith, 3 Oreg. 363, 367.

The burden of proof is on the petition-

er. Hopkins v. Hopkins, 39 Wis. 167, 169

7. Adams v. Adams, 51 N. H. 388.

Especially if the rights of third parties

Especially if the rights of third parties have become involved. See Colvin v. Colvin, 2 Paige (N. Y.). 385, 386; Dunn v. Dunn, 4 Paige (N. Y.). 425, 430. Or one of the parties has married again. Whitcomb v. Whitcomb, 46 Iowa, 437, 445; McJunkin v. McJunkin, 3 Ind. 30; Singer v. Singer, 40 Barb. (N. Y.) 139,

But such marriage on the part of the respondent is no bar. Lawrence v. Lawrence, 73 Ill. 577, 282; Rush v. Rush, 46 Iowa, 648, 650; Whitcomb v. Whitcomb, lowa, 648, 650; Whitcomb v. Whitcomb, 46 Iowa, 437, 445; Comstock v. Adams, 23 Kan. 517, 523; Holmes v. Holmes, 63 Me. 420, 423; Edson v. Edson, 108 Mass, 590 599; True v. True, 6 Minn. 458, 466; Smith v. Smith, 20 Mo. 167. 168; Nichols v. Nichols, 25 N. J. Eq. 65, 66; Wortman v. Wortman, 17 Abb. Pr. (N. Y.) 66, 70; Allen v. McClellan, 12 Pa. St. 228, 222; Stephens v. Stephens Pa. St. 328, 332; Stephens v. Stephens, 62 Tex. 337; Everett v. Everett, 60 Wis. 200; Crouch v. Crouch, 30 Wis 667, 670. Except, perhaps, in Maine. Stilphen v. Stilphen, 58 Me. 508, 514. But see Holmes v. Holmes, 63 Me. 420, 423. But see

But if the petitioner has married on the strength of the divorce, he cannot have it set aside. Stephens v. Stephens 57 Ind. 542, 543.

The death of one of the parties is no Boyd v. Boyd, 38 Pa. St. 241, 243;

Zoellner v. Zoellner, 46 Mich. 511. 8. Webster v. Webster, 54 Iowa, 152.

9. Comstock v. Adams, 23 Kan. 513, 522; Holmes v. Holmes, 63 Me. 420, 423; Greene v. Greene, 2 Gray (Mass.), 361, 363; Allen v. McClellan, 12 Pa. St. 328, 331; Crouch v. Crouch, 30 Wis. 667,

10. Comstock v. Adams, 23 Kan. 513. 11. Allen v. McClellan, 12 Pa. St. 328; cases supra, n. 7.

and gives no marriage rights. and no legitimacy to the children

resulting from it.2

(5) The Decree Res Adjudicata—As Between the Parties.—If the final decree is against the complainant and the bill is dismissed. it is conclusive against such complainant, who cannot afterwards rely on the facts alleged.³ But this is not the case if the decree be "without prejudice," or on a mere matter of pleading.⁴ If a divorce is granted and the decree is valid,⁵ it is conclusive upon the parties of all facts found, and of all facts which might have been proved in support of the charges or the defences.7

1. Greene v. Greene, 2 Grav (Mass.).

361. 2. Greene v. Greene, 2 Gray (Mass.), 361; Allen v. McClellan, 12 Pa. St. 328;

Crouch v. Crouch, 30 Wis. 667.

3. Res Adjudicata.—Decree dismissing complaint (ante, XIII. (1), notes) is concomplaint (ante, XIII. (1), notes) is conclusive as to the charges therein set forth. Finney v. Finney, 37 L. J. Mat. Cas. 43, 44; Vinsant v. Vinsant, 49 Iowa, 639, 642; Vance v. Vance, 17 Me. 203; 204; Thurston v. Thurston, 98 Mass. 39; Fera v. Fera, 98 Mass. 155, 157, Brown v. Brown, 37 N. H. 536, 538. And the same party cannot afterwards, even in applying for a different kind of divorce (Fera v. Fera, 98 Mass. 155; Slade v. Slade, 58 Me. 157, 161), al-lege the same adultery (Vinsant v. Vinsant, 49 Iowa, 639), cruelty (Slade v. Slade, 58 Me. 157), or desertion (Thurston v. Thurston, 98 Mass. 39). But, of course, facts occurring after the filing of the first bill may be alleged in a subse-quent case. Vance v. Vance, 17 Me. 203, 205.

4. Dismissal "without prejudice" is no bar. Thurston v. Thurston, 98 Mass. 39; Cornelius v. Cornelius, 31 Ála. 479, 483. Nor is a dismissal before final hearing, or on a plea in abatement, or as a Brown v. Brown, 37 nonsuit, a bar.

N. H. 536, 538.

5. A decree against a wife for adultery, she never having been duly notified (ante, VII), is no evidence of her adultery in a suit in another State. Van Storch v. Van

Storch, 71 Pa. St. 240.

6. Sapwith v. Sapwith, 30 L. J. Mat. Cas. 131, 134; 2 Swab. & T. 160; Prescott v. Fisher, 22 Ill. 390, 393; Vinsant v. Vinsant, 49 Iowa, 639, 642; Slade v. Slade, 58 Me. 157, 161; Greene v. Greene, 2 Gray (Mass.), 361, 363.

7. Prescott v. Fisher, 22 Ill. 390, 393; Patton v. Loughridge, 49 Iowa, 218, 219.

Thus, it settles the fact that the parties were duly married. Cook Ecc. Pract. 346, 357; Mayhew v. Mayhew, 3 Maule.

& S. 266; 2 Phillim. 11; 1 Eng. Ecc. 166. So that after a divorce a mensa one of the parties was not allowed to bring a suit of nullity on the ground of impotence. Guest v. Shipley, 2 Hagg. Consist. 321;

4 Eng. Ecc. 548.

In case of an absolute divorce, the dissolution of the marriage is settled, and neither of the parties can maintain another suit for divorce. Hood v. Hood, 11 Allen (Mass.), 196, 200; Cooper v. Cooper, 7 Ohio (2d pt.), 238, 239. But statutes in some States allow one party to obtain a divorce if the other has obv. Stilphen. 58 Me. 508; Stilphen v. Hondlette, 60 Me. 447, 452. And so where the divorce is partially invalid [ante, XIV. (3)], there may be enough left to base another suit on. Webster v. Webster, 54 Iowa, 153; Doughty v. Doughty, 28 N. J. Eq. 581; Wright v. Wright, 24 Mich. 180, 181; Cook v. Cook, 56 Wis. 195.

Where a limited divorce was granted for cruelty, it was held conclusive as to cruelty in a subsequent application for an absolute divorce for cruelty and adul-

tery. Bland v. Bland, 35 L. J. Mat. Cas. 104; L. R. 1 P. & D. 237.

Matters settled in a divorce a mensa cannot be reopened in a suit for divorce a vinculo. Slade v. Slade, 58 Me. 157,

After a divorce awarding alimony the husband can sue his wife for money alleged to be due him by her, for he should have shown this to reduce the alimony. Patton v. Loughridge, 40 Iowa, 218, 219.

A party is concluded by his allegations in the bill. Prescott v. Fisher, 22 Ill. 390, 393; Guest v. Shipley, 2 Hagg. Con-

sist. 321.

But a decree finding that a party has not committed adultery does not prevent his being charged on the same facts with attempting to commit a rape. Vinsant v. Vinsant, 49 Iowa, 639, 642.

As to Third Parties.—A decree divorcing the parties wholly or partially is conclusive on every one as to their status. But such a decree is not conclusive upon third persons not parties to the suit as to the marriage² of the parties, or as to their respective innocence or guilt.3

D0.— See note 4.

DOCKAGE.—(See also TONNAGE: WHARVES and WHARFAGE.) -Charges made for the use of docks. Dock rent.5

1. Burlen v. Shannon, 3 Gray (Mass.), 387, 389; Gouraud v. Gouraud, 3 Redf. (N. Y.) 262, 265.

2. Gouraud v. Gouraud, 3 Redf. (N.Y.)

3. Gill v. Read, 5 R. I. 343, 346; Needham v. Bremner, 12 Jur. N. S. 434,

Thus, when a third party sued a husband for necessaries supplied his wife, a decree of divorce determining that the wife was apart from her husband by her own fault (Burlen v. Shannon, 3 Gray (Mass.), 387, 388), or that she was (Needham v. Bremner, 12 Jur. N. S. 434) or was not (Gill v. Read, 5 R. I. 343) guilty

of adultery, was held not conclusive.
4. To "abide, do, and perform 4. To "abide, do, and perform the judgment" in the condition of a bailbond means no more than to "abide the judgment," the rest of the phrase being iterative, and not meaning "to pay." Hewins v. Currier, 62 Me. 236.

Ín a proviso in a lease giving power of re-entry "if the lessee shall do, or cause to be done, any act, matter or thing" contrary to the covenants and agreements contained therein, the words "do or cause to be done" import an act, and do not include an omission to do an act incumbent upon the lessee. Abdy v. Stevens, 3 B. & Ad. 299. But an act of omission was held to be included in the expression, "anything done," in Jolliffe v. Wallasey Local Board, L. R. 9 C. P.

Where "do" and "suffer" are used together, they are antithetical, "do" being active and "suffer" passive. In re Moore's Est., 17 L. R. Ir. 549.

In a covenant in a lease not to assign, transfer, set over, or otherwise do or put away the lease or premises, the words "otherwise do or put away" signify any other mode of getting rid of the premises entirely, than those enumerated. Crusoe v. Bugby, 2 Com. Bl. 766.

In an ordinance under which an as-sessment was laid for regulating and grading a street, and for setting curb-stones, and flagging sidewalks "where 2), levy a tax in the nature of a tonnage not already done," the words "not al-duty upon vessels or commerce, it has

ready done" applied to that portion of the street in which it was not necessary to regulate, grade, etc.; they "exclude its application to parts of the line where the work contemplated had been done, and continued to be in such state that further attention was unnecessary." In re Petition of Burmeister, 6 N. Y. W'kly Dig.

A board of health intending to assess a rate under a statute providing for their making rates, gave notice of their intention, but before the notice had expired the act was repealed by another act, which, however, saved "anything duly done," and provided for rating in a similar manner. The board, in ignorance of the repeal, proceeded to make a rate. Held to be a thing duly done. The Queen v. Justices of West Riding of Yorkshire, 1 Q. B. D. 220.

Doing Business. - See Business. 5. In sustaining a claim for dockage in a libel brought by the proprietor of a dry-dock in the vicinity of Detroit, to re-cover payment of a bill for docking and repairing a steamer, the court, Wilkins, J. said: "The first item is for dockage, which, being the pecuniary compensation for the use of a dock while a vessel is undergoing repairs, is subject solely to the will of the proprietor. It is in the nature of rent; and the owner of a drydock has a right to demand from those who seek its use whatever he considers a fair compensation, uncontrolled by the custom of other docks in other places. House rent in Buffalo or Cleveland is not to govern landlords in Detroit, although where there is no special agreement touching the subject the usual rent of similar buildings in the same locality would enlighten the judgment of a court as to what such property was worth." Ives v. Steamboat Buckeye State, 1 Newb. Adm. (U. S.) 69.

While a State, or any of the municipal corporations thereof, cannot, under the constitutional prohibition against tonnage

DOCKET,—(See also CALENDAR: RECORD.)—A summary or di-

gest : a register.

This word is usually applied to the book or paper in which is entered a brief abstract of all proceedings in court. The various proceedings are entered in different books, and thus we speak of the trial docket, the judgment docket, mechanics'-lien docket, etc.1

been held that a city, under legislative authority, can lawfully charge reasonable compensation for the use of expensive and artificial conveniences, such as wharves or docks, which a vessel may use at its option; there being ample space elsewhere for it to land within the harbor, where no artificial or expensive improvements have been made. N. W. Union Packet Co. 7'. St. Louis. 4 Dill.

(U. S.) 10.

This has been confirmed by the supreme court of the United States, in which it has been held that a municipal corporation, having by its charter an exclusive right to make wharves on the banks of a navigable river upon which it is situated, and to collect wharfage and regulate wharfage rates, can charge and collect from the owner of steamboats which moor and land at a wharf constructed by it wharfage proportioned to their tonnage; the court, Strong, J., saying: "The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or duty that is prohibited; something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by a State, a municipal corporation, or a private individual; and where compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property. passing vessel may use the wharf or not, at its election, and thus may incur liability for wharfage or not, at the choice of the master or owner. No one would claim that a demand of compensation for the use of a dry-dock for repairing a vessel, or a demand for towage in a harbor, would be a demand of a tonnage tax, no matter whether the dock was the property of a private individual or of a State, and no matter whether proportioned or

not to the size or tonnage of the vessel. Packet Co. v. Keokuk, 95 U. S. 80. See City of Muscatine v. Keokuk Northern

Line Packet Co., 45 Iowa, 185.

1. The Revised Statutes of New York -2 R. S. (3d Ed.) p. 151—having given priority, in the payment of the debts of decedents, to "judgments docketed and decrees enrolled," it was held that a judgment against the deceased in a justice's court was within the statute, though not having been docketed in the decedent's lifetime it had no priority of payment over other debts, the surrogate saying: "Our statute, following the rule of the common law, gives precedence only to judgments docketed. A 'docket'is a brief writing or statement of a judgment made from the record or roll, generally kept in books alphabetically arranged with the clerk of the court or the county clerk. A transcript of a justice's docket may be filed with the county clerk, and the judgment docketed. Under these provisions, I do not suppose that to entitle a judgment against a deceased person to priority it is necessary it should be the judgment of a court of record. The statute gives such preference to all 'judgments,' provided they are docketed, but they must be docketed in the lifetime of the deceased, in order to entitle them to precedence over other debts." Stevenson v. Weisler, I Bradf. (N. Y.) 343. Compare, on magistrates' judgments, Scott v. Ramsay, I Binn. (Pa.) 220.

In a South Carolina case, the circuit judge having dismissed a rule upon the sheriff to show cause why he had not paid a certain sum, alleged to be in his hands, to the plaintiff, based on the transcript of a judgment in another county, because he held the said transcript deficient, the supreme reversed the judgment, Haskell, A. J., saying: "As stated in the court below, 'the validity of the transcript [of judgment] was the question in the case,' and the circuit judge decides that 'the transcript' is so defective as to create no lien. The decision rests upon the legal presumption that the transcript lodged cannot be a copy of a judgment; or upon this, that if the transcript be correct, the judgment is defective and constitutes no lien. There is attached to

the 'transcript' a certificate 'that the foregoing is a correct transcript from the docket of judgments kept in my office. [Seal.] Jesse Jones, C. C. C. P.' And no evidence was produced to show that the certificate was erroneous." After showing that there is no authority to go behind the transcript and certificate to question the sufficiency of the judgment the judge continues: "The decision seems also to assume that 'docket of judgments' means 'abstract of judgments.' There is a book called 'Abstract of Judgments,' and if the clerk meant to designate that book he should have used the proper ti-So it may be said, on the other hand, he should have used the name 'Judgment-Book.' But neither in law nor justice should an innocent party be made to suffer by the carelessness of another if it can be remedied. The first meaning attached to the word 'docket' is a formal record of judicial proceedings. Bouy, Law Dict. As a secondary meaning, the same authority says: 'Docket is also said to be a brief writing, on a small piece of paper or parchment, containing the substance of a larger writing.' The first meaning will effect justice, for about the justice of the case, the law being equal. there can be no question, while the latter will impose hardship. There being no evidence to the contrary, 'docket, etc., may then be taken to mean 'the formal record' of the judgments, and that is contained in the judgment-book."

Harrison v. Mfg. Co., 10 S. Car. 278, 295. "Calendar" and "Docket" Distinguished.-Where a case was dismissed in the circuit court, and the following order of dismissal entered: "And now at this day, said cause being reached on the call of the calendar, and the defendant not being present nor any one for him, thereupon on motion of said plaintiffs, by their attorney, it is ordered by the court that said appeal be and it is dismissed," etc., the appellate court reversed the judgment, Bailey, J., saying: "The judgment of the court below dismissing the appeal in this case recites that 'said cause being reached on the call of the calendar,' etc., the appeal was dismissed for want of prosecution. The point is made that by this recital the order of dismissal appears to have been entered when the cause was reached for trial in its order on the 'docket,' and that this fact thus established cannot be controverted by the affidavits filed in support of the motion to vacate the order. We agree with counsel that facts properly appearing by the record are conclusively proven, and that their truth cannot be impeached by

affidavits. We are of the opinion, however, that the record in this case, when properly interpreted, fails to show that the cause was reached for trial in its or-der on the 'docket.' The record speaks only of a 'call of the calendar.' The word 'calendar' is not used in our statute, and it may or may not be synonymous with the statutory word 'docket.' Its ordinary signification is, a list or enumeration of causes arranged for trial in court; but there is nothing in the word from which it can be determined how such list was made up, or upon what principle the various causes were arranged thereon. The statute requires the clerks of courts to keep a 'docket' which shall contain the names of the parties, etc., to all causes pending in their respective courts, arranged in the order of the dates of their commence-The record here, however, inment stead of employing the statutory word, uses one which may signify a list made up upon entirely different principles, and we must therefore hold that it fails to show that the cause was reached in its order on the docket. It may furthermore be observed, that the record does not state that the cause was reached for trial, or upon a call of the 'calendar, where the causes were being called for trial; but, so far as appears, it may have been upon precisely such preliminary call as is described in the affidavits. We are at liberty, therefore, to look into the affidavits for the purpose of ascertaining the circumstances under which the appeal was dismissed. The affidavits show that it was dismissed for want of prosecution, on a preliminary call of the docket, the only default in the prosecution of his appeal alleged against the defendant being a failure to appear and respond to such call. At that time the cause had not been reached in its order on the docket, and as the business of the court was then progressing, it could not have been reached for several days thereafter. The only question then for us to consider is whether the mere absence of the defendant from this preliminary call constituted of itself a failure to prosecute his appeal. The record fails to show the existence of any rule of practice in the circuit court of Cook county in relation to preliminary calls of the 'docket,' and this case, therefore, must be decided on the assumption that no such rule exists. As to what the proper practice would be if such a rule were adopted and entered of record, we desire to express no opinion. . . . The practice of making preliminary calls of the

A sheriff's docket is not a record.¹ "To strike a docket" is a term used in the English bankruptcy law, and is said of a creditor who enters into a bond engaging to prove that the debtor is a bankrupt, whereupon a *fiat* of bankruptcy is issued against the debtor.² On the docket as a record, and the power the court has to amend it, see note 3.

DOCKS.—(See also WHARFS AND WHARFAGE.)—A space between wharves.⁴

'docket,' which, it seems, has prevailed to some extent in the courts of Cook county, has, as we may presume, been adopted for the purpose of obtaining in advance information as to the condition of the business before the court. information doubtless is highly desirable for the guidance both of the court and of the attorneys and suitors who may have business before it, but it must be conceded that the practice is based upon no rule of either common or statutory law, and in the absence of any rule of court authorizing it, it is without warrant of law, and rests upon the mere will of the judge who presides over the court. We do not say that, even under these circumstances, the court may not properly call over the 'docket' in advance, to ascertain, as far as practicable, what causes may be ready for trial; but we do not think that the court has power to compel the attendance of suitors or their attornevs upon such call, in such sense as to hold them in default for non-attendance, and dismiss them out of court; or as in this case, enter an order which becomes, by operation of law, a final adjudication between the parties of the subject-matter of the litigation." Titley v. Kaehler, 9 Brad. (Ill.) 537. See also Killian v. Clark, 9 Bradw. (Ill.) 426.

1. Thomas v. Wright, 9 S. & R. (Pa.)

2. Eden's Bankrupt Law, chap. iv. sec. I, page 51.

3. I Bishop on Crim. Proc. (3d Ed.)

chap. 89. and cases there cited.

4. Where a suit was brought against the city of Boston for the erection of a public nuisance, especially injurious to the plaintiff, and it appeared that the plaintiff was in possession of a wharf estate situated on the southerly side of Boston, extending to the sea, and entirely unobstructed at the end seaward, but with a dock about thirty feet wide extending along it to the sea, in which dock the Board of Health ordered a drain or sewer to be constructed from one end to the other, so as to carry the drainage out to deep water, whereby the

approach of vessels to the plaintiff's wharf was obstructed,—it was claimed that the dock was a public dock, which he had a right to use. It was held that the city of Boston, as a littoral owner. owned down to low-water mark, subject only to the condition that until the city occupied the space between high and low water mark the public had a right to use it for the purposes of navigation; and that consequently the city had the right to construct a sewer for the purpose of carrying off drainage from the highwater to the low-water end of the dock, no dedication being implied by mere abstainer from using it; the court, Grier, J., saying: "That the plaintiff had, in common with the rest of the world, a. right to navigate over the land belonging to the city, on which the erections complained of were made, is not disputed. Nor is the title of the city to the land so used, unless they have granted it away, or otherwise disposed of it, a subject of dispute in the case. Those under whom the plaintiff claims, as owners of the property adjoining Summer Street, have exercised their right of dominion over the land to low-water mark by covering it with a wharf many years ago, which is called Bull's Wharf. And those who adjoin the street on the other side have in the same manner exercised their right by erecting a wharf called Price's Wharf. The property of the city being but thirty feet wide, and lying between these two wharfs, was thus, by the accidents of its form and position, converted into a dock or receptacle for vessels, without any act of the owners of the land. A 'dock' is defined by philologists, according to the American use of the term, to be 'the space between wharves.' No dock or slip has been made by the city or people of Boston on their land, either for their own use, or that of any other extraneous or indefi-nite public. So long as they did not elect to exercise their dominion over this part of the shore, the public right of naviga-tion continued. It was a right defeasible at the will of the owner of the sub-

DOCK WARRANTS.—(See also BILLS OF LADING: WAREHOUSE RECEIPTS.)—A negotiable instrument in use in England, given by the dock-owners to the owner of goods imported and warehoused in the docks, as a recognition of his title to the goods upon the production of the bills of lading.1

DOCTOR. — See MEDICINE AND MEDICAL PRACTITIONERS: PHYSICIAN.

jacent land. It was a natural right. noderived from any grant, real or pret sumed, originating with the owner of the soil. But the adjoiners, by the use of this right of navigation in connection with their wharves, claim a right to eniov the benefit of defendant's property as a dock for their wharves, and thus convert it to their private use, under color of a public right. In order to effect this it is contended that the people of Boston, by not exercising their right of reclamation, and by using their property according to their own pleasure, have dedicated it to the public, or people of Boston, and have abandoned the full dominion which they once might have exercised over it. The people of Boston, who owned this land as their common and private property, acted through a corporation whose corporate grants and Their licenses are matters of record. own use of their own property for their own benefit cannot be called a dedication of it to any other public of wider extent. Whether it was called 'town dock' or 'public dock,' — which were used as synonymous terms,-it would furnish no ground to presume that they had parted with their right to govern, and use it in the manner most beneficial to the people or public of the town or city." City of Boston v. Lecraw, 17 How. (U. S.) 426.

In New York, in a case which decided that the corporation of Albany had the right to pass ordinances to prevent obstructions in the docks and slips within its bound, and in the river opposite to such docks, wharves, and slips, and to enforce the same by the infliction of a penalty, it was said by Mr. Senator Allen: "By the act of the legislature (sess. 49, ch. 185, § 15), the corporation are authorized to regulate docks, wharves, or whatever may be necessary in and about the same; to abate or remove any nuisances; to regulate bridges, wharves, and slips; to prevent all obstructions in the river near or opposite such wharves, docks, or slips; to prevent the incumbering of the wharves or slips, etc. . . . These are the statutory powers possessed by the corporation, and under which

they are authorized to regulate the docks. wharves, and slips; to remove any nuisance from them, and to prevent obstructions in them. By the terms 'docks, wharves, and slips,' the piers, bulkheads, and matters surrounding them are meant; and the jurisdiction of the corporation, therefore, for the above purposes is extended over the waters of the river to the centre of the same, and every erection in or on it, including the basin and pier docks alluded to." Hart v. Mayor, etc., 9 Wend. (N Y.) 571, 591.

On an indictment for larceny on the

"high seas," where it appeared that the supposed larceny was committed on board the American ship Augusta while she lay in an enclosed dock in the port of Havre in France, into which dock the water was admitted only at the will of the owners, by direction of the court a verdict was rendered for the defendant, Story, J., saying: "Upon this evidence the indictment is not maintained. place where the ship lay was in no sense the 'high seas.' The admiralty has never held that the waters of havens where the tide ebbs and flows are properly the high seas, unless those waters are without low-water mark. The common law has attempted a still more narrow construction of the terms." U.S. v. Hamilton, I Mason (U.S.), 152.

Actual Arrival in Dock .- Where a penalty was imposed (by sec. 237 of the Merchant Shipping Act 1854, 17 & 18 Vict. c. 104) on every person who, without the permission of the master, "goes on board a ship about to arrive at the place of her destination, before her actual arrival in dock or at the place of her discharge," it was held that a ship which, at the time the respondent boarded her, had just entered a basin in the port of Bristol, which basin was a complete dock, forming part of, but separated by gates from, the rest of the docks, had actually arrived in dock, within the meaning of the section, although the dock was not the dock in which she ultimately discharged. Attwood v. Case, L. R. 1 Q. B. Div. 134.

1. Bouvier's Law Dict., sub voce. Benjamin, in his Treatise on Sales, in **DOCUMENTARY.**—(See also BOOKS AS EVIDENCE; EVIDENCE.)
—Used in the expression "documentary evidence" to denote one of the instruments of evidence.¹

DOCUMENTS.—(See also WRITTEN INSTRUMENTS.)—A written or printed paper. A paper containing information relating to any matter.²

speaking of this subject, says: "In treating of the effect of indorsing and delivering dock warrants and warehouse warrants or certificates, Blackburn, J., remarks (Blackburn on Sales, p. 297), that 'these documents are generally written contracts, by which the holder of the indorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that when goods are at sea the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle in his seeking out the master of the ship, and requiring him to attorn to his rights; but when the goods are on land there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or construc-There is. tive possession of the goods. therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on Besides this substantial difference between them, there is the more technical one, that bills of lading are ancient mercantile documents, which may be subject to the law merchant, whilst the other class of documents are of modern invention, and no custom of merchants relating to them has ever been established.' After reviewing the authorities then extant, the learned author concluded by saying: 'It is therefore submitted, that the indorsement of a delivery order or dock warrant has not (independently of the Factor's Act) any effect beyond that of a token of an authority to receive possession.' . . . But this anomaly is now removed by the 4th section of the Factors' Act. 1877." Benjamin on Sales (Bennett Ed. 1888). § 815 et seq. See also Attenborough v. Wale, L. R. 3 C. P. Div. 373; s. c., L. R. 3 C.

P. Div. 450.

1. By "instruments of evidence" are meant the media through which the evidence of facts, either disputed or required

to be proved, is conveyed to the mind of a judicial tribunal. The word "instrument" has, however, both with ourselves and the civilians, a secondary sense, i.e., denoting a particular kind of document. These instruments of evidence are of three kinds: 1st. "Witnesses"—persons who inform the tribunal respecting facts. 2d. "Real evidence"—evidence from 3d. "Documents"- evidence supplied by material substances, on which the existence of things is recorded by conventional marks or symbols. Although in natural order the subject of real evidence precedes that of witnesses, it will be more convenient to treat of the latter first, as it is by means of witnesses that both real and "documentary evidence" are usually presented to the tri-bunal. I Best on Ev. (Am. Ed. 1875)

2. Where, in proceedings before a master in a bill in equity, the right was claimed by the complainant to use in evidence a printed report of a committee of Congress under Equity Rules, Rule 72, as follows: "All affidavits, depositions, and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master;" the court rejected the claim, Durfee, C. J., saying: "In the hearing before the court the report of a committee of Congress, with appended exhibits and testimony, was read as evidence by consent. The complainants claim the right to use it before the master as a document, under the rule above cited. The report is a Congressional document, but it is not, in our opinion, a document within the meaning What the of the word as used in the rule. rule means is some writing like a deed, a will, a letter, or an account rendered or stated, which is evidence as soon as it is authenticated, independently of the consent of parties." Hazard v. Durant, 12 R. I. 99.

Public Documents.—(See Public.)—In refusing to admit in evidence, on a question as to the place of the birth or the age of one M., a report of a committee appointed by the Genoese government to inquire into the advisability of raising M., the consul for Genoa in London, to the

DOCUMENTS OF TITLE—Documents which enable the possessor to deal with the property described in it as if he were the owner.¹

DOG.—See ANIMALS.

DOLLAR.—(See also ABBREVIATION; COUNTERFEITING; MONEY; TENDER.)—The money unit of the United States.²

rank and employment of diplomatic agent. which report contained the words. "Consul Mangini is a native of Quarto, aged about forty-five," the House of Lords per Lord Blackburn said: "It is an established rule of law that public documents are admitted for certain purposes. What a public document is, within that sense, is of course the great point which we have now to consider. Public documents are admissible, and I think I can hardly state it better than by quoting what Mr. Baron Parke said in delivering the opinion of the judges in the case of the Irish Society v. The Bishop of Derry, 12 Cl. & F. 641. . . . Now, my lords, taking that decision, the principle upon which it goes is, that it should be a public inquiry, a public document, and made by a public I do not think that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it and being able to refer to it." Sturla v. Freccia, L. R. 5 App. Cas. 623, 642.

Where in order to prove a bill of sale, under which the plaintiff in an interpleader issue claimed the property in question, a clerk from the queen's bench office was called to produce the copy of the bill of sale filed, with the affidavit filed therewith, and to prove the date of filing the same, on taxation of the plaintiff's costs, the master disallowed him the expenses of the attendance of this witness. Upon a rule to show cause why the master should not review his taxation, the court discharged the rule, on the ground that the book in which the clerk enters the filing of the bill of sale, etc., was a "public document," and a certified copy thereof would have been sufficient proof. Grindell & Brendon, 6 C. B. N. S. 608.

So it has been held that the register of protests for non-acceptance and non-payment of bills of exchange and promissory notes is a public document, to which everybody has a right of access, and that to publish it in a printed paper does not constitute a libellous publication. Fleming v. Newton, I. H. of L. Cas., 363.

A copy of chart, for which a copyright has been obtained, deposited with the navy department for the use of the government, and to preserve the information among the public archives, is not a public document, and the use of it by any one in publishing another chart is an infringement of the copyright. Blunt v. Patten, 2 Paine (U. S.). 393.

But maps, charts, etc., made by State authority are public documents, and are admissible in evidence. McCall v. United States, 1 Dakota, 320.

Shipping Documents.—The papers accompanying a cargo. Tamraco v. Lucas, I. B. & S. 185.

1. By the Factors' Act, 5 & 6 Vict. c. 30, section 4, a "document of title" is stated to mean, "any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery of goods, or any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented." Benjamin on Sales (Bennett's Ed. 1888), 750.

nett's Ed. 1888). 759.

2. Bouv. L. Dict.; Rev. Stats. U. S. § 3511. The term "dollar" does not necessarily import a coin coined at the mint of the United States. Where the crime charged in an indictment is "the having in possession, etc., a certain counterfeit coin in the likeness of a silver coin called a dollar," the charge is sustained by proof that the coin was in the likeness of a Mexican dollar, which had been legalized by statute of the United States. "A Mexican dollar is none the less a

dollar, nor is it inappropriately described as a dollar." Comm. v. Stearns, 10

Metc. (Mass.) 250.

A promissory note, payable in dollars. can only be discharged by a payment or tender of legal-tender funds. Stoughton v. Hill, 3 Woods (C. C.), 404; Beardsley v. Southmayd, 2 Green (N. J.), 543. Baled cotton is not such. Lang v. Waters' Admr., 47 Ala. 424. Nor is Confederate currency. The Confederate Note Case, 19 Wall. (U.S.) 548; Hightower v. Maull. 50 Ala. 495 (1873). But where the contract was made during the civil war in one of the revolting States. evidence will be received of a contemporaneous parol agreement that the note should be discharged in Confederate treasury notes. Riddle v. Hill's Admr .. Ala. 224; Thorington v. Smith, 8 Wall. (U.S.) I. And it has even been held that it may be shown by circumstances that Confederate dollars were intended. Chalmers v. Jones, 23 S. Car. 463. But parol evidence that "dollars" in a promissory note meant Confederate dollars, or dollars in Confederate States currency. was held inadmissible, as altering the expressed terms of the contract, the word 'dollars" being neither uncertain nor ambiguous in meaning, in Roane v. Greene, 24 Ark. 210; Miller v. Lacv. 33 Tex. 351.

Where a note is expressed to be payable in dollars, it is consistent with the expression on the face of it to prove an agreement that it was to be paid, not in bonds or coupons, but in specie. Ses-

sions v. Peay, 21 Ark. 100.

A note promising the payment of a certain number of "dollars in gold and silver" is a note "for the direct payment of money," and cannot be discharged by a tender of bullion, bars, or old gold and silver spoons, rings, etc. Hart v. Flynn's Exr., 8 Dana (Ky.), 190. Such contracts, and promises to pay a certain number of "dollars payable in gold and silver coin," can only be discharged by payment in coined dollars, that is, pieces of gold and silver "certified to be of a certain weight and purity, by the form and impress given to them at the mint of the United States." They cannot be discharged by a tender of United States notes. Bronson v. Rodes, 7 Wall. (U. S.) 229.

Where one shipped at St. John, N. B., in an American vessel, for a specified voyage, for the wages of "\$25 per month," the voyage to terminate in the United States, the wages are payable in money of the United States without reference to the relative value of New Bruns-

wick dollars." Trecartin v. Ship Rochambeau, 2 Clif. (C. C.) 465.

In construing a direction to executors "to place the sum of twenty thousand dollars on my estate at interest, in some good and safe investment" for a daughter. Chancellor Zabriskie savs: "There is no ambiguity about the word 'dollars.' If any word has a settled meaning at law and in the courts it is this. It can only mean the legal currency of the United States, not dollars vested in lands and stocks, either at the market or par value, or at the original cost to the testator. "No one can suppose that the testator, when using the term 'dollars' to designate the amount of money he intended to give or offer, meant dollars in any specific stock." Halsted v. Meeker, 18 N. J. Eq. 136.

The term "dollars," used in an indictment to describe the subject of a larceny. does not necessarily import a number of one-dollar pieces, nor does it indi-cate whether the property stolen was coin, or bank, or treasury notes. A description, therefore, as "one hundred and thirty dollars" in an indictment is insufficient. Barton v. State, 24 Ark. 68; State v. Longbottom, 11 Humph. (Tenn.) 39; People v. Ball, 14 Cal. 101; State v. Murphy, 6 Ala. 846. But in McKane v. State, 11 Ind. 195, where the accused was charged with stealing "sixty dollars of the current gold coin of the United States," the court said: "We have a piece of money of the gold coin called a dollar; and is it not just as intelligible to say 'sixty dollars of the gold coin, as to say 'sixty dollars'? In our opinion the indictment is unobjectionable.'

Spanish Dollar.—Under an indictment for counterfeiting and uttering "Spanish dollars," whether there was such a coin as a Spanish dollar, and whether it was current in the State, were held to be questions for the jury. Fight v. State, 7 Ohio, 180; s. c., 28 Am. Dec. 626.

In a prosecution for counterfeiting, a "pistareen" was held not to be a part of a Spanish milled dollar, within the meaning of an act of Congress making such dollars and parts thereof current. The term "parts of a dollar" is used with reference to the divisions of a dollar as established at the mint, and one fifth of a dollar, to which a pistareen was found to correspond, was not at that time an established division of a dollar. United States v. Gardner, 10 Pet. (U.S.) 618.

DOMESTIC.—(See also Animals: Cruelty: Master and Ser-VANT.)—A servant who resides in the same house with the master whom he serves; menial servants. For other meanings see note 2.

1. Bouv. L. Dict.; 1 Bl. Com. 425; Ex parte Meason, 5 Binn, (Pa.) 167.

By the Texas Penal Code (art. 714) theft from a house by "a domestic servant or other inhabitant of such house" is not burglary, but simple theft. who was in the service of a guest of the house, and had access to it for the purpose of getting the key to his employer's mess chest, was held not to be a domestic servant. After quoting Bouvier's defini-tion of "domestics," the court continued: "By Webster, a domestic is 'a servant or hired laborer residing with a family; and he defines an inhabitant to be 'one who has a fixed residence, as distinguished from an occasional lodger or visitor.' The Code combines these terms. . . . These terms, then, do not extend to a servant whose employment is out of doors and not in the house, or to a lodger. or visitor, as distinguished from an in-Wakefield v. State, 41 Tex. They do not include a farm hand who sleeps and eats outside of his master's house, though he performs chores inside the house when required. Waterhouse v. State, 21 Tex. App. 663; s. c., 2 S. W, Rep. 889. Nor one who is hired for one day to butcher and cut up meat in a butcher-shop,—Richardson v. State, 43 Tex. 456;—nor a boarder in a boarding-house,—Ullman v. State, Tex. App.

In a statutory provision as to preferred debts, "servants and domestics" were defined, in Louisiana, to be "those who receive wages and stay in the house of the person paying and employing them, for his service or that of his family; such are valets, footmen, cooks, butlers, and others who reside in the house." v. Dodge, 6 La. Ann. 276.

A head gardener is not entitled under a will giving legacies "to each person as a servant in my domestic establishment." By this expression indoor servants alone were meant. Ogle v. Morgan, I De G., M. & G. 559; Vaughan v. Booth, 16 Jur.

2. Horses are "domestic animals" within the meaning of an act which provides that persons who "suffer loss by reason of the worrying, maining, or killing of his sheep, lambs, or other domes-tic animals, by dogs" may have their damages paid from the fund arising from

a dog tax. Osborn v. Selectmen of Lenox, 2 Allen (Mass.), 207.

Dogs are not "domestic animals" under a statute which makes the killing or wounding of such an indictable offence. State v. Harriman, 75 Me. 562; s. c., 46 Am. Rep. 423; 29 Alb. L. J. 204. But see the interesting dissenting opinion of Appleton, C. J. A hog is a "domestic beast" within the meaning of such State v. Enslow, 10 Iowa, an act.

In a cruelty to animals act it was provided that "the word 'animal' shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal." This was held to include a cock, -Budge v. Parsons, 3 B. & S. 382; s. c., 32 L. J. N. S. M. C. 95; Bates v. M'Cormick, 9 L. T. N. S. 175;—also linnets kept in captivity, and trained to act as decoys,-Colam v. Pagett, 53 L. J. R. M. C. 64; 29 Alb. L. J. 204; 46 Am. Rep. 428, n.; -and tame rats,-29 Alb. L. J. 204;but not a dancing bear,-49 Am. Rep.

Domestic distilled spirits," in the inspection laws of a State, means spirits distilled within the State, and not those distilled anywhere within the United States. Comm. v. Giltinan, 64 Pa. St.

Where those who were travelling on the "ordinary domestic business of family concerns" were exempted from the payment of tolls, the exemption extended only to "the common and ordinary business pertaining primarily and directly to the maintenance and support of the family of the person claiming the exemption." The visits of a physician to his patients are not such. Turnpike Co. v. Smith, 12 Vt. 212. And see Proprietors v. Taylor, 6 N. H. 499.

Under an act requiring a water company to furnish a supply of water "for domestic use" to owners of houses who should demand it, water used in a stable, upon the same premises with the house, in which were kept a horse and carriage for private use, was held to be applied to domestic use. Busby v. Chesterfield Water-works Co., E. B. & E. 176. And see Bristol Water-works v. Wren, 54 L. J. R. M. C. 97.

DOMICIL.—(See also CONFLICT OF LAWS; CORPORATIONS; DIVORCE: ELECTIONS: EXECUTORS AND ADMINISTRATORS: INHABITANTS: MARRIAGE: POOR AND POOR LAWS: RESIDENCE: TAXATION: WILLS.

(For legal effects of domicil, see CONFLICT OF LAWS, under subtitles Marriage and Divorce; Bankrupt and Insolvent Laws; Wills and Testaments; Succession and Distribution.)

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- 1. Definition.—That place where a man has his true, fixed, and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.1
- 1. Hayes v. Hayes, 74 Ill. 312; Bouvier Law Dict., citing Lieber Encycl. Am.; Tanner v. King, II La. 175; Crawford v. Wilson, 4 Barb. (N. Y.) 505; White v. Brown, I Wall. Jr. (U. S.) 217; Horne v. Horne, 9 Ired. L. (N. Car.) 99; Haviston v. Haviston, 27 Miss. 704. Dicey, after reviewing all the principal definitions of the contraction o tions, gives the following as accurately describing all the circumstances or cases under which a person may with strict ac-curacy be said to have a home in a par-ticular country: "A person's home is that place or country, either in which he in fact resides with the intention of residence, or in which, having so resided, he continues actually to reside, though no longer retaining the intention of resi-dence, or with regard to which, having so resided there, he retains the intention of residence, though he in fact no longer resides there." Dicey on Domicil, 44 Appendix, 332. Story defines the domicil of a person as "that place in which his habitation is fixed, without any present intention of removing therefrom." Story Confl. Laws, § 43. Wharton defines the term as follows: "Domicil is a residence acquired as a final abode. To constitute it there must be: I. Residence, actual or

inchoate; 2. The non-existence of any intention to make a domicil elsewhere. Wharton's Confl. Laws, sec. 21. Phillimore gives this definition: "A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." Phillimore Inter. L. § 49 "The place where one's family permanently resides." Daniel v. Sullivan, 49 Ga. 277.
The term "domicil of succession," as

contradistinguished from a commercial, a political, or a forensic domicil, may be defined to be "the actual residence of a man within some particular jurisdiction, of such character as shall, in accordance with certain well-established principles of public law, give direction to the succession of his personal estates." Smith v. Croom, 7 Fla. 81.

In Thorndike v. City of Boston, Metc. (Mass.) 242, the court say: "No exact definition can be given of domicil; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case."

"Most of the so-called definitions of domicil are not definitions of the term in its general scope and meaning, but of

The terms "domicil," "inhabitancy," and "residence" have not precisely the same meaning, 1 for a person's domicil may be in one State and his residence in another; 2 yet for certain purposes they have been considered convertible terms.3

domicil of choice, or that which is acquired by the act and intention of an independent person, and therefore do not cover either domicil of origin or that imputed by law to dependent persons. Moreover, even as definitions of domicil of choice or acquired domicil, they are usually defective, in that they relate only to the time of the acquisition of such domicil, and do not provide for its retention by actual residence where there has been a change of intention, or by intention where there has been a change of actual residence. Again, many of them are not properly definitions at all, but mere formulæ of evidence framed apparently for the purpose of succinctly stating the most usual criteria by which domicil of choice is determined." Jacobs

on Domicil, § 68. 1. Briggs v. Inhabitants of Rochester, 16 Gray (Mass.), 340; Lyman v. Fiske, 17 Pick. (Mass.) 234; Thorndike v. Boston, Pick. (Mass.) 234; Thorndike v. Boston, 1 Metc. (Mass.) 245; Foster v. Hall, 4 Humph. (Tenn.) 348; Warren v. Thomaston, 43 Me. 312; Jefferson v. Washington, 19 Me. 293. Bartlett v. City of New York, 5 Sandf. (N. Y.) 44; Alston v. Newcomer, 42 Miss. 187; Risewick v. Davis, 19 Md. 82; Burrell v. Jewett, 2 Robt. (N. Y.) 701. In In re Wrigley, 8 Wend. (N. Y.) 140, it is held that inhabitancy and residence do not mean inhabitancy and residence do not mean precisely the same thing as domicil, when the latter term is applied to successions to personal estate, but they mean a fixed and permanent abode or dwelling-place for the time being, as contradistinguished from a mere temporary locality of existence. In Chariton County v. Moberly, 59 Mo. 238, the word "residence" is held to have technically a more restricted meaning than "domicil," but the words "not a resident" and "domicil" must be held to be used with reference to the same subject-matter, and to denote opposite conditions with reference to habitancy, but not differing in degree. One who has a domicil in Missouri cannot be a non-resident while temporarily absent; and in Mayor v. Genet. 4 Hun (N. Y.), 487, domicil is said to be the habitation fixed in any place with the intention of always staying there, while residence is much more temporary in its character.

The term "domicil" has a more extensive signification than the term "resi-In addition to residence, it embraces within its meaning the intention of making the residence the home of the party. Foster v. Hall, 4 Humph. (Tenn.) 346. To constitute a domicil two things must concur: first, residence: second, the intention to remain there. Residence is to have a permanent abode for the time being. Long v. Ryan, 30

Gratt. (Va.) 718.

Nor are the terms "resident" and "inhabitant" synonymous; the latter implies a more fixed and permanent abode than the former, and frequently imparts many privileges and duties to which a mere resident could not lay which a mere resident could not lay claim or be subject. Tazewell County v. Davenport, 40 Ill. 197; Bartlett v. New York, 5 Sandf. (N. Y.) 44; Chaine v. Wilson, I Bosw. (N. Y.) 673; Matter of Hawley, I Daly (N. Y.), 531. Compare Hart v. Horn, 4 Kan. 238; Crawford v. Wilson, 4 Barb. (N. Y.) 522; Inhabitants of Warren v. Inhabitants of Thomaston, 43 Me. 406.

2. Frost v. Brisbin, 19 Wend. (N. Y.) 11; s. c., 32 Am. Dec. 423; Haggart v. Morgan, 1 N. Y. 428; Alston v. Newcomer, 42 Miss. 186; Morgan v. Numes, 54 Miss. 311; Wheeler v. Cobb. 75 N. Car. 21; Stout v. Leonard, 37 N. J. L. 495; Risewick v. Davis, 19 Md. 82; Nailor v. French, 4 Yeates (Pa.), 241;

Nation v. French, 4 Yeates (Pa.), 241;
Alston v. Newcomer, 42 Miss. 186;
Briggs v. Rochester, 16 Gray (Mass.),
337; Krone v. Cooper, 43 Ark. 547.

3. For the purpose of taxation. State
v. Ross, 3 Zab. (N. J.) 528; Moore v.
Wilkins, 10 N. H. 456; Lyman v. Fiske,
17 Pick (Mass.) 261 c. 28 Arg. Park 17 Pick. (Mass.) 291; s. c., 28 Am. Dec. 290. In this case the court say: "In some respects, perhaps, there is a distinction between habitancy and domicil, as pointed out and explained in the case of Harvard College v. Gore, 5 Pick. (Mass) 377, the former being held to include citizenship and municipal relations. But this distinction is believed to be of no importance in the present case (determining the place of taxation); because all the facts and circumstances which would tend to fix the domicil would alike tend to establish the habitancy." But where a statute provided that where a 2. Nature of Domicil.—General Rules.—Every person must have a domicil somewhere; first, the domicil of origin, or the domicil received at his birth, which he retains until he acquires another; and the one thus acquired is in like manner retained. But the

person has two or more residences, he shall be taxable in that place of residence in which he carries on his principal business, it has been held that the legislative recognition that a person may have two residences will bind the court and prevent it from treating residence as of the same meaning as domicil. Bartlett v. New York, 5 Sandf. (N. Y.) 46; Douglass v. New York, 2 Duer (N. Y.), 120. For the purpose of determining the settlement of paupers. Abingdon v. North Bridgewater, 23 Pick. (Mass.) 170. So with reference to testamentary cases. Isham v. Gibbons, I Bradf. (N. Y.) 84. And where it is provided by statute that no person shall be proceeded against by summons out of the county in which he resides, the residence meant will be the place of domicil. Church v. Crossman, 49 Iowa, 447. See note to Frost v. Brisbin, 32 Am. Dec.

1. Abington v. North Bridgewater, 23 Pick. (Mass.) 177; Otis v. Boston, 12 Cush. (Mass.) 44; Shaw v. Shaw, 98 Mass. 158; Thorndike v. City of Boston, 1 Metc. (Mass.) 242; Wilson v. Terry, 11 Allen (Mass.) 206; Barland v. Boston, 132 Mass. 89; Kilburn v. Bennett, 3 Metc. (Mass.) 199; Briggs v. Rochester, 16 Gray (Mass.), 237; Shaw v. Shaw, 98 Mass. 158; McDaniel v. King, 5 Cush. (Mass.) 469; Rue High, Appellant, 2 Dougl. (Mich.) 523; Lowry v. Bradley, 1 Speer's Eq. (S. Car.) 1; s. c., 39 Am. Dec. 142; Glover v. Glover, 18 Ala. 67; Barrett v. Williford, 25 Ga. 151; White v. Brown, I Wall. Jr. (U. S.) 217; Burnham v. Rangely, I Woodb. & M. (U. S.) 7; Cadwalder v. Howell, 3 Harr. (N. J.) 138; Nixon v. Palmer, 10 Barb. (N. Y.) 175; Hood's Estate, 21 Pa. St. 106; Reed's Appeal, 71 Pa. St. 378; Hindman's Appeal, 85 Pa. St. 466; Morgan v. Numes, 54 Miss. 308; Shepherd v. Cassidy, 20 Tex. 24; Cross v. Everts, 28 Tex. 523; Layne v. Pardee, 2 Swan (Tenn.), 232; In Matter of Bye, 2 Daly (N. Y.), 528; Hall v. Hall, 25 Wis. 600; Kellogg v. Oshkosh, 14 Wis. 623; Bank v. Balcomb, 35 Conn. 351; Horne v. Horne, 9 Ired. L. (N. Car.) 99; Desmare v. United States, 93 U. S. 603; Kellogg v. Supervisors, 42 Wis, 97; State v. Gizzard, 89 N. Car. 115. Compare North Yarmouth

v. West Gardiner, 58 Me. 207; Littlefield v. Brooks. 50 Me. 575.

"It is a settled principle, that no man shall be without a domicil. . . . The principle here laid down is, in effect, that for the purpose of determining a person's legal rights or liabilities the courts will invariably hold that there is some country in which he has a home. and will not admit the possibility of his being in fact homeless, or, in other words, even if he is in fact homeless, a home will, for the purpose of determining his legal rights, or those of other persons. always be assigned to him by a presumption or fiction of law. The mode by which this result is achieved consists for the most part in the assumption that every one for whom no other domicil can be found, retains what is called his domicil of origin, i.e., the domicil assigned to him by a rule of law at the time of his birth, combined with the principle that a domicil is retained until it is changed by the act of the domiciled person himself. Dicey on Domicil, p. 60. But a native domicil, where superseded by an acquired one under the same national jurisdiction, does not revive by the mere abandonment of the latter, and an unexecuted purpose to return to the former, but can be recovered only in the same way that a new domicil would be acquired. Nat. Bank v. Balcom, 35 Conn. 351.
"The general rule, and, for practical

purposes, a fixed rule, is, that a man must have a habitation somewhere; he can have but one; and therefore, in order to lose one he must acquire another. This is the test, the practical test; and it is hardly necessary to say how important it is to have a practical rule and a general rule. One of the fixed rules on the subject is this: that a purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicil, The fact and the intent He must remove without must concur. the intention of going back. The question here is, whether he can abandon one without acquiring another, and we think it has always been held that he cannot. If he goes into another State and returns for his family, his personal presence there concurring with the intent, may fix his domicil there. But if he has

presumption that a domicil once acquired continues, will not prevail when its effect would be to impose upon a party the character of an enemy to his government.1

A person can have only one domicil, for one purpose at one and the same time; 2 yet it has been held that for some purposes a man may have two domicils.3

not previously removed to another State. he has not acquired a domicil there nor lost one here." Bulkley v. Inhabitants

of Williamstown, 3 Gray, 495.

In Wilbraham v. Ludlow, 99 Mass. 587, it was held that where a person legally capable of choosing or changing his domicil, who abandons his home and thenceforth wanders from town to town, working as a day-laborer, "with no purpose in view, and with no opinions, desires, or intentions in relation to residence, except to have a home wherever he works," he ceases to have a continuing domicil for the purpose of acquiring a settlement in the town where the home is which he so abandons. See also Hicks v. Skinner, 72 N. Car. I.

1. Stoughton v. Hill, 3 Woods (U. S.

C. Ct.), 404.

2. Abington v. North Bridgewater, 23 Pick. (Mass.) 170. The court say: "The supposition that a man can have two domicils would lead to the absurdest consequences. If he had two domicils within the limits of distant sovereign states, in case of war, what would be an act of imperative duty to one would make him a traitor to the other, as not only sovereigns, but all their subjects, collectively and individually, are put into a state of hostility by war, he would become an enemy to himself, and bound to commit hostilities and afford protection to the same persons and property at the same time. But without such an extravagant supposition, suppose he were domiciled within two military districts of the same State, he might be bound to do personal service at two places at the same time; or in two counties he would be compellable, on peril of attachment, to serve on juries at two remote shire towns; or in two towns to do watch and ward in two different places. . . . These propositions, therefore, that every person must have some domicil, and can have but one at one time, are rather to be regarded as postulata, than as propositions to be proved." See also Rue High, Appellant, 2 Dougl. (Mich.) 522; Kellogg v. Supervisors, 42 Wis. 97; Somerville v. Somerville, 5 Ves. 786; Undy v. Undy, L. R. 1 Sc. Ap. 441; Church v. Rowell, 49 Me. 367; Borland

v. Boston, 132 Mass. 89; Thorndike v. Boston, 1 Metc. (Mass.) 242; Otis v. Boston, 12 Cush. (Mass.) 44; Bulkley v. Boston, 12 Cush. (Mass.), 44; Bulkley v. Williamston, 3 Gray (Mass.), 493; Shepherd v. Cassidy, 20 Tex. 24; Long v. Ryan, 30 Gratt. 718; Love v. Cherry, 24 Iowa, 204; Lee v. Stanley, 9 How. Pr. (N. Y.), 272; Douglas v. Mayor, 2 Duer. (N. Y.), 110; Ryal v. Kennedy, 40 N. Y. Supr. Ct. 347; Bartlett v. New York, 5 Sandf. (N. Y.) 44.

"It would not only be highly inconvenient, but quité impossible, for a person to have two places from which equally to draw the law applicable to him as a personal quality,—in other words, to have adhering to him perhaps conflicting laws, the one affirming and the other denying capacity or the like. In such case there would be no certain uniform rule for the guidance of courts in the determination of legal relations, and the greatest perplexity and confusion would arise. There are two ways of escaping the consequences of such an anomalous situation: (1) By assuming that a person can have but one domicil; and (2) by assuming that while a person may have more than one domicil, yet he draws his personal law from the earliest established domicil still adhering to him. The latter is the position of the civilians according to Savigny, while the former is the posi-tion of the British and American authorities. The result is, however, practically the same, since in the one case the existence of a latter domicil is denied, and in the other is simply ignored." Jacobs on Domicil, § 90.

3. Greene v. Greene, 11 Pick. (Mass.) 415; Somerville v. Somerville, 5 Vesey, 749; In re Capdevielle, 33 L. J. (Ex.) 306; Croker v. Marquis of Heriford, 4 Moore P. C. 339. Dicey, in his work on domicil, disapproves of the doctrine laid down in these cases, and states the rule clearly that "no person can have at the same time more than one domicil." attributes the prevalence of the notion to two causes: First, the fact that the term "domicil" is often used in a lax sense, and is confused with the term "residence;" second, the inquiry, which of two countries is to be considered a person's domicil, has (especially in the latter

3. Acquisition of Domicil.—I. GENERALLY.—Every independent person of full age has at any given moment of his life either the same domicil as that which he received at birth, technically called the domicil of origin, or a different domicil, which he has acquired when of full age, by his own act and choice, technically called a domicil of choice.

II. DOMICIL OF ORIGIN.—Every person is held by an absolute rule or fiction of law to be at birth domiciled, or to have his legal home, in the country in which, at the time of the infant's birth. the person (in most cases the infant's father) on whom the infant is legally dependent is then domiciled.2 This domicil of origin, though received at birth, need not be either the country in which the infant is born, or the country in which his parents are residing, or the country to which his father belongs by race or allegiance.3 A legitimate child, therefore, born during his father's lifetime, has his domicil of origin in the country where the infant's father is domiciled at the moment of the child's birth. But an illegitimate child has for his domicil of origin the domicil of his mother at the time of his birth.⁵ In the case of a foundling, it is the country where he was born or found; 6 and a person born illegitimate, but afterwards legitimated by the subsequent marriage of his parents. stands in the position (after his legitimation) which he would have occupied if he had been born legitimate. His domicil of origin is the country where his father was domiciled at the time of his hirth 7

III. DOMICIL OF CHOICE.—Every person begins life as an infant, and therefore as a dependent person. When he becomes an independent person he will find himself in possession of a domicil

cases) been confused with the question whether one person can at the same time have a domicil in two countries. Dicey on Domicil, p. 63.

Jacobs also denies this doctrine.

Jacobs on Domicil, §§ 91-93.

 Dicey on Domicil, 67.
 Udny v. Udny, L. R. 1 Sc. Ap. 441.
 Somerville v. Somerville, 5 Vesey, 749. Thus D., the son of an Englishman, and a British subject, is born in France, where his father is residing for the moment, though domiciled without being naturalized in America. D.'s domicil of origin is neither English nor French, but American. This may be a matter of great importance to D., for supposing his father and mother to be unmarried at the time of his birth, the effect of their subsequent marriage on D.'s legitimacy will depend on the law of the country where D.'s father was domiciled at the time of D's birth. See Re Wright's Trusts, 2 K.

& J. 595.
The British and American authorities attach great importance and peculiar qualities to domicil of origin, and lay down with respect to it two principles, which have passed into maxims: namely, (I) Domicil of origin clings closely, and (2) Domicil of origin reverts easily. Both these principles are universally received in Great Britain and America.

Jacobs on Domicil, § 109.

4. Udny v. Udny, L. R. 1 Sc. App.
441; Dalhousie v. McDonall, 7 Clar. &
Fin. 817; Wharton Confl. L. sec. 35;

Dicey on Domicil, 72.
Where a father loses his residence in Louisiana by a voluntary absence of two years, not being on business of the State or the United States, his children born of an alien mother, and having never visited, are not domiciliated in that State.

State v. Poydras, 9 La. Ann. 165.
5. Westlake Priv. Int. Law, sec. 35;
Dicey on Domicil, 72; Story's Confl. L. sec. 46; Wharton's Confl. L. sec. 37; 4
Phillim. Inter. L. 90; Houlton v. Loubec,
35 Me. 411. See BASTARDY, vol. 2, p. 129.

6. Dicey on Domicil, 72.

7. Udny v. Udny, L. R. 1 Sc. App. 441; Dalhousie v. McDonall, 4 Clar. & F. 817; Munro v. Munro, 7 Clar. & F.817.

which will in most cases be his domicil of origin. He can then obtain for himself, by his own act and will, a legal home, or domicil different from the domicil of origin, and called a domicil of choice. This domicil is acquired by the combination of residence and the intention to reside in a given country, and can be acquired in no other way.

1 Udny v. Udny, L. R. 1 Sc. App. 441; Bell v. Kennedy, 1 Sc. App. 307; Collier v. Rivaz, 2 Curt. 855; Maltass v. Collier v. Rivaz, 2 Curt. 855; Maltass v. Maltass, I Rob. Ecc. 67; Forbes v. Forbes, 23 L. J. Ch. 724; Haldane v. Eckford, L. R. 8 Eq 631; Hoskis v. Mathews, 25 L. J. Ch. 689; Jopp v. Wood, 4 De G. J. & S. 616; Cockerell v. Cockerell, 25 L. J. (Ch.) 730; Attorney-General v. Kent, 31 L. J. Ex. 391; Holmes v. Greene, 7 Cush. (Mass.) 299; Lyman v. Fiske, 17 Pick. (Mass.) 231; S. 28 Am. Dec. 2023; Hart v. Horn 4 c., 28 Am. Dec. 203; Hart v. Horn, 4 Kan. 232; Hallowell v. Saco, 5 Me. 143; Green v. Windham, 13 Me. 225; Richmond v. Vassalborough, 5 Me. 396; v. Littlefield v. Brooks. 50 Me. 475; Brewer v. Linnæus, 36 Me. 428; Stockton v. Staples, 66 Me. 197; Ensor v. Gray, 43 Md. 291; Kemna v. Brockhaus, 10 Biss. wealth v. Walker, 4 Mass. 556; Gravillion v. Richards' Executor, 13 La. 293; s. c., 33 Am. Dec. 563; McKowen v. Mc-S. C., 33 Am. Dec. 503; McKowen v. McGuire, 15 La. Ann. 637; Lowry v. Bradly, I Speerirs Eq. (S. Car.) 1; s. c., 39 Am. Dec. 142; Leach v. Pillsbury, 15 N. H. 137; State v. Daniels, 44 N. H. 383; Hart v. Lindsey, 17 N. H. 235; s. c., 43 Am. Dec. 597; Phillips v. Kingfield, 19 Am. Dec. 597; Phillips v. Kingfield, 19 Me. 375; s. c., 36 Am. Dec. 761; Henrietta v. Oxford, 2 Ohio St. 32; Smith v. Croom, 7 Fla. 81; White v. White, 3 Head (Tenn.), 404; Layne v. Pardee, 2 Swan (Tenn.), 232; Hegeman v. Fox, 31 Barb. (N. Y.) 475; Boardman v. House, 18 Wend. (N. Y.) 512; Frost v. Brisbin. 19 Wend. (N. Y.) 11; Ely v. Lyon, 18 Wend. (N. Y.) 644; Brown v. Ashbough, 40 How. Pr. (N. Y.) 260; Graham v. Public Admr., 4 Bradf. (N. Y.) 127; McIntyre v. Chappel, 4 Tex. 187; Moreland v. Davidson, 71 Pa. St. 371; Story Confl. L. sec. 44; Dicey on Domicil, 73. "A person in making this change does

"A person in making this change does an act which is more nearly designated by the word 'settling' than by any one word in our language. Thus, we speak of a colonist settling in Canada or Australia, or of a Scotsman settling in England; and the word is frequently used as expressive of the act of change of domicil, in the various judgments pronounced by our courts." Udny v. Udny, L. R. r

Sc. App. 441.

2. Residence alone will clearly not suf-Plummer v. Brandon, 5 Ired. Eq. (N. Car.) 190; State v. Dayton, 77 Mo. 678; The Venus, 8 Cranch (U. S.). 116; Wayne v. Green, 21 Me. 357; Veile v. Koch, 27 Ill. 129; Rumney v. Camptown, 10 N. H. 567; Smith v. Croom, 7 Fla. 81; Boardman v. House, 18 Wend. (N. Y) 512; Jacobs on Domicil. § 135, and cases cited. Nor will intention alone suffice. Bulkley v. Inhabitants of Williamstown, 3 Gray (Mass.), 495; Wright v. Boston, 126 Mass. 161; Otis v. Boston, 12 Cush. (Mass.) 44; Sears v. City of Boston, I Metc. (Mass.) 250; Sacket's Case, I Mass. 58; Abington v. Boston, 4 Mass. 312; Commonwealth v. Walker, 4 Mass. 556; v. Amherst, 7 Mass. 1550, Granby v. Amherst, 7 Mass. 1; Lincoln v. Hapgood, 11 Mass. 350; Williams v. Whiting, 11 Mass. 424; Harvard College v. Gore, 5 Pick. (Mass.) 370; Carey's Appeal, 75 Pa. St. 201; Pickering v. City peai, 75 Fa. St. 201; Fickering 9. City of Cambridge (Mass.). Io N. E. Rep. 827; Kellar v. Baird, 5 Hejsk. (Tenn.) 39; Hart v. Horn, 4 Kan. 232; Hallowell v. Saco, 5 Me. 143; Richmond v. Vassalborough. 5 Me. 306; Ringgold v. Bailev, 5 Md. 186.

A citizen of Massachusetts removed with h's family to another State, and retained no dwelling-place in that commonwealth, though he retained his place of business there, and intended to retain his domicil there, and to return at some future indefinite period of time. Held, that he had no domicil in Massachusetts. Holmes v. Greene. 7 Gray (Mass.), 299. And if a party leaves the State with the intention to change his residence, and to take up his abode and make his home elsewhere, he loses his residence in the State, notwithstanding he may entertain a floating intention to return at some future period. State v. Frest, 4 Harr. (Del.) 558; State v. De Casinova, r Tex.

In an action which was barred by the *Tennessee* Statute of Limitations, unless previous to its accrual plaintiff had become a resident of New York, plaintiff proved that he had formed the intention of living in New York, and had sent his

(a) Residence.—The residence which goes to constitute domicil need not be long in point of time. If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicil.1

wife to Brooklyn, but had not followed her until a year after the accrual of the cause of action, held, that plaintiff did not thereby acquire a residence in New York before the accrual of the cause of action, and that the Statute of Limitations was a bar. Penfield v. Chesapeake, etc., R. Co., 29 Fed. Rep. 494.

But the rule requiring concurrence of intent and fact to establish a change of domicil cannot be applied to make the acts and intentions of the wife affect the domicil of the husband. Parsons v.

City of Bangor, 61 Me. 457.

It follows that a domicil cannot be acquired in itinere. Bulkley v. Inhabitants quired in itinere. Bulkley v. Inhabitants of Williamstown, 3 Gray (Mass.), 495; Harvard College v. Gore, 5 Pick. (Mass.) 370; Jennison v. Hapgood, 10 Pick. (Mass.) 77; Shaw v. Shaw, 98 Mass. 158; Borland v. Boston, 132 Mass. 89; Littlefield v. Brooks, 50 Me. 476; Clark v. Likens, 2 Dutch. (N. J.) 207; Ringgold v. Borley, 5 Md. 186; Lyall v. Foreman, 1 Dall (Pa) 480; Isham v. Gibbons v. Dolley, But. 100; Lyan v. Foleman, 1 Dall. (Pa.) 480; Isham v. Gibbons, 1 Bradf. (N. V.) 60; Vanderpoel v. O'Hanlon, 53 Iowa, 246; McIntyre v. Chappel, 4 Tex. 187. Thus, where a party abandons the domicil of origin in fact, and with the present intention to acquire a new one if he dies in itinere, and before he has consummated that intention by an actual residence, the domicil of origin immediately reverts and reattaches. Smith v. Croom, 7 Fla. 81; Fayette v. Livermore, 62 Me. 229.

And where a party who had acquired a domicil in a foreign country was on his return with his family to his native country, and died in it nere, that fact is not sufficient to create the presumption of an abandonment of the foreign domicil, unless it is proved that he left with the intention of such abandonment; and such intention must be proved by the party relying on it. Mills v. Alexander, 21 Tex. 154. But where a master mariner, in 1867, left B., the town in which was his domicil of origin, went to sea with his wife, and with intent to make his home in O. sent her in 1868 to O., where she boarded at her father's, and in July, 1869, arrived at O. himself, held, that in May, 1869, his domicil was in O. Bangs v. Brewster, 111 Mass. 382.

And a person's wish to retain a domicil in one country will not enable him to retain it if in fact he resides with the animus manendi in another. In re Steer, 3

H. & N. 594.

Nor can the acquisition of a domicil be affected by rules of foreign law. Bremer v. Freeman, 10 Moore P. C. 306; Collier v. Rivaz, 2 Curt. 855; Hamilton v. Dallas, 1 Ch. D. 257.

1. Bell v. Kennedy, L. R. I Sc. App. 307; Horne v. Horne, 9 Ired. L. (N. Car.) 99; Plummer v. Brandon, 5 Ired. (N. Car.) 190; Wilton v. Falmouth, 15 Me. 479; Parsons v. Bangor, 61 Me. 457; Stockton v. Staples, 66 Me. 197; Johnson v. Turner, 29 Ark. 280; Russell v. Randolph, 11 Tex. 460; Kemna v. Brockhaus, 10 Biss. (U. S.) 128; Burnham v. Rangeley, I Woodb. & M. (U. S.) 7; Doyle v. Clark, I Flip. (U. S.) 536; Guier v. O'Daniel, I Binn. (Pa.) 349; Carey's Appeal, 75 Pa. St. 201; Swaney v. Hutchins, 13 Neb. 266; Gravillan v. Richards' Ex'r, 13 La. 293; Cadwallader v. Howell, 3 Harr. (N. J.) 138; Vischer v. Vischer, 12 Barb. (N. Y.) 640; Hart v. Horn, 4 Kans. 232.

"The nature of residence considered as a part of domicil, and thus looked at as a physical fact, independently of the animus manendi, has been little discussed. It may be defined as 'habitual physical presence in a place or country.' The word, however, 'habitual' must not mislead. What is meant is not presence in a place or country for a length of time, but presence there for the greater part of the time, be it long or short, which the person using the term 'residence' contemplates." Dicey on Domicil, 76.

The residence in a county necessary to establish a settlement therein, must be a personal presence in a fixed abode, or of a character indicating permanency of occupation. Cerro Gordo County v.

Wright County, 50 Iowa, 439.

A. lived in New Orleans for fifteen years. He owned real estate there; he was old and infirm, was unmarried, did not live with relatives, and his household effects consisted of a chamber set of furniture only, which he took with him to the house of a nephew in another parish, declaring it to be his intention to make his home there. In a month he died. Held, that his domicil at the time of his death was in the parish to which he had thus removed. Verret v. Bonvillian, 33 La. Ann. 1304. In Bell v. Kendall (Ch. D.), 22 S.1.

(b) Intention.—The requisite animus is the present intention of permanent or indefinite residence in a given country, or, negatively expressed, the absence of any present intention of not residing permanently or indefinitely in a given country.1

Jour. 274, the question was as to the domicil of one Bell, for the purpose of ascertaining who were the persons entitled under certain voluntary settlements made by him. The settlor's domicil of origin was in Guernsey. In 1852 he entered the army and served in various parts of the world until 1870, when he retired from the army. From 1870 until his death in 1887 he resided in England. He never had any fixed residence there. but lived sometimes in one part of the country, sometimes in another, but in no case for more than five years in one place. There was evidence on the part of his wife that he had expressed an intention at some time, when he should become entitled to certain property which he expected, to return and live in Guern-It was argued that the burden of proof of change of domicil was on those who alleged it, that the domicil of origin remained until a domicil of choice was acquired, and that mere residence was not sufficient to show an intention to acquire a domicil of choice. Held, that the long residence of seventeen years in England was evidence of an intention to acquire a domicil of choice in that country, which, in the absence of evidence to the contrary, was conclusive. The evidence of the wife merely showed an intention, in certain contingencies which had not happened, to return to Guernsey.

See Story Confl. L. s. 43; Dicey

on Domicil, 77.

Dicey says there exists no authoritative definition of the animus manendi necessary to the acquisition of a domicil of choice, but that there are four points as to its character which deserve notice: 1st. The intention must amount to a purpose or choice. 2d. The intention must be an intention to reside permanently or for an indefinite period. 3d. The intention must be an intention of abandoning, i.e., of ceasing to reside permanently in, the former domicil. 4th. The intention need not be an intention to change allegiance. To these propositions are cited, Udny v. Udny, L. R. 1 Sc. App. 441; King v. Foxwell, 3 Ch. D. 518; Hoskins v. Matthews, 25 L. J. Ch. 689; Attorney-General v. Pottinger, 30 L. J. Ex. 284; Douglas v. Douglas, L. R. 12 Eq. 617; Maltass v. Maltass, I Rob. Ecc. 67; Jopp v. Wood, 34 L. J. Ch. 212; Lyall v. Paton, 25 L. J. Ch. 746; Brunel v. Brunel, L. R. 12 Eq. 298.

If a party leaves a State with the intention to change his residence, and to take up his abode and make his home elsewhere, he loses his residence in the State. notwithstanding he may entertain a floating intention to return at some future period. State v. Frest, 4 Harr. (Del.) 568; State v. De Casinova, 1 Tex. 401. Plaintiff was born in New York, but

removed to New Jersey in 1868, where he married, in 1877, and continued to reside until the death of his wife in 1880. He then took his children to Scotland. On his return he located in New Jersey, and lived there, boarding, until 1884, when he went to St. Louis, His business was contracting for street work, and he secured many important contracts there for granite paving. He also formed a partnership with defendant for quarrying granite. He then closed out his business in New Jersey, and moved such of his machinery as he could not sell to St. Louis. After living there for two years, part of the time in a hotel and part with relatives, he sued defendant in the Federal court for dissolution of partnership, alleging that he was a citizen of New Jersey. *Held*, that the facts set out established a residence in Missouri, and that they were not overcome by a secret purpose of plaintiff to return to New Jersev when his business in Missouri was concluded at some indefinite future Wright v. Schneider, 32 Fed. period. Rep. 215.

So the place to which a person has removed, with the intention to remain there an indefinite time, and as a place of present domicil, is the place of his domicil, although he may entertain a floating intention to remove elsewhere at some future period. Harris v. Firth, 4 Cranch (U. S. C. C.), 710. But one does not acquire a domicil in a State by entering it with the intention of resid-ing therein only if he shall there find employment. Ross v. Ross, 103 Mass.

Whether a person removing from one place to another intends to change his domicil, is a question of fact and not of law. Fitchburg v. Wichendon, 4 Cush. (Mass.) 190; Mooar v. Harvey, 126 Mass.

Jacobs says: "Intention implies three things: (1) capacity to choose, (2) freedom of choice and (2) actual choice," Jacobs or choice, and (3) actual choice." Jacobs on Domicil, § 137. And further: "The 4. Change of Domicil.—I. GENERALLY.—Every one's domicil of origin must be presumed to continue until he has acquired another sole domicil by actual residence, with the intention of abandoning his domicil of origin.¹ This change must be animo et facto, and the burden of proof unquestionably lies on the party who asserts the change.²

A person retains his domicil of choice until it is abandoned, whereupon either a new domicil of choice is acquired or the domicil of origin is resumed; either he in fact resumes it, or if he does not do so in fact, he is assumed by a rule of law to resume or re-

acquire it.3

intention requisite for a change of domicil is (1) intention completely to abandon the former place of abode as a place of abode, and (2) to settle presently and permanently in another place." Id. § 150. And again, "The former place of abode must be abandoned only as a place of abode. Therefore occasional returns, or an intention to return for temporary purposes of business or pleasure, to remove one's family, or the like, will not prevent a change of domicil. The mere retention of landed estate at the former place of abode is certainly not inconsistent with abandonment; but whether the retention of a place of residence-a furnished house or the like-in which the person may and probably does intend to reside occasionally, is or is not consist-ent with abandonment, has been the subject of some difference of opinion." Jacobs on Domicil, § 160.

1. Hart v. Lindsey, 17 N. H. 235; Dupuy v. Wurtz, 53 N. Y. 556; Methodist Book Concern, I Daly (N. Y.), 3; Crawford v. Wilson, 4 Barb. (N. Y.) 504; Brown v. Ashbough, 40 How. Pr. (N. Y.) 260; Hood's Estate, 21 Pa St. 106; Reed's Appeal, 71 Pa. St. 378; White v. Brown, I Wall. Jr. (U. S.) 217; Prentiss v. Barton, I Brock. (U. S.) 389; Johnson v. Twenty-one Bales, 2 Paine (U. S.), 601; Kellogg v. Supervisors, 42 Wis. 297; Harkins v. Arnold, 46 Ga. 656; Quimby v. Duncan, 4 Harr. (Del.) 383; Littlefield v. Brooks, 50 Me. 575; Gilman v. Gilman, 52 Me. 165; Layne v. Pardee, 2 Swan (Tenn.), 232; Morgan v. Numes, 54 Miss. 308; Plummer v. Brandon, 5 Ired. (N. Car.) 190; Horne v. Horne, 9 Ired. (N. Car.) 190; Rue High, Appellant, 2 Doug. (Mich.) 515; Bangs v. Brewster, 111 Mass. 382; Kirkland v. Whatley, 4 All. (Mass.) 462; Thorndyke v. Bassett, 100 Mass. 167; Heirs of Halliman v. Peebles, 1 Tex. 673.

2. Aikman v. Aikman, 3 Macq. 854; Udny v. Udny, L. R. 1 Sc. App. 441;

Harvard College v. Gore, 5 Pick. (Mass.) 370; Plummer v. Brandon, 5 Ired. (N. Car.) 190: Tucker v. Field, 5 Redf. (N. Y.) 139; Dupty v. Wurtz, 53 N. Y. 556; De Meli v. De Meli, 67 How. Pr. (N. Y.) 20; Cole v. Lucas, 2 La. Ann. 946; Ennis v. Smith. 14 How. (U. S.) 400.

v. Smith, 14 How. (U. S.) 400.
"But the importance of domicil of origin in this respect is somewhat modified by circumstances. For it may sometimes happen that the individual whose domicil is in question has been, at a very tenderage, and before strong attachments have had time to spring up, transplanted from the land of his birth to another; or he may during the whole course of his previous life have had little or indeed no connection with the place where the law by its fiction attributes to him a domicil. In such case the attachments which form as the child grows up would probably be assumed in favor of his home in fact, and less than the usual quantum of evidence be required to show a change of his domi-cil of origin. 'The evidence that a man intends to resign his domicil of origin ought to be cogent in proportion to the improbability of such desire. And the converse is true—that if the probability is great, far less evidence may suffice.' Sharp v. Crispin L. R. I P. & D. 611."

Jacobs on Domicil, § 116.

The rule that the person who asserts a change of domicil must prove it, applies as well when the question is one of reverter of the domicil of origin as when it is one of the acquisition of a domicil of choice. Reverter, therefore, will not be presumed, and the onus probandi rests upon him alleging it. Jacobs on Domicil, § 203; Maxwell v. McClure, 6 Jur. (N. S.) 407; Lord Advocate v. Lamont, 19 D. (Sc. Sess. Cas., 2d Ser., 1857) 779; Harvard College v. Gore, 5 Pick. (Mass.)

8. Udny v. Udny, L. R. I Sc. App. 441; Bell v. Kennedy, L. R. I Sc. App. 307; In Goods of Raffenel, 32 L. J. (P. & M.) 203.

II. INFANTS.—An infant cannot of his own accord change his domicil, but it changes while the father is alive with the domicil of the father; but the domicil of an illegitimate infant is the same as, and changes with, the domicil of his mother.

If after the death of the father an unmarried infant lives with its mother, and the mother, while a widow, acquires a new domicil.

it is communicated to the infant.4

"It seems reasonable to say, that if the choice of a new abode and actual settlement there constitute a change of the original domicil, then the exact converse of such a procedure, viz., the intention to abandon the new domicil, and an actual abandonment of it, ought to be equally effective to destroy the new domi-That which may be acquired may surely be abandoned. . . . The true doctrine is, that the domicil of origin reverts from the moment that the domicil of choice is given up. This is a necessary conclusion, if it be true that an acquired domicil ceases entirely whenever it is intentionally abandoned, and that a man can never be without a domicil. The domicil of origin always remains, as it were, in reserve, to be resorted to in case no other domicil is found to exist." Udny o. Udny, L. R. 1 Sc. App. 441.

1. This rule is well established, and has been but little questioned. Jacobs on Domicil, § 220; Somerville v. Somerville, 5 Ves. 749; Hiestand v. Kuns, 8 Blackf. (Ind.) 345; Warren v. Hafer, 13 Ind. 167; Wheeler v. Burrows, 18 Ind. 14; Parsonsfield v. Kennebunkport, 4 Me. 47;

Lacy v. Williams, 27 Mo. 280.

A male infant cannot change his domicil by marriage. Trammell v. Trammell, 20 Tex. 406: Taunton v. Plymouth, 15 Mass. 203; Jacobs on Domicil, § 232.

It has been held otherwise with reference to emancipated minors. Dennysville v. Trescott, 30 Me. 470; Charleston v. Boston, 13 Mass. 468; Washington v. Beaver, 3 W. & S. (Pa.) 548; Lubec v. Freeport, 3 Greenl. (Me.) 220; St. George v. Deer Isle, 3 Greenl. (Me.) 390; Wells v. Kennebunkport, 8 Greenl. (Me.) 200.

2. Somerville v. Somerville, 5 Ves. 749; Sharpe v. Crispin, L. R. I P. & D. 611; Forbes v. Forbes, 23 L. J. Ch. 724; Udny v. Udny, L. R. I Sc. App. 441; Dalhousie v. McDonall, 7 Clar. & Fin. 817; Ames v. Duryea, 6 Lans. (N. Y.) 155; Ryall v. Kennedy, 40 N. Y. Supr. Ct 347; s. c., 67 N. Y. 379; Re Rice, 7 Daly (N. Y.), 22; Crawford v. Wilson, 4 Barb. (N. Y.) 504; Lacy v. Williams, 27 Mo. 280; Heistand v. Kuns, 8 Blackf. Ind.) 345; Warren v. Hafer, 13 Ind. 167; Wheeler v. Burrows, 18 Ind. 14; McCal-

lum v. White, 23 Ind. 43; Parsonsfield v. Kennebunkport, 4 Me. 47; Foley's Estate, II Phila. (Pa.) 47; School Directors v. James, 2 Watts & S. (Pa.) 568; Guier v. O'Daniel, I Binn. (Pa.) 349; Kelly v. Garrett, 67 Ala. 304; Metcalf v. Lowther's Exrs., 56 Ala. 312; Lamar v. Micom, II2 U. S. 452; Hart v. Lindsay, I7 N. H. 235; Mears v. Sinclair, I W. Va. 185.

3. Forbes v. Forbes, 23 L. J. Ch. 724; Story's Confl. L. § 46; Wharton's Confl.

3. Forbes v. Forbes, 23 L. J. Ch 724; Story's Confl. L. § 46; Wharton's Confl. L. § 37; Dicey on Domicil, 98; Jacobs on Domicil, § 244, a; Houlton v. Loubec, 35 Me. 411; Inhabitants of Blackstone v. Inhabitants of Seekonk, 8 Cush. (Mass) 75; Ryall v. Kennedy, 40 N. Y. Superior Ct. 347. See BASTARDY, vol. 2, p. 129.

4. Johnstone v. Beattie, 10 Clar. & F. 42; Potinger v. Wrightman, 3 Mer. 67; Brown v. Lynch, 2 Bradf. (N. Y.) 214; Ryal v. Kennedy, 40 N. Y. Supr. Ct. 347; Ex parte Dawson, 3 Bradf. (N. Y.) 130; School Directors v. James, 2 Watts & S. (Pa.) 568; Harkins v. Arnold, 46 Ga. 656; Mears v. Sinclair, 1 W. Va. 185; Allen v. Thomaston, 11 Humph. (Tenn.) 536; Lacy v. Williams, 27 Mo. 280; Succession of Lewis, 10 La. Ann. 789; Powers v. Martee. 4 Am. L. Reg. 427; Jacobs on Domicil. § 240.

"Difficult questions may, however, be raised as to the effect of a widow's change of domicil on that of her children, where she is not their guardian. Such questions may refer to the two different cases of infants who reside, and of infants who do not reside, with their mother.

"1st. Suppose that an infant resides with his mother who is not his guardian. The question may be raised, whether the domicil of the infant is determined by that of the mother, or by that of the guardian. No English case decides the precise point; but it may be laid down with some confidence, that (even if a guardian can in any case change the domicil of his ward) yet the domicil of a child living with his mother, whilst still a widow, will be that of the mother and not of the guardian. 2d. Suppose that an infant resides away from his mother, who is not his guardian. The question whether it is on his mother or his guardian that the change of the child's domicil

It is possible that the domicil of an orphan follows that of his guardian, but whether this be so or not is an open question.1

depends, presents some difficulty. In the absence of decisions on the subject, it is impossible to give any certain answer to the inquiry suggested. It is quite possible that whenever the point calls for decision the courts may hold that there are circumstances under which an infant's domicil must be taken, even in the lifetime of the mother, to be changed by the guardian.

"These questions, and others of a similar character, really raise the general inquiry, whether as a matter of law an infant's domicil is identified with that of the infant's widowed mother, to the same extent to which it is identified with that of his father during the father's lifetime?

"It may be doubted whether the courts would not under several circumstances hold that an infant, in spite of a change of domicil on the part of the child's mother, retained the domicil of his deceased father. Still in general the rule appears to hold good that the domicil of an infant whose father is dead changes with the domicil of the child's mother."

Dicey on Domicil, 99.

Infant's Domicil not Affected by Mother's Marriage. - If an infant's father dies, the infant's domicil follows, in the absence of fraud, that of its mother, until such time as the mother remarries, when, by reason of her domicil being subordinate to that of her husband, that of the infant ceases to follow any further change by the mother, or, in other words, does not follow that of its stepfather. Ryall v. Kennedy, 40 N. Y. Superior Ct. 347; Ex parte Dawson, 3 Bradf. (N. Y.) 130; Brown v. Lynch, 2 Bradf. (N. Y.) 214; Mears v. Sinclair, T W. Va. 185; Allen v. Thomaston, 11 Humph. (Tenn.) 536; Lamar v. Micou, 112 U. S. 452; Johnson v. Copeland, 35 Ala. 521. And where the widow of a resident citizen intermarried, and then, without the guardian's assent, carried the child of tender years to another State, where it died, the child's domicil was held not to have been changed by the removal. Johnson v. Copeland, 35 Ala.

1. Dicey on Domicil, 100. "It seems doubtful whether a guardian can change an infant's domicil. The difficulty is that a person may be guardian in one place and not in another." Douglas v. Doug-

las, L. R. 12 Eq. 617.

There is much conflict of authority upon this question in the American cases. See, generally, School Directors v. James, 2 W. & S. (Pa.) 568; Seiter v. Straub, 1

Demar. (N. Y.) 264; White v. Howard, 52 Barb. (N. Y.) 594; Cutts v. Haskins, 9 Mass. 543; Holyoke v. Haskins, 5 Pick. (Mass.) 20; Ex parte Bartlett, 4 Bradf. (N. Y.) 221; Wood v. Wood, 5 Paige Ch. (N. Y.) 596; Kirkland v. Whatley, 4 Allen (Mass.), 642; Marheineke v. Grothous. 72 Mo. 204; Anderson v. Anderson, 42 Vt. 350; Pedan v. Robb's Adm'r, 8 Ohio. 227; Townsend v. Kendall, 4 Minn. 412; Afflick's Estate, 3 McAr. (D. C.) 95; Colburn v. Holland, 14 Rich. Eq. (S. Car.) 176; Mears v. Sinclair, 1 W. Va. 185; Daniel v. Hill, 52 Ala. 430; Lamar v. Micon, 112 U. S. 452.

Jacobs, in his valuable work on Domicil, § 260, gives the following as the general results of the American cases. "The doctrine which we may extract from the American cases may be thus stated: (1) That a guardian has the power to change the municipal domicil of his ward. (2) That the domicil of the ward is not necessarily that of his guardian. (3) That the natural guardian certainly, and the testamentary guardian probably, has the power to change the national or quasi-national domicil of his ward, unless expressly prohibited by a competent court. (4) That the power of an appointed guardian to change the national or quasi-national domicil of his ward is, to say the least, very doubtful."

In Wheeler v. Hollis, 19 Tex. 522, it was held that the emigration of a guardian from Mississippi to Texas, and from the latter State to Arkansas, his ward accompanying him as a member of his family, operates a change on the ward's domicil according to that of the guardian, where the conduct of the guardian is not in fraud of those entitled to succeed to the ward's property in case of her death, nor fraudulent nor injurious in relation to the ward herself. The fact that the guardian left the former State in order to avoid paying his debts is not otherwise material, on the trial of the issue, whether the domicil of the ward was changed by the guardian's emigration, than as showing that his primary object was not to benefit his ward. Nor is his failure to settle his guardianship account in the former State conclusive evidence of such fraud upon the ward, or the successors to her estate, as would prevent a change of domicil.

A child three years old, upon the death of its parents in Tennessee, the place of their domicil, was brought to the District of Columbia by an uncle not its guardian.

also Conflict of Laws—Foreign Guardians, Vol. III., pp.

656-658.

In *Indiana*, it has been held that the residence (or domicil) of the master is the residence of an apprentice for every purpose known to the law; and whilst a minor, the apprentice could not by leaving the master and going into another State change that residence.1

III. MARRIED WOMEN.—A woman, of whatever age, acquires at marriage the domicil of her husband, and her domicil continues to be the same as his, and changes with his, throughout their married life.2 She cannot acquire a domicil separate from her hus-

Held, that the domicil of the child continued in Tennessee, and it dying in the District of Columbia, its estate must be distributed according to the laws of Ten-Re Afflick, 3 McArthur (D. C.),

In Lamar v. Micon, 114 U. S. 452, it was held that a child under ten years of age, who with the assent of its guardian after the death of its parents resides with its paternal grand-parent in another State, who is next of kin and the head of the family, acquires the domicil of the grand-parent. And see Darden v. Wyatt, 15 Ga. 114.

In Lewis v. Costello, 17 Mo. App. 593, it was held that the legal domicil of minor orphans is at the place where the surviving parent was domiciled at the time of his or her death; nor does the orphan's domicil change by reason of its tempo rary removal to be cared for.

1. Maddox v. State, 32 Ind. 14. 2. Davis v. Davis, 30 Ill. 180; Babbett v. Babbett, 69 Ill. 277: Freeport v. Supervisors, 40 Ill. 495; Green v. Green, 11 Pick. (Mass.) 410; Mason v. Homer, 105 Mass. 116; Harteau v. Harteau, 14 Pick. (Mass.) 181; Hood v. Hood, 11 Allen (Mass.), 196; Hairston v. Hairston, 27 Miss. 704; s. c., 61 Am. Dec. 530; Williams v. Saunders, 5 Coldw. (Tenn.) 60; Hackettstown Bank v. Mitchell, 28 N. J. L 516; McPherson v. Housel, 13 N. J. Eq. 35; Baldwin v. Flagg, 43 N. J. L. 495; McAffee v. Kentucky University, 7 Bush (Ky.), 135; Hanberry v. Hanberry, 29 Ala. 719; Sanderson v. Ralston, 20 La. Ann. 312; Dugat v. Markham, 2 La. R. 35; Succession of Christie, 20 La. Ann. 383; Succession of McKenna, 23 La. Ann. 369; Warrender v. Warrender, 2 Cl. & F. 488; Dolphin v. Robbins, 7 H. L. C. 390; Re Daly's Settlement, 25 Beav. 456; Geils v. Geils, I Macq. H. L. Cas. 254; Whitcomb v. Whitcomb, 2 Curteis, 351; Gilis v. Gilis, Ir. R. 8 Eq. 597; Niboyet v. Niboyet, L. R. 4 P. D. 1; Chichester v. Donegal, 1 Add. Eccl. 5; Kemna v.

Brockhaus, 12 Biss. (U. S.) 128; Barber v. Barber, 21 How. (U.S.) 103; Burnham v. Rangeley, I Woodb. & M. (U. S.) 7; Bennett v. Bennett, Deady (U. S.), 299; Dow v. Gould, 31 Cal. 629; Kashaw v. Kashaw, 3 Cal. 312; Hollister v. Hol-lister, 6 Pa. St. 449; Dougherty v. Snyder, 15 S. & R. (Pa.) 84; School Directors v. James, 2 W. & S. (Pa.) 568; Dorsey v. James, 2 W. & S. (Pa.) 508; Dorsey v. Dorsey, 7 Watts (Pa.), 349; Johnson v. Turner, 29 Ark. 280; Ditson v. Ditson, 4 R. I. 87; Green v. Windham, 13 Me. 225; Knox v. Waldoborough, 3 Greenl. (Me.) 445; Danbury v. New Haven, 5 Conn. 584; Guilford v. Guilford, 9 Conn. Conn 584; Guilford v. Guilford, 9 Conn. 321; Bank v. Balcom, 35 Conn. 351; Russell v. Randolph, 11 Tex. 460; Lacey v. Clements, 36 Tex. 661; Jenness v. Jenness, 24 Ind. 355; McCollum v. White, 23 Ind. 43; Ensor v. Graff, 43 Md. 391; Brown v. Lynch, 2 Bradf. (N. Y.) 214; Vischer v. Vischer, 12 Barb. (N. Y.) 640; Paulding's Will, Tuck. (N. Y.) 47; Lipscomb v. N. J. R. & Trans. Co., 6 Lans. (N. Y.) 75; Hunt v. Hunt, 72 N. Y. 217; Smith v. Moorehead, 6 Jones Eq. (N. Car.) 369; Harkins v. Arnold. 46 Ga. 656; Swaney v. Hutchins, 13 Neb. 266; Colburn v. Holland, 14 Rich. Eq. (S. Car.) 16; Johnson v. John-Rich. Eq. (S. Car.) 16; Johnson v. Johnson, 12 Bush (Ky.), 485.

If the marriage was invalid, it has been held in New Hampshire that the woman's domicil is still that of her husband. Concord v. Rumney, 45 N. H. 423. Compare Middleborough v. Rochester, 12 Mass.

The factum of a change of bodily presence, which is an indispensable element for the acquisition of domicil by an independent person, is not a necessary condition of a change of the wife's domicil, so long as it depends upon that of the husband, and the domici of the wife follows that of her husband whether or not she accompanies him to his new place of abode. Jacobs on Domicil, § 214; Republic v. Young, Dallam (Tex.), 464; Russell v. Randolph, II Tex. 460;

band's, and although they live apart she still follows his domicil: 1 nor will the fact that they have separated by agreement enable the

wife to acquire a separate domicil.2

A widow or a divorced woman retains her late husband's last domicil until she changes it, which she has power to do.3 But when the husband begins an action for divorce, it has been held that the legal fiction of one domicil no longer operates, and the jurisdiction depends on the actual facts.4

IV. ADULT OF UNSOUND MIND.—The rule as to an infant's domicil is extended to the domicil of an adult who, though he has

Lacev v. Clements, 36 Tex. 661: Succession of Christie, 20 La. Ann. 383; Succession of McKenna, 23 La. Ann. 369; Johnson v. Turner, 29 Ark. 280; Burlen v. Shannon, 115 Mass. 438. Compare Kelly ω . Robertson, 10 La. Ann.

1. Greene v. Greene, II Pick. (Mass.) 410; Hood v. Hood, II Allen (Mass.), 196; Warrender v. Warrender, 2 Cl. & F. 488; Dolphin v. Robbins, 7 H. L. Cas. 390.: Re Daly's Settlement, 25 Beav. 456 Jackson, 1 Johns (N. Y.) 424; Greene v. Windham, 13 Me. 235; Cox v. Cox, 19 Ohio St. 502; Maguire v. Maguire, 7 Dana (Ky.), 180; Sanderson v. Ralston, 20 La. Ann. 312. And the removal of the wife from the State where the husband is domiciled does not operate to change her domicil, although she is induced to leave him by his harsh treatment. Harrison v. Harrison, 20 Ala. 629; s. ..., 56 Am. Dec. 227. Compare Scholes v. Murray Iron-works Co., 44 Iowa, 190; Porterfield v. Augusta. 67 Me. 556; Irby v. Wilson, 1 Dev. & B. Eq. (N. Car.) 568.

Where it appeared that the husband had separated from his wife, who with her children had gone to live with her father, and the husband after boarding for a short time in an adjoining county lest the State and was confined for crime in the penitentiary of Pennsylvania, held, that the wife's actual domicil was not the husband's legal domicil; nor could it be deemed, contrary to the fact, as his actual residence within the meaning of the statute regulating the service of process. McPherson v. Housel, 13 N. J. Eq. 35.

In Dutcher v. Dutcher, 39 Wis. 659, the court say: "Doubtless for certain purposes the domicil of the husband is the domicil of the wife. That rule, however, goes upon the unity of husband and wife; and very generally, if not al-ways, implies continuing, though temporarily interrupted, cohabitation. Per-

manent separation implies separate domicil of husband and wife. If the rule were to be applied to cases of desertion, it would imply something like an absurdity. The weight of authority is against the application of the rule, as applied to cases of divorce, when the parties are actually living in different jurisdictions. actually living in different jurisdictions. Diston v. Diston, 4 R. I. 87; Harteau v. Harteau, 14 Pick. 181; Payson v. Payson, 34 N. H. 518; Hopkins v. Hopkins, 35 N. H. 474; Harding v. Alden, 9 Greenl. 140; Yates v. Yates, 13 N. J. Ch. 280; Schonwald v. Schonwald, 2 Jones Eq. (N. Car.) 367; Jenness v. Jenness, 24 Ind. 355. The question cannot be considered an open one in this court. Hubbell v. Hubbell v. Wis 662; Phillips Hubbell v. Hubbell, 3 Wis. 662; Phillips v. Phillips, 22 Wis. 256; Shafer v. Bushnell, 24 Wis. 372; Craven v. Craven, 27 Wis. 418." See Conflict of Laws; DIVORCE.

2. Dolphin v. Robbins, 7 H. L. C. 390. In this case D., an Englishwoman, married M., a domiciled Englishman. After some years they agreed to live separate, and ultimately obtained a divorce, which however was not valid, from the Scotch courts. D., after the supposed divorce, resided in France, and during M.'s lifetime married N., a domiciled Frenchman. M., her English husband, remained domiciled in England till D.'s death in France. D., at her death, was domiciled in England and not in France. And see Warrender v. Warrender, 3 Cl.

& F. 488.
3. Dicey on Domicil, 108-9; Jacobs on Goat v. Zimmer-Domicil, §§ 219–222; Goat v. Zimmerman, 5 Notes of Cases (Eng.), 455; Bennett v. Bennett, Deady (U. S.) 299.

A woman divorced a mensa et thoro may establish a domicil for herself. Barber v. Barber, 21 How. (U. S.) 582; Hunt v. Hunt, 72 N. Y. 217; Vischer v. Vischer, 12 Barb. (N. Y.) 650; Paulding's Will, 1 Tuck. (N. Y.) 47; Williamsport v. Eldred, 84 Pa St. 429.

4. Mellen v. Mellen, ro Abb. N. Cas.

(N. Y.) 329.

attained his majority, has never attained sufficient intellectual capacity to choose a home for himself.1

5. Ascertainment of Domicil.—I. LEGAL PRESUMPTIONS.—A person's presence in a place is presumptive evidence of domicil: but this prima facies disappears whenever it is shown that he was formerly domiciled elsewhere, and is not where he is now found cum animo manendi.3 And where a person is known to have had a domicil in a given place, he is presumed in the absence of proof of a change to retain such domicil.4

II. EVIDENCE OF DOMICIL.—(a) Generally.—Any circumstance may be proof or evidence of domicil which is evidence either of a person's residence (factum), or of his intention to reside permanently (animus), within a particular country.5 Hence oral or writ-

1. Sharpe v. Crispin, L. R. I P. & D. 611. See DOMICIL OF PARTICULAR PER-SONS-LUNATICS, infra.

2. Bruce v. Bruce, 2 B. & P. 229; Bempde v. Johnstone, 3 Ves. Junr. 198; Ryall v. Kennedy, 40 N. Y. Superior Ct.

347.
"The place of a man's birth has in itself no necessary connection with the place of his domicil, for though D. be born in England, yet if D.'s father is then domiciled in France, D.'s domicil of origin is not English, but French. If, however, nothing be known about D.'s domicil except the fact of his birth in England, this fact is ground for a presumption that D.'s domicil at the moment of his birth, and therefore D.'s domicil of origin, was English." Dicey on Domicil, 116.

So a man is *prima facie* domiciled at the place where he is resident at the time of his death; and it is incumbent on those who deny it to repel the presumption of law, which may be done in several ways. It may be shown that he was a traveller, or on some particular business, or on a visit, or for the sake of health; any of which circumstances will remove the impression that he was domiciled at the place of his death. Guier v. O'Daniel, I Binney (Pa.), 349.

The place where a person lives and dies is taken to be his domicil until facts adduced establish the contrary; and where, as in this case, the testator, being in poor health, left his place of residence in Illinois, with the intention of making his future home elsewhere, and, after staying a short time at each of several places in quest of health and business, he despaired of regaining his health, and finally settled down with his widowed mother, whose home was in Taylor county, Iowa, intending to remain there an indefinite time, and at which place he was married and made his will, and soon afterward died,

held, that Taylor county, Iowa, was his domicil at the time of his death.

Olson, 63 Iowa, 145.

3. Jacobs on Domicil, § 162.

4. Munro v. Munro, 7 Cl. & F. 842; Aikman v. Aikman, 3 Macq. 854; Douglas v. Douglas, L. R. 12 Eq. 617; Glover v. Glover, 18 Ala. 367; Burnham v. Rangeley, I Woodb. & M. (U. S.) 7; Layne v. Pardee, 2 Swan (Tenn.), 232; Barrett v. Black, 25 Ga. 151; Cadwalder v. Howell, 3 Harr. (N. J.) 138; Wilson v. Terry, 11 Allen (Mass.), 206; Nixon v. Palmer, 10 Barb. (N. Y.) 175; Hood's Estate, 21 Pa. St. 106; Keith v. Setter, 25 Kans. 109; St. 100; Kehn v. Setter, 25 Kans. 109; Lindsay v. Murphy, 76 Va. 428, Palson v. Bushong, 29 Gratt. (Va.) 291; Mitchell v. United States, 21 Wall. (U. S.) 351; Desmare v. U. S., 93 U. S. 605; Nugent v. Bates, 51 Iowa, 77; Mooar v. Harvey, 128 Mass. 219; Kilburn v. Bennett, 3 Metc. (Mass.) 199; Chicopee v. Whatley, 6 Allen, 508.

But this presumption is particularly strong when the change in question is in derogation of the domicil of origin, especially if the domicil of origin corresponds with the place of birth and early educa-Jacobs on Domicil, § 122, and cases

5. Dicey on Domicil, rule 16, p. 119. "There is no act, no circumstance, in a man's life, however trivial it may be in itself, which ought to be left out of con sideration in trying the question whether there was an intention to change the domicil. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his lifetime." Drevon v. Drevon, 34 L. J. Ch. 129. See Haskins v. Matthews, 25 L. J. Ch. 689; Aitchison v. Dixon, L. R. 10 Eq. 589; Douglas v. Douglas, L. R. 12 Eq. 617; Hodgson v. De Beauchesne, 12 Moore P. C. 285.

ten expressions of intention to make a home in a particular place, or from which such an intention, or the absence of it, may be inferred, presence in a place, time of residence, the mere absence of proof that a domicil once acquired has been changed.4 the ownership or purchase of land, the mode of dealing with a household establishment, the taking of lodgings, the buying of a burial-place, the deposit of plate and valuables, the exercise of political rights, the exercise of political rights are the exercise of political rights.

On the issue whether a party to a suit had his domicil in a certain city on the first day of May, his declarations as to his residence in a letter by him to the assessors of the city, in reply to a circular sent to him by them; deeds in which he was grantor, describing him as of another place, one of which was to the city as grantee; his will, in which he was described as in the deeds: and the will of his father, in which he was so described-are all admissible in his favor. Wright v. Boston, 126 Mass, 161. Likewise deeds to him as grantee, in which he was described as of another town; and evidence that he and his son were accustomed to talk over and discuss the affairs of such other town-are inadmissible in his favor; but deeds to him as grantee, describing him as resident of the city, are admissible against him. Weld v. Boston, 126 Mass. 166.

1. See Expressions of Intention,

infra.

2. Bruce v. Bruce, 2 B. & P. 229;
Bempde v. Johnstone, 3 Vesey Jr. 198;
Stanley v. Burnes, 3 Hagg. Eccl. 373.
See Legal Presumption, ante.
3. The Harmony, 2 C. Rob. 322. See

RESIDENCE, infra.

4. Munro v. Munro, 7 Cl. & F. 842.

See LEGAL PRESUMPTION, ante.

5. In re Capdevielle, 33 L. J. (Exch.) 306; Somerville v. Somerville, 5 Ves. Jr. 750; Moorhouse v. Lord. 10 H. L. Cas. 272; Dupuy v. Wurtz, 53 N. Y. 556; Barton v. Irasburgh, 33 Vt. 159; Heirs of Holliman v. Peebles, I Tex. 673; Hood's Estate, 21 Pa. St. 106; New Orleans v. Shepherd, 10 La. Ann. 268; Shelton v. Tiffin, 6 How. (U. S.) 163.

6. Somerville v. Somerville, 5 Vesey,

749, a.
7. Craige v. Lewin, 3 Curt. 435.

8. In re Capdevielle, 33 L. J. Exch. 306; Haldane v. Eckford, L. R. 8 Eq. Cas. 631: Succession of Franklyn, 7 La. Ann.

9. Curling v. Thornton, 2 Add. 219; Hodgson v. De Beauchesne, 12 Moore

10. In Smith v. Croom, 7 Fla. 81, it was held that the exercise of the political right of voting within a particular jurisdiction is not conclusive evidence upon the question of "domicil of succession." It is but one of the many criteria which may serve to indicate the intention of the individual. and may be overcome by other circum-

It has always been received, however, as important evidence of domicil. Brunel v. Brunel, L. R. 12 Eq. 298; Malone v. Lindley, 1 Phila. (Pa.) 192; Carey's Appeal, 75 Pa. St. 201; Follweiller v. Lutz, 112 Pa. St. 107; Guier v. O'Daniel. 1 Binn. (Pa.) 349; East Livermore v. Farmington, 74 Me. 154; State v. Groome, 10 Iowa, 308; Weld v. Boston, 126 Mass. 166; Howard College v. Gore, 5 Pick. (Mass.) 370; Cobat v. Boston, 12 Cush. (Mass.) 52; Easterly v. Goodwin, 35 Conn. 279; Venable v. Paulding, 19 Minn. 488; Yonkey v. State, 27 Ind. 236; McKowen v. McGuire, 15 La. Ann. 637; Hill v. Sparkenburg, 4 La. Ann. 553; Sanderson v. Ralston, 21 La. Ann. 553; Sanderson v. Ralston, 21 La. Ann. 312; Hairston v. Hairston, 27 Miss. 704; Fiske v. Chicago, etc., R. Co., 53 Barb. 472; State v. Ross, 3 Zab. (N. J.) 517; Woodworth v. St. Paul, etc., R. Co., 18 Fed. Rep. 282; Mitchell v. United States, 21 Wall (U.S.) 270; Shelton v. 275 Wall. (U. S.) 350; Shelton v. Tiffin, 6 How. (U. S.) 163; Blair v. Western Female Seminary, 1 Bond (U. S.), 578; United States v. Thorpe, 2 Bond (U. S.), 340.

In Kellogg v. City of Oshkosh, 14 Wis. 678, it is held that the act of voting in a certain place is the highest evidence that a person has made that place his domicil. But in Shelton v. Tiffin, 6 How. 185, the court say: "On a change of domicil from one State to another, citizenship may depend on the intention of the indi-But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive on the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient." In Fisk v. Chester, 8 Gray (Mass.), 506. Evidence that the selectmen of a town decided that a person taxed there was an inhabitant, and put his name upon the voting list, was held not admissible for the purpose of showing that his domicil was

the way of spelling the Christian name, 1 official acts of a public officer recognizing a person as an inhabitant, payment of personal taxes, holding of office, jury service, have all been deemed matters worth consideration in determining the question of a person's domicil.

The place of a person's death is of very little importance in

determining his domicil; 6 and so as to the place of burial.

The question of domicil when a party is shown to have been resident of two places, and to have exercised acts of habitancy in both, is a mixed question of law and fact. So far as it involves questions of fact, including the ascertainment of the intention of the party as to the place of his domicil,—in many cases an important and decisive element,—is to be determined by the verdict of the jury, and their determination is conclusive, unless the verdict is set aside as being against the evidence.8

(b) Expressions of Intention.—Expressions of intention to reside permanently in a country are evidence of such an intention, and in so far evidence of domicil.9 These expressions may be direct,

in that town, without showing that they did it at his request. The act and circumstances under which the vote is given are proper facts for the consideration of the jury. And see East Livermore v. Farmington, 74 Me. 154.

Offering, refusing, and failing to vote have all been considered to be of some importance in determining a person's domicil. Guier v. O'Daniel, I Binn. (Pa.) 349; Heirs of Holliman v. Peebles, I Tex. 673; New Orleans v. Shepherd, Io La. Ann. 268; Shelton v. Tiffin, 6 How. (U. S.) 163; Hindman's Appeal, 85 Pa. Št. 466.

But where the question in issue is the domicil of a person for the purpose of taxation, evidence is inadmissible that the taxpayer, prior to the year in which the taxes were assessed, declined to accept a nomination for office, or to serve if elected, because he "had no connection with or interest in the affairs of" the city. Pickering v. City of Cambridge (Mass.), 10 North E. Repr. 827.

The naturalization of a person is also of some importance. Drevon v. Drevon, 34 L. J. Ch. 129; Stanley v. Bemes, 3 Hagg. Eccl. 373; Hood's Estate, 21 Pa. St. 106; Ennis v. Smith, 14 How. 400.

1. Brunel v. Brunel, L. R. 12 Eq. 98. 2. West Boylston v. Sterling, 17 Pick. (Mass.) 126. See Mead v. Boxborough, II Cush. (Mass.) 362; Fisk v. Chester, 8 Gray (Mass.), 506; Sewall v. Sewall, 122 Mass. 156.

3. Hulett v. Hulett, 37 Vt. 518; Mitchell v. United States. 21 Wall. (U. S.) 350; Weld v. Boston, 126 Mass. 166; Carey's Appeal, 75 Pa. St. 201; Yonkey v. State.

27 Ind. 236; Cambridge v. Charlestown, 13 Mass. 501; Harvard College v. Gore, 5 Pick. (Mass.) 370; State v. Steele, 33 La. Ann. 910; Jacobs on Domicil, § 442. But the election to pay taxes in one town rather than another does not of itself determine the fact of habitancy. Lyman v. Fisk, 17 Pick. (Mass.) 231.

But if taxes are paid under a misapprehension of residence, it is otherwise. Ellsworth v. Gouldsboro, 55 Me. 94; Mc-Kowen v. McGuire, 15 La. Ann. 637; or if the taxes are paid under protest. Isham v. Gibbons, I Bradf. (N. Y.) 69.

Omission or refusal to pay taxes is not of much importance in determining a person's domicil. Hallett v. Bassett, 100

person's domicil. Hallett v. Bassett, 100 Mass. 167; Guier v. O'Daniel, I Binn. (Pa.) 349; Moar v. Harvey, 128 Mass. 219; Hindman's Appeal, 85 Pa. St. 396.

4. Maxwell v. McClure, 6 Jur. (N. S.) 107; Drevon v. Drevon, 34 L. J. Ch. 129; Harvard College v. Gore, 5 Pick. 370; Cole v Cheshire, I Gray (Mass.), 441; Butler v. Hopper, I Wash. (U. S.) 449.

5. Sanderson 7. Ralston, 20 La. Ann. 312; Villere v. Butman, 23 La. Ann. 515.

6. Jacobs on Domicil, § 426; Somerville v. Somerville, 5 Ves. Jr. 750.

7. Jacobs on Domicil, § 427.

8. Cochrane v. Boston, 4 Allen (Mass.). 178; Lyman v. Fiske, 17 Pick. (Mass.) 293; Fitchburg v. Wichendon, 4 Cush. (Mass.) 190.

9. Hamilton v. Dallas, I Ch. D. 257; Udny v. Udny, L. R. I Sc. App. 441; Bell v. Kennedy, L. R. I Sc. App. 441; Wallace v. Lodge. 5 Ill. App. 507; Mitchell v. United States, 21 Wall. (U. S.) 350; Burnham v. Rangeley, I Woodb. & M.

as where a person says that it is his purpose to settle in a certain place; or they may be indirect, as where a person by his acts intimates an intention of acquiring or keeping a certain home.

(U. S.) 7; Woodworth v. St. Paul, etc., R. Co., 18 Fed. Rep. 282; Prentiss v. Barton, 1 Brock. (U. S.) 389; Thorndike v. Boston, 1 Metc. (Mass.) 242; Salem v. Lynn, 13 Metc. (Mass.) 544; Cole v. Cheshire, 1 Gray (Mass.) 441; Wright v. Boston, 126 Mass. 161; Dicey on Domicil, Rule 17, p. 121; Jacobs on Domicil, § 441.

1. D., an English peer, who had lived for some time in France, expressed in a letter a deliberate intention of never returning to England. He also accepted the jurisdiction of a French court, on the ground, expressed in a letter to his attorney, of his being bona fide domiciled in France; and added, "I have no domicil in England or any other country excepting the one (France) from which I now write." These expressions, combined with other circumstances, were, after D.'s death. held to prove that he was in fact domiciled in France. Hamilton v. Dallas. I Ch. D. 257.

Direct expressions, however, of intention may be worth little as evidence. See Doucet v. Geoghegan, 9 Ch. D. 441; Attorney-Gen'l v. Kent, 31 L. J. Ex. 391; Hamilton v. Dallas, 1 Ch. D. 257; Udny v. Udny L. R. I. Sc. App. 441.

v. Udny, L. R. I Sc. App. 441.
On questions of domicil, a party's declarations in authentic acts, though admissible against him, are not conclusive, but may be disproved when not causes of the contract. Davis v. Binion,

5 La. Ann. 248.

In deciding the question, courts of justice will look to the real facts of the case, and the declarations of a party on that subject, made for the purpose of establishing a fictitious domicil, will be rejected. Watson v. Simpson, 13 La. Ann. 337. The word "residence" being commonly employed in the sense of sojourn, a recital in a will that the testator is residing at a place named, is not controlling on the question of domicil. Tucker v. Field, 5 Redf. (N. Y.) 139. But where the evidence leaves the question of the domicil of a testator in doubt, his declaration in his will, written by himself, on the subject, is conclusive. Redf. (N. Y.) 82.

In Louisiana, it is held that where a person resides alternately in different parishes, and his residence in each appears to be nearly of the same nature, he may determine, by a declaration made in the manner prescribed by law, in which

of the two he intends to have his domicil, and in such case he can be cited only in the parish of his elected domicil. Otherwise where the residence in each parish is not of the same nature. Judson o. Lathrop, I La, Ann. 78.

Where a widow remarried, and after living some time at her first husband's residence in Georgia removed with her minor children to Tennessee, where her second husband became pastor of a church, but they always avowed their intention to return, held, that they did not lose their domicil in Georgia, and were entitled to a homestead from the estate of the first husband. Harkins v.

Arnold, 46 Ga. 656.

A native-born citizen of the United States, for many years a resident of the city of New York, after an absence of several years from this country, executed her will at Nice, according to the formalities prescribed by the laws of New York, in which she declared that as she had for several years resided in Europe, now at one place and now at another, as her health and comfort had required, she deemed it proper to say that she considered her home and residence as still being in the city of New York, "in my beloved country, the United States of America." Held, that this should be regarded as clear evidence of the intention of the testatrix in respect to domicil. Dupuy v. Seymour, 64 Barb. (N. Y.) 156.

But upon the question of domicil of a pauper, it appeared that he went from one town with his household goods to another town, and soon afterwards returned again. Held, that declarations of his intention not accompanying the act of removal, or a part of any transaction connected therewith, in itself competent evidence, were inadmissible. Brookfield

v. Warren, 128 Mass. 287.

2. "A person's purpose may be more certainly inferred from his acts than from his language. Thus, the fact that D. keeps up a large establishment in England, that he occupies a particular kind of house, that he deposits his plate and valuables there, and a hundred other circumstances, may be indicative of a purpose to live permanently in England, and therefore be evidence of his having an English domicil." Dicey on Domicil, 122. See Somerville v. Somerville, 5 Vesey, 749, a: Forbes v. Forbes, 23 L. J. Ch. 724; Craige v. Lewin, 3 Curt. 435;

Curling v. Thornton, 2 Add. 19; Keith v. Setler. 25 Kan. 100.

In order to determine a man's domicil after evidence has been introduced of the man's declaration that he should no longer make a certain town his residence, evidence is admissible to show the length and frequency of his subsequent visits to the same town. Wilson v. Terry, II

Allen (Mass.), 206.

In Smith v. People, 44 Ill. 23, it appeared that the defendant, who was an attorney, left Illinois, where he was domiciled with his family, in August, 1865, and moved into Tennessee. Before going to Tennessee he repeatedly declared that he was going as an experiment; if the people were such that he could remain with satisfaction, then he would not return. He also refused to sell his Illinois reports, saying that if he should return he would need them. He returned to Illinois in March, 1866, and it was held that he had not lost his domicil there

In Folger v. Slaughter, 19 La. Ann. 323, the defendants had their domicil in one parish where they had resided for a number of years, from which they removed temporarily to another parish to avoid the dangers resulting from the late war, and there engaged in business, and voted at one or two elections, but did not otherwise signify their intention of a change of domicil. Held, that these acts of themselves were not sufficient to operate such change, and that they must be sued at their former residence.

And the fact that a person has voted in one State, and even become a candidate for the legislature here, is not sufficient to show a change of domicil from another State, if it be proved that he never made a permanent change in his residence. Mandeville v. Houston, 15

La. Ann. 281.

A Spanish subject came to the United States, in a time of peace between Spain and Great Britain, to carry on a trade between this country and the Spanish provinces, under a royal Spanish license. He continued to reside here and to carry on the trade, after the breaking out of the war between Great Britain and Spain. Held, that he was to be considered an American merchant. Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 506.

In Bremer v. Freeman, 10 Moore P. C. 306, an Englishwoman resided uninterruptedly in France for a period of fiften years, without any business or occupation in that country, renting apartments

on lease, and making declarations never to return to England, providing, moreover, a vault in the cemetery of Père la Chaise, in Paris, where she expressed her wish to be buried. In 1842 she made a will in Paris, in the English form, but not in conformity with the French law, bequeathing personal property, the bulk of which was in English funds, to parties resident in England. The decedent was not, at the time of making her will, nor at her death, naturalized in France, nor had she obtained any authorization as required by Article 13 of the Code Napoleon. Held, that by the jus gentium, the decedent was de facto domiciled in France, and that the authorization of the French government was not necessary in order to give the right of testacy, and that the will, not having been executed in accordance with the requirements of the law of the domicil, was invalid, and probate was refused.

In Anderson v. Lanenville, o Moore's P. C. 325, a testator, who sold his house and furniture and broke up his establishment in England, in 1836, and went to France, where he bought and turnished a house in which he resided permanently (cohabiting with a French woman) until his death in 1849, with the exception only of occasional short visits to England for business purposes, was held to have fixed his domicil in France, which was not affected by his having expressed an intention to return to England, in an event which never happened, nor by his having, on one occasion when in England, executed a will according to the English form and law, or from the circumstance that the bulk of his property was, at his death, in the English funds.

In Chariton County v. Moberly, 59 Mo. 238, it is held that if a married man has two places of residence at different times of the year, that will be his domicil which he himself selects or describes or deems to be his home, or which appears to be the centre of his affairs, or where he votes or exercises the rights and duties

of a citizen.

In Cerro Gordo Co. v. Hancock Co., 58 Iowa, 114 where one H., a foreigner, without parents or home, kept her trunk and clothes at the house of her brother in a certain county, and seemed to regard it as a home, going out at various times to work in another county, but when sick or out of employment returning to her brother's house, it was held that such county was the county of her residence.

(c) Residence.—Residence in a country is prima facie evidence of the intention to reside there permanently, and in so far evidence of domicil.¹ The effect of residence as evidence depends both on the *time*² and the *mode*³ of residence. Residence in a place,

1. Munro v. Munro, 7 Cl. & F. 842; The Harmony, 2 C. Rob. 322; Ryall v. Kennedy, 40 N. Y. Super. Ct. 347; Elbers v. Insurance Co., 16 Johns. (N. Y.) 128; Ames v. Duryea, 6 Lans. (N. Y.) 155; Crawford v. Wilson, 4 Barb. (N. Y.) 504; Vischer v. Vischer, 12 Barb. (N. Y.) 640; Mitchell v. United States, 21 Wall. (U.S.) 350; Kemna v. Brockhaus, 10 Biss. (U.S.) 128; The Venus, 8 Cranch (U. S.), 253; Hairston v. Hairston, 27 Miss 704; Harv. Lindsey, 17 N. H. 235; Carey's Appeal, 75 Pa. St. 201; Hindman's Appeal, 85 Pa. St. 466; Alter v. Waddel, 20 La. Ann. 246; Dow v. Gould, 31 Cal. 629; Horne v. Horne, 9 Ired. (N. Car.) 99; Mills v. Alexander, 21 Tex. 154; Ex parte Blummer. 27 Tex. 735; Cadwallader v. Howell, 3 Harr. (N. J.) 138.

2. Length of Time of Residence.—

"Length of time is considered one of the criteria, or one of the indicia, from which the intention to acquire a new domicil is to be inferred; and it is considered a very material ingredient in the consideration of the question. . . . Some foreign jurists have suggested, if they have not actually laid it down, that a period of ten years' residence ought of itself to be a sufficient indication of the intention to acquire a new domicil. certainly, that is not the view of the law that has been adopted by English jurists generally, and I think it is impossible to lay down any precise period which per se is to constitute domicil. At the same time, if a man goes to another country and continues to reside there for a . . . period of ten years, without saying that a residence of ten years is necessary, or that ten years is the period sufficient, still the fact of his residing there for ten years is a very strong indication of his intention to establish his home and his domicil in that place." Cockrell v. Cock-

rell, 25 L. J. Ch. 730. In Knox v. Waldoborough, 3 Me. 455, an absence of five years was held not to change the domicil of the party, he having left home to seek temporary employment, and there being no evidence that this purpose had been altered. And in Hulet v. Hulet, 37 Vt. 581, to prove the domicil of the defendant at the time a suit against him was brought, the plaintiff offered to show that the defendant continued to reside in the State for two years after service was made upon him. Held.

that this was admissible upon the question whether he intended to make his abode there permanent, as the duration of a residence is an important element

in determining such intent.

The authorities all support this position. See Jacobs on Domicil, and cases cited. Dupuy v. Wurtz, 53 N. Y. 556; Elbers v. Insurance Co., 16 Johns. (N.Y.) 128; White v. Brown, 1 Wall. Jr. (U. S.) 217; Johnson v. Twenty-one Bales, 2 Paine (U. S.), 601; Knox v. Waldoborough, 3 Greenl. (Me.) 455; Hulett v. Hulett, 37 Vt. 581; Hairston v. Hairston, 27 Miss. 704; Hood's Estate, 21 Pa. St. 106; Easterly v. Goodwin, 35 Conn. 279; The Ann Eliza, 1 Gall. (U. S.) 274.

In the case last cited, Story, I., said: "As to domicil, it is undoubtedly true that length of time, connected with other circumstances, may go very far to constitute a domicil. 'Time,' says Sir William Scott, is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects. In most cases it is unavoidably conclusive.' Upon a residence, therefore, for temporary purposes, there may be engrafted all the effects of permanent settlement, if it be continued for a great length of time and be attended with conduct which demonstrates that new views and new connections have supervened upon the original purposes; but, on the other hand, mere length of time cannot of itself be decisive, where the purpose is clearly proved to have been temporary, and still continues so, without any enlargement of views; and even the shortest residence, with a design of permanent settlement, stamps the party with the national character.

3. Mode of Residence.-The effect of residence in a country as evidence of a man's intention to continue residing there, depends to a great extent on the manner of his residence. If D. not only lives in France, but buys land there, and makes that country the home of his wife and family, there is clearly far more reason for inferring a purpose of residence on his part than if he has merely taken lodgings in Paris and lives there alone.

Dicey on Domicil, 125.

The presence of a man's wife and family is sometimes spoken of as decisive. Daniel v. Sullivan, 46 Ga. 277; Douglas v. Douglas, L. R. 12 Eq. 617; Banks v. Brewster, 111 Mass, 382: Forbes v. Forbes, Kay, 341.

There is at least a presumption that a married man is domiciled at the place where his wife and family dwell. Smith v. Croom, 7 Fla. 81; Grant v. Dalliber, 11 Conn. .234; Anderson v. Anderson, 42 Vt. 350; Knox v. Waldoborough, 3 Greenl. (Me.) 455; Greene v. Windham, 13 Me. 225; Brewer v. Linnæus, 36 Me. 428; Topsham v. Lewiston, 74 Me. 236; Penley v. Waterhouse, I Iowa, 498; State v. Groome, 10 Iowa, 308; Nugent v. Bates, 51 Iowa, 77; Plumer v. Brandon, 5 Ired. Eq. (N. Car.) 190; Prieto v. Duncan, 22 Ill. 26; Yonkey v. State, 27 Ind. can, 22 Ill. 26; Yonkey v. State, 27 Ind. 236; Shattuck v. Maynard, 3 N. H. 123; Rumney v. Camptown, 10 N. H. 567; Sherwood v. Judd, 3 Bradf. (N. Y.) 167; Matter of Bye, 2 Daly (N. Y.), 525; Ames v. Duryea, 6 Lans. (N. Y.) 155; Lee v. Stanley, 9 How. Pr. (N. Y.) 272; Chaine v. Wilson, 1 Bosw. (N. Y.) 673; Matter of Scott, 1 Daly (N. Y.), 534; Brown v. Boulden 18 Tex 212 Blusher Brown v. Boulden, 18 Tex. 431; Blucher v. Milsted, 31 Tex. 621; Keith v. Setter. 25 Kan. 100; Cunningham v. Mound, 2 Ga. 171; Gilmer v. Gilmer, 32 Ga. 685; Colburn v. Holland, 14 Rich. Eq. (S. Car.) 176.

But the presumption that the abode of a married man's family is his domicil, is of fact, not of law, and rebuttable. Pearce v. State, I Sneed (Tenn), 63; Blucher v. Wilsted, 31 Tex. 621; Gilmer v. Gilmer, 32 Ga. 685; Scholes v. Murray Iron Works Co.. 44 Iowa, 190; Hairston v. Hairston, 27 Miss. 704; Nugent v. Bates, 31 Iowa, 77: Parsons v. Bangor, 61 Me. 457; Cambridge v, Charlestown, 13 Mass. 501; McDaniel v. King, 5 Cush. (Mass.) 469; Greene v. Windham, 13 Me. 225.

But the actual change of one's residence with his family, and the taking up of a residence elsewhere, without any intention of returning, is one of the strong indications of change of domicil, and unless controlled by other circumstances is decisive. Thorndike v. City of Boston.

I Metc. (Mass.) 242.
A citizen of Massachusetts removing with his family to another State, and retaining no dwelling-place in this commonwealth, though retaining his place of business here, and intending to retain his domicile here, and to return at some future indefinite period of time, has no domicil in that commonwealth. Holmes v. Greene, 7 Gray (Mass.), 299. And if a person having a family be domiciled in any town within that commonwealth, he will not be considered as having changed his domicil by removing into another town, until he removes his family.

Williams v. Whitney, 11 Mass, 424. And if an inhabitant of another State moves into that State, leaving his family behind him, but with the intention of removing them there at some future time, he will be considered as having his domicil there. Cambridge v. Charlestown, 13 Mass. 501 .

In 1854, an Englishman, being in pecuniary difficulties, left England and went to reside in Scotland in order to avoid his creditors. He left his wife in England, she refusing to accompany him. 1858 he became lessee for a term of six vears of a house and shooting ground. He occasionally visited England and corresponded with solicitors in reference to getting rid of his liabilities. In 1860 he commenced proceedings in the Scotch courts for a divorce from his wife on the ground of adultery. Held, that the husband had not acquired a Scotch domicil, and therefore the court of session had no jurisdiction. Pitt v. Pitt, 4 Macq. H. L. Cas. 627; 10 Jur. N. S. 735.

In general, the place where an unmarried man has his business and exercises his political right, is his domicil, but not conclusively so. Lindley, I Phil. (Pa.) 192. Malone v.

A party who was domiciled and doing business as a merchant in a country parish removed to New Orleans, where he became engaged in trade. At the time of removing he filed in the office of the parish judge, both in New Orleans and in the country, a declaration of his intention to preserve his original domicil. It was proved that he passed eight months of each year, or the business season, in New Orleans, and the remaining four months in the parish from which he had removed, and where he still re-tained an interest in his partnership. Held, that he might be sued in the parish of New Orleans. Judson v. Lathrop, r La. Ann. 78.

The place where a man educates his children indictates though it does not prove a fixed residence, and thus goes to make up the evidence for domicil.

dane v. Eckford, L. R. 8 Eq. 631.

"As between residence and place of business, the former is preferred as the domicil, particularly, as we have seen, in the case of a married man who resides with his family, or returns to them at intervals. In determining the effect of residence, the sleeping place is an important element. If a person have more than one dwelling-house, the one in which he sleeps or passes his nights will govern. If he works and boards in one town and sleeps in another, the latter is to be prehowever, is not even *prima facie* evidence of domicil, when the nature of the residence either is inconsistent with, or rebuts the presumption of, the existence of an intention to reside there permanently.¹ But if, while absent from his place of residence, a

ferred." Jacobs on Domicil, § 413, citing Dinning v. Bell, 6 Low. Can. 178; Cooper v. Galbraith, 3 Wash. (U. S.) 546; Greene v. Greene, 11 Pick. (Mass.) 410; Abington v. North Bridgewater, 23 Pick. (Mass.) 170; Hill v. Spangenberg, 4 La. Ann. 553; McKowen v. McGuire, 15 La. Ann. 637; Commonwealth v. Kellehef, 115 Mass. 103.

4 La. Ann. 553; McKowen v. McGuire, 15 La. Ann. 637; Commonwealth v. Kelleher, 115 Mass. 103.

1. Jopp v. Wood, 4 De G. J. & S. 616; Hodgson v. De Beauchesne, 12 Moore P. C. 285; Plummer v. Brandon, 5 Ired. Eq. (N. Car.) 190; Walker v. Walker, 1

Mo. App. 404.

Nothing is better settled with reference to the law of domicil than that domicil can be changed only animo et facot, and although residence may be decisive as to the factum, it cannot, when looked at with reference to the animus, be regarded otherwise than as an equivocal The mere fact of a man residing in a place, different from that in which he has been before domiciled, even although his residence there may be long and continuous, does not of necessity show that he has elected that place as his permanent and abiding home. He may have taken up and continued his residence there for some special purpose, or he may have elected to make that place his temporary home. But domicil, although in some cases spoken of as home, imports an abiding and permanent one, and not a mere temporary one. . . . In considering cases of this description it must be borne in mind that the acquisition of a new domicil involves the abandonment of the previous domicil. . . . Whether this intention of abandonment may not be inferred from long and continuous residence alone, in a case in which there may be no other circumstances indicative of the intention, is a question which in this case it is unnecessary to decide, and on which, therefore, I give no opinion. Such a case can very rarely, if ever, occur." Jopp v. Wood, 3 De G. J. & S.616.

Where, therefore, one has acquired a fixed domicil, a temporary absence on business or pleasure, with the intention of returning, and an actual return in accordance with such intention, will not work a change of domicil. Boyd v. Beck, 29 Ala. 703. Thus, a native of Philadelphia resides in South America seventeen years, then returns and resides at Philadelphia. Soon after he engages to go

abroad for a limited time, without any intention of resuming his foreign domicil. Held, that his native domicil was revived, and was not affected by his temporary absence. Miller's Estate, 3 Rawle (Pa.), 312. Nor does a merchant having a fixed residence, and carrying on business at the place of his birth, acquire a foreign commercial domicil or character by occasional visits to a foreign country. The Nereide, 9 Cranch (U. S.), 388. To the effect that the domicil of origin is not lost by very long residence abroad, and mere doubt, even very strong doubt, of a real intention to returnee, see White v. Brown, I Wall. Jr. (U. S.) 217; State v. Judge, 13 Ala. 805; Clarke v. Territory, I Wash. Ter. 82; Re Fight, 39 Ala. 452; Love v. Cherry, 24 Iowa, 204; Risewick v. Davis, 19 Md. 82; Williams v. Roxburry, 12 Gray (Mass.), 21.

Where a person abandons his business and home, not with a view to a permanent abode elsewhere, but only to regain his health or prolong his life by travel, he does not thereby change his domicil. Still v. Woodville, 38 Miss. 646. But if an inhabitant of a town moves to another town, not intending to remain there permanently, but with the intention of not returning to his former home, and does not so return, he loses his domicil in the former town. Mead v. Boxborough, 11

Cush. (Mass.) 362.

Where the wife left her husband and returned with her children and furniture to her father's house in the same town, and the husband, not being suffered to follow her, and having no property, sought employment in a neighboring town, intending to return and dwell with his wife whenever she should be reconciled to him, which was afterwards effected. *Held*, that his domicil remained in the town where his family had continued to reside. Waterborough v. Newfield, 8 Me. 203. And when a person removes and settles his family at a place different from his former residence, the presumption is that such is also his residence; and the mere fact that he returns to his former place of doing business is insufficient to warrant the presumption that such is his place of transacting business. This is a matter peculiarly within the knowledge of the defendant, and should be made to appear with certainty. Riggs v. Andrews, 8 Ala. 628.

person form an intention to abandon it, his residence then as effectually ceases as if he had intended not to return when he left.¹

6. Domicil of Particular Persons.—I. LUNATICS.—The domicil of a person non compos mentis, and nnder guardianship, may be changed by the direction or with the assent of the guardian, express or implied.² If the non compos is without a guardian, he is incapable

A native citizen of Rhode Island, whose father was dead, but whose mother lived on the family estate in Rhode Island, went to New York to reside, as a merchant, and there failed, and afterwards returned to his mother's family, and resided there, being unmarried. At the time when the suit was brought he was in a store in Connecticut, acting as clerk there for his brother. There being no proof that he intended a permanent residence in Connecticut, held, that he was a citizen of Rhode Island. Catlin v. Gladding, 4 Mass. 308.

In order to determine a man's domicil after evidence has been introduced of the man's declaration that he should no longer make a certain town his residence, evidence is admissible to show the length and frequency of his subsequent visits to the same town. Wilson v. Terry, II Allen (Mass.), 206. So evidence produced by a single man having no family, tending to show his residence in a particular town during a certain year, may be counteracted by showing that during such year he did not vote or pay taxes in such town, and that his conduct and business relations tended to fix his residence in another town. Hitt v. Crosby. 26 How. Pr. (N. Y.) 413. also Fleming v. Straley, i Ired. L. (N. Car.) 305.

One who had a native domicil in New York removed to Connecticut and afterward became domiciled at B. in that State. Afterwards he removed from Connecticut, not intending to return, but with no purpose of fixing his home in any particular place. He went to G. in New York. remaining there, mainly for the benefit of his wife's health, about three months, until she died, when he went to W. in Connecticut, where he fixed his residence. Held, that the domicil of his wife at the time of her death was at B. in Connecticut. First Nat. Bank v. Balcom, 35 Conn. 351.

A resident of Illinois left that State

A resident of Illinois left that State with a view to seeking a better climate, and if he found one that "suited" him, and everything else was agreeable, of making it his home, but with no particular place in view. He visited Iowa, Nebraska.

and Kansas, and in the latter State he took a contract to do some hauling for a railroad bridge being built. There he was taken sick, and returned to his former home in Illinois, never having acquired a residence or determined to make his residence at any other place than in Illinois, and having been absent in all about seven months. Held, that he did not lose his residence in Illinois. Wilkins v. Marshall, So Ill. 74.

In 1857, while decedent was a minor, his parents separated, and the mother

went abroad with decedent for economy of living, and to educate her son. sojourned at various places in Europe, the mother sometimes living apart from her son while he was away at school. The mother derived her income from a house and lot in the city of New York. which had been settled on her by her husband. The mother stated to her brother-in-law, a banker of New York, during several visits made by him to Europe, that she intended to send her son, when he was properly educated, to him. to enter and continue in his employ; and in a letter addressed by the mother to her brother-in-law, written shortly before her death, she bequeathed her son to him, stating that she left him without support. to his guidance and protection. The son, at the time of his death, was about twen-

The father continued

v. Ward, 4 Redf. (N. Y.) 244.

Although a testatrix in her will described herself as of Philadelphia, which was formerly her home, and where she was only temporarily residing at the time, held, that her domicil was at Lancaster, her house and home being there, her intention to return there having frequently been expressed, and the evidence showing that her domicil had undergone no change. Harberger's Will, 13 Phila. (Pa.) 368.

to reside in the State of New York. Held, that the evidence did not establish

an intention on the part of decedent to

adopt a foreign domicil. Von Hoffman

tv-one years old.

Hampton v. Levant, 59 Me. 557.
 Holyoke v. Haskins, 5 Pick, (Mass.)
 Anderson v. Anderson, 42 Vt. 350;
 Pitfield v. Detroit, 53 Me. 442; Hill v.

of choosing a domicil for himself, because he is incapable of form-

ing the intention requisite to acquire a new domicil. 1

II. PRISONERS.—A prisoner retains, during imprisonment, the domicil which he possessed at its commencement. He cannot form any purpose or intention as to his residence in the place where he is imprisoned.2

III. INVALIDS.—Where a person abandons his business and home, not with a view to a permanent abode elsewhere, but only to regain his health or to prolong his life by travel, he does not

thereby change his domicil.3

Horton, 4 Dem. (N. Y.) 88. Jacobs considers this question to be still in doubt. Jacobs on Domicil, § 265. The English cases hold that a lunatic retains the domicil which he possessed at the time he became insane, or, more strictly, when he began to be legally treated as insane. Bempde v. Johnstone, 3 Ves. Jr. 198; Hepburn v. Skirving, 9 W. R. 764. "If this view be correct, the lunatic under confinement is in the same position as a prisoner. He cannot exercise choice or will. He cannot, therefore, acquire a Hence he retains his existing domicil. D., for example, is an Englishman, who becomes lunatic, and is under control. He is taken to Scotland and placed in a Scotch asylum. He remains there until his death. He retains, on this view, his English domicil. The time in the asylum counts for nothing,' Dicey on Domicil, 132.

A. had lived in S., within the probate district of N., and had a conservator who was appointed by the probate court of that district, and who acted as such to the time of A.'s death. He had been addicted to intoxication, and his mind, naturally weak, had become more enfeebled, but he was able to determine where he preferred to reside. months after the appointment of the conservator, A., of his own accord, went to W., intending to remain there, and did in fact dwell there till his death, about a year and a half later. The conservator did not, at the time, assent to his going there, but soon afterwards consented to his remaining for a while, and afterwards paid a person with whom he lived for his clothes and in part for his board. there he was admitted as a voter of W., and voted there. Held, that he was to be regarded as domiciled in W., and that the probate court of that district had jurisdiction of the settlement of his estate. Culver's Appeal, 48 Conn. 165.

1. Strong v. Farmington, 74 Me. 46; Payne v. Dunham, 29 Ill. 125; Sharpe v. Crispin, L. R. 1 P. & D. 611; Hepburn

v. Skirving, 9 W. R. 764; Anderson v. Anderson, 42 Vt. 350.
2. Dicey on Domicil, 129; Story's Confl. of L. § 47; Jacobs on Domicil, § 272; Burton v. Fisher, Milward's Rep. 183; Inhabitants of Topsham v. Inhabitants of Lewiston, 74 Me. 236; Woodstock v. Hartland, 21 Vt. 563; Freeport v. Supervisors, 41 Ill. 495.

3. Still v. Woodville. 38 Miss. 646;

Ishams v. Gibbons, I Bradf. (N. Y.) 69. See also Hegeman v. Fox, 31 Bart. (N. Y.) 475; Dupuy v. Wurtz, 53 N. Y. 556. Dicey, in his work on Domicil, dis-

cusses the law as it has been laid down by the English courts with reference to this particular class of persons, as follows:
"There is at first sight considerable

difficulty in determining whether D., an Englishman, who resides abroad on ac-count of his health, loses his English domicil or not; for there exists an apparent inconsistency between the different judicial dicta on the subject.

"On the one hand, it has been laid down that such a residence, being involuntary, does not change D.'s domicil

"'There must,' it has been said, 'be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness.' Udny v. Udny, L. R. 1 Sc.

App. 441.
"A man might leave England with no intention of returning, nay, with a determination never to return, e.g., a man laboring under mortal disease, and told that to preserve his life, or even to alleviate his sufferings, he must go abroad. Was it to be said that if he went to Madeira he could not do so without losing his character of an English subject-without losing the right to the intervention of the English law in the transmission of his property after his death and in the construction of his testamentary instruments? Such a proposition was revolting to common-sense." Moorehouse v. Lord, 10 H. L. C, 272.

"This doctrine has been thus applied to a particular case: 'If [D.] had gone for health to the island of Madeira, . . . and had written letters, stating that she should die there, and had given directions that she should be buried there, although she had died and been buried there, unquestionably her Scotch domicil would never have been superseded.' Johnstone v. Beattie, Io Cl. & Fin. 42.

"On the other hand, it has been maintained that if D. chooses to reside abroad with the intention of making the foreign country his residence permanently, or for an indefinite time, the fact that the motive of the change is health does not prevent D. from changing his domicil. In a case of this kind the law has been judicially expounded as follows:

"'That there may be cases in which even a permanent residence in a foreign country occasioned by the state of the health, may not operate a change of domicil, may well be admitted. Such was the case put by Lord Campbell in Johnstone v. Beattie; but such cases must not be confounded with others in which the foreign residence may be determined by the preference of climate, or the hope or the opinion that the air or the habits of another country may be better suited to the health or the constitution. In the one case, the foreign abode is determined by necessity; in the other, it is by choice. . . . In settling there [in Tuscany], D., it is decided, was exercising a preference, and not acting upon a necessity; and I cannot venture to hold that in such a case the domicil cannot be changed. If domicil is to remain unchanged upon the ground of climate being more suitable to health, I hardly know how we could stop short of holding that it ought to remain unchanged also upon the ground of habits being more suitable to fortune. There is in both cases a degree of moral compul-Hoskins v. Matthews, 8 De G. M. & G. 28.

"The apparent inconsistency between these doctrines may be removed, or explained, if we dismiss all reference to motive, to external necessity, and so forth; avoid the use of the misleading terms 'voluntary' and 'involuntary,' and, recurring to the principle that residence combined with the purpose of permanent or indefinite residence, constitutes domicil, apply it to the different cases or circumstances under which a domiciled Englishman may take up a foreign residence for the sake of his health.

"These cases are three:

"First Case.—D. goes to France for relief from sickness, with the fixed intention of residing there for six months and no longer.

This case presents no difficulty whatever. D. does not acquire a French domicil any more than he does if he goes to France for six months on business or for pleasure. The reason why he does not acquire a domicil is that he has not the animus manendi, but the quite different intention of staying for a determinate time or definite purpose.

"Second case.—D. finding that his health suffers from the English climate, goes to France and settles there, that is, he intends to reside there permanently or indefinitely. D., in this case, acquires a French domicil. (This is precisely what Hoskins v. Matthews, 25 L. J. Ch. 689, 8 De G. M. & G. 13, decides, and decides correctly.)

"Here, again, there is no deviation from general principle. D. acquires a French domicil because he resides in France with the animus manendi.

"Third case.—D. goes to France in a dying state, in order to alleviate his sufferings, without any expectation of returning to England.

"This is the case which has suggested the doctrine that a change of residence for the sake of health does not involve a change of domicil. The doctrine itself, as applied to this case, conforms to com-mon-sense. It would be absurd to say that D., who goes to Pau to spend there in peace the few remaining months of his life, acquires a French domicil. But the doctrine in question, as applied to this case, is in conformity, not only with common-sense, but with the general theory of the law of domicil. D. does not acquire a domicil in France, because he does not go to France with the intention of permanent or indefinite residence, in the sense in which these words are applied to a person settling in another country, but goes there for the definite and determinate purpose of passing in France the few remaining months of his life. The third case, now under consideration, is in its essential features like the first and not like the second of the cases already examined. If D. knew for certain that he would die on the day six months after he left England, it would be apparent that the first and third cases were identical. That the definite period for which he intends to reside is limited not by a fixed day, or by the conclusion of a definite piece of business, but by the expected termination of his life, can make no difference in the character of the resi-

IV. SEAMEN.—The residence of a seaman, if married is the place where his family dwells, or if he has never been married, the place where his domicil was fixed when he first went to sea as a mariner.1

V. AMBASSADORS.—The most important class of public officers whom the law exempts from the presumption of domicil attaching to continuous residence in a particular place are ambassadors. No position of international law is better established than that which preserves to the ambassador in a foreign State the domicil of the country which he represents.2

In neither the first nor the third case is the residence combined with the

proper animus manendi.

In no one of the three cases we have examined is there any necessity, in order to arrive at a right conclusion, for reference to the motive, as contrasted with, what is quite a different thing, the pur-

pose or intention of residence.

"We may now see that the contradictory dicta as to the effect of a residence for the sake of health do not of necessity imply any fundamental difference of opinion among the high authorities by whom these dicta were delivered. these authorities might probably have arrived at the same conclusion if they had had the same circumstances before

their minds.
"The court which gave judgment in Hoskins v. Matthews, 25 L. J. (Ch.) 689, had to deal with the second of our supposed cases, and arrived at what, both according to common-sense and according to theory, is a perfectly sound con-

clusion.

"The dicta, on the other hand, of the authorities who lay down that a residence adopted for the sake of health does not involve a change of domicil, are obviously delivered by persons who had before their minds the third, not the second, of our supposed cases. These dicta, again, embody what, in reference to such a case, is, as we have shown. a perfectly sound conclusion. Their only defect is, that they are expressed in terms which are too wide, and which therefore cover circumstances, probably not within the contemplation of the authorities by whom they were delivered; and, further, that while embodying a sound conclusion they introduce an unnecessary and misguiding reference to the motives which may lead to the adoption of a foreign domicil."

1. Matter of Scott, 1 Daly (N. Y.), 534. It has also been held that the domicil of a sailor is the place where he voluntarily spends most of his time when on shore

Guier v. O'Daniel, 1 Binn. (Pa.) 349. See also Sherwood v. Judd, 3 Bradf. (N. Y.) 267; Matter of Hawley, I Daly (N. Y.), 531. In Boothbay v. Wiscasset, 3 Me. 354, it was held that the domicil of a fisherman who usually dwells in his boat in the summer was the place where he most usually resorted in the winter for board.

In the case of Matter of Bye, 2 Daly (N. Y.), 525, it was held that a foreigner continuously and exclusively employed in the vessels of a nation may, by length of time, acquire a residence in that nation as effectually as though he had remained on land within its boundaries; for vessels are subject to the jurisdiction of the country to which they belong, and for certain purposes regarded as part of its territory

2. 4 Phillim. Inter. L. p. 122; Wheat v. Smith (Ark.), 7 S. W. Rep. 161.

An ambassador, however, if he is before his appointment already domiciled in the country where he resides as ambassador, retains his domicil in spite of his office, and this though the domicil in the place of his residence is an acquired domicil, and the country which he represents is his domicil of origin. Heath v. Samson, 14 Beav. 441.

In a case where it was held that an attaché to the Portuguese embassy retained the English domicil, which he had acquired before his appointment, the court say: "We are not saying that if a. man should have continued an attaché for forty or fifty years that he would thereby, simpliciten, acquire an English domicil, and that his property would be subject to legacy duty. We affirm nothing of the sort. What we do affirm is, that he, having acquired an English domicil, does not lose it ipso facto, without more, by taking this office of an attaché." Attorney-general v. Kent, 31 L. J. (Ex.) 391.

The same rule is held to apply to con-

suls. Direy on Domicil, 138; Jacobs on

Domicil, § 323.

VI. PERSONS IN THE SERVICE OF THE GOVERNMENT. Though an employee of the United States or State government (as one in the civil or military service) cannot gain or lose a residence by reason of his presence or absence while employed in his service, yet he can establish his domicil and gain a residence at such a point as he may desire, by taking the proper and appropriate steps to do so, independently of his employment.1

VII. STUDENTS.—It is well settled that one who goes to a place for the purpose of attending a school or university, intending to

remain for a limited time, does not thereby gain a domicil.2

DONATE-DONATION .- (See also GIFT.)-A donation is "the act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person without any consideration." 3

1. Wood v. Fitzgerald, 3 Oreg. 586; Mooar v. Harvey, 126 Mass. 219; Crawford v. Wilson, 4 Barb. (N. Y.) 504; Brewer v. Linnæus, 36 Me. 428; Williams v. Saunders, 5 Coldw. (Tenn.) 60; Woodworth v. St. Paul, M. & M. R. Co., 18 Fed. Rep. 282; Atherton v. Thornton, 8 N. H. 178; Harvard College v. Gore, 5 Pick. 370; State v. Grizzard, 89 N. Car. 115; State v. Dennis, 17 Fla. 389; Tyler v. Murray, 57 Md. 418; Yonkey v. State, 27 Ind. 236; Venable v. Paulding, 19 Minn. 488.

A soldier may abandon his domicil,

A soldier may abandon his domicil, and acquire a new one as other persons. His purchasing or renting a dwelling, to which he removes his family and in which he lives, is evidence of a change of domicil, in the absence of facts manifesting an intention not to remain permanently in such dwelling; and the removal of his family to a place where they take board is evidence of such change. Ames v. Duryea, 6 Lans. (N. Y.) 155.

If a person who has come to reside in a place where his official duties are performed remains there after his term of office has expired, or his appointment has been revoked, such continued residence is evidence of the acquisition of domicil there. Jacobs on Domicil, §,315, and cases cited.

Where a person was indicted for adultery and convicted, though brought after the statutory period of time for bringing such actions, viz., two years, and it was upheld by the prosecution on the ground that the defendant, having enlisted in the army and been out of the State, had been such an inhabitant against whom the statute would not run until his return to the State, the supreme court, Thompson, J. said: "His usual residence was not changed by the fact that he obeyed the call of the President,

and volunteered to fight for his country at her command. To hold the contrary would be against the spirit of all our legislation. A soldier is regarded as a voter, because a citizen of the residence he left before entering the service, and he votes there, wherever he may be. So he gets a stay of execution as a citizen soldier, if judgments happen to be against him in the county from which he volunteers or enlists. It would be 'as ungracious as unreasonable to hold that the citizen who absents himself in obedience to the call of his country thereby loses the advantage of residence by such an act. This is not so: his residence remains, whether it operate for or against him. . . . If we were to yield to the construction contended for, that a man is not an inhabitant of a State, and cannot usually be a resident of it, who is not within it all the time during the two years, we would in effect repeal the limitation as it regards many persons, who, residing near the borders of the State, or whose business requires it, are out of the State numerous times within every two years. In such cases they would be forever liable unless they tarried some time or other during two whole years in the State," Graham v. Commonwealth, 51 Pa. St. 255.

2. Sanders v. Getchell, 76 Me. 158; Hart v. Lindsey, 17 N. H. 235; Jacobs

on Domicil, § 325, and cases cited.

But there is no reason why a student cannot acquire a domicil at the place of study if he is possessed of the requisite intention. Sanders v. Getchell, 76 Me. 158; Putnam v. Johnson, 10 Mass. 488; Opinion of the Judges, 5 Metc. (Mass.) 587; Dale v. Irwin, 78 Ill. 160; Vander-

poel v. O'Hanlon, 53 Iowa, 246.
3, Bouv. L. Dict. This definition and that of Webster, "that which is given or **DONATIO**; **DONATIO** INTERVIVOS; **DONATIO** MORTIS CAUSA.—See GIFT.

DONE.—See Do.

DOOMING.—The assessing of a tax, according to the assessor's estimate or conjecture of a man's ability to pay, where he has made no return of his taxable property.¹

DOOR.—(See also COURT-HOUSE.)—See note 2.

DORMANT.-See PARTNERSHIP.

DOTAGE.—(See also INSANITY.)—The feebleness of the mental faculties which proceeds from age.³

DOUBT.—On reasonable doubt, see BURDEN OF PROOF and PRESUMPTIONS.

bestowed; that which is transferred to another gratuitously, or without a valuable consideration; a gift; a grant," are approved in I. N. & S. R. W. Co. v. City

of Attica, 56 Ind. 476.

Under a constitutional provision that "no vote, resolution or order shall pass granting a donation or gratuity in favor of any person except by the concurrence of two thirds of each branch of the general assembly," an act authorizing the governor to furnish a certain railroad company with two hundred and fifty convicts, without charge for three years, upon their giving satisfactory obligations to clothe, feed, and provide for the same, is not unconstitutional. The court adopted Bouvier's definition of donation, and held that it did not cover the present case, as the State did not have a title to the con-The law only subjects their persons to confinement and to such labor as the authorities may lawfully designate; and it is competent for the government to relieve itself of the expense of this charge, by making an arrangement with any person to take charge of its convicts, and subject them to labor, and to clothe and feed them. Ga. Penitentiary Co. v.

Nelms, 65 Ga. 499; S. c., 38 Am. Rep. 793.

"A donation," said Catron, J., in Forsyth v. Reynolds, 15 How. (U. S.) 358,
"is a gift and gratuity, and not a grant of land founded on a consideration, as where the government is bound to make it by treaty stipulation conferring mutual benefit." In this case it was decided that a grant of lands to settlers in Michigan, prior to the surrender of the western posts by Great Britain, and made to carry outhe Jay Treaty of 1794, were not dona-

tions so as to exclude their settlers from the benefit of acts of Congress granting a lot to every settler in a certain village who "had not heretofore received a confirmation of claim, or donation of any'tract of land or village lot from the United States."

An authority given by charter to a college to receive donations carries with it the right to receive subscriptions; and where the subscribers enter into a bond to pay their subscriptions, it is enforceable at law. Hooker v. Wittenberg Col-

lege, 2 Cincinnati (Ohio), 353.

The electors of a town resolved to "donate \$1000" to certain persons "for the use of a bridge" over a river at a specified place, provided they would by a day named "erect a substantial bridge for the public use at that point." This was held to constitute an agreement to pay the amount named in consideration of the erection of the bridge. "Donate' generally means given gratuitously, or without any consideration; but in this instance the language of the resolution shows that it was giving, or agreeing to give, for a consideration, and so both the electors and plaintiffs must have under stood it." Goodhue o. Beloit, 21 Wis. 636.

1. Thurston v. Little, 3 Mass. 429.

2. An act requiring a notice to be affixed to "the doors of all the churches" is reasonably complied with if the notice is affixed, not to every door, but to the principal door of every church. Omerod v. Chadwick, 16 M. & W. 267; Wilberf, Stat. L. 129.

3. Owing's Case, I Bland's Ch. (Md.)

370; s. c., 17 Am. Dec. 11.

DOWER.

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I. Definitions. — Meaning of the Word "Dower." — The word "dower" means, in its general acceptance, a certain estate of a wife 1 in the real property 2 of her husband. The origin of the estate is obscure, and in different States and countries its history has been varied.3

1. Schiffer v. Pruden, 64 N. Y. 47, 49; Brooke v. Brooke, 64 Md. 524, 533,

2. "The word 'dower,' both technically and in popular acceptation, has reference to real estate exclusively." Dow v. Dow, 36 Me. 211, 216. See also Connor v. Shepherd, 15 Mass. 164, See

3. Antiquity of Dower. - The custom of conferring upon a widow for life a portion of her husband's property, or allowing her dower, is universally conceded to be of great antiquity,-so ancient, that neither Toke one Blackstone could trace it to its source. I Scribner Dow. ch. I. § I; Hill v. Mitchell, 5 Ark. 608, 610; Wright v. Jennings, I Bailey, 277, 278; Combs v. Young, 4 Yerg. (Tenn.) 218. It is said on the one hand to be of German origin, while on the other hand its introduction is ascribed to the Normans as a part of their local tenure. 4 Kent Comm, 35. n. (c); I Scribner Dow. ch. I; Wright Tenures, 192.

Distinguished from the Dos of the Civil Law.—Dower is called in Latin by the continental jurists doarium, but by Bracton and other early English writers dos; but the civil law in its original state had nothing that bore any resemblance to the English law of dower. The dos of the civil law, which still obtains in Louisiana (De Young v. De Young, 6 La. Ann. 786), signified the marriage portion which the wife brought to her husband, either in land or in money, and corresponded to some extent with the maritagium of the 2 Bla. Comm. 129; 1 common law. Scribner Dow, ch. 1, § 4.

Gradual Changes in the Law Relating to. -At first dower is said to have consisted.

Dower at common law is the life estate 1 of a wife 2 in one third 3 of all the legal 4 estates of inheritance 5 of which her husband is seized 6 at any time during coverture 7 of a sole, 8 beneficial, 9 and immediate 10 seizin, and which any issue of theirs might directly 11 inherit.12 It has three stages, 13 namely: (1) Its inchoate stage, extending from the time of the marriage or the acquisition of the property in question to the time of the husband's death: 14 (2) its consummate stage, extending from the death of the husband: 15 and (3) its assigned stage, extending from the time it is set off to the widow.16

of personalty; but at a later period, not distinctly ascertained, it became solely an interest in lands. Wright Tenures, 191, 193; I Scribner Dow. ch. I, §§ 5-II. The portion of land allotted as dower likewise varied at different times, consisting of one fourth, one tenth, and one half. before it became settled at one third for life. I Scribner Dow. ch. I, § 7. This result was due to English statutes, result was due to English statutes, which, as a part of the common law, were generally adopted in the United States. I Scribner Dow. ch. 2; Stewart Husb. and Wife, § 6. Later statutes, however, have much modified commonlaw dower, both in England and in the United States. 1 Scribner Dow. ch. 2; Stewart Husb. and Wife, § 247; Stimson Am. Stat. L. §§ 3200-3282.

Kinds of Dower.-Littleton enumerates five kinds of dower; namely, dower ad ostium ecclesiæ; dower ex assensu patris, dower by the custom, dower de la plus' belle, and dower at common law; but only the last named has even been known in the United States. Littleton, § 51; I Scribner Dow. ch. I, §§ 26, 30.

Object of the Law.—The provision of the common law entitling the wife to

dower in her husband's lands was intended for the sure and competent sustenance of the widow. Banks v. Sutton, 2 P. Wms. 702; Noel v. Ewing, 9 Ind. 37, 43. Some writers add, the better nurture and education of the children. Co. Litt. 30, 6; 4 Kent Comm. 35; I Bright Husb. and Wife, 321; I Washburn Real Prop. 146. But this position is doubted. I Bishop Mar. Women, §§ 245, 474.
To further this object, courts have

always highly favored the widow's claim for dower. Coke says: "There be three things highly favored in law—life, liberty, and dower." Co. Litt. 124, b. "Dower is a legal, equitable, and moral right, favored in a high degree by the law, and next to life and liberty held sacred." McKean, Ch. J. in Kennedy v. Nedrow, I Dall. (U. S.) 415. 417. See also I Scribner Dow. ch. I, § 33; Banks v. Sutton, 2 P. Wms. 702; Noel v. Ewing, 9

Ind. 37, 47, 48; Lasher v. Lasher, 13 Barb. (N. Y.) 106; Mahon v. Smith, 6 How. Pr. (N. Y.) 385; Chew v. Chew, 1 Md. 163, 172, 173; Meigs v. Dimock, 6 Conn. 462; Kate v. Jay, 31 Ark. 576. 1. Orick v. Boehm, 49 Md. 72, 101; Brown v. Collins, 14 Ark. 421.

 Ante, n. 1, p. 884.
 Inst. 16; I Washburn Real Prop. 150: Mantz v. Buchanan, 1 Md. Ch. 202,

4. Gully v. Ray, 18 B. Monr. 107, 113. 5. For the wife's estate in such case is a mere continuance of the husband's. and if his were less than one of inheritance, it could not extend beyond his own life. 1 Washburn Real Prop. 152; Buckeridge v. Ingram, 2 Ves.

6. 1 Washb, Real Prop. 172, 173; Stewart Husb. and Wife, § 252.

7. I Washb. Real Prop. 172, 173;

Price v. Hobbs, 47 Md. 359, 378.

8. Maybury v. Brien, 15 Pet. (U. S.)

21, 37; Chew v. Chew, 1 Md. 162, 173;

Cockerill v. Armstrong, 31 Ark. 580,

9. Johnson v. Clume, 17 Ind. 166, 167; McCauley v. Grimes, 2 Gill & J. (Md.)

318, 325.

10. 1 Scribner Dow. 232; Park Dow. 56; Beardslee v. Beardslee, 55 Barb. (N. V.) 332; House v. Jackson, 50 N. Y. 161; Leech v. Leech, 21 Hun (N. Y.), 382; Kennedy v. Kennedy, 29 N. J. L. 185; Vanleer v. Vanleer, 3 Tenn. Ch. 23; Jackson v. Jacob, 11 Bush, 646; Houston v. Smith, 88 N. Car. 312.

11. I Scribner Dow. 228; Park Dow.

12. Litt. § 53; Spangler v. Stanler, 1

Md. Ch. 36, 38.

13. Wait v. Wait, 4 N. Y. 95, 99; Moore v. Mayor, 8 Ib. 110, 113; s. c., 59 Am. Dec. 473.

14. Stewart Husb. and Wife, § 262;

Reiff v. Horst, 55 Md. 42.

15. Stewart Husb. and Wife, § 263; Sutliff v. Forgey, I Cow. (N. Y.) 89, 96.

16. Stewart Husb. and Wife, § 264;

Joyner v. Speed, 68 N. Car. 236.

Dower under the statutes of the several United States and of England is more or less different from dower at common law: in some States it is the old estate only in name, and in some even the name has been destroyed.1

II. Requisites of Dower.—(1) In General.—At common law two things are necessary to the existence of inchoate dower-the marriage of the parties and the husband's seizin of the property in question: 2 and three things to the existence of consummate dower marriage, seisin, and the husband's death; 3 and there is one other requisite to the actual enjoyment of the estate, namely, assignment.4 Birth of issue is not a requisite; 5 nor is resi-

1. Stimson Am. Stat. L. §§ 3200-3282, 6247-6252, 6504; Stewart Husb. and

Wife, & 247.

Common-law dower has never existed, or has been abolished, other analogous or has been abolished, other analogous estates existing in its place, in Arizona (Comp. Laws 1877, § 1976); California (Civ. Code 1876, § 5173); Colorado (Gen. Stats. 1883, § 1039); Dakota (Civ. Code, 1883, § 779); Idaho (Laws 1874-5, p. 636, § 10); Indiana (Rev. Stats. 1881, § 2482); Iowa (Rev. Stats. 1880, § 2440); 2482); Iowa (Rev. Stats. 1880, § 2440); Kansas (Comp. Laws 1879, ch. 33, § 28); Louisiana (Civ. Code 1875, arts. 2337 et seg); Minnesota (Gen, Stats. 1878, art. 48, § 1); Mississippi (Rev. Stats. 1880, § 1170); Nevada (Rev. Stats. 1873, § 157); Texas (Rev. Stats. 1879, § 2582); Utah (Comp. Laws 1876, § 1022); Washington (Code 1881, § 2414); Wyoming (Comp. Laws 1876, ch. 42, § 1).

Laws 1876, ch. 42, § 1).

Common-law dower exists in a more or less modified form in England (3 & 8 Vict. ch. 66, § 16; 24 Vict. ch. 126, § 26–7); Alabama (Code 1876, §§ 2232–51); Arkansas (Dig. 1884, § 2571); Connecticut (Rev. Stats. 1875, pp. 376-7); Delaware (Rev. Code 1874, ch. 87, § 1); Florida (Dig. 1881, pp. 476-80); Georgia (Code 1882, §§ 1763-71); Illinois (Stats. 1883, ch. 41, § 1); Kentucky (Gen. Stats. 1873, ch. 52, art. 4, § 2); Maine (Rev. Stats. 1883, art. 103, § 1); Maryland (Rev. Code 1878, p. 397); Massachusetts (Pub. Stats. 1882, ch. 124, § 3); Michigan (Rev. Stats. 1882, § 5733); Missouri (Rev. Stats. 1879, §§ 2186-2239, 3290); Nebraska (Comp. Stats. 1881, pt. 1, ch. 23, § 1); New Hampshire (Gen. Laws 1878, ch. 202); New Jersey (Rev. Stats. 1877, tit. Arkansas (Dig. 1884, § 2571); Connecticut 202); New Jersey (Rev. Stats. 1877, tit. 202); New Jersey (Rev. Stats. 1877, It. Dower); New York (Rev. Stats. pt. 2, ch. 1, tit. 3, § 1); North Carolina (Code 1883, § 2102); Ohio (Rev. Stats. 1886, §§ 4188-94); Oregon (Gen. Laws 1872, pp. 584-7); Pennsylvania (Purd. Dig. 1883, pp. 55-6, 529-30); Rhode Island (Pub. Stats. 1882, pp. 636-40); South Carolina (Gen. Stats. 1882, §§ 1796-1804); Tennessee (Code 1884, § 3244); Vermont' (Rev. Laws 1880, §§ 2215-20); Virginia (Code 1873, pp. 853-6); West Virginia (Act 1882, art. 86, § 1); Wisconsin (Rev. Stats. 1878, §§ 2159-63).

In one or more of these latter States. the statutes make one or more of thefollowing changes in common-law dower: Possession (Conn. Pub. Stats. 1875, p. 76, §1), or right of entry (3 & 4 Wm. IV. ch. 105, § 2), is substituted for seizin; the interest is made one half instead of one third (Ala. Code 1876, § 2233). dower is given in personal property (Ark. dower is given in personal property (AFR, Dig. 1884, § 2591), in leaseholds (Mo. Rev. Stats. 1879, § 2186), in remainders (Ohio Rev. Stats. 1886, § 4188), in equitable estates (Ill. Rev. Stats. 1883, ch. 41, table estates (III. Rev. Stats. 1883, Ch. 41, § 1; Md. Rev. Code, 1878, p. 397, § 1; Ind. Rev. Stats. 1881, § 2491; Va. Code 1873, ch. 112, § 17; W. Va. Rev. Stats. 1878, art. 82, § 17; N. C. Code 1883, § 2103; Tenn. Code 1884, § 3244; Ala. Code 1876, § 2232), is limited to such property as the husband dies seized of (N. H. Gar. Love, 1878, ch. 2008, § 21, p. 1878, p. 1878, ch. 2008, § 21, p. 1878, p. 1878, ch. 2008, § 21, p. 1878, property as the husband dies seized of (N. H. Gen. Laws 1878, ch. 202, § 2; Vt. Rev. Laws 1880, § 2215; Ct. Laws 1885, ch. 110, § 189; Del. Rev. Code 1874, ch. 87, § 1; Tenn. Code 1884, § 3244; Ga. Code, 1882, § 1763), or such as he has not disposed of by deed or will (3 & 4 Wm. IV. ch. 105, § 4).

2. Denton v. Nanny, 8 Barb. (N. Y.) 618, 620; Price v. Hobbs, 47 Md. 359, 287

3. 1 Greenl. Cruise, 154; 1 Washb. Real Prop. 169; King v. King, 61 Ala. 479, 481; Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64; s. c., 20 Am. Dec. 205; Wait v. Wait, 4 N. Y. 95, 99.

4. Moore v. Mayor, 8 N. Y. 110, 113, 114; s. c., 50 Am. Dec. 473.
5. Not even the possibility thereof is necessary, and an impotent woman may have dower. I Scribner Dow. 229. But it is said that the woman must be old enough to conceive before her husband's dence, or citizenship, in States where aliens can hold prop-

ertv. (2) Marriage as a Requisite.—The woman must be the wife of the man in whose property she claims dower: 3 and she must be his wife at the time of his death,4 unless some statute provides otherwise.⁵ A marriage by consent, if valid, will give dower; 6 and so will a foreign marriage.7 If the marriage is voidable and has not been avoided, dower exists; but a void marriage cannot give dower.9

death. Ib.; Park Dow. 81. Her age at the time of marriage, however, does not affect the right. 2 Bl. Com. 131; Co. Litt. 40, a.

1. Pratt v. Teft, 14 Mich. 191, 198.

2. I Scribner Dow. ch. 9; 33 Vict. ch. 14, § 2; Sharp v. St. Saveur, L. R. 7 Ch. 343; Congregational v. Morris, 8 Ala. 182; Etheridge v. Malampre, 18 Ala. 565; Forrester v. Forrester, 3 Ala. 220; 565; Forrester v. Forrester, 39 Ala. 220; Ark. Dig. 1884, ch. 53, § 2572; Sistare v. Sistare, 2 Root (Conn), 468; Whiting v. Stevens, 4 Conn. 44; Headenan v. Rose, 63 Ga. 458; Ill. Stats. 1885, c. 41, § 2; State v. Blackmo, 8 Blackf. (Ind.) 246; Eldon v. Doe, 6 Blackf. (Ind.) 341; Alsberry v. Hawkins, 9 Dana (Ky.), 177; s. c., 33 Am. Dec. 546; Moore v. Tisdale, 5 B. Monr. (Ky.) 352; Mussey v. Pierce, 24 Me. 559; Potter v. Titcomb, 22 Me. 530: Buchanan v. Deshon, 1 Pierce, 24 Me. 559; Potter v. Titcomb, 22 Me. 539; Buchanan v. Deshon, I Harr. & G. (Md.) 280; Sewall v. Lee, 8 Mass. 363; Fox v. Southack, I2 Mass. 143; Foss v. Cripps, 20 Pick. (Mass.) 121; Piper v. Richardson, 9 Metc. (Mass.) 155; Mich. Rev. Stats. 1882, § 5753; Stokes v. Falloe, 2 Mo. 32; Colgan v. McKeown, 4 Zab. (N. J.) 566; Sutliff v. Forgey, I Cow. (N. Y.) 80; s. c., 5 Cow. (N. Y.) 713; Priest v. Cummings, I6 Wend. (N. Y.) 617; s. c., 20 Wend. (N. Y.) 338; Burton v. Burton, 26 How. Pr. (N. Y.) 474; s. c., 1 Abb. App. Dec. (N. Y.) 271; Hall v. Hall, 82 N. Y. 130; Reese v. Waters, 4 W. & S. (Pa.) 145; Bennett v. Harms, 51 Wis. 251.

Recese v. waiers, 4 w. & S. (Pa.) 145; Bennett v. Harms, 51 Wis. 251. 3. Park Dow. 7; Co. Litt. 31, a.; I Roper Husb. and Wife, 333; I Scribner Dow. ch. 3; Jones v. Jones, 28 Ark. 19, 21; Denton v. Nanny, 8 Barb. (N. Y.) 618, 620; Moore v. Mayor, 8 N. Y. 110,

114; s. c., 59 Am. Dec. 473.

Where, on a woman's claim for dower, it appears that she was not a wife, she will be enjoined from setting up further claim, and will be required to give up possession of land occupied by her under her claim. Besson v. Gribble, 39 N. J. Eq. 111. Though the woman innocently supposes herself married, she cannot have dower. De France v. Johnson, 26 Fed. Rep. 891.

4. Stewart Mar. and Div. § 446; McCraney v. McCraney, 5 Iowa, 232,

5. Stewart Mar. and Div. § 446.

6. Marriage as a Requisite of Dower. -Some authorities hold that the marriage must be not only valid, but legal, and solemnized in facie ecclesiæ as well. Shelford Mar. & Div. 35, 36; 2 Kent Comm. 87, n. a; I Scribner Dow. ch. 6; Dalrymple v. Dalrymple, 2 Hagg. Con. 54, 68. But, in the United States at least, a valid marriage makes the parties husband and wife to all intents and purposes,—I Scribner Dow. ch. 6, § 12; and a marriage by consent, per verba de-præsenti, if valid, is sufficient to give dower. Stewart Mar. & Div. §§ 86, 88; Pearson v. Howey, 11 N. J. L. 12, 18, 21; Adams v. Adams, 57 Miss. 267; Donnelly v. Donnelly, 8 B. Mon. (Ky.) 113. See title MARRIAGE.

In suits affecting dower rights, marriage, as in other cases, may be proven by cohabitation and repute. Mar. & Div. §§ 132, 136; Carter v. Parker, 28 Me. 509, 510. See title Mar-

RIAGE.

7. Ilderton v. Ilderton, 2 H. Bl. 145; Moore v. Mayor, 8 N. Y. 110, 114; s. c.,

59 Am. Dec. 473.

8. I Scribner Dow. ch. 8; Litt. § 36; I Greenl. Cruise, 154; Higgins v. Breen,

9 Mo. 497, 501.

9. 1 Scribner Dow. ch. 7, § 3; Higgins v. Breen, 9 Mo. 497, 501; Jenkins v. Jenkins, 2 Dana (Ky.), 102; s. c., 26 Am.

Where, however, a married man had imposed upon a woman and married her, and the parties cohabited as husband and wife, with the reputation and understanding that they were husband and wife, both during and after the lifetime of the first wife, and dower had been allotted to the second (supposed) wife, the husband's heirs were not allowed in equity to deprive her thereof. Donnelly, v. Donnelly, 8 B. Mon. (Ky.) 113, follow-

(3) Husband's Death as a Requisite.—The husband's death must occur before that of the wife in order that her right to dower may be consummate. vested. and absolute. And it must be natural death; civil death will not give dower,4 nor is an absolute divorce the equivalent of death in this connection.5

(4) Husband's Seizin as a Requisite. — The husband must be seized of the property before any dower rights can attach thereto.6 Seizin in law is as effective as seizin in fact to give dower.7 Wrongful seizin is generally sufficient to give the wife dower as against her husband's heirs and assigns. The husband's seizin

ing Fenton v. Reed, 4 Johns. (N. Y.) 52; s. c., 4 Am. Dec. 244. See Gully v. Ray, 18 B. Mon. (Ky.) 107, 113.

1. Litt. § 36; Park Dow. 247; Wait v. Wait. 4 N. Y. 95. 99.

2. Thornbury v. Thornbury, 18 W. Va.

 S. Sutliff v. Forgey, I Cow. (N.Y.) 89, 96; s. c. (affirmed), 5 Cow. (N. Y.) 713.
 Litt. 33, b; 132; b; I Scribner, Dow. 650; Stewart Mar. & Div. § 475; Woolbridge v. Lucas, 7 B. Monr. (Ky.) 49, 51; Platner v. Sherwood, 6 Johns. Ch. (N. Y.) 129.

5. Stewart Mar. & Div. § 446. Proof of Death of Husband.—The husband's death may be proved in the usual ways. Moors v. De Bervales, I Russ. oo3; Newman v. Jenkins, 10 Pick. (Mass.) 515. The proof may be by reputation in the family. Cochrane v. Libby, 18 Me. 39, 42. His death also may be presumed from his long absence. Stewart Mar. &

Div. § 474; Fulks v. Rhea, 7 Bush (Ky.), 568; Woods v. Woods, 2 Bay (S. Car.), 476.
6. Houston v. Smith, 88 N. Car. 312, 313; Butler v. Cheatham, 8 Bush (Ky.), 594; Atwood v. Atwood, 22 Pick: (Mass.) 283; Durando v. Durando, 23 N. Y. 331; Leach v. Leach, 21 Hun (N. Y.), 381; Poor v. Horton, 15 Barb. (N. Y.), 485; Galbraith v. Green, 13 S. & R. (Pa.) 85; Pretts v. Richey, 29 Pa. St. 71.

This rule was very strictly enforced at common law. Park Dow. 24; I Scribner Dow. 249. A mere right of entry into land held by another under claim of title was not enough. I Scribner Dow: 255was not enough. I Scribner Dow: 255-257; Perkins, §§ 366-369; Winnington: v. Winnington, z. Coldw. (Tenn.) 59, 60; Thompson v. Thompson, r. Jones (N. Car.), 430; Beardslee v. Beardslee, § Barb. (N. Y.) 324. Nor was a judgment before execution. Park Dow. 26; I Scribner Dow. 257; Witham v. Lewis, I Wils. 48, 55; Shelley v. Shelley, 4 Bro. Parl. Cas. 510. But this has been changed in England by 3 & 4 W. IV. c. 105, and in this country, perhaps, by construction, actual ownership being equivalent to

seizin. Borland v. Marshall, 2 Ohio St. 308, 313; McClure v. Harris, 12 B. Monr. (Ky.) 261, 266; Reed v. Morrison; 12 S. & R. (Pa.) 18, 21. The rule as to technical seizin does not apply to incorporeal he-

seizin does not apply to incorporeal hereditaments. I Stribnen Dow. 267.

7. Stevens v. Smith; 4 J. J. Marsh. (Ky.) 64; s. c., 20 Am. Dec. 205; Green v. Siter, 8 Cranch (U. S. C. C.); 247; Bowen v. Collins, 15 Ga. 100; Denis v. Denis, 7 Blackf. (Ind.) 572; Moun v. Edson, 39 Me. 35; Chew v. Chew. I Md. 163, 172; Atwood v. Atwood, 22 Pick. (Mass.) 283; Green v. Chelsea. 24 Pick. (Mass.) 78; Ware v. Washington, 6.Sm. & M. (Miss.) 277; Houston v. Smith, 88 N. Car. 212. 737; Houston v. Smith, 88 N. Car. 312; Borland & Marshall, 2 Ohio St. 308: Welch v. Buckins, 9.Ohio St. 371; Secrest v. McKenna, 6-Rich. Eq. (S. Can.) 72,

Possession under a warranty deed is prima facie evidence of saizin. Wheeler v. Smith, 50 Mich, 93. And the deed under which land; is held need not be recorded to give seizin. Pickett v. Lyles, S. Car. 275, 278; Kirby v. Vautree, 26 Ark. 368; 370; Sutton v. Jervis, 31 Ind. 265, 268; Johnston v. Miller, 40 Ind. 376; s. c., 17 Am. Rep. 699; Tyson v. Harrington, 6 Ired. Eq. (N. Car.) 329, 332. Except, perhaps, where there is no dower in equitable estates. Kirby v. Vantree, 26 Ark. 368, 370. And, under the terms of certain registry acts, as against bona fide creditors and purchasers. Stribling v. Ross, 16 Ill. 122, 124; Talbot v. Armstrong, 14 Ind. 254, 256. Nor is one seized of land which he has conveyed away by an unrecorded deed. Blood v. away by an unrecorded deed, Blood v. Blood, 23 Pick. (Mass.) 80, 84; Thomas v. Thomas, 10 Ired. (M. Car.) 123; Norwood v. Morrow, 4. Dev. & B. (N. Car.) 442, 449; Chester v. Greer, 5 Humph. (Tenm.) 26, 30. Or by a deed that is fraudulent as against creditors, such being merely voidable by them. King v. King, 61 Ala. 479, 481; Withed v. Mallory, 4 Cush. (Mass.) 138, 140.

8. Park Dow. 37; I Scribner Dow. 268; Toomey v. McLean, 125 Mass, 122;

Toomey v. McLean, 125 Mass. 122; Randolph v. Doss, 3 How. (Miss.) 205; must be beneficial, and he must be seized for his own use. 1 The

Hitchcock v. Harrington, 6 Johns. (N. Y.)

293; s. c., 5 Am. Dec. 220. Estoppel Against Third Party to Deny Husband's Title.—When a third party has accepted a conveyance of property from the husband, the rule seems to be, if he have no other title, he cannot deny the husband's seizin Park Dow, 41; 2 Scribner Dow. 231; Henley v. Webb, 5 Madd. 407; Bancroft v. White, I Caines (N. Y.), 185; Chapman v. Shroeder, 10 Ga. 321; Owen v. Robbins, 19 Ill. 545; Davis v. O'Ferrall, 4 Greene (Iowa), 358; Gully v. Ray, 18 B. Monr. (Ky.) 107; Kimball v. Kimball, 2 Me. 226; Nason v. Allen, 6 Me. 243; Harris v. Gardner, 10 Me. 383; Smith v. Ingalls, 13 Me. 284; Thorndike v. Spear, 31 Me. 91; Lewis v. Meserve, 61 Me. 374; Wedge v. Moore. 6 Cush. (Mass.) 8; May v. Tillman, 1 Mich. 262; (Mass.) 8; May v. Tillman, 1 Mich. 262; Randolph v. Dors, 4 Miss. 205; Thompson v. Boyd, 22 N. J. L. 543; Montgomery v. Bruere, 5 N. J. L. 865; Moore v. Esty, 5 N. H. 470; Jewell v. Harrington, 19 Wend. (N. Y.) 471, 474; Brown v. Potter, 17 Wend. (N. Y.) 164; Davis v. Barrow, 12 Wend. (N. Y.) 65; Sherwood v. Vanderburgh, 2 Hill (N. Y.), 203; Hitchcock v. Harrington, 6 Johns. (N. Y.) 290; s. c., 5 Am. Dec, 229; Norwood v. Morrow, 4 Dev. & B. (N. Car.) 442; Love v. Yates, 4 Dev. & B. (N. Car.) 364; Shaw v. Galbraith, 7 Pa. St. 111; Pickett v. Lyles, 5 S. Car. 275; Pledger v. Ellerbee, 6 Rich, (S. Car.), 266; s. c., 60 Am. Dec. 123; Gayle v. Price, 5 Rich. 60 Am. Dec. 123; Gayle v. Price, 5 Rich, (S. Car.) 125. Nor can he set up the title of a third party. Carter v. Hallahan, 61 Ga. 314. 322; Evans v. Evans, 29 Pa. St. 277. He may, however, set up by way of defence to the widow's claim any circumstances that go to establish the fact that the husband's seizin was not sufficient to permit dower to attach. Plant v. Bayne, 2 Bail. (S. Car.) 819; Blight v. Rochester, 7 Wheat. (U.S.) 535; Foster v. Dwinel, 49 Me. 44, 47; Edmondson v. Welch, 27 Ala. 578; Shelton v. Carroll. 16 Ala. 148; Edmondson v. Montague, 14 Ala. 370; Blakeney v. Ferguson, 20 Ark. 547; Crittenden v. Crittenden, 6 Eng. (Ark.) 82; Owen v. Robbins, 19 Ill. 545; Gully v. Ray, 18 B. Mon. (Ky.) 107; Dashiell v. Collier. 4 J. J. Marsh. 107; Dasniell v. Collier. 4 J. J. Marsh. (Ky.) 601; Gammon v. Freeman, 31 Me. 243, 246; Smith v. Ingalls, 13 Me. 284, 287; Otis v. Parshley, 10 N. H. 403; Moore v. Esty, 5 N. H. 470; Hutchins v. Carlton, 19 N. H. 487; Hill v. Hill, 4 Barb. (N.Y.) 410, 429; Sparrow v. Kingman, 1 N. Y. 242; s. c., 12 Barb. (N. Y.) 201; Averill v. Wilson, 4 Barb. (N. Y.) 180; Henry v. Reichert, 22 Hun (N. Y.). 394; Coakley v. Perry, 3 Ohio St. 344; Gardner v. Greene, 5 R. I. 104; Farnum v.

Loomis, 2 Oregon, 29, 31.

In a number of the cases the estoppel is carried much further, and it is held that he cannot deny the husband's title at all, or set up a better title in himself from a third party. Laboree v. Laboree, 33 Me. 343; Brown v. Potter, 17 Wend. (N. Y.) 164; Jewellv. Harrington, 19 Wend. (N. Y.) 471, 474; Norwood v. Morrow, 4 Dev. & B. (N. Car.) 442. But this is objectionable, because an estoppel, to be effectual, must be mutual, and because the estoppel in this case is based upon the acceptance of an estate from the husband, and if the husband's title was not a good one, no estate passed. Sherwood v. Vandenburgh, 2 Hill (N. Y.), 203; Osterhort v. Shoemaker, 3 Hill (N. Y.), 513; Sparrow v. Kingman, 1 N. Y. 242.

1. Johnson v. Plume, 77 Ind. 166, 171; McCauley v. Grimes, 2 Gill & J. (Md.)

1. Johnson v. Plume, 77 Ind. 166, 171; McCauley v. Grimes, 2 Gill & J. (Md.) 318, 325; s. c., 20 Am. Dec. 434; Gully v. Ray, 18 B. Mon, (Ky.) 107, 114. A wife has no dower in lands held by

A wife has no dower in lands held by her husband as administrator or trustee. Tillman v. Snann, 68. Ala. 102, 106; Cowman v. Hall, 3 Gill & J. (Md.) 398, 405. But if the seizin be beneficial, it matters, not how short a time it lasts. Boughton v. Randall, Noy, 64; Sutherland, 69 Ill. 481, 486; Johnson v. Plume, 77 Ind. 466; Stanwood v. Dunning, 14 Me. 200, 294; Mc-Cauley v. Grimes, 2 Gill & J. (Md.) 398; Rawlings v. Lowndes, 34 Md. 639, 646; Smith v. McCarty, 119 Mass. 519. Still, if in one transaction, though by different deeds, the title passes in and out of the husband, as when property is purchased and a mortgage given for the purchasemoney, the seizin is merely transitory, and no right to dower attaches. Johnson v. Plume, 77 Ind. 166; McClure v. Harris, 12 B. Mour. (Ky.) 261, 266; Gully v. Ray, 18 B. Mon. (Ky.) 107, 114; Gage v. Ward, 25 Me. 101; Glenn v. Clark, 53 Md. 580, 605, 609; Rawlings v. Lowndes, 34 Md. 639; Holbrook v. Finney, 4 Mass. 566, 569; s. c., 3 Am. Dec. 243; Clark v. Monvoe, 14 Mass. 352; Fontaine v. Boatmen, 57 Mo. 552, 558; Moore v. Esty, 5 N. H. 479; Stow v. Tifft, 15 Johns. (N. Y.) 459; s. c., 8 Am. Dec. 266; Gilbain v. Moore, 4 Leigh (Va.), 30; s. Mc.. 24 Am. Dec. 704. Even though there be considerable delay before the execution of the retransfer, and though this be made to a

seizin must be sole and not joint.1 The seizin must be the immediate seizin of the inheritance.² The seizin must exist at some time during coverture,3 but it need not, except by statute, exist at the time of the husband's death.4

III. Property and Estates Subject to Dower.—(I) Property Subject to Dower, Generally.—Dower attaches to all hereditaments, corporeal or incorporeal, which savor of the realty.⁵ Thus, dower may attach to lands and tenements, manors, advowsons, in gross or appendant; s commons certain, gross or appendant (but, it seems, dower will attach to things appendant only if it has attached to the things to which they are appendant); 10 tithes, 11 pensions, and ecclesi-

Wheatley v. Calhoun, 12 Leigh (Va.), 264, 274; s. c., 37 Am. Dec. 654; Glenn v. Clark, 53 Md. 605.

1. Maybury v. Brien, 15 Pet. (U. S.)

1. Maybury v. Brien, 15 Pet. (U. S.)
21, 37; Cockerill v. Armstrong, 31 Ark.
580, 584; Chew v. Chew, 1 Md. 163, 172.
There is no dower in joint estates,—
Maybury v. Brien, 15 Pet. (U. S.) 21;
Cockerill v. Armstrong, 31 Ark. 580;
Chew v. Chew, 1 Md. 163; Holbrook v. Finney, 4 Mass. 566; s. c., 3 Am. Dec. 243; Weir v. Tate, 4 Ired. Eq. (N. Car.) 264; Tobbe v. Wiseman, 2 Ohio St. 207; Walker v. Walker, 6 Coldw. (Tenn.) 571;— though there is in estates in common mond in coparcenary. Lee v. Lindell, 22 Mo. 202, 206; s. P. Sutton v. Rolfe, 3 Lev. 84; Harvill v. Holloway, 24 Ark. 19; Ross v. Wilson, 58 Ga. 249; Rank v. Hanna, 6 Ind. 20; Davis v. Logan, v. Hanna, 6 Ind. 20; Davis v. Logan, 9 Dana (Ky.), 185; Mosher v. Mosher, 32 Me. 412; Blanchard v. Blanchard, 48 Me. 174; French v. Lord, 69 Me. 537; Chew v. Chew, I Md. 163; Potter v. Wheeler, 13 Mass. 504; Hill v. Gregory, 56 Miss. 341; Lloyd v. Conover, 25 N. J. L. 47; Wilkinson v. Parish, 3 Paige (N. Y.), 653; Smith v. Smith, 6 Lans. (N. Y.) 313; Woodhull v. Longstreet, 15 Pa. St. 405; Hudson v. Steere, 9 R. I. 106. But if the joint estate is destroyed by any other means than the husband's assignment, dower attaches. destroyed by any other means than the husband's assignment, dower attaches. I Scribner Dow, 337; Cockerill v. Armstrong, 3r Ark. 580; Maybury v. Brien, 15 Pet. (U. S.) 21; Davis v. Logan, 9 Dana (Ky.), 185; Holbrook v. Finney, 4 Mass. 566; James v. Raran, 6 Sm. & M. (Miss.) 393; Weir v. Tate, 4 Ired. Eq. (N. Car.) 264; Reid v. Kennedy, 2 Strob.

(N. Car.) 264; Reid v. Kennedy, 2 Strob. (S. Car.) 67.

2. Park Dow. 56; I Scribner Dow. 232; Bates v. Bates, I L. Raym. 326; Jackson v. Jacob, II Bush (Ky.), 646, Kennedy v. Kennedy, 29 N. J. L. 185; Leech v. Leech, 21 Hun (N. Y.), 382; Beardslee v. Beardslee, 5 Barb. (N. Y.) 332; House v. Jackson, 50 N. Y. 161; Dunham v. Osborn, I Paige (N. Y.), 634; Green v. Putnam, I Barb. (N. Y.) 500;

Eldredge v. Forrestal, 7 Mass. 253; Brooks. v. Everett, 13 Allen (Mass.), 457; Wilmarth v. Bridges, 113 Mass. 457; Houston v. Smith, 88 N. Car. 312; S. P. Robinson v. Codman, I Sumn. (U. S.) 130; Butler v. Cheatham, 8 Bush (Ky.), 594; Northcut v. Whipp, 12 B. Mon. (Ky.), 594, Northcut v. Whipp, 12 B. Mon. (Ky.) 65; Dunham v. Angier, 20 Me. 242; Spangler v. Stanler, 1 Md. Ch. 36; Gibbons v. Brittlemun, 56 Miss. 232; Otis v. Parshley, 10 N. H. 403; Fisk v. Eastman, 5. N. H. 240; Weir v. Humphries, 4 Ired. N. H. 240; Weir v. Humphries, 4 irea. Eq. (N. Car.) 273; Royster v. Royster, Phill. Eq. (N. Car.), 226; Watkins v. Thornton, II Ohio St. 367; Gardner v. Greene, 5 R. I. 104; Apple v. Apple, r. Head (Tenn.) 348; Vanleer v. Vanleer, 3 Tenn. Ch. 23; Blow v. Maynard, 2 Leigh

(Va.), 30. 3. Kade v Lauber, 16 Abb. Pr. N. S. (N. Y.) 287; s. c., 48 How. Pr. (N. Y.)

4. Norwood v. Morrow, 4 Dev. & B. (N. Car.) 47; Chester v. Greer, 5 Humph. (Tenn.) 26, 30; Price v. Hobbs, 47 Md. 359, 378; Stewart v. Stewart, 3 J. J. Marsh. (Ky.) 48.

If the husband give a bond of conveyance before marriage and convey in accordance therewith after the marriage, the second conveyance dates back to the time of the bond, and there is no dower. Gully v. Ray, 8 B. Mon. (Ky.) 107, 113; Rawlings v. Adams, 7 Md. 27, 54.

5. Park Dow. 110-112; 1 Scribner Dow. pp. 198. et seq.; Buckenridge v. Ingram, 2 Ves. Jr. 652, 664; Conner v. Shepherd, 15 Mass. 164, 167. See also Hudson v. Steere, 9 R. I. 106; Leach v. Leach, 21 Hun (N. Y.), 381; Gorham v. Daniels, 23 Vt. 611.

6. Litt. § 36; Stoughton v. Leigh, I.

Taunt. 409.

7. Bragg v. Bragg, Godb. 135; s. c., Goulds. 37.

8. Co. Litt. 32, a; Howard v. Cavendish, Cro. Jac. 621.

9. Perkins, § 342; Fitz. N. B. 148.

10. Park Dow. 114, 115.

11. Co. Litt. 159 a, 32 a; Thynn v.

astical benefits from the crown; 1 a rent service, a rent charge, rent seck; ² franchises, parcel of an honor, ³ offices; ⁴ a piscary; ⁵ a fair; ⁶ a market; ⁷ a dove-house; ⁸ a mill; ⁹ a ferry; ¹⁰ courts, fines, and heriots, ¹¹ and estovers. ¹² So dower attaches to mines already opened; 13 perhaps to wild lands; 14 to land covered with water; 15 to turpentine trees boxed by the husband, and enough others to keep up the same number. 16 But there is no dower in shares of stock in corporations, generally; 17 and none in annuities not charges on

 See preceding note.
 Perkins, §§ 345, 347; 1 Scribner Dow. pp. 373 et seq.; Stoughton v. Leigh, I Taunt. 402; Herbert v. Wren, 7 Cranch (U. S. C. C.), 370; Boyd v. Hunter, 44 Ala. 705; Chase v. Chase, I Bland (Md.), 206, 225, 226.

3. Howard v. Cavendish, Cro. Iac. 622.

4. Style Pr. Reg. 122; Fitz. N. B. 18,

5. Bradon, 98, 208; Co. Litt. 32, α.
6. Co. Litt. 32, α; Fitz. N. B. 8 (K), n.

7. Gilb. Uses, 371. Cf. Gwynne v. Cin-

cinnati, 3 Ohio, 24.

8. Co. Litt. 32, a.

9. Perkins § 342; Gilb. Uses, 371. Cf. Beavers v. Smith, 11 Ala. 20.

10. Stevens v. Stevens, 3 Dana (Ky.),

371, 373.
11. Co. Litt. 32, a.
12. Perkins, §§ 341, 343.
13. Whether by the husband or by his heirs before the assignment. Hoby v. Hoby, I Vern. 218; Stoughton v. Leigh, I Taunt. 402; Quarrington v. Arthur, 10 M. & W. 335; King v. Dunsford, 2 Ad. & El. 568, 593; Lenfers v. Heake, 73 Ill. 405; s. c., 24 Am. Rep. 263. Not only to the extent to which they have been opened, but their full extent. Moore v. Rollins, Moore v. Rollins, 45 Me. 493; Billings v. Taylor, 10 Pick. (Mass.) 460; s. c., 20 Am. Dec. 533; Findlay v. Smith, 6 Munf. (Va.) 134; s. c., 8 Am. Dec. 733; Crouch v. Puryear, 1 Rand. (Va.) 258; s. c., 10 Am. Dec. 528. Whether, too, they have been abandoned, closed, or not. Coates v. Cheever, I Cow. 460. But the widow cannot open mines. Park Dow. 117, 120; 1 Scribner Dow. 205; King v. Dunsford, 2 Ad. & El. 568.

14. 1 Scribner Dow. 214; Allen v. Mc-Coy, 8 Ohio, 418, 464; Conner v. Shepherd, 15 Mass. 164, 167; Webb v. Townsend, 1 Pick. (Mass.) 21; s. c., 11 Am. Dec. 132; Pike v. Underhill, 24 Ark. 124; Chapman v. Shroeder, 10 Ga. 321; Schaebly v. Schaebly, 26 Ill. 116; Hickman v. Irvine, 3 Dana (Ky.), 121; Campbell v. Campbell, 2 Doug. 141; Brown v. Richards, 17 N. J. Eq. 32; Jackson v. Sellick, Younge & C. 268, 294, 295; Welles v.

Thynn, Style, 99. See also Ebey v. Ebey, 8 Johns. (N. Y.) 262; Jackson v. Browns I Wash. (Va.) 216. son, 7 Johns. (N. Y.) 227; s. c., 5 Am. Dec. 258; Walker v. Schuyler, 10 Wend. (N. Y.) 480; Joyner v. Speed, 68 N. Car. 236; Hastings v. Crunckleton, 3 Yeates 230, Hastings v. Chunckleton, 3 reales (Pa.) 261; Wilson v. Smith, 5 Yerg. (Tenn.) 379; Owen v. Heydes, 6 Yerg. (Tenn.) 334; s. c., 28 Am. Dec. 467; Findlay v. Smith, 6 Munf. (Va.) 134; s. c., 8 Am. Dec. 733.

But lands connected with a dwelling. or used for pasture or cultivated at all, are not wild lands. Shattuck v. Grey, 23, Pick. (Mass.) 88, 92; White v. Willis, 7 Pick. (Mass.) 193; Stevens v. Perley, 24 Me. 94; Demham v. Angier, 20 Me. 242, 246; Mosher v. Mosher, 15 Me. 371; Johnson v. Perley, 2 N. H. 56; s. c., 9 Am. Dec. 35.

15. Brackett v. Unknown, 53 Me. 238, 246; Kingman v. Sparrow, 12 Barb. (N. Y.) 201.

16. Carr v. Carr, 4 Dev. & B. (N. Car.)

179. 17. Boone Corp. § 105; 1 Scribner Dow. 214; Weekly v. Weekly, 2 Younge & C. 281; Johns v. Johns, I Ohio St. 350; s. p., Bradley v. Holsworth, 3 M. & W. 422; Knight v. Barber, 16 M. & W. 66; Watson v. Spratley, 28 Eng. L. & Eq. 507; Planters v. Merchants, 4 Ala. 753; Mc-Dougal v. Hepburn, 5 Fla. 568; Russell v. Temple, 3 Dane Abr. 108, §§ 2-6; Tippets v. Walker, 4 Mass. 596; Howe v. Starkweather, 17 Mass. 243; Tisdale v. Harris, 20 Pick. (Mass.) 9; Hutchins v. State, 12 Met. (Mass.) 421; Denton v. Livingston, 9 Johns. (N. Y.) 96; s. c., 6 Am. Dec. 264; Heart v. State, 2 Dev. Ch. (N. Car.) 111; Staymaker v. Gettysburg, 10 Pa. St. 373; Gelpin v. Howell, 5 Pa. St. 57; s. c., 14 Am. Dec. 720; Arnold v. Ruggles, 1 R. I. 165; Brightwell v. Mallory, 10 Yerg. (Tenn.) 196.

In some cases, however, whether upon the ground that the corporate lands were vested in the individual shareholders and the corporation merely managed them, or upon other grounds, dower has been allowed in them as in realty.. Drybutter v. Bartholemew, 2 P. Wms. 127; Townsend v. Ash, 3 Atk. 336; Bligh v. Brent, 2 land. and none in grass, fruits, and spontaneous productions of the soil growing at the time of the husband's death.2 By statute there was dower in slaves.3

(2) Estates Subject to Dower, Generally.—Absolute fee-simple estates are subject to dower. So are estates tail, except in the case of a fee-tail special where the wife's issue is excluded 6 A condition annexed to an estate in fee that it shall not be subject to dower is repugnant, and void at common law.7 If one estate in fee is exchanged for another the wife must elect to take dower in one or the other.8 both at common law and by statute. Base or qualified fees are subject to dower, but when such a fee ceases so does dower. Determinable fees are generally subject to dower, 10 except that if the estate ceases before the husband's death dower does not become consummate at all.11 Estates in remainder or reversion ex-

Cowes, 2 Conn. 567; s.c., 4 Conn. 182; 10 Am. Dec. 115; Copeland v. Copeland, 7 Bush (Ky.), 349; Price v. Price, 6 Dana (Ky.), 107; s. c., 34 Am. Dec. 608; Binney v. Binney, 2 Bland (Md.), 99, 145, 146; Cape Sable Co., 3 Bland (Md.), 606, 670; Hurst v. Meeson, 4 Watts (Pa.),

1. Robinson v. Townsend, 3 Gill & J.

(Md.) 413. 2. Ralston v. Ralston, 3 Iowa, 533; Kain v. Fisher, 6 N. Y. 507.

3. I Scribner Dow. 224-226.

4. I Scribner Dow. 281; Conner v. Shepherd, 15 Mass. 164, 167; Stevens v. Owen, 25 Me. 94.

5. I Scribner Dow. 227, 281; Chew v. Chew, I Md. 163, 172; Spangler v. Stanler, I Md. Ch. 36, 38; Smith v. Sm.h, 23 Pa. St. 9.

6. Cases cited in preceding note.

7. Co. Litt. 424, a; Mildmay v. Mild-

may, 6 Coke, 41, a.

8. Co. Litt. 31, b; Park Dow. 261; Perkins, §[319; Butler v. Butler, 3 Leon. 271; Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64; s. c., 20 Am. Dec. 205; Mahoney v. Young, 3 Dana (Ky.), 588; s. c., 28 Am. Dec. 114.

But there must have been a technical exchange. The estates must have been of the same quantity. 1 Scribner Dow. 284; Wilcox v. Randall, 7 Barb. (N. Y.) 633. And the deed must have been one of exchange; for where A and B exchanged lands by two ordinary deeds, A's widow was allowed dower in both properties. Cass v. Thompson, I N. H. 65. But the properties need not have been of the same value. 1 Scribner Dow. 284.

9. Machell v. Clark, 2 Ld. Raym. 778; s. c., 2 Salk. 619; Whiting v. Whiting, 4 Conn. 179; Jackson v. Kip, 8 N. J. L.

In property conveyed to the husband

on condition that he pay certain debts, wife has dower subject to payment of such debts. Coffman, v. Coffman, 70 Va. 504.

10. 1 Washb. Real Prop. 131, 208.

11. 1 Scribner Dow. 320.

Determinable Estates.—More particularly if the estate determines by natural limitation, the wife has dower as if it had not determined at all. Park Dow. 157, 158; I Scribner Dow. 286, 287; North-cutt v. Whipp, 12 B. Mon. (Ky.) 73; Lawrence v. Brown, 5 N. Y. 394; Fowler v. Griffin, 3 Sandf. (N. Y.) 385. If it is determined by the entry of one who has a superior title, dower determines too. I Scribner Dow. 200; Courtless v. Vanlore,

Winch, 77.

If the estate be determinable under a power of appointment, dower ceases if power of appointment, dower ceases if the power is exercised; otherwise not. Ray v. Pung, 5 B. & Ald. 561; s. c., 7 Eng. C. L. 193; Chinnubee v. Nicks, 3 Port. (Ala.) 362; Thompson v. Vance, 1 Metc. (Ky.) 670; s. c., 7 Am. L. Reg. 222; Link v. Edmondson, 19 Mo. 987; Hawley v. James, 5 Paige (N. Y.), 318, 455; Peay v. Peay, 6 Rich. Eq. (S. Car.) 409. If the estate be conditional, and be determined by entry for forfeiture, dower determined by entry for forfeiture, dower is destroyed. Park Dow. 154; 1 Scribner Dow. 291; Moore v. Esty, 5 N. H. 479; Beardslee v. Beardslee, 5 Barb. (N. Y.) 324. If the estate be determinable under collateral limitations, dower is determined when the event happens. Park Dow. 165, 167; 1 Scribner Dow. 297. Whether an estate determinable under a conditional limitation or by an executory de-vise continues subject to dower after it has determined, is disputed, though the weight of opinion seems to be that it does. 1 Scribner Dow. pp. 289 et seq.; Pollard v. Slaughter, 92 N. Car. 72; 53 Am. Repr. 402.

pectant on a freehold are not subject to dower, 1 but those expectant on a leasehold are. 2 Estates in common, 3 and in coparcenary 4 are subject to dower, but joint estates are not.5 There is no dower in bare legal estates,6 or in equitable estates at common law,7 or in partnership estates, or in estates for years, or in estates at will, 10 or in estates of preëmption. There is no dower in life estates. whether for the life of the tenant or per autre vie; 12 and this is true though the life-tenant have a power of absolute appointment by deed or will.13

(3) Dower in Dower Lands.—As assigned dower is a life estate. 14 the inheritance in lands assigned for dower is subject to a freehold, and the tenant thereof has not the immediate seizin which is requisite to entitle his wife to dower therein; and therefore there is a rule, Dos de dote peti non debet-there is no dower in dower lands. 15 This is strictly true if the lands have come by devise or descent, for in such case the ancestor died seized, and the widow's seizin is but a continuation of his, the assignment dating back to the time of his death. 16 and the heir or devisee is not seized of the

1. Moody v. King, 2 Bing, 447; s. c., o Eng. C. L. 475; Barker v. Barker, 2 Sim. 243; Buckworth v. Thirkell, 1 Coll. Juris. 243; Buckworth v. Thirkell, I Coll. Juris 332; s. c., 3 Bos. & P. 652, a.; Edwards v. Bibb, 54 Ala. 475; Northcutt v. Whipp, 12 B. Mon. (Ky.) 65; Hilleary v. Hilleary, 26 Md. 274, 287; Adams v. Beekman, I Paige (N. Y.), 631; Weller v. Weller, 28 Barb. (N. Y.) 588; Evans v. Evans, 9 Pa. St. 190; Lovett v. Lovett, 10 Phila. 537; Milledge v. Lamar, 4 Desaus. (S. Car.) 617, 637, 645; Jones v. Hughes, 27 Gratt. (Va.) 568; Houston v. Smith, 88 N. Car. 312.

2. 1 Greenl. Cruise, 162; Bates v. Bates, I La. Raym. 326; Boyd v. Hunter, 44

Ala. 705.

If, however, the precedent estate determines during coverture while the husband has the inheritance, inchoate dower at once arises. Co. Litt. 29, a; I Scribner Dow. 234. If the intervening estate is merely a contingent remainder, dower attaches, but is defeated if the remainder vests. I Scribner Dow. 246. Hence there can be no dower in lands assigned for dower. Durando v. Durando, 23 N. Y. 331; s. c., 32 Barb. (N. Y.) 529; 9 Am. L. Reg. 630.

Chew v. Chew, 1 Md. 163, 172.
 Lee v. Lindell, 27 Miss. 202, 206.
 Maybury v. Brien, 15 Pet. (U. S.)
 37; Babbitt v. Day, 41 N. J. Eq. 392.
 Gully v. Ray, 18 B. Mon. (Ky.) 107,

7. Gully v. Ray, 18 B. Mon. (Ky.) 107.

8. Nicoll v. Ogden, 29 Ill. 323. 9. Spangler v. Stanler, 1 Md. Ch. 36; s. p., Goodwin v. Goodwin, 33 Conn. 314;

Ware v. Washington, 6 Sm. & M. (Miss.) 637; Joelckner v. Hudson, I Sandf. (N.Y.) 215; Reynolds v. Conv. Co., 5 Ohio, 204; North v. Rossa, 13 Ohio, 234, 363; Murdock v. Ratcliff, 7 Ohio, 119. Not though the base be for 999 years. Whitmire v. Wright, 22 S. Car. 446.

10. 4 Coke, 22 a, 22 b; 1 Scribner Dow. 369; 1 Washb. Real Prop. 119.

11. Drennan v. Walker, 21 Ark. 539; Wooley v. Magie, 26 Ill. 526; Davenport Wooley J. Magle, 20 III. 520, Bavenport
 Fauer, 2 III. 314; Longworthy v. Heeb,
 46 Iowa, 64; Bowers v. Keesecker, 14
 Iowa, 301; Wells v. Moore, 16 Mo. 408.
 12. Litt. § 56; Park Dow. 48, 58; 1 Scrib-

ner Dow. 359; Exton v. St. John, Finch, 368; Bowles v. Poore, I Bulst. 135, Low v. Burrow, 3 P. Wms. 262; Edwards v. Bibb, 54 Ala. 475; Thompson v. Vance, 1 Metc. (Ky.) 669; Fisher v. Grimes, 1 Sm. & M. (Miss.) 107; Burris v. Page, 17 Mo. 358; Gillis v. Brown, 5 Cow. (N. Y.) 388; Knickerbacker v. Seymour, 46 Bart. (N. Y.) 198; People v. Gillis, 24 Wend. (N. Y.) 201; Alexander v. Cunningham, 5 Ired. (N. Car.) 430.

13. Thompson v. Vance, I Metc. (Ky.) 670; s. c., 7 Am. L. Reg. 222; Collins v. Carlisle, 7 B. Mon. (Ky.) 14; McGaughey v. Henry, 15 B. Mon. (Ky.) 383.

14. Moore v. Mayor, 8 N. Y. 110, 113;

15. Glanv. lib. 6, ch. 16; Perkins, § 315; Park Dow. 154-156; I Scribner Dow. 324; D'Arcy v. Blake, 2 Sch. & L. 387; Windham v. Portland, 4 Mass. 384, 388.

16. When first wife has been endowed after divorce, second wife may have dower subject to first wife's dower.

immediate estate of inheritance requisite to give his wife dower.1 But when the first holder has assigned the lands before his death. and the assignee has married before the widow of the assignor has had her dower assigned, the requisites concur and the assignee's widow can have her dower out of the lands assigned to the assignor's widow for dower.2 When the dower has not been assigned by metes and bounds calculation is resorted to, when another dower has to come out of the same property, to accomplish the same results as would have followed assignment by metes and bounds.3

(4) Dower in Equitable Estates.—At common law dower attached only to legal estates; 4 the husband, as has been seen, had to be seized of the legal title. All kinds of uses and trusts were therefore exempt from dower, such as trusts created by deed or will, equities of redemption, and lands paid for but not formally deeded.8 The common-law rule still prevails in some States, and in others has been expressly or impliedly changed by statute, as will be seen in the notes.9 Statutes giving dower in equitable estates

Stahl v. Stahl, 114 Ill. 375; Park Dow. 156; 1 Scribner Dow. 331-333; Hitchv. Hitchens, 2 Vern. 403; Steel v. La Framboise, 68 Ill. 456; Robinson v. Miller, 2 B. Mon. (Ky.) 284. 288; McLeery v. McLeery, 65 Me. 172; s. c., 20 Am. Rep. 683; Geer v. Hamblin, 1 Me. 54; Moore v. Mayor, 8 N. Y. 110, 113; s. c., 59 Am. Dec. 473; Beekman v. Hudson, 20 Wend. (N. Y.) 53; Durando v. Durando, 23 N. Y. 335; s. c., 9 Am. L. Reg. 630; Reitzel v. Eckard, 65 N. Car. 673; Peckham v. Howden, 8 R. I. 160; Apple v. Apple, I Head (Tenn) 348.

1. Cases cited in preceding note.

2. Bustard v. Bustard, 4 Coke, 122, a; 2. Bustard v. Bustard, 4 Coke, 122, a; Geer v. Hamblin, 1 Me. 54; Manning v. Lahoree, 33 Me. 343; Durando v. Durando, 23 N. Y. 331; Cregier v. Cregier, 1 Barb. Ch. (N. Y.) 598; Dunham v. Qsborn, 1 Paige (N. Y.), 634; Reitzel v. Eckard, 65 N. Car. 673.

So if the widow of the heir has her

dower assigned before the widow of the ancestor has hers assigned, though the former dower ceases when the latter is assigned, it revives when the latter ceases. I Scribner Dow. 327; Cregier v. Cregier, I Barb. Ch. (N.Y.) 598. Likewise, in any case, if the widow dies before the heir, devisee or purchaser dies or aliens the inheritance, the widow of such heir, devisee, or purchaser will of course have her dower. 1 Scribner Dow. 326; Bear v. Snyder, 11 Wend. 592. The same thing happens if the widow waives, forfeits, or otherwise determines her dower. Geer v. Hamblin, I Me. 54; Elwood v. Kloch, I3 Barb. (N. Y.) 50. But see Leavitt v. Lamphrey, 13 Pick. (Mass.) 382; s. c., 23 Am. Dec. 685.

3. I Scribner Dow. 329; Fisher v. Grimes, I Sm. & M. (Miss.) 107; Dunham v. Osborn, t Paige (N. Y.), 634.

4. Dower in Equitable Estates. - None at common law. Chaplin v. Chaplin, 3 P. Wms. 229, 234; D'Arcey v. Blake, 2 Schoales & L. 387, 388; Smith v. Adams, 5 De Gex, M. & G. 712; Ransom v. Ran-som, 17 Fed. Rep. 331, 333; Blakeney v. Ferguson, 20 Ark. 547; Gully v. Ray, 18 B. Mon. (Ky.) 107, 113; Mann v. Edson, 20 Me. 35; 2389; 1173;

39 Me. 25; cases infra.
"It is not necessary to refer to adjudged cases for the purpose of proving that, according to the principles of the common law, a widow is not dowable in her husband's equity of redemption; and if a man mortgages in fee before marriage, and dies without redeeming the mortgage, his widow is not entitled to dower. Stelle v. Carroll, 12 Pet. (U. S.) 201, 205.

5. I Scribner Dow. 413.

There is no dower in money treated in equity as land. Crabtree v. Bramble, 3 Atk. 680, 687.

6. Chaplin v. Chaplin, 3 P. Wms. 229,

7. "By the common law, dower does not attach to an equity of redemption. The fee is vested in the mortgagee and the wife is not dowable of an equitable seizin." Maybury v. Brien, 15 Pet. (U. S.) 21, 38; s. p., Dixon v. Saville, Bro. Ch. Ca. 326. 8. Williams v. Barrett, 2 Cranch (C.

9. The common-law rule still exists in Connecticut, Delaware, Florida, Georgia, Maine, Massachusetts, Michigan, New Hampshire, Oregon, South Carolina, Vermont, and Wisconsin. In Pennsylvania are remedial, and are applied to estates owned by the husband be-

this rule has never existed. It has been abolished by implication in Arkansas, and expressly in England, Alabama, Illinois, Kentucky, Maryland, Missouri, New Jersey, New York, North Carolina, Ohio, Rhode Island, Tennessee, Virginia,

And West Virginia.

Connecticut: R. S. 1875, p. 376; Deforest v. Deforest, I Root (Conn.), 50;

Calder v. Bull, 2 Root (Conn.), 50;

Stewart v. Stewart, 5 Conn. 517; Steadman v. Fortune, 5 Conn. 462.

Delaware: R. L. 1874, p. 533; Conroy

v. Conroy, 3 Del. Ch. 407. Florida: Dig. 1881, p. 475.

Georgia: Code 1873, p. 304; Chapman v. Shroeder, 10 Ga. 321; Green v. Causey, 10 Ga. 435; Bowen v. Collins, 15 Ga. 100; Hart v. McCollum, 28 Ga. 478;

Aaron v. Boyne, 28 Ga. 107; Day v.

Maine: R. S. 1884, p. 722; Hamlin v. Hamlin, 19 Me. 141; Mann v. Edson, 39 Me. 25; Freeman v. Freeman, 39 Me. 426; Thorndike v. Spear, 31 Me. 91; Kid-

der v. Blaisdell, 45 Me. 461.

Massachusetts: P. S. 1882, p. 740, § 3.

Dower is given in equities of redemption, and in property to which the husband has a complete equitable title. Reed v. Whitney, 7 Gray (Mass.), 533, 538; Hall

v. Munn, 4 Gray (Mass.), 535, 536, Flatt v. Munn, 4 Gray (Mass.), 132. Michigan. R. S. 1882, §§ 57, 83; Campbell v. Clark, 2 Doug. (Mich.) 141; May

v. Sprecht, I Mich. 187.

New Hampshire: R. S. 1878, p. 474; Hobbinson v. Dumas, 42 N. H. 296.

Oregon: Dig. 1874, p. 584; Farnum v.

Loomis, 2 Oreg. 29.

South Carolina: R. S. 1882, § 1801;
Secrest v. McKenna, 6 Rich. Eq. (S. Car.) 72; Spreight v. Meigs, I Brev. (S. Car.) 486; Peay v. Peay. 2 Rich. Eq. (S. Car.)

Vermont: R. S. 1880; p. 449; Jenry v. Jenry, 24 Vt. 324; Thayer v. Thayer, 14 Vt. 107; 39 Am. Dec. 211; Ladd v. Ladd. 14 Vt. 185; Gorham v. Daniels, 23 Vt.600.

Wisconsin: R. S. 1878, p. 626. Pennsylvania: Shoemaker v. Walker, Pennsylvanna. Snoemaker v. Walker, 2 S. & R. (Pa.) 534; Reed v. Morrison, 12 S. & R. (Pa.) 18; Kelly v. Mehan, 2 Yeates (Pa.), 515; Jones v. Patterson, 12 Pa. St. 149, 154; Pritts v. Richey, 29 Pa. St. 71, 76; Dubs v. Dubs, 31 Pa. St. 149; Junk v. Canon, 34 Pa. St. 286.

Arkansas: Kirby v. Vantreece, 26 Ark.

368, 370.

England: 3 William IV. ch. 105, § 2.

Alabama: Code 1876, § 2232; Gillespie v. Somerville, 3 Stew. & P. (Ala.) 347; Allen v. Allen, 4 Ala. 536; Edmondson v. Montague, 14 Ala. 370; Crabb v. Pratt, 15 Ala. 843; Parks v. Brooks, 16 Ala. 529; Harrison v. Boyd, 36 Ala. 503.

Illinois: R. S. 1880, p. 425; Davenport v. Farrar, I Scam. Ill. 314; Sisk v. Smith. I Gilm. (Ill.) 503; Owen v. Robbins, 19 Ill. 549; Atkin v. Merrill, 39 Ill. 62; Stow v. Steel, 45 Ill. 328; Greenbaum v.

Nostrian, 70 Ill. 591.

Kentucky: R. S. 1881, p. 527. § 2;
Pugh v. Bell, 2 Mon. (Ky.) 126; Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64; s. c., 20 Am. Dec. 205; Dean v. Mitchell, 4 J. J. Am. Dec. 205; Dean v. Mitchell, 4 J. J. Marsh. (Ky.) 451; Hamilton v. Hughes, 6 J. J. Marsh. (Ky.) 581; Lindsey v. Stevens, 5 Dana (Ky.), 104; Lawson v. Morton, 6 Dana (Ky.), 471; Brewer v. Van Arsdale, 6 Dana (Ky.), 204 Robinson v. Miller, I B. Mon. (Ky.) 88, 91; Heed v. Ford, 16 B. Mon. (Ky.) 114; Gully v.

Ray, 18 B. Mon. (Ky.) 114; Gully v. Ray, 18 B. Mon. (Ky.) 107.

Maryland: R. S. 1878, p. 397; Hopkin v. Frey, 2 Gill (Md.), 359; Miller v. Stump, 3 Gill (Md.), 304, 311; Spangler v. Stanler, 1 Md. Ch. 36; Bowie v. Berry, 1 Md. Ch. 452; S.c., 3 Md. Ch. 359; Purdy v. Purdy v. Md. Ch. 547; Stewart v. Berry, 1 Md. Ch. 547; Stewart v v. Purdy, 3 Md. Ch. 547; Stewart v. Beard, 4 Md. Ch. 319; Lynn v. Gebhart, 27 Md. 347; Glenn v. Clark, 53 Md. 580, 604; Bank v. Owens, 31 Md. 320, 320. Missouri: R. S. 1879, p. 363; Duke v.

Brandt, 51 Mo. 221, 225; Hart v. Logan,

V. Mercereau, 18 N. J.L. 387, 390; Boyd v. Thompson, 21 N. J. L. 58, 61; s. c.,

v. Thompson, 21 N. J. L. 58, 61; s. c., 22 N. J. L. 543, 548.

New York: R. S. 1882, p. 2196; Hicks v. Stebbins, 3 Lans. (N. Y.) 39; Johnson v. Thomas, 2 Paige (N. Y.), 377; Hawley v. James, 5 Paige (N. Y.), 318; Church v. Church, 3 Sand. Ch. (N. Y.) 434; Coster v. Clark, 3 Edw. Ch. (N. Y.) 428; McCartee v. Teller, 2 Paige (N. Y.), 511.

North Carolina: R. S. 1873, p. 839; Klutts v. Klutts, 5 Jones Eq. (N. Car.) 80; Thompson v. Thompson, 1 Jones (N. Car.), 430.

Ohio: R. S. 1880, p. 1048; Abbott v.

Ohio: R. S. 1880, p. 1048; Abbott v. Bosworth, 36 Ohio St. 605; Miller v. Wilson, 15 Ohio, 105; Rands v. Kendall, Wilson, 15 Ohio, 105, Kalius v. Keliusin, 15 Ohio, 671; Smiley v. Wright, 2 Ohio, 506; McDonald v. Aten, 1 Ohio St. 293. Rhode Island: P. S. 1882, p. 637. Tennessee: R. S. 1873, § 2308.

Virginia: Code 1873, p. 853; Routon v. Routon, I Hen. & M. (Va.) 92; Claiborne v. Henderson, 3 Hen. & M. (Va.) 322; Wheatley v. Calhoun, 12 Leigh (Va.), 264; s. c., 37 Am. Dec. 654; Blair v. Thompson, 11 Gratt. (Va.) 441.

West Virginia: R. S. 1879, c. 82, § 17.

fore the passage of the statute. 1 if the rights of third persons have not intervened.2

But equitable estates must be distinguished from equitable rights. for even under the above statutes there is no dower in a mere right.3 Therefore, to entitle the wife to dower, the husband's equity must be perfect and complete. 4 an interest which would pass to his heirs, and not a mere right of action which would pass to his personal representatives.⁵ And it must be such an equitable title that equity would decree the legal title, other rights not conflicting,6 and not a mere moral right depending upon an unenforceable contract or trust.⁷ The question has repeatedly arisen in cases where the husband had not completed a purchase at the time of his death, but had paid the whole or a part of the purchase-money, and in such cases the wife's right to dower depends very much on the terms of the contract.8

1. Bailey v. Duncan, 4 Mon. (Ky.) 256, 265; Duke v. Brandt, 51 Mo. 221,

2. Hawley v. James, 5 Paige (N. Y.).

318, 453. 3. Thompson v. Thompson, I Jones (N. Car.), 430, 431; Yeo v. Mercereau, 18

N. J. L. 387, 390.

4. Pugh v. Bell, 2 Mon. (Ky.) 125, 128.

Royd 26 Ala. 503; See Harrison v. Boyd, 36 Ala. 503; Nicholl v. Todd, 70 III. 295, 297; Barnes v. Gay, 7 Iowa, 26; Yeo v. Mercereau, 18 N. J. L. 387, 390; Pritts v. Richey, 29

Da. St. 71, 77.
Nicholl v. Todd, 70 Ill. 295, 297;
Duke v. Brandt, 51 Mo. 221, 225.
Thus there is dower in land which a husband has bought and paid for, but the deed to which he has lost before recording it. Tyson v. Harrington, 6 Ired. Eq. (N. Car.) 329.

So there is dower in equities of redemp-

tion. Post, III. (6).
6. Taylor v. Kearn, 68 Ill. 339, 341;
Rowton v. Rowton, 1 Hen. & M. (Va.) 92; Claiborner v. Henderson, 3 Hen. &

M. (Va.) 322, 382.
7. Ransom v. Ransom, 17 Fed. Rep. 331, 335; Herron v. Williamson, Litt. Sel. Cas. 250.

8. Contracts of Purchase-Title Not Perfected.-When the husband has paid all the purchase money and is entitled to a deed, and could in equity obtain a decree of specific performance, the wife is entitled to dower. Edmondson v. Montague, 14 Ala. 370, 379; Taylor v. Kearn, 68 Ill. 339, 341; Pugh v. Bell, 2 Mon. (Ky.) 125, 128; Tyson v. Harrington, 6 Ired. Eq. (N. Car.) 329.

And when none of the purchase-money has been paid she has no dower. Harrison v. Boyd, 36 Ala. 203, 233; Latham v. McLain, 64 Ga. 320; Smith v. Addleman, 5 Blackf. (Ind.) 406: Barnes v. Gav. 7 Iowa, 26.

But there is considerable dispute as to the effect of a part payment of purchasemoney. Some cases hold that all the purchase money must be paid. Edmondv. Montague, 14 Ala. 370, 379; Pugh v. Bell, 2 Mon. (Ky.) 125, 128. Others hold the contrary. Brewer v. Van Ars-

dale, 6 Dana (Ky.), 204.

The true rule seems to be that if the terms of the contract give the husband the right to the property only after the payment of all the purchase-money, his wife can have no dower unless all the purchasemoney is paid; but when he has taken possession of the property after a part payment (see Claiborne v. Henderson, 3 Hen. & M. (Va.) 322, 382), and the vendor has retained the title only as security, or has relied on his lien for the purchasemoney, the wife has dower subject to the vendor's rights. Duke v. Brandt, 51 Mo. 221, 226. And after the husband's death in such a case the widow can call on hisrepresentatives to pay the balance (but. she must also contribute her share; see Austrian, 70 Ill. 591, 594; Lindsey v. Stevens, 5 Dana (Ky.), 104; Brewer v. Van Arsdale, 6 Dana (Ky.), 204; Thompson v. Thompson, I Jones (N. Car.), 430, 434. And if the property is sold to satisfy the lien for the balance, dower is allowed. out of the surplus. See Bank v. Owens, 31 Md. 320, 326; Thompson v. Cochran, 7 Humph. (Tenn.) 72; post, III. (6).
"The widow is entitled (under the

statute) to dower out of an equitable estate, however created, provided that it is not tothe prejudice of the vendor, or other lien attaching before her marriage, or sub-sequently with her consent." Lynn v.

Gephart, 27 Md. 547, 568.

And dower in equitable estates differs from dower in legal estates, generally, in that the husband must die seized of the former to entitle his wife to dower. If he has aliened an equitable estate, his wife not consenting to the deed, absolutely or by mortgage or other encumbrance, he has defeated dower absolutely or pro tanto, as the case may be.2 And a legal title acquired by the husband after he has so disposed of or encumbered the equitable estate inures to the benefit of his assignee, and does not perfect dower.3

(5) Dower in Partnership Property.—It has been a much vexed question whether and to what extent dower exists in partnership real estate.4 Some cases hold that partnership real estate is personalty, and that there is therefore no dower therein at all; 5 others hold that real estate is real estate though owned by a partnership, and is therefore fully subject to dower. But the true rule seems to be that realty bought with partnership funds or for partnership

1. This seems to be the general rule under the statutes. Ransom v. Ransom, under the statutes. Ransom v. Ransom, 17 Fed. Rep. 331, 333; Owen v. Robbins, 19 Ill, 545; Morse v. Thorsell, 78 Ill. 600, 604; Butler v. Holtzman, 55 Ind. 125; Barnes v. Gay, 7 Iowa, 26; Gully v. Ray, 18 B. Mon. (Ky.) 107, 113; Heed v. Ford, 16 B. Mon. (Ky.) 482; Hamilton v. Hewes, 6 J. J. Marsh. (Ky.) 581; Lawson v. Morton, 6 Dana (Ky.), 471; Purdy v. Purdy, 3 Md. Ch. 547; Bowie v. Berry, 1 Md. Ch. 482; Glenn v. Clark, 53 Md. 589, 604; Lobdell v. Hayes, 4 Allen (Mass.), 187 tol. Duke v. Brandt 51 Mo. 221, 225; 604; Lobdell v. Hayes, 4 Allen (Mass.), 187, 191; Duke v. Brandt, 51 Mo. 221, 225; Hawley v. James, 5 Paige (N. Y.), 318; 452, 453; Smiley v. Wright, 2 Ohio, 506; Miller v. Wilson, 15 Ohio, 108; Abbott v. Bosworth, 36 Ohio St. 605; Pritts v. Richey, 29 Pa. St. 71; Junk v. Canon, 34 Pa. St. 286.

The statutes may provide otherwise, sin Nath Carolina, R. S. 1872, p. 826.

as in North Carolina, R. S. 1873, p. 839,

Under the Maryland statute, which gives dower in equitable estates, but not to the "prejudice of any lien on the same," it has been held that a claim in such estates can be asserted only when it could not "operate to the prejudice of the rights of any but creditors, heirs, and devisees," and that it would prejudice the rights of others if asserted against a Miller v. Stump, 3 Gill purchaser. (Md.), 304, 311.

2. In a case where the husband, a cestui que trust of certain land, mortgaged the same without the consent of his wife, it was held that she had no dower as against the mortgagee, though she might have dower in any surplus. Miller v. Stump, 3 Gill (Md.), 304, 310, 311. See Taylor v. Kearn, 68 Ill. 339, 341.

And so where a husband bought land. paying part of the purchase-money, but getting no legal title and sold his equitable title absolutely, it was held that his widow had no dower. Glenn v. Clark, 53 Md. 580, 604.

But a widow was held dowable out of an equitable estate irrespective of a judgment obtained after her dower attached.

Lynn v. Gephart, 27 Md. 547, 568.

An agreement to convey land will not defeat dower, except to the extent of the v. Berry, 3 Md. Ch. 359.

And if a husband has with his wife's

joinder put a mortgage on an estate and thus converted it into an equitable estate, he cannot defeat her dower in the latter estate without her further consent. Mc-Mahon v. Russell, 17 Fla. 698, 703; Bank v. Owens, 31 Md. 320, 325; Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452.

If a husband has agreed to buy land and paid money thereon, he may rescind the contract without subjecting the property to a claim for his wife's dower. Owen z. Robbins, 19 Ill. 549, 554; Wheatly v. Calhoun, 12 Leigh (Va.

264; s. c., 37 Am. Dec. 654.

3. Morse v. Thorsell, 78 Ill. 600; Gully v. Ray, 18 B. Mon. (Ky.) 107; Heed v. Ford, 16 B. Mon. (Ky.) 114.

4. 1 Scribner Dow. 563 et seq.
5. Pierce v. Trigg, 10 Leigh (Va.), 405;
Wheatley v. Calhoun, 12 Leigh (Va.), 264, 273; s. c., 37 Am. Dec. 654; Hewitt v. Rankin, 41 Iowa, 35; Mallory v. Rus-

sell, 71 Iowa, 63.
6. Smith v. Jackson, 2 Edw. Ch. (N, Y.) 28, 35; Bell v. Phyn, 7 Ves. Jr. 253 Woolidge v. Wilkins, 3 How. (Miss.) 360; Markham v. Marrett, 7 How. (Miss.) 437.

purposes is realty at law subject to dower just as if the partners were tenants in common, unless the terms of the partnership. agreement declare it to be personalty; but that in equity it is subject to a trust 3 in favor of the partnership creditors and of any of the partners with a balance due him, 4 this trust being paramount to any dower claims, and there being no dower if the property is needed to pay the firm creditors, or to pay any partner a balance due him, but there being dower if the property is not needed for such purposes, or in the surplus if it be so needed only in part; 8 provided, however, that if the property is sold under the partnership equitable lien during coverture, as in the case of the enforcement of other paramount liens, dower is defeated; 10 and that the wives of the partners do not have to join in any deed of the partnership property, 11 or be made parties to any suit when the partnership property is foreclosed or otherwise attacked by the partnership creditors.12

1. Loubat v. Nourse, 5 Fla. 350, 357; Matlock v. Matlock, 5 Ind. 403, 406; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631, 634; Dyer v. Clark, 5 Metc. (Mass.) 562, 577; s. c., 39 Am. Dec. 697; Howard v. Priest, 5 Metc. (Mass.) 582, 585; Burnside v. Merrick, 4 Metc. (Mass.) 537, 541; Willet v. Brown, 65 Mo. 138, 145; s. c., 33 Am. Rep. 265; Campbell v. Campbell, 30 N. J. Eq. 415, 417; Greene v. Greene, I Ohio, 244, 249, 250; s. c., 13 Am. Dec. 642.

2. Galbraith v. Gedge, 16 B. Mon. (Kv.) 631, 634, 636; Goodburn v. Stevens,

5 Gill (Md.), 1, 27. 3. Willet v. Brown, 65 Mo. 138, 147;

s. c., 37 Am. Rep. 265.
4. Drewry v. Montgomery, 28 Ark.
256, 259; Loubat v. Nourse, 5 Fla. 350, 357; Matlock v. Matlock, 5 Ind. 403, 407; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631, 634; Divine v. Mitchum, 4 B. Mon. (Ky.) 488, 491; s. c., 41 Am. Dec. 241; (Ry.) 469, 5. c., 41 Am. Bet. 241; Goodburn v. Stevens, 5 Gill (Md.), 1, 27; Dyer v. Clark, 5 Metc. (Mass.) 562, 577; s. c., 39 Am. Dec. 697; Howard v. Priest, 5 Metc. (Mass.) 582, 585, 586; Burnside v. Merrick, 4 Metc. (Mass.) 537, 541; Willet v. Brown, 65 Mo. 138, 148; s. c., 33 Am. Rep. 265; Campbell v. Campbell, 30 N. J. Eq. 415, 417.

5. Simpson v. Leech, 86 Ill. 286, 287;

Bopp v. Fox, 63 Ill. 540, 544; Burnside v. Merrick, 4 Metc. (Mass.) 537, 541; Willet v. Brown, 65 Mo. 138, 147; s. c., 33 Am. Rep. 265; Sumner v. Hampson, 8 Ohio, 328, 364; s. c., 32 Am. Dec. 722.
6. Howard v. Priest, 5 Metc. (Mass.) 582, 585, 586; Mowry v. Bradley, 11 R.

I. 370, 372.

7. Hiscock v. Jaycox, 12 Bank Reg. 507, 511; Simpson v. Leech, 86 Ill. 286.

288; Hale v. Plummer, 6 Ind. 121, 124; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631, 634; Goodburn v. Stevens, 5 Gill (Md.), 1, 27; s. c., 1 Md. Ch. 420, 440, 441; Campbell v. Campbell, 30 N. J. Eq. 415,

8. Huston v. Neil, 41 Ind. 504, 508, 509; Dyer v. Clark, 5 Metc. (Mass.) 562, 579; s. c., 39 Am. Dec. 697; Goodburn v. Stevens, 5 Gill. (Md.) 1. 27, 28; Duhb. Stevens, § Gill. (Md.) 1, 27, 28; Dunring v. Duhring, 20 Mo. 174, 182; Campbell v. Campbell, 30 N. J. Eq. 415, 417; Mowry v. Bradley, 11 R. I. 370, 372.

9. Stewart Husband and Wife, § 258.

10. Folsom v. Rhodes, 22 Ohio St. 435.

11. Simpson v. Leech, 86 Ill. 286, 288; Huston v. Neil, 41 Ind. 504, 510; Duh-

v. Bradley, 11 R. I. 370, 372.

12. Huston v. Neil, 14 Ind. 504, 510; Galbraith v. Gedge, 16 B. Mon. (Ky.)

631, 635.

If there is an express agreement that the realty of the partnership shall be used for paying the debts of the firm, the property is undoubtedly subject to the trust above described. Park Dow. 199; 1 Scribner Dow. 564; Thornton v. Dixon, 3 Bro. C. C. 199; Greene v. Greene, 1 Ohio, 244; s. c., 13 Am. Dec. 642.

It is well settled that such an agreement is always implied, so that the property vests in the partners subject to an equitable lien, which is therefore prior v. Nourse, 5 Fla. 350; Howard v. Priest, 5 Metc. (Mass.) 582; Willet v. Brown, 65 Mo. 138; s. c., 33 Am. Rep. 265; Greene v. Greene, I Ohio, 244; Sumner v. Hampson, 8 Ohio, 328, 364; s. c., 32 Am. Dec. If the lands are sold under the partnership lien, the widow has no dower in

(6) Dower in Mortgaged Property.—Where land, which would in ordinary circumstances be subject to dower, has been mortgaged, the mortgagee's interest is personalty, and his wife can have no dower in the property unless he has perfected his title thereto by foreclosure during his life. The mortgagor's interest, on the other hand, until default or foreclosure, is generally, under the terms of the usual mortgage, a legal estate on condition,2 and his wife takes dower subject to defeasance by breach of condition.3 After default the mortgagor has generally only an equitable title or estate called an equity of redemption, and at common law there was no dower in equities of redemption or in any other equitable estates.4 But now, as has been seen, equities of redemption are subject to dower.5 This applies of course only to such mortgages as are paramount to dower; 6 if the mortgage is made after marriage without the wife's joinder to release her dower, she has her dower as if the mortgage had not been made. as she would if the property had been conveyed absolutely and not by way of mortgage.8

rents and profits accruing before the sale. Goodburn v. Stevens, 1 Md. Ch. 420, 440,

The realty must, of course, be partnership property, or it will be subject to dower as any other realty. Wheatley v. Calhoun, 12 Leigh (Va.), 264, 273; s. c., 37 Am. Dec 654. If bought by the partners, it is *prima facie* partnership property. Loubat v. Nourse, 5 Fla. 350; Willet v. Brown, 65 Mo. 138. It is such property if bought with partnership funds or for the use of the firm. Drewry v. Montgomery, 28 Ark. 250, 260; Hiscock v. Jaycox, 12 Bank Reg. 512, 517. But it is not, if bought for and charged to one partner, or if taken in common by express agreement. Smith v. Smith, 2 Ves. Ir. 189; Drewry v. Montgomery, 28 Ark. 250.

1. I Washburn Real Prop. 163, § 15; I Scribner Dow. 477, 478; Foster v. Dwinel, 49 Me. 44, 53; Nash v. Preston, Cro. Car. 190; Hinton v. Hinton, 2 Ves. Jr. 631; Noel v. Jevon, Freem. 43, 71; Crittenden v. Johnson, 11 Ark. 94, 104; Cooper v. Whitney, 3 Hill (N. Y.), 94; Reid v. Shipley, 6 Vt. 602, 609; Waller

v. Waller, 33 Gratt. (Va.) 83.

2. Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452; Denton v. Nanny. 8 Barb. (N. Y.) 618; Bank v. Arnold, 5 Paige (N. Y.), 38; Bell v. Mayor, 10 Paige (N. Y.), 49, 54, 68; Danforth v. Smith, 23 Vt. 247.

3. Moore v. Esty, 5 N. H. 479. 4. Ransom v. Ransom, 17 Fed. Rep.

331; Dixon v. Saville, I Bro. C. C. 326; Dawson v. Whitehaven, L. R. 6 Ch. D. 218; Maybury v. Brien, 15 Pet. (U. S.) 21, 38; Cox v. Garst, 105 Ill. 342; Glenn v. Clark, 53 Md. 580. 607; Pickett v. Buckner, 45 Miss. 226, 243; Denton v. Nanny, 8 Barb. (N. Y.) 618; Hopkinson

v. Dumas, 42 N. H. 296; Reed v. Morrison, 12 S. & R. (Pa.) 18; Eddy v. Moulton, 13 R. I. 105. Still, the mortgagor's wife had dower, if the mortgage were for years only. Park Dow. 143, 350, 351; I Scribner Dow. 476; Palmes v. Danby, Prec. Ch. 137; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482; Heth v. Cocke, 1 Rand. (Va.) 344.

5. Ante, n. 9, p. 894. 6. That is, whether the land was bought subject to the mortgage, or the mortgage was made by the husband be-fore marriage, or after marriage jointly with the wife, or after marriage without her joinder, as a part of the transaction that vested the property in him. Carll v. Butman, 7 Me. 102; Campbell v. Campbell, 30 N. J. Eq. 415; Opdyke v. Bartles, 11 N. J. Eq. 133; Heth v. Cocke, 1 Rand. (Va.) 344; Cox v. Garst. 105 Ill. 342; Mantz v. Buchanan, 1 Md. Ch. 202; Glenn v. Clark, 53 Md. 580, 604: Bank v. Owens, 31 Md. 320; Smith v. Eustis, 7 Me. 41; Holbrook v. Finney. 4 Mass. 566; s. c., (N. Y.), 49: House v. House, 10 Paige (N. Y.), 49: House v. House, 10 Paige (N. Y.), 158; Denton v. Nanny, 8 Barb. (N. Y.) 618; State v. Hinton, 21 Ohio St. 509; Matthewson v. Smith, 1 R. I. 22. In these cases there is now dower in the lands, but only in the equity of redemption. Opdyke v. Bartles, II N. J. Eq.; Heth v. Cocke, I Rand. (Va.) 344.

7. Davis v. McDonald, 42 Ga. 205;

Gerry v. Stinson, 60 Me. 186.

Except where she has dower only in the lands of which her husband dies seized.

Mortgage pro tanto an alienation. Bell

v. Mayor. 10 Paige (N. Y.), 49. 8. Stoughton v. Leigh, 1 Taunt. 410;

Where the wife has her dower in mortgaged land subject to defeasance by breach of condition, or has dower in the equity of redemption, and her husband dies without default and foreclosure. she may be endowed out of the lands and hold them until default and foreclosure. But if there has been default and the mortgagee has taken possession the widow cannot disturb him and have dower.2 but she has certain rights in case of redemption or a foreclosure sale.

First, as to Redemption.—Where the husband died seized of the equity of redemption and the mortgage is in default, the widow may require his personal representatives to redeem out of the assets of the estate, and she need not contribute.3 If there are not enough assets to pay the whole debt the personal representatives must pay as much as they can, and save the widow's dower as far

as possible.4

If the husband during his life has assigned the equity of redemption, there are no decisions to the effect that the widow can require the assignee to redeem; still, if the assignee does redeem and the widow contributes her proportion, she has her dower.⁵ But if the assignee redeems during the husband's life the widow has her

Sisk v. Smith, 6 Ill. 503; Gerry v. Stinson, 60 Me. 186; Combs v. Young, 4 Yerg. (Tenn.) 218; s. c., 26 Am. Dec.

1. Bank v. Arnold, 5 Paige (N. Y.), 38; Danforth v. Smith, 21 Vt. 247; Cockerill v Armstrong, 31 Ark. 580; Ready v. Haur, 46 Miss. 422; Tucker v. Field, 51 Miss. 191; Pickett v. Buckner, 45 Miss. 226; Culber v. Harper, 27 Ohio, 464; Perkins v. McDonald, 3 Baxt. (Tenn.) 343; Tarpley v. Gunnaway, 2 Coldw. (Tenn.) 245; James v. Fields, 5 Heisk. (Tenn.) 304.

For even when she joins in the mortgage she releases her rights only as to the mortgagee, and as to him only to the extent that the husband releases his. Young v. Tarbell, 37 Me. 509; Pickett v. Buckner. 45 Miss. 226; Bell v. Mayor, 5 Paige (N. Y.), 49; Bank v. Arnold, 5 Paige (N. Y.), 38; Matthewson v. Smith,

I R. I. 22.

2. Van Duyne v. Thayre, 14 Wend. (N. Y.) 233.

Unless the property has been redeemed, or sold under the mortgage. Bell v. Mayor, 10 Paige (N. Y.), 49; Smith v. Jackson, 2 Edw. (N. Y.) 28.

3. Mantz v. Buchanan, 1 Md. Ch. 202; Boynton v. Sawyer, 35 Ala. 497; Morgan v. Sackett, 57 Ind. 580; Perry v. Barton, 25 Ind. 274; Hunsucker v. Smith, 49 Ind. 114; Harrow v. Johnson, 3 Metc. (Ky.) 578; King v. King, 100 Mass. 224; Rossiter v. Cossitt, 15 N. H. 38; Holmes v. Holmes, 3 Paige (N. Y.), 363; Warner v. Van Alstyne, 3 Paige (N. Y.), 513; Campvan Alstyne, 3 Falge (N. Y.), 513; Campbell v. Murphy, 2 Jones Eq. (N. Car.) 357; Creecy v. Pearce, 69 N. Car. 67; Matthewson v. Smith, 1 R. I. 22: Henegan v. Harblee, 10 Rich. Eq. (S. Car.) 285; Keckley v. Keckley, 2 Hill Ch. (S. Car.) 250; Rossiter v. Cossitt, 15 N. H.

4. Hunsucker v. Smith, 49 N. H. 114;

Perry v. Barton. 25 Ind. 274. 5. Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482; Cox v. Garst, 105 Ill. 342; Watson v. Clendenin, 6 Blackf. (Ind.) 447; Mantz v. Buchanan, 1 Md. Ch. 202; Bank v. Owens, 31 Md. 320; Carll v. Butman. 7 Me. 102; Simonton v. Gray, 34 Me 50; Moore v. Rollins, 45 Me. 493; Barbour v. Barbour, 46 Me. 9; Wilkins v. French, 20 Me. 111; Hatch v. Palmer, 58 Me. 271; v. Lester, 6 Gray (Mass.), 314; Eaton v. Simonds, 14 Pick. (Mass.), 98; McCabe v. Bellows, 7 Gray (Mass.), 148; Niles v. Nye, 13 Metc. (Mass.), 122, 135; Newton v. Cook, 4 Gray (Mass.), 46; Atkinson v. Stewart, 46 Mo. 510; Atkinson v. Angert, 46 Mo. 575; Seveany v. Mallory, 62 Mo. v. Hersey, 31 N. H. 317; Woods v. Wallace, 30 N. H. 384; Hastings v. Stevens, 29 N. H. 564; Wheeler v. Morris, 2 Bosw. (N. Y.) 524; Bell v. Mayor, 10 Paige (N. Y.), 40; House v. House, 10 Paige (N. Y.), 158; Creecy v. Pearce, 60 N. Car. 67; Fox v. Pratt, 27 Ohio St. 512; Wheatley v. Calhoun, 12 Leigh (Va.), 264; s. c., 37 Am. Dec. 654.

dower without any contribution. The widow's share for contribution is the interest on one third the amount paid for redemption

during her life or the equivalent thereof.2

The widow may herself redeem, but she must pay the whole debt, unless the mortgagee will accept a contribution and release her dower interest; 3 this is important, because if she does pay the whole it is doubtful whether she can require contribution from those holding under her husband.4

If the mortgagee buys in the equity of redemption, or if the holder of the equity buys in the mortgage, 6 though a merger is

1. Washb. Real Prop. 186, § 21; Eaton v. Simonds, 14 Pick. (Mass.) 98; Atkinson v. Stewart, 46 Mo. 510; Ketchum v. Shaw, 28 Ohio St. 503. But see I Scribner Dow. 535; Barbour v. Barbour, 46 Me. o; Newton v. Cook, 4 Gray (Mass.), 46; Pynchon v. Lester, 6 Gray (Mass.),

2. Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 493; Greenbaum v. Austrian, 70 Y.) 482, 493; Greenbaum v. Austrian, 70 Ill. 591; Bank v. Owens, 31 Md. 320; Gibson v. Crehore, 5 Pick. (Mass.) 146; Cass v. Martin, 6 N. H. 25; Rossiter v. Cossitt, 15 N. H. 38; Clough v. Elliott, 23 N. H. 182; Woods v. Wallace, 30 N. H. 384; Hartshorne v. Hartshorne, 2 N. J. Eq. 349; Evartson v. Tappen, 5 Johns. Ch. (N Y.) 482, 493; Bell v. Mayor, 10 Paige (N. Y.), 49, 71; House v. House, 10 Paige (N. Y.), 158; Ross v. Boardman, 22 Hun (N. Y.), 527.

3. The widow has herself the right to redeem. Whitcomb v. Sutherland, 18 Ill. 578; Lamb v. Montague, 112 Mass. 352; Woods v. Wallace, 30 N. H. 384; Wheeler v. Morris, 2 Bosw. (N. Y.) 524; Robinson v. Shacklett. 29 Gratt. (Va) 99. Merchants, 15 Ala. 810; McMahon v. Russell, 17 Fla. 698; Hanover v. Johnson, 3 Metc. (Ky.) 578; Gage v. Ward, 25 Me. 101; Peabody v. Patten, 2 Pick. 25 Me. 101; Peabody v. Patten, 2 Pick. (Mass.) 517; Snyder v. Snyder, 6 Mich. 470; Furman v. Clark, 11 N. J. Eq. 135; Cass v. Martin, 6 N. H. 25; Van Duyne v. Thayre. 14 Wend. (N. Y.) 233; s. c., 19 Wend. (N. Y.) 162; Ketchum v. Shaw, 28 Ohio St. 503; Reed v. Morrison, 12 S. & R. (Pa.) 18; Hennegan v. Harlleg. Rich. Eq. (S. Car.) 285; Heth v. Cocke, I Rand. 341; Danforth v. Smith, 23 Vt. 247. But she must pay the whole debt. McCabe v. Bellows, 7 Gray (Mass.), 148; s. p., McMahon v. Russell, 17 Fla. 608; Kinnebrew v. McWharter, 61 Ga. 33; Mc-Mahan v. Kimball, 3 Blackf. (Ind.) 1; Watson v. Clendenin, 6 Blackf. (Ind.) 447; Gage v. Ward, 25 Me. 101; Campbell v. Knights, 24 Me. 332; s. c., 45 Am. Dec. 107, Wing v. Ayer, 53 Me. 138; Purdy

v. Purdy, 3 Md. Ch. 537; Gibson v. Crehore, 5 Pick. (Mass.) 135; Messiter v. Wright, 13 Pick. (Mass.) 151; Sneed v. Wood, 11 Metc. (Mass.) 566; Brown v. Lapham. 3 Cush. (Mass.) 551; Rossiter v. Cash. Mass.) 151; Mass. Lapham, 3 Cush. (Mass.) 551, Nossici v. Cossitt, 15 N. H. 38; Bell v. Mayor, 10 Paige (N. Y.), 49; Van Duyne v. Thayer, 14 Wend. (N. Y.) 233; s. c., 19 Wend. (N. Y.) 162; Wheatley v. Calhoun, 12 Leigh (Va.), 264; s. c., 37 Am. Dec. 654. Unless the mortgagee agrees to accept a proportion thereof, and to release the mortgage only as to her dower lands. Gibson v. Crehore, 5 Pick. (Mass.) 135.

She may redeem pro tanto, and have ower. Kenyon v. Segar, 14 R. I. 490.

4. I Scribner Dow. 498, 499; Pickett v. Buckner, 45 Miss. 226, 246; McMahan v. Kimball, 3 Blackf. (Ind.) I, 12; Carll v. Butman, 7 Me. 102; Gage v. Ward, 25 Me. 101; Wilkins v. French, 20 Me. 111; Gibson v. Crehore, 5 Pick. (Mass.) 146, 152; Woods v. Wallace, 30 N. H. 384; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482; Bell v. Mayor, 10 Paige (N. Y.), 49.

5. Hitchcock v. Harrington, 6 Johns. (N. Y.) 290; s. c., 5 Am. Dec. 229; Dewal (N. Y.) 290; s. c., 5 Am. Dec. 229; Dewal v. Febiger, I Cinn. App. 268; Denton v. Harris, 2 Mason (U. S.), 531, 539; Popkin v. Bumpstead. 8 Mass. 491; s. c., 5 Am. Dec. 113; Thompson v. Boyd, 22 N. J. 513; s. c., 21 N. J. 58; Coates v. Cheever, I Cow. (N. Y.) 463, 479; Collins v. Torry, 7 Johns. (N. Y.) 278; s. c., 5 Am. Dec. 273; Campbell v. Knights, 24 Me. 332; s. c., 45 Am. Dec. 107; Van Vronker v. Eastman, 7 Metc. (Mass.) 157, Snyder v. Snyder, 6 Mich. 470; Woods v. Snyder v. Snyder, o Mich. 470; Woods v. Wallace, 30 N. H. 384; James v. Morey, 2 Cow. (N. Y.) 246, 285, 303; s. c., 14 Am. Dec. 475; Van Duyne v. Thayre, 19 Wend, (N. Y.) 162, 171.

6. Brown v. Lapham, 3 Cush. (Mass.) 531, 557; Woods v. Wallace, 30 N. H. 384; Hartshorne v. Hartshorne, 2 N. J.

Eq. 349, 359. Regarded as assignee of mortgagee: Carll v. Butman, 7 Me. 102; McCable v. Swap. 14 Allen (Mass.), 188; Gibson v. Crehore, 5 Pick. (Mass.) 146; Russell v. Austin, 1 Paige (N. Y.), 192. thereby created, as far as the widow and dower are concerned it is treated as a redemption.

If the husband, or any one for him, pays off the mortgage, there

is dower as if no mortgage ever existed.1

Second, as to Foreclosure.—If the mortgage is foreclosed during coverture the land is turned into personalty under a lien paramount to dower, and dower is gone.2 If the mortgage has been foreclosed after the husband's death, or the fund has not been distributed at that time, the widow has dower in the surplus, and if there is no surplus, dower is gone.3 Foreclosure destroys all the widow's rights in the property mortgaged,4 but the widow should be made a party to the suit.5

(7) Dower in Property Not Fully Paid for.—As a general rule, every kind of lien for the purchase-money of land is superior to a wife's right of dower therein.6 If a vendor retains the legal title to the land as security, this is superior to dower: 7 and so is his

1. Carter v. Goodin, 3 Ohio St. 75; Hatch v. Palmer, 58 Me. 271; Brown v. Lapham, 3 Cush. (Mass.) 551; Eaton v. Simonds, 14 Pick. (Mass.) 98; Bolton v. Ballard, 13 Mass. 227; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 493; Ketchum v. Shaw, 28 Ohio St. 503.

2. Dean v. Phillips, 17 Ind. 406; New-2. Dean v. Finings, 17 Ind. 400; New-hall v. Lynn, 101 Mass. 428; s. c., 3 Am. Rep. 387: Frost v. Peacock, 4 Edw. Ch. (N. Y.) 678, 695; Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452; Bell v. Mayor, 5 Paige (N. Y.), 49, 55; State v. Hinton, 21 Ohio St. 509; Folsom v. Rhodes, 22

Ohio St. 435.

But some courts have held that, on account of her inchoate right, the wife must be a party to the foreclosure suit, and that if there is a surplus, dower therein will be set aside and kept for her. Wheeler v. Morris, 2 Bosw. (N. Y.) 524, 535; Vreeland v. Jacobus, 2 Bosw. (N. Y.) 524, 535; Denton v. Nanny, 8 Barb. (N. Y.) 618; Mills v. Van Voorhies, 21 N. Y. 112; Unger v. Leiter, 32 Ohio St. 210; Ketchum v. Shaw, 28 Ohio St. 503. Contra: Pritts v. Aldrich, 11 Allen (Mass.), 39; Reddick v. Aldrich, 11 Allen (Mass.), 39; Reddick v. Walsh, 15 Mo. 519, 538; Lamb v. Montague, 112 Mass. 352; Davis v. Wetherell, 13 Allen (Mass.), 60; Robinson v. Shacklett, 29 Gratt. (Va.) 99; 107.
3. Reiff v. Horst, 55 Md. 42; s. p., Cornog v. Cornog, 3 Del. Ch. 407; Harrow v. Johnson, 3 Metc. (Ky.) 578; Jennison v. Hapgood, 14 Pick. (Mass.) 345; s. c. 10 Am Dec. 258; Rutherford v.

nison v. Hapgood, 14 Pick. (Mass.) 345; s. c., 19 Am. Dec. 258; Rutherford v. Niunce, Walk. (Miss.) 370; Tucker v. Field, 51 Miss. 191; Van Doren v. Dickerson, 33 N. J. Eq. 388; Henchman v. Stiles, 9 N. J. Eq. 454; Matthews v. Duryea, 45 Barb. (N. Y.) 69; Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452; Hawley

v. Bradford, 9 Paige (N. Y.), 201; s. c., 37 Am. Dec. 390; Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Frost v. Peacock, 4 Edw. Ch. (N. Y.) 678, 695; Nothingham v. Nothingham, r Cart. 527; Elmigham Lockwood, 57 N. Y. 322; Fox v. Pratt, 27 Ohio St. 512; Culver v. Harper, 27 Ohio St. 464; State v. Hinton, 12 Ohio St. 509; Baker v. Fetters, 16 Ohio St. 596; Reed v. Morrison, 12 S. & R. (Pa.) 18; Chaffee v. Franklin, 11 R. I. 578; Brown v. Duncan, 4 McCord (S. Car.), 346; Seith v. Trapier, I Bail. Ch. (S. Car.) 63; Tibbetts v. Langley, 12 S. Car. 465; 63; Hobetts v. Langley, 12 S. Car. 405;
Boyd v. Martin, 9 Heisk. (Tenn.) 382;
Hollis v. Hollis, 4 Baxt. (Tenn.) 524;
Boyer v. Boyer, 1 Coldw. (Tenn.) 12;
Robinson v. Shacklett, 29 Gratt. (Va.) 99;
Thompson v. Lyman, 28 Wis. 266.
4. Chew v. Farmers, 9 Gill (Md.), 361,
274; Markey Brokeser, 1 Md. Ch. 2001.

374; Mantz v. Buchanan, 1 Md. Ch. 202; Hartshorne v. Hartshorne, 2 N. J. Eq. 349, 358; Matthews v. Duryea, 45 Barb. (N. Y.) 69; Smith v. Jackson, 2 Edw. (N. Y.) 28. 35.

5. Denton v. Nanny, 8 Barb. (N. Y.) 618; Mills v. Van Voorhies, 20 N. Y. 412; s. c., 23 Barb. (N. Y.) 125; Bell v. Mayor, 10 Paige (N. Y.), 49, 56; Ross v. Boardman, 22 Hun (N. Y.), 527; Ketchum v. Shaw, 28 Ohio St. 503.

6. I Scribner Dow. 555; I Washb. Real

Prop. 165, § 19. 7. Miller v. Stump, 3 Gill (Md.), 30., Thorn v. Ingram, 25 Ark. 52; Birnie v. Main, 29 Ark. 591; Clements v. Bostwick, 38 Ga. 1; Day v. Solomon, 40 Ga. 32; Malin v. Coult, 4 Ind. 535; Crane v. Palmer, 8 Blackf. (Ind.) 120; Thomas v. Hanson, 44 Iowa, 651; Barnes v. Gay, 7 Iowa, 26; Naz. Lit. v. Lowe, 1 B. Mon. (Ky.) 257; Willett v. Beatty, 12 B. Mon. equitable lien superior, in places where such liens are recognized.2 though he has parted with the legal title: 3 unless the vendor has taken other security, in which case the vendor's lien is, in the ab-

sence of express agreement, gone.4

If the vendor takes a mortgage for the purchase-money, it is almost universally admitted that such mortgage is superior to dower, though not signed by the wife. And if a third party lends the purchaser the purchase-money and takes a mortgage therefor, he has the same rights superior to dower that the vendor himself would have had if the mortgage had been taken by the vendor. It is essential that the payment of the purchase-money

(Ky.) 172; McClure v. Harris, 12 B. Mon. (Ky.) 261; Glenn v. Clark, 53 Md. 580; Walton v. Hargroves, 42 Miss. 18; Cocke v. Bailey, 42 Miss. 81; Warner v. Van Alstyne, 3 Paige (N. Y.), 513; Kirby v. Dalton, 1 Dev. Ch. (N. Car.) 195; Fire-stone v. Firestone, 2 Ohio St. 415; Pritts v. Ritchey, 29 Pa. St. 71: Boyd v. Martin, 9 Heisk. (Tenn.) 382; Wilson v. Davisson, 2 Rob. (Va.) 384.

1. Hugunin v. Cochrane, 51 Ill. 302,

305; s. c., 2 Am. Rep. 303.

2. It is adopted in Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Mississippi, Missouri, New York, Ohio, Tennessee, Texas, and Virginia. It is rejected in Maine, North Carolina, Pennsylvania, and Vermont. Its exist-ence is doubtful in Connecticut, Delaware, and Massachusetts. I Scribner Dow. 552, n. 2; I Washb. Real Prop. 508, n.; I Lea.

Cas. in Eq., Hare & Wal., n. 481.

3. Brooks v. Woods, 40 Ala. 538;
Thorn v. Ingram, 25 Ark. 52; Meigs v. Dimock, 6 Conn. 458; Slaughter v. Culpepper, 44 Ga 319; Fletcher v. Holms, 32 Ind. 437; Carver v. Grove, 68 Ind. 371; Talbott v. Armstrong, 14 Ind. 254; 73/1; 141001 v. Armstong, 14 1101, 254, Noyes v. Kramer, 54 Iowa. 22; Thomas v. Hanson, 44 Iowa. 651; McClure v. Harris, 12 B. Mon. (Ky.) 261; King v. Ayer, 53 Me. 138; Price v. Hobbs. 47 Md. 359; Rawling v. Lowndes, 34 Md. 639; Smith v. McCartney, 119 Mass. 519; Bis-land v. Hewett, 11 Sm. & M. (Miss.) 164; Cocke v. Bailey, 42 Miss. 81; Duke v. Brandt, 51 Mo. 221; Warner v. Van Alstyne, 3 Paige (N. Y.), 513; Brackett v. Baum, 50 N. Y. 8; Culver v. Harper, 27 Ohio St. 464; Fox v. Pratt, 27 Ohio St. 512; Calmes v. McCracken, 8 S. Car. 87; Williams v. Woods, I Humph. (Tenn.) 408; Blair v. Thompson, 11 Gratt. (Va.) 441; George v. Cooper, 15 W.

4. McClure v. Harris, 12 B. Mon. (Ky.) 261; Blair v. Thompson, 11 Gratt. (Va.) 446; Meigs v. Dimock, 6 Conn. 458;

Clements v. Bostwick, 38 Ga. 1; Hart v. Logan, 49 Mo. 47; Hollis v. Hollis, 4 Baxt. (Tenn.) 524; Gregg v. Jones, 5 Heisk. (Tenn.) 443; s. c., 1 Lea. Cas. Eq. 262-281.

So that, even if he obtains judgment against the purchaser for the purchasemoney, he thereby loses his equitable lien, and the judgment is secondary to the dower. McArthur v. Porter, 1 Ohio, 91; Stewart v. Beard, 4 Md. Ch. 319.

5. Maybury v. Brien, 15 Pet. (U. S.) 21, 38; s. p., Eslava v. Lepretre, 21 Ala. 504, 528; s. c., 56 Am. Dec. 266; Baker Me. 489; Gage v. Ward, 25 Me. 101, 130; Gammon v. Freeman, 31 Me. 240; Glenn v. Clark, 53 Md. 580, 604; Heinsler v. Nickum, 38 Md. 270; Rawlings v. Lowndes, 34 Md. 639; Smith v. McCartney, 119 Mass. 519; King v. Stetson, 11 Allen (Mass.), 407; Pendleton v. Pomeroy, 11 Allen (Mass.), 501; Fontaine v. Boatmen's, 57 Mo. 552; Bullard v. Bowers, 10 N. H. 500; Griggs v. Smith, 12 N. I. 22; Kittle v. Van Dyck 1 Sandi ers, 10 N. H. 500; Griggs v. Smith, 12 N. J. L. 22; Kittle v. Van Dyck, 1 Sandf. Ch. (N. Y.) 76; Stow v. Tifft, 15 Johns. (N. Y.) 459; s. c., 8 Am. Dec. 266; Gowan v. Smith, 44 Barb. (N. Y.) 232, 239; Welsh v. Buckins, 9 Ohio St. 331; Gilliam v. Moore, 4 Leigh (Va.), 30; s. c., 24 Am. Dec. 204; Wheatley v. Calhoun, 12 Alli. Bec. 204; Wheatey v. Cambuli. 12. Leigh (Va.), 264, 274; s. c., 37 Am. Dec. 654; George v. Cooper, 15 W. Va. 666; Jones v. Parker, 31 Wis. 218. Contra : Slaughter v. Culpepper, 44 Ga. 319; Mc-Clure v. Harris, 12 B. Mon. (Ky.) 261; Reed v. Morrison, 12 S. & R. (Pa.) 18. 6. Boynton v. Sawyer, 33 Ala. 499;

Thomas v. Hanson, 44 Iowa, 651; Moore w. Rollins, 45 Me. 493; Glenn v. Clark, 53 Md. 580, 604; McCauley v. Grimes. 2 Gill & J. (Md.) 418; s. c., 20 Am. Dec. 484; King v. Stetson, 11 Allen (Mass.) 407; McGowan v. Smith, 44 Barb. (N. Y.) 232; Welsh v. Buckins, 9 Ohio St. 331; Jones v. Parker, 51 Wis. 218. Cf. Spencer

v. Lee, 10 W. Va. 179, 183.

and the giving of the mortgage should be part of one and the same transaction.1

Whether the vendor reserves his lien or takes a mortgage, very nearly the same rights result, and the rules applicable to dower in mortgaged property, the mortgage being superior to dower, apply.2

IV. Incidents of Dower.—(I) Incidents of Inchoate Dower.—Dower is a mere inchoate right 3 from the time of the marriage, or of the vesting of the property if the property were acquired after the marriage, until the death of the husband, at common law;4 or under statutes, until the time of divorce, the husband's bankruptcy, etc.⁵ It is a wife's right to such part of her husband's lands as the law at the time of his death, or of the alienation if he has aliened it,7 may allow her. It is not a vested right,8 and the legislature may change it; 9 it is a contingent right, 10 and does not rise to the dignity of an estate.11

But inchoate dower is a valuable right, 12 and has many of the

274; s. c., 37 Am. Dec. 654; Gilliam v. Moore, 4 Leigh (Va.), 30; s. c., 24 Am.

Dec. 704.

2. Thus, the wife has dower against all persons, except the mortgagor or vendor, or assigns. Boynton v. Sawyer, 35 Ala. 497; Rawlings v. Lowndes, 34 Md. 639; Whitehead v. Middleton, 6 How. (Miss.) 692. She may have dower till the claim of such parties is asserted. (Miss.) 692. She may have dower in the claim of such parties is asserted. Thompson v. Thompson, I Jones (N. Car.), 430; Tucker v. Field, 51 Miss. 19; Pickett v. Buckner, 45 Miss. 226; Tarpley v. Gunnaway, 2 Coldw. (Tenn.) 245; James v. Fields, 5 Heisk. (Tenn.) 394; Perkins v. McDonald, 3 Baxt. (Tenn.) 343. If the lien is discharged by payv. Smith, 25 W. Va. 579; Bullard v. Bowers, 10 N. H. 500. After her husband's death she may call on his personal representatives to satisfy the lien, or have the other realty exhausted for this purpose. Warner v. Van Alstyne, 3 Paige (N. Y.), 513; Caroon v. Cooper, 63 N. Car. 386. If the lien is enforced during her husband's life, her dower is gone; if after his death, she has dower in the surplus. Brooks v. Woods, 40 in the surplus. Brooks v. Woods, 40 Ala. 538; Willett v. Beatty, 12 B. Mon. (Ky.) 172; Warner v. Van Alstyne, 3 Paige (N. V.), 513; Thompson v. Thompson. I Jones (N. Car.), 430; Klutts v. Klutts, 5 Jones Eq. (N. Car.) 80; Williams v. Woods, I Humph. (Tenn.) 408. In any case the purchaser takes the land

1. Gage v. Ward, 25 Me. 101; Rawlings v. Lowndes, 34 Md. 639; Smith v. 26; Naz. Lit. v. Lowe, I B. Mon. (Ky.)
McCartney, 119 Mass. 519; King v. Stet257; Bisland v. Hewett, II Sm. & M.
son, II Allen (Mass.), 407; Fontaine v.
(Miss.) 164; Riddicle v. Walsh, 15 Mo.
Boatmen's, 57 Mo. 552; Stow v. Tifft, 15
Johns. (N. Y.) 459; s. c., 8 Am. Dec. 266; (Tenn.) 408; Wilson v. Davisson, 2 Rob.
Wheatley v. Calhoun, 12 Leigh (Va.), 264, (Va.) 384. But the wife must be made a party to the proceeding. McArthur v. party to the proceeding. McArinur v. Porter, 1 Ohio, 99; Willett v. Beatty, 12 B. Mon. (Ky.) 172; Smith v. Gardner, 42 Barb. (N. Y.) 357. The vendor's lien is on the land, not on the rents and profits. Wilson v. Ewing, 79 Ky. 549. The husband may reconvey the land to the vendor in satisfaction of the lien, provided that this is not done to defeat the

wife's rights. Hugunin v. Cochrane, 51
Ill. 302; s. c., 2 Am. Rep. 303.
3. Buzick v. Buzick, 42 Iowa, 259.
4. Wait v. Wait, 4 N. Y. 95; Price v.
Hobbs, 47 Md. 359, 381; Reiff v. Horst, 55 Md. 42.

5. Wright v. Gelvin, 85 Ind. 128; Rob-

erts v. Shroyer, 68 Ind. 64.

6. Guerin v. Moore, 25 Minn. 462.

7. O'Ferralls v. Simplot, 4 Iowa, 381.

8. Simon v. Canady, 53 N. Y. 298; s.

c., 3 Am. Rep. 523.
9. Thornbury v. Thornbury, 18 W. Va.

But not so as to enlarge it against one who has purchased the land from the husband, or to place it ahead of a prior incumbrance. Lucas v. Sawyer, 17 Iowa, 517; Helphinstine v. Meredith, 84 Ind. 1. 10. Johnson v. Vandyke, 6 McLean

(U. S.), 422, 441. 11. Simon v. Canady, 53 N. Y. 293, 303; s. c., 13 Am. Rep. 523; Moore v. Mayor, 8 N. Y. 110; s. c., 59 Am. Dec. 473; State v. Wincroft, 76 N. Car. 38.

12. Bullard v. Briggs, 7 Pick (Mass.) 533; s. c., 19 Am. Dec. 292; Simon v.

incidents of property.1 Though some cases say it has no present value,2 others say that its present value can be computed; 3 it is a valuable consideration for a conveyance to a wife, and she may maintain an action for its protection, or file a bill for the redemption of a mortgage covering it; 6 and in some States she must be a party to any suit affecting it. 7 Still it cannot be bargained and sold,8 but only released to the tenant;9 nor can it be taken in execution: 10 nor can the Statute of Limitations apply to it. 11

Though it has at times been questioned whether inchoate dower is an incumbrance, 12 that it is, is now settled; 13 it comes within a covenant against incumbrances,14 and is such an incumbrance as would justify a vendee in refusing to carry out his con-

tract.15

24 Am. Rep. 240. 2. Reiff v. Horst, 55 Md. 42, 49; Moore v. Mayor, 8 N. Y. 110; s. c., 59 Am. Dec.

3. Buzick v. Buzick, 42 Iowa, 259; Jackson v. Edwards, 7 Paige (N. Y.), 386,

4. Buzick v. Buzick, 42 Iowa, 259; Bullard v. Briggs, 7 Pick. (Mass.) 533, 539; s. c., 19 Am. Dec. 292; Reiff v. Horst,

5. C., 19 Am. Dec. 292, Rem v. 11010, 55 Md. 42, 49.

5. Buzick v. Buzick, 42 Iowa, 259; Petty v. Petty, 4 B. Mon. (Ky.) 215; s. c., 39 Am. Dec. 501; Burns v. Lynde, 6 Allen (Mass.), 305; Simon v. Canady, 53 N. Y. 298; s. c., 13 Am. Rep. 323; Russell v. Taylor, 41 Mich. 702.

6. Davis v. Wetherell, 13 Allen (Mass.),

7. Greiner v. Klein, 28 Mich. 12. Contra: Pritts v. Aldrich, 11 Allen (Mass.), 39. Cf. Vreeland v. Jacobus, 19 N. J. Éq. 231.

8. McKee v. Keynolds, 26 Iowa. 578; Reiff v. Horst, 55 Md. 42; Davis v. Wetherell, 13 Allen (Mass.), 60; Moore v. Mayor, 8 N. Y. 110; s. c., 59 Am.

Dec. 473.
9. Moore v. Mayor, 8 N. Y. 110. See also Reiff v. Horst, 55 Md. 42; Miller v. Crawford, 32 Gratt. (Va.) 277.

10. Davis v. Wetherell, 13 Allen (Mass.),

11. Davis v. Wetherell, 13 Allen (Mass.),

12. Powell v. Monson, 3 Mass. 347, 355;

12. Powell v. Molisoli, 3 Mass. 347,355; Fuller v. Wright, 18 Pick. (Mass.) 405; Nyce v. Oberts, 17 Ohio, 71.

18. Blodget v. Brent, 3 Cranch (C. C.), 394; Barnett v. Gaines. 8 Ala. 275; s. p., Duvall v. Craig, 2 Wheat. (U. S.) 45; Parks v. Brooks, 16 Ala. 529; Shelton v. Duvall v. Craig, 2 Wheat. (U. S.) 45; St. 595; Johnson v. Nyce, 17 Ohio, 66; Parks v. Brooks, 16 Ala. 529; Shelton v. s. c., 49 Am. Dec. 444; Tuite v. Miller, 5 Carroll, 16 Ala. 148; Springle v. Shields, 17 West. L. J. 413.

Canady, 53 N. Y. 293; Miller v. Craw- Ala. 296; Vance v. Hooper, 11 Ala. 552; ford, 32 Gratt. (Va.) 277. Beavers v. Smith, 11 Ala. 20; McLemore 1. Buzick v. Buzick, 42 Iowa, 259; s. c., v. Malison, 20 Ala. 137; Thrasher v. Beavers v. Smith, 11 Ala. 20; McLemore v. Malison, 20 Ala. 137; Thrasher v. Pinkard, 34 Ala. 616; Smith v. Ackerman, 5 Blackf. (Ind.) 542; Whisler v. Hicks, 5 Blackf. (Ind.) 100; s. c., 33 Am. Dec. 454; Clark v. Richardson, 32 Iowa, 399; Porter v. Noyes, 26 Me. 26; s. c.. 11 Am. Dec. 30; Post v. Campan, 42 Mich. 95; Bigelow v. Hubbard. 97 Mass. 195; Prescott v. Trueman, 4 Mass. 627; s. c., 3 Am. Dec. 246; Greenwood v. Lyon, 10 Sm. & M. (Miss.) 615; s. c., 43 Lyon, 10 Sm. & M. (Miss.) 615; s. c., 43 Am. Dec. 775; Russ v. Perry, 49 N. H. 517; Fitts v. Hoitt, 17 N. H. 530; Carter v. Denman, 23 N. J. 260; Jones v. Gar-diner, 10 Johns. (N. Y.) 266; Fill v. Res-segieu, 17 Barb. (N. Y.) 162; Stevens v. Hunt, 15 Barb. (N. Y.) 17; Ketchum v. Evertson, 13 Johns. (N. Y.) 359; s. c., 7 Am. Dec. 384; Bitner v. Brough, 11 Pa. St. 137. 14. Shearer v. Ranger, 22 Pick. (Mass.)

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15. Barnett v. Gaines, 8 Ala. 373; s.p., Spinger v. Shields, 17 Ala. 296; Porter v. Noyes, 2 Me. 26; s. c., 11 Am. Dec. 30; Fuller v. Wright, 18 Pick. (Miss.) 405; Greenwood v. Lyon, 10 Sm. & M. (Miss.) 615; s. c., 43 Am. Dec. 775; Beardslee v. Underhill, 37 N. J. L. 310; Jones v. Gardiner, 10 Johns. (N. Y.) 266; Bitner v. Brough, 11 Pa. St. 137. But see Nyce v. Oberts, 17 Ohio, 71.

But its existence is not a breach of covenant of seizing. Lewis v. Lewis, 5 Rich. (S. Car.) 12. Nor is there a breach of covenant not to set up dower, or for quiet enjoyment, or of general warranty, until dower has been claimed and set off. Hudson v. Steere, 9 R. I. 106; Lewis v. Lewis, 5 Rich. (S. Car.) 12; Leary v. Dunham, 4 G. 393; Wilson v. Taylor, 9 Ohio

(2) Incidents of Consummate Dower Before Assignment.—At common law, on the husband's death, and under statutes, on divorce, the husband's bankruptcy, etc., dower is consummate.1 is a vested right,2 which the legislature cannot take away.3 Tt is not an estate, 4 but a mere right of action growing out of land, 5 —the right to have dower assigned. The widow is not seized of the land in which she has such right; she cannot hold possession of such property; she has no right of entry as against the tenant; she cannot maintain ejectment; sue for trespass 11 or proceed for partition; 12 she cannot oppose the entry by the husband's heirs: 13 and in many States she need not be made a party to a proceeding against the land. 14 She cannot bargain and sell it at law; 15

Measure of Damages .- Before assignment only nominal damages can be claimed in any case. Runnels v. Webber, 59 Me. 488; Harrington v. Murphy, 100 Mass. 200

Quieting Title.-A suit may be maintained for quieting the title of land in which inchoate dower is claimed. Mad-

igan v. Welsh, 22 Wis. 501.

1. Reiff v. Horst, 25 Md. 42; Wright v. Gebin, 85 Ind. 128; Price v. Hobbs, 47 Md. 359, 381.

2. Thornbury v. Thornbury, 18 W. Va.

3. Burke v. Barron, 8 Iowa, 132.

4. Blodget v. Brent, 3 Cranch (C. C.), 391; Hilleary v. Hilleary, 26 Md. 274, 289; Hoxsie v. Ellis, 4 R. I. 123; Weaver v. Sturtevant, 12 R. I. 537; Whyte v. v. Sturtevant, 12 R. 1. 537; Whyte v. Mayor, 2 Swan (Tenn.), 364; s. p., Smith v. Smith, 13 Ala. 329; Sharpley v. Jones, 5 Harr. (Del.) 373; Hoots v. Graham, 23 Ill. 81; Reynolds v. McCurry, 100 Ill. 356; Taylor v. McCrackin, 2 Blackf. (Ind.) 260; Carey v. Buntin, 4 Bibb (Ky.), Lobdell v. Hayes, 12 Gray (Mass.), 236; Raynor v. Lee, 20 Mich. 384; McClanahan v. Porter, 10 Mo. 746; Waller v. Mardus, 29 Mo. 25; Johnson v. Morse, 20 N. H. 48; Bleecker v. Hennion, 23 N. J. Eq. 123; Wade v. Miller, 32 N. J. 296; Branson v. Yancy, I Dev. Eq. (N. Car.) 77; Scott v. Howard, 3 Barb. (N. Y.) 319; Jones v. Hollopeter, 10 S. & R. (Pa.) 326; Weaver v. Sturtevant. 12 R. I. 537; Lamar v. Scott, 4 Rich. (S. Car.) 516; Guthrie v. Owen, 10 Yerg. (Tenn.) 339; Chapman v. Armistead, 4 Munf. (Va.)

5. Bogardus v. Parker, 7 How. Pr. (N. Y.) 303; Farnsworth v. Cole, 42 Wis. 403.
5. Bogardus v. Parker, 7 How. Pr. (N. Y.) 303; Pennington v. Yell, 1 Ark. 212, 239; s. c., 52 Am. Dec. 262; Summers v. Babb, 13 Ill. 483; Hilleary v. Hilleary, 26 Md. 274, 289; Torry v. Minor, 1 Sm. & M. Ch. 489; Raynor v. Lee, 20 Mich. 384; Hoysia v. Filis L. R. L. 102; Wayner 384; Hoxsie v. Ellis, 4 R. I. 123; Weaver v. Sturtevant, 12 R. I. 537; Downs v. Allen. 10 Lea (Tenn.), 652, 668.

6. Stewart Husb. and Wife, § 283. 7. Hilleary v. Hilleary, 26 Md. 274, 289; Downs v. Allen, 10 Lea (Tenn.),

652, 668. 8. Hildreth v. Thompson, 16 Mass. 191. Except by the law of quarantine. Stew-

Except by the law of quarantine. Stewart Mar. and Div. § 459.

9. Sheaf v. O'Neal, 9 Mass. 13.

10. Doe v. Smith, 2 Car. & P. 430; s. c., 12 Eng. C. L. 205; Coles v. Coles, 15 Johns. (N. Y.) 310; s. c., 8 Am. Dec. 231; Bradshaw v. Callaghan. 5 Johns. (N. Y.) 80; s. c., 8 Johns. (N. Y.) 435.

11. Tuttle v. Burlington, 49 Iowa. 134.
12. Reynolds v. McCurry, 100 Ill. 356; Coles v. Coles, 15 Johns. (N. Y.) 319; s. c., 8 Am. Dec. 231; Thorn v. Adams. 2

c., 8 Am. Dec. 231; Thorn v. Adams, 2 Whart. (Pa.) 188.

13. Hildreth v. Thompson, 16 Mass. 191; Evans v. Webb, I Yeates (Pa.), 424; s. c.,

50 Am. Dec. 308.

14. Blodget v. Brent, 3 Cranch (C. C.), 394; Cavender v. Smith, 8 Iowa, 360; Stewart v. Chadwick, Iowa, 463; Postle-Stewart v. Chadwick, Iowa, 463; Postlewaite v. Howe, 3 Iowa, 365; Moody v. Seaman, 46 Mich. 74; Proctor v. Bigelow, 38 Mich. 282; McClurg v. Turner, 74 Mo. 45; Miller v. Talley, 48 Mo. 503; Haulenbeck v. Cronkright, 23 N. J. Eq. 407; Tanner v. Wiles, 1 Barb. (N. Y.) 560; Bradshaw v. Callaghan, 5 Johns. (N. Y.) 80; s. c., 8 Johns. (N. Y.) 425; Pringle v. Gaw, 5 S. & R. (Pa.) 536; Hoxsie v. Ellis, 4 R. I. 123.

15. Weaver v. Sturtevant, 12 R. I. 537.

15. Weaver v. Sturtevant, 12 R. I. 537, 540; s. p., Terry v. Purnell, 14 Fed. Rep. 807; Nelson v. Holly, 50 Ala. 3; Saltmarsh v. Smith, 32 Ala. 404; Wallace v. Hall, 19 Ala. 367; Powell v. Powell, 10 Ala. 900; Hunt v. Acre, 28 Ala. 580; Barber v. Williams, 74 Ala. 321; Reed v. Ash, 30 Ark. 775; Jacks v. Dyer, 31 Ark. 334; Carmall v. Wilson, 21 Ark. 62; Hoots v. Graham, 23 Ill. 81; Summers v. Babb, 13 Ill. 483; Metlock v. Lee, 9 nor can it be seized in execution by her creditors: 1 but she can transfer it in equity,2 and in equity it can be charged with her She cannot mortgage 4 or lease it. 5 but she can release it to the tenant: 6 and being sui juris, she can accept an award in its place. Tit is, however, an incumbrance, and an adverse claim

against the land.8

(3) Incidents of Consummate Dower After Assignment,—After assignment of dower and entry by the widow, she is seized of a freehold for her life,9 and her estate has generally the incidents of a conventional life estate. 10 She may alien her estate. 11 and it is liable for her debts; 12 she may lease it, and the back rent belongs to her representatives in case of her death. 13 She must pay the taxes 14 and charges 15 upon the property assigned to her for dower:

Ind. 298; Strong v. Bragg, 7 Blackf. (Ind.) 62; Houston v. Seeley, 27 Iowa, 183; Tucker v. Vance, 2 A. K. Marsh. (Ky.) 458; Johnson v. Shields, 32 Me. (Ky.) 458; Johnson v. Shields, 32 Me. 424; Rowe v. Johnson, 19 Me. 46; Hildreth v. Thompson, 16 Mass. 191; Leavitt v. Lamprey, 13 Pick. (Mass.) 382; s. c., 23 Am. Dec. 685; Jones v. Manby, 58 Mo. 559; Jackson v. Aspell, 20 Johns. (N. Y.) 411; Sutliff v. Forgey, 1 Cow. (N. Y.) 89, 96; Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167; s. c., 8 Am. Dec. 378; Cox v. Jagger, 2 Cow. (N. Y.) 638; s. c., 19 Am. Dec. 522; Douglass v. McCoy, 5 Ohio, 522; Miller v. Woodman, 14 Ohio, 518; Lamar v. Scott, 4 Rich. (S. Car.) 516; Thomas v. Simpson, 3 Pa. St. 60, 71.

Št. 60, 71.

1. Pennington v. Yell, II Ark. 212, 1. Pennington v. Yell, 11 Ark. 212, 239; s. c., 52 Am. Dec. 262; Summers v. Babb, 13 Ill. 483; Gorch v. Atkins, 14 Mass. 378; Moore v. Mayor, 8 N. Y. 110; s. c., 59 Am. Dec. 473; Sutliff v. Forgey, I Cow. (N. Y.) 89, 96; s. p., Wallace v. Hall, 19 Ala. 367; Newman v. Willetts, 48 Ill. 524; Hous v. Graham v. 21 Ill. 814 48 Ill. 534; Hoots v. Graham, 23 Ill. 81; Blair v. Harrison, 11 Ill. 384; Rausch v. Moore, 48 Iowa, 611; s. c., 30 Am. Rep. 412; Carey v. Buntlien, 4 Bibb (Ky.), 217; Petty v. Malin, 15 B. Mon. (Ky.) 591; Vasar v. Allen, 5 Me. 477; Wallace v. Smith, 1 Sm. & M. (Miss.) 220; Torrey v. Minor, I Sm. & M. Ch. (Miss.) 480; v. Minor, I Sm. & M. Ch. (Miss.) 480; Waller v. Mardus, 29 Mo. 55; Johnson v. Morse, 2 N. H. 48; Jackson v. Aspell, 20 Johns. (N. Y.) 411; Webb v. Boyle, 63 N. Car. 271; Garretson v. Brien, 3 Heisk. (Tenn.) 534. 2. Tompkins v. Fonda, 4 Paige (N. Y.),

448; s. p., Brown v. Meredith, 2 Keen, v. Bragg, 7 Blackf. (Ind.) 62; Maccubbin v. Cromwell, 2 Harr. & G. (Md.) 443; Torrey v. Minor, I Sm. & M. Ch. (Miss.) 489; Pope v. Mead, 99 N. Y. 201; Porter v. Everett, 7 Ired. Eq. (N. Car.) 152;

Wilson v. McLenaghan, I McMull. Eq. (S. Car.) 35. Contra: Saltmarsh v. Smith, 32 Ala. 404; Blair v. Harrison, 11 Ill. 384.

3. Davison v. Whittlesey, I McArthur (D. C.), 163; Stewart v. McMartin, 5 Barb. (N. Y.) 438; Tompkins v. Fonda, 4 Paige (N. Y.), 448; Payne v. Becker, 87 N. Y. 153; Boltz v. Stolz, 41 Ohio St. 540. Contra: Maxon v. Gray, 14 R. I.

4. Strong v. Bragg, 7 Blackf. (Ind.) 62. 5. Foster v. Gorton, 5 Pick. (Mass.) 185; s. p., Blair v. Harrison, 11 Ill. 384; Croude v. Ingraham, 13 Pick. (Mass.) 33; Hildreth v. Thompson, 16 Mass. 101.

6. Meek v. Chamberlain, 8 L. R. Q. B. D. 31; Matlock v. Lee, 9 Ind. 298; Summers v. Babb, 13 Ill. 483; Weaver v.

Sturtevant, 12 R. I. 537.

7. Furber v. Chamberlain, 28 N. H. 405; Cox v. Jagger, 2 Cow. (N. Y.) 638; Shotwell v. Sedam, 3 Ohio, 5.

8. Bensiat v. Murrin, 47 Mo. 537.

9. Whyte v. Mayor, 2 Swan (Tenn.),

364; Summers v. Babb, 13 Ill. 483.

10. Whyte v. Mayor, 2 Swan (Tenn.),

11. Summers v. Babb, 13 Ill, 483; Windham v. Portland, 4 Mass. 384; Matlock v. Lee, 9 Ind. 298; Stevens v. Stevens, 3 Dana (Ky.), 371; Child v. Smith, 1 Md. Ch. 483; Norwood v. Morrow, 4 Dev. & B. (N. Car.) 442.

Summers v. Babb, 13 Ill. 483.
 Stockwell v. Sargent, 37 Vt. 16.
 Graham v. Dunigan, 2 Bosw. (N.

Y.) 516; Varney v. Stevens, 22 Me. 331; Stetson v. Day, 51 Me. 434; Cains v. Chabert, 3 Edw. Ch. (N. Y.) 312; Bidwell v. Greenshield. 2 Abb. N. C. (N. Y.) 427; Whyte v. Mayor, 2 Swan (Tenn.), 364; Durkee v. Felton, 44 Wis. 467. 15. Peyton v. Jeffries, 50 Ill. 143; Whyte

v. Mayor, 2 Swan (Tenn.), 364; Haulenback v. Cronkright, 23 N. J. Eq. 407.

she is entitled to reasonable estovers: 1 she has a right to all crops growing on the property at the time of the assignment: 2 her representatives are entitled after her death to all crops sown by her; 3 on her death the estate ceases,4 and her representatives cannot claim betterments put on the property by her. 5 She takes the property subject to all liens paramount to dower, 6 but free from all others. Her possession is not adverse to the reversioner. In various ways she may forfeit her estate. as by waste: 10 but the strict common-law rule as to waste is not enforced in the United States, 11 and the widow may make any reasonable use of the dower estate.12

- (4) Dower as an Incumbrance—Priorities.—As has already been seen, even inchoate dower is an incumbrance or lien on the property subject thereto. 13 As a lien or incumbrance it is inferior to all liens attaching prior to the marriage or to the acquisition of the property by the husband, 14 and to all other liens attaching with the legally given consent of the wife; 15 but it is superior to all liens attaching during coverture without such consent; 16 except where statutes give the husband power to destroy dower by his sole act.17 As a general rule, if the property is sold under a superior lien during coverture, the realty is converted into personalty, and dower is lost; 18 but if sold after the husband's death, dower is awarded out of the surplus. 19 If a superior lien is satisfied, dower exists as if such superior lien had never been.20 Any sale under an inferior lien must be subject to dower.21
- 1. White v. Cutler, 17 Pick. (Mass.) 248. 2. Kain v. Fisher, 6 N. Y. 597; Street v. Saunders, 27 Ark. 554; Talbot v. Hill, 68 Ill. 106; Ralston v. Ralston, 3 G. Greene (Iowa), 533; Parker v. Parker, 17 Pick. (Mass.) 236; Budd v. Hiller, 27 N.

J. L. 43. 3. 2 Scribner Dow. 780.

- 6. 2 SCILDER DOW. 780.
 4. Holmes v. McGee, 20 Miss. 411;
 Stockwell v. Sargent, 37 Vt. 16.
 5. Maddison v. Jellison, 11 Me. 482;
 Bent v. Weeds, 44 Me. 45; Wiltse v. Hurley, 11 Ohio, 473; Cannon v. Hare, 1
 Tenn. Ch. 22.
 - 6. 2 Scribner Dow. 775. 7. 2 Scribner Dow. 775.
- 8. Chairs v. Hobson, 10 Humph. (Tenn.) 354.

- 9. 2 Scribner Dow. 975.
 10. By statute in Delaware, Illinois, Kentucky, Maine, Minnesota, Missouri, New Jersey, New York, North Carolina. Ohio, and Rhode Island, she forfeits dower for waste. In Maryland, Michigan, New Hampshire, Oregon, South Carolina, Virginia, Vermont, and Wisconsin, she is liable in damages therefor. 2 Scribner Dow. 800, 801.
 - 11. Allen v. McCoy, 8 Ohio, 418. 12. Joyner v. Speed, 68 N. Car. 236.
 - 13. Ante, a. 13, page 905.

- 14. Stewart Husb. and Wife, § 258.
- Stewart Husb. and Wife, \$ 258.
 Stewart Husb. and Wife, \$ 258.
 Stewart Husb. and Wife, \$ 258.
 Melone v. Armstrong, 79 Ky. 248.
 Irvine v. Armistead, 46 Ala. 363; Kintner v. McRae, 2 Ind. 453; Dean v. Phillips, 17 Ind. 406; Robbins v. Robbins, 8 Blackf. (Ind.) 174; Brown v. Williams, 31 Me. 403: Queen v. Pratt, 10 Md. 5; Bisland v. Hewett, 11 Sm. & M. Md. 5; Bisland v. Hewett, 11 5m. & M. (Miss.) 164; Bell v. Mayor, 10 Paige (N. Y.), 49; Sandford v. McLean. 3 Paige (N. Y.), 117; s. c., 23 Am. Dec. 773; Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452; Folsom v. Rhodes, 22 Ohio St. 435; Directors v. Roger, 43 Ohio St. 184; Rose v. Rose, 6 Heisk. (Tenn.) 533; Wilson v. Pavisson 2 Rob. (Va.) 308. Davisson, 2 Rob. (Va.) 398.

19. King v. King, 100 Mass. 224; Smith v. Jackson, 2 Edw. (N. Y.) 28; Green v. Causey, 10 Ga. 435; Simons v. Latimer, 37 Ga. 490; Robbins v. Robbins, 8 Blackf. (Ind.) 174; Sandford v. McLean, 3 Paige (N. Y.), 117; s. c., 23 Am. Dec. 773.

Thus, widow is dowable out of surplus, where she has joined with husband in a deed of trust for benefit of creditors, and has died. Gwynne v. Estes, 14 Lea (Tenn.), 662.

20. Mayo v. Hamlen, 73 Me. 182. 21. Davis v. McDonald, 42 Ga. 182.

V. Barring and Defeating of Dower.—(1) Generally.—A widow may have no right to dower either because the right never attached, or because after attaching it was destroyed; the right may be barred or defeated. A general glance over the various modes of barring and defeating dower is given in a note, and these modes are separately discussed in the succeeding paragraphs.1

(2) Barring Dower by Ante-nuptial Settlement or Agreement. By the common law, no provision or settlement made by a man before his marriage in favor of his future wife could bar dower.2 but the Statute of Uses gave this effect to a specified kind of settlement called a legal jointure.3 Nor at common law could a woman be bound by any ante-nuptial agreement not to claim dower.4 And even now, except under the express provisions of some statute, no settlement or agreement between husband and wife is at law a bar to dower.5

But in equity any provision in lieu of dower accepted by the widow is an equitable jointure and bars dower, and ante-nuptial covenants of a woman not to claim dower have always been enforced.7 Legal and equitable jointures are discussed later on in

1. Though it is extremely difficult to lay down any general rule which might not mislead, the following statement is substantially correct: The husband may avoid the inconvenience of dower by taking such a title in himself that the requisites of dower will not exist, or by changing his tenure before marriage for the same purpose; but this must not be done secretly, or it will be a fraud on the wife: so he may prevent dower by making a settlement before marriage, in accordance with the Statute of Uses or similar acts, by legal jointure. After marriage and acquisition of his property, he can, in most States, do nothing to relieve it of dower without his wife's consent; but he can make a provision for her by deed or will in lieu of dower, -an equitable jointure,—by the acceptance of which after his death she will be barred of dower. wife may prevent dower by covenanting before marriage never to claim it. During coverture she may release it by complying with the statute; and after her husband's death she may bar herself by any agreement she may make, or by accepting any provision in its stead, or by any conduct which would make it inequitable to claim it, or by her laches or delay. So dower may be defeated by operation of law, as when the husband's estate terminates, or is converted into personalty by legal proceedings during coverture, or when the realty is taken during coverture by right of eminent domain, or when the husband and wife are absolutely divorced.

2. Vincent v. Spooner, 2 Cush. (Mass.)

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Because dower, being a freehold estate, by a maxim of the common law, could not be barred by a collateral satisfaction. Hastings v. Dickinson, 7 Mass. 153; s. c., 5 Am. Dec. 34; Vernon v. Vernon, 4 Rep. 1; O'Brien v. Elliott, 15 Me. 125; s. c., 32 Am. Dec. 137; Logan v. Phillips, 18 Mo. 22; Jones v. Powell, 6 Johns. Ch. (N. Y.)

22; Jones v. Powen, o Johns. Ch. (N. 1.) 196; Murphy v. Murphy, 12 Ohio St. 407. 3. 27 H. VIII. ch. 10; Co. Litt. 36, δ; I Greenl. Cruise, 199, § 37; I Washburn Real Prop. 263; 2 Scribner Dow. 405; Vernon v. Vernon, 4 Rep. 1, 3, α.

This statute was adopted in the United States as a part of the common law. Alexander Brit. Stat. 301, 302.

4. Gibson v. Gibson, 15 Mass. 106; s. c., 8 Am. Dec. 94; Hastings v. Dick-inson, 7 Mass. 153; s. c., 5 Am. Dec. 34; Logan v. Phillips, 18 Mo. 22; Murphy v. Murphy, 12 Ohio St. 407.

5. Martin v. Martin. 22 Ala. 86, 104; Andrews v. Andrews, 8 Conn. 79; Cau-Murphy v. Avery, 1 Dev. & B. (N. Car.) 132; Murphy v. Avery, 1 Dev. & B. (N. Car.) 25; Murphy v. Murphy, 12 Ohio St. 407; Gelzer v. Gelzer, 1 Bail. Eq. (S. Car.)

6. Logan v. Phillips, 18 Mo. 22; Andrews v. Andrews, 8 Conn. 79, 85; McGee v. McGee, 91 Ill. 548; Jordan v. Clark.
81 Ill. 465; Hastings v. Dickinson, 7
Mass. 153; s. c., 5 Am. Dec. 34.
7. Dyke v. Rendall, 2 De G., M. & G.
209; Andrews v. Andrews, 8 Conn. 79;

Culbertson v. Culbertson, 37 Ga. 296; McGee v. McGee, 91 Ill. 548; Jordan v. Clark, 81 Ill. 465; Wentworth v. Wentworth, 69 Me. 247; Naill v. Maurer, 25

this article, and discussions connected with this section will be

found under the article on MARRIAGE SETTLEMENTS.

(3) Barring or Defeating Dower by Post-nuptial Settlement or Agreement.—(See also HUSBAND AND WIFE and MARRIED WOM-EN.)—At common law any agreement between husband and wife was void, and a married woman had no power to contract even in equity, except as to her equitable separate property; 2 later, statutes gave a married woman, in some States, the capacity to contract as to her statutory separate property.3 But dower is a common-law estate of a wife, 4 and is not either equitable 5 or statutory separate property; and the only way in which a wife can during coverture bar or defeat her dower is by complying strictly with statutes relating to the release of dower, discussed later, or by acting under the full capacity to contract accorded women by the statutes of a few States.8

Md. 542; Busey v. McCurley, 61 Md. 436; Freeland v. Freeland, 128 Mass. 509; lenkins v. Holt, 100 Mass, 261; Miller v. Goodwin, 8 Gray (Mass.), 542; Vincent v. Spooner, 2 Cush. (Mass.) 467; Logan v. Phillips, 18 Mo. 22; Heald v. Heald, 22 N. H. 265; Camden v. Jones, 23 N. 22 N. 11. 23, Calley v. Lawson, 5 Jones Eq. (N. Car.) 132; Murphy v. Murphy, 12 Ohio St. 407; Bowen v. Bowen, 32 Ohio St. 164, 180; Mintier v. Mintier, 28 Ohio St. 307; Geizer v. Geizer, I Bail. Gratt. (Va.) 486; s. c., 56 Am. Dec. 155; Faulkner v. Faulkner, 3 Leigh (Va.), 255;

s. c., 23 Am. Dec. 264.

1. Barron v. Barron, 27 Vt. 375, 398; Scarborough v. Watkins, 9 B. Mon. (Ky.) 540; s. c., 50 Am. Dec. 528; White v. Wagner, 25 N. Y. 328.

2. Yale v. Dederer, 22 N. Y. 451; s. c.,

68 N. Y. 329.

3. See Wicks v. Mitchell, 9 Kan. 80; Radford v. Carwill, 13 W. Va. 573; Krouskop v. Shoutz, 51 Wis. 204.

4. Martin v. Martin, 22 Ala. 86, 105. 5. Because such estate is always created by contract. Morrison v. Thistle,

67 Mo. 596, 599.

6. Bressler v. Kent, 61 Ill. 426; s. c., 14 Am. Rep. 67; McCormick v. Hunter, 50 Ind. 186; Ulp v. Campbell, 19 Pa. St. 361; Townsend v. Brown, 16 S. Car.

7. Grove v. Todd, 41 Md. 633, 639; s.

c., 20 Am. Rep. 76.

A release not valid at common law is not valid in equity. Stidham v. Matthews, 29 Ark. 650; Wiswall v. Hall. 3 Paige (N. Y.), 313; Carr v. Williams, 10 Ohio. 305; s. c , 36 Am. Dec. 87; Atwater v. Buckingham, 5 Day (Conn.), 492.

8. Martin v. Martin, 22 Ala. 86, 105; Stidham v. Matthews. 29 Ark. 650; Davis v. McDonald, 42 Ga. 205; Lathrop v. Me. 395; Grove v. Todd, 41 Md. 633; Keeler v. Tatnell, 23 N. J. 62; White v. White, 16 N. J. 202, 214; Conover v.

Porter, 14 Ohio St. 450.

When the question arises as to the validity of a release to the husband under one of these statutes, which authorizes releases generally, it must be remembered that in dealing with her husband a wife is said to be under a double incapacity, that of wife and that of married woman, -White v. Wagner, 25 N. Y. 328, 332-334,—and that it is fairly settled that, under a statute authorizing a married woman to contract generally, she cannot contract with her husband. Haker v. Boggs, 63 Ill. 161; Whitney v. Closson, 138 Mass. 49; Knowles v. Hull, 99 Mass. 562; Lord v. Parker, 3 Allen (Mass.). 502; Lord v. Parker, 3 Allen (Mass.), 127; Aultman v. Obermeyer, 6 Neb. 260; Savage v. O'Neill, 42 Barb. (N. Y.) 374; White v. Wagner. 25 N. Y. 328. Contra. Bank v. Banks, 101 U. S. 240; Kinkead v. Kinkead, 3 Biss. (U. S.) 405; Wells v. Gaywood, 3 Colo. 487; Hamilton v. Hamilton, 89 Ill. 349; Robertson v. Robertson v. Robertson v. Lovage (Mass.) ertson, 25 Iowa, 350; Allen v. Hooper, 50 Me. 371; Jenne v. Marble, 37 Mich. 379; Ransom v. Ransom, 30 Mich. 328; Rankin v. West, 25 Mich. 195; Burdeno v. Amperse, 14 Mich. 91; Albin v. Lord, 39 N. H. 196; Zimmerman v. Erhard, 58 How. Pr. (N. Y.) 11; Woodworth v. Sweet, 51 N. Y. 81. Accordingly, it has been held that a release of dower under a statute directly to the husband is void. Markling v. Markling, 30 Ark: 17; Pillow v. Wade, 31 Ark. 678; Rowe v. Hamilton, 3 Me. 63; Carson v. Mur-

But, granting the capacity of a husband and wife to contract together, there is nothing in the nature of dower to prevent the enforcing in equity of an agreement of a wife otherwise valid not to claim dower.1

And any provision made by a husband for his wife during coverture in lieu of dower puts her to an election to take it or dower.2 If after the husband's death she accepts such a provision, she bars herself of dower: 3 but if she has received the provision during his life and has spent or wasted it, she may take her dower as if it had not been made; 4 it is necessary in order to estop her that she should have enjoyed the provision, in part at least, after her husband's death.5 This question sometimes arises in cases of deeds of separation.6

(4) Barring or Defeating Dower by the Act of the Husband Before or After Marriage.—Any incumbrance placed upon a husband's property before his marriage may defeat dower to that extent, and a husband may prevent dower from attaching by alienating his property, or by changing property which would be subject

to dower into property which is not.?

ray, 3 Paige (N. Y.), 483; Crain v. Cavana, 36 Barb. (N. Y.) 410; Graham v. Van Wyck, 14 Barb. (N. Y.) 531; Mallory v. Horan, 12 Abb. Pr. N. S. (N. Y.) 289. Even when the wife is authorized to contract, any agreement betwen them has been held to be void. Whitney v. Closson, 138 Mass. 49; Martin v. Martin, 22 Ala. 86, 104; Pillow v. Wade, 31 Ark. 22 Ala. 80, 104; Fillow v. Wade, 31 Ark. 678; Markling v. Markling, 30 Ark. 17; Rowe v. Hamilton, 3 Me. 63; Shaw v. Reese, 14 Me. 432; Graham v. Van Wyck, 14 Barb. (N. Y.) 531; Crain v. Cavana, 36 Barb. (N. Y.) 410; Townsend v. Townsend, 2 Sandf. (N. Y.) 711; Mallory v. Horan, 12 Abb. Pr. N. S. (N. Y.) 280; Carson v. Murray, 2 Pairs (N. Y.) 289; Carson v. Murray, 3 Paige (N. Y.), 483; Walsh v. Kelly, 34 Pa. St. 84; Evans v. Evans, 3 Yeates (Pa.), 507. And this is true though the release was commanded by a court of equity. Crain v. Cavana, 36 Barb. (N. Y.) 410. But see Blake v. Blake, 7 Iowa, 46, 54; Lake υ. Gray. 30 Iowa, 415.
 1. Hastings υ. Dickinson, 7 Mass. 153;

S. C., 5 Am. Dec. 34.
 Stat. 27 H. VIII. ch. 10, § 9; Co. Litt. 36, b; Jones v. Powell, 6 Johns. Ch. (N. Y.) 194.
 Martin v. Martin, 22 Ala. 86, 104;

Lively v. Paschal, 35 Ga. 218; Stoddard v. Cutcompt, 41 Iowa, 329; Day v. West, 2 Edw. Ch. (N. Y.) 592; Crain v. Cavana, 36 Barb. (N. Y.) 410; Townsend v. Townsend, 2 Sandf. (N. Y.) 711; Evans v. Evans, 3 Yeates (Pa.), 507; Parham v. Parham, 6 Humph. (Tenn.) 287, 297.

4. Crain v. Cavana, 36 Barb. (N. Y.)

410; Carson v. Murray, 3 Paige (N. Y.), 483, 503.

5. Townsend v. Townsend, 2 Sandt. (N. Y.) 711.
6. Carson v. Murray, 3 Paige (N. Y.), 483; Day v. West, 2 Edw. Ch. (N. Y.) 592; Evans v. Evans, 3 Yeates (Pa.) 507; Parham v. Parham, 6 Humph. (Tenn.)

rainam v. rainam, o riumph. (1enn.) 287; Burdick v. Briggs, 11 Wis. 126.
7. Houston v. Smith, 88 N. Car. 312; Rawlings v. Adams, 7 Md. 26, 54; Spangler v. Stanler, 1 Md. Ch. 36; Heth v. Cocke, 1 Rand. (Va.) 344; Rands v. Kendall, 15 Ohio, 671; Gully v. Ray, 1

B. Mon. (Ky.) 107.

The wife is barred, though the conveyance is not executed or recorded at the time of the marriage. Gully v. Ray, 18 B. Mon. (Ky.) 107; Rawlings v. Adams, 7 Md. 26; Richardson v. Skolfield, 45 Me. 389. Though it is fraudulent as to creditors, if not set aside during coverture. King v. King, 61 Ala. 479; Withed v. Malloy, 4 Cush. (Mass.) 138. The husband's simple agreement to convey is likewise paramount to dower. Adkins v. Holmes, 2 Ind. 197; Kintner v. McRae, 2 Ind. 453; Dean v. Mitchell, 4 J. J. Marsh. (Ky.) 451; Gaines v. Gaines, 9 Marsh. (Ky.) 451. Gaines, y B. Mon. (Ky.) 295; s. c., 48 Am. Dec. 425; Bowie v. Berry, 3 Md. Ch. 359; Cowman v. Hall, 3 Gill & J. (Md.) 398; Firestone v. Firestone, 2 Ohio St. 415. But a deed made or a judgment confessed on the day of the marriage is, unless proved to have been made or entered before the marriage, inferior to dower. Stewart v. Stewart, 3 J. J. Marsh. (Ky.)

But a secret disposition of property by the husband or change in its form would be a fraud on the wife, and would not affect her dower; and so when dispositions during marriage defeat dower, a conveyance for this purpose alone would be a fraud of the husband on his wife and have no effect as to her.2

As a general rule, however, no acts of a husband during coverture, without the concurrence of the wife, can defeat dower.3 This was the rule at common law, and is still the rule in most of the United States.4 But now in England and in some States a husband may alone convey away his property without his wife's joinder in the deed, and thus defeat dower. Such statutes apply only to deeds of a husband made after their passage; 6 and a statute enabling a husband to defeat dower by conveyance during his life does not enable him to accomplish this by will.

(5) Defeating of Dower by Act of the Wife During Coverture.— Under such statutes as the English statute of 13 Edward I. ch. 34, a wife may defeat her dower by elopement and adultery; 8 and other statutes may give this result to adultery alone; 9 or to abandonment alone; 10 or to other wrongful conduct; but as a general rule, a wife can defeat her dower by an act in the nature of a contract only by pursuing some mode prescribed by some statute,11 unless her disabilities have been entirely removed.

(6) A Wife's Release of Dower.—In all States where a husband cannot by his sole deed defeat dower, statutes provide for the release thereof by the wife. But statutes relating to married women's separate property have nothing to do with her dower

rights.13

The provisions of the statute relating to the release of dower must be strictly complied with; 14 and a release not good at law is not good at all, and cannot be rectified in equity. 15 The release

48; s. c., 23 Am. Dec. 396; Ingram v.

Morris, 4 Harr. (Del.) 111.

1. Cranson v. Cranson, 4 Mich. 230; Nye v. Patterson, 35 Mich. 415; Pomeroy v. Pomeroy, 54 How. Pr. (N.Y.) 228; Brewer v. Connel, 11 Humph. (Tenn.) 500.

2. Gibson v. Hutchinson, 120 Mass. 27; Crecelius v. Horst, II Mo. App. 304; Jenny v. Jenny, 24 Vt. 324. But see Stroad v. O'Neil, 13 Mo. App. 581; s. c.,

20 Cent. L. J. 308.

3. Crecelius v. Horst, 11 Mo. App. 304; Gerry v. Stinson, 60 Me. 186.

4. Stewart Husb. and Wife, § 268;

4. Stewart Husb. and Wife, § 208; Stimson Am. St. L. § 3249.

5. 3 & 4 Wm. IV. ch. 105, § 2; Fry v. Noble, 24 L. J. N. S. 591; s. c., 7 De G. M. & G. 687; Stewart Husb. and Wife, § 268; Stimson Am. St. L. § 3203.

6. Fry v. Noble, 24 L. J. N. S. 591; s. c., 7 De G. M. & G. 687.

7. Stewart v. Stewart, 5 Conn. 317.

8. See Alex. Brit. Stats. 138; Stewart Mar and Div. § 178: Stimson Am. Stat.

L. § 3246.

Mar. and Div. § 178; Stimson Am. Stat.

9. Stimson Am. Stat. L. § 3246.

10. Thornberry v. Thornberry, 18 W. Va. 522.

 Sisk v. Smith, 68 Ill. 503.
 The statutes of the particular State must be consulted on this point.

13. McCormick v. Hunter, 50 Ind. 186; Blake v. Blake, 7 Iowa, 46; Ulp v. Campbell, 19 Pa. St. 361; Townsend v. Brown, 16 S. Car. 91.

14. Russell v. Amphlet, 27 Ark. 339; Stidham v. Matthews, 29 Ark. 650; Davis v. McDonald, 42 Ga. 207; Grove v. Todd, 41 Md. 633; s. c., 20 Am. Rep. 76; Con-

41 Md. 633; s. c., 20 Am. Rep. 76; Conover v. Porter, 14 Ohio St. 450. See also Raverty v. Fridge, 3 McLean (U. S.), 230; Clark v. Redman, 1 Blackf. (Ind.) 379; s. c., 12 Am. Dec. 213; O'Ferrall v. Simplot, 4 Iowa, 381; Rogers v. Woody, 23 Mo. 548; Sheppard v. Wardell, 1 N. J. 452; Moore v. Thomas, 1 Oreg. 201; Thompson v. Morrow, 5 S. & R. (Pa.) 289; s. c., 9 Am. Dec. 258; Kirk v. Dean, 2 Binn. (Pa.) 341.

15. Carr v. Williams, 10 Ohio, 305; s.

need not be in any particular form, though in many States it must appear that the wife signs for the purpose of releasing her dower, while in others it is sufficient if she join in or execute the deed, which carries all her interest.3 Until delivery of the deed she may revoke her release.4

Unless the statute expressly authorizes her to release alone, her husband must join in the deed with her; 5 but she need not necessarily execute the deed at the same time with him; 6 and where

c., 36 Am. Dec. 87; Davenport v. Sovil.

6 Ohio St. 459.

Release of Dower—Requisites.—Nothing short of an actual release has any effect on the wife's dower right. Stidman v. Matthews, 29 Ark. 650; Atwater v. v. Matthews, 29 Ark. 050; Alwater v. Buckingham, 5 Day (Conn.), 492; White v. White, 16 N. J. 207; Marvin v. Smith, 46 N. Y. 571; Wiswall v. Hall, 3 Paige (N. Y.), 313; Green v. Branton, 1 Dev. Eq. (N. Car.) 500; Purcell v. Goshorn, 17 Ohio, 105; s. c., 44 Am. Dec. 448; Davenport v. Sovil, 6 Ohio St. 459; Carr v. Williams, 10 Ohio, 305; s. c., 36 Am. Dec. 87. See also Tevis v. Richardson, Dec. 87. See also I evis v. Richardson, 7 Mon. 654; Richmond v. Robinson, 12 Mich. 193; Martin v. Dwelly, 6 Wend. (N. Y.) 9; s. c., 21 Am. Dec. 245; Roseburgh v. Sterling, 27 Pa. St. 292. Contra. Lake v. Gray, 30 Iowa, 415; County v. Geiger, I Call (Va.), 190. Thus dower cannot be released by parol, but only by deed duly sealed, unless, of course, the statutes require no seal. Davis v. Davis, statutes require no seal. Davis v. Davis, 61 Me. 395; Lathrop v. Foster, 51 Me. 367; Sargent v. Roberts, 34 Me. 135; Manning v. Laboree, 33 Me. 343; Worthington v. Middleton, 6 Dana (Ky.), 300; Brown v. Starke, 3 Dana (Ky.), 316; Keeler v. Tatnell, 23 N. J. 62; Tasker v. Bartlett, 5 Cush. (Mass.) 359; Giles v. Moore, 4 Gray (Mass.), 600; Foster v. Dennison, 9 Ohio, 121; Walsh v. Kelly, 34 Pa. St. 84.

Presumption.—A release will not be presumed until twenty years after the husband's death. Barnard v. Edwards,

4 N. H. 321; s. c., 17 Am. Dec. 403. A release will never be presumed to have been executed during coverture in favor of one who does not claim under the husband, but adversely to Durham v. Angier, 20 Me. 242. If deed in which wife joins to release dower is set aside as void, she has her dower. Munger v. Perkins, 62 Wis. 499.
1. Dundas v. Hitchcock, 12 How. (U.

S.) 256, 267; Meyer v. Gossett, 38 Ark. 377; Davis v. Bartholomew, 3 Ind. 485; Frost v. Deering, 21 Me. 156; Usher v. Richardson, 29 Me. 415; Stearns v.

Swift, 8 Pick. (Mass.) 532; Gray v. Mc-

Cune, 23 Pa. St. 447.

2. Hall v. Savage, 4 Mason (U. S.), 273; Powell v. Monson, 3 Mason (U. S.), 347; Davis v. Bartholomew, 3 Ind. 485; Cox v. Wells, 7 Blackf. (Ind.) 410; Hatcher v. Andrews, 5 Bush (Ky.), 561; McDowell v. Prather, 8 Bush (Ky.), 46, McDowell v. Frather, 8 Bush (Ky.), 40, 61; Lathrop v. Foster, 51 Me. 367; Stevens v. Owen, 25 Me. 94; Fowler v. Shearer, 7 Mass. 14; Catlin v. Ware, 9 Mass. 218; s. c., 6 Am. Dec. 56; Leavitt v. Lamprey, 13 Pick. (Mass.) 382; s. c., 23 Am. Dec. 685; McFarland v. Febiger, 104: 56. 7 Ohio, 194; s. c., 28 Am. Dec. 632; Carter v. Goodlin, 3 Ohio St. 75. In such case no words of grant are necessary. Stearns v. Swift, 8 Pick. (S. Car.)

3. Learned v. Cutler, 18 Pick. (Mass.) 9; Gillian v. Swift, 14 Hun (N. Y.), 574; Smith v. Hany, 16 Ohio, 191, 220; Daly v. Willis, 5 Lea (Tenn.), 100; Burge v. Smith, 27 N. H. 332; Dustin v. Steele, 27 N. H. 431.

4. Leland v. Leland, 13 Pa. St. 84. Not after. McNeely v. Kucker, 6 Blackf.

(Ind.) 391.

5. Moore v. Tisdale, 5 B. Mon. (Ky) 352; Shaw v. Russ, 14 Me. 432; French v. Peters, 33 Me. 396, 410; Page v. Page, 6 Cush. (Mass.) 196; Stearns v. Swift, 8 Pick. (Mass.) 532; Rannels v. Gelmor, 9 Mo. App. 506; s. c., 18 Cent. L. J. 182; Mallory v. Horan, 12 Abb. Pr. N. S. (N. Y.) 289; Willing v. Peters, 7 Pa. St. 287; Ulp v. Campbell, 19 Pa. St. 361. But see Powell v. Monson, 3 Mason (U. S.), 347; Gordon v. Haywood, 2 N. H. 402.

The husband must join also in release of dower in former husband's lands.

Osborn v. Horine, 19 Ill. 124.

6. Forg v. Gregory, 10 B. Mon. (Ky.) 175; Frost v. Deering, 21 Me. 156; Ludlow v. O'Neill, 20 Ohio St. 181; Williams v. Robson, 6 Ohio St. 510; Montgomery v. Hobson, Meigs (Tenn.), 437, 451.
She may even re-execute it if it is at

first defectively acknowledged. Newell

v. Anderson, 7 Ohio St. 12.

she must join with her husband, it is sufficient if she join with his attorney in fact,1 or with his guardian or committee if he be insane.2 But she must execute the release herself;3 she cannot release by power of attorney, 4 and cannot, perhaps, even leave blanks to be filled up after the execution. An insane wife cannot release dower,6 nor can an infant wife;7 nor can a wife's guardian release dower for her.8

Though a wife is empowered to release her dower by her sole deed, it is doubtful whether she can release to her husband.9 (See

also Husband and Wife, Contracts Between.)

The grantee in the release cannot be a mere stranger. 10 but only some one who holds in some way under the husband: 11 for the release operates by way of estoppel, and an estoppel must be mutual: 12 inchoate dower, it must be remembered, cannot be bargained and sold, but only released.13

The question of *consideration* is not important; a wife may re-

1. Fowler v. Shearer, 7 Mass. 14, 21;

1. Fowler v. Shearer, 7 Mass. 14, 21, Glenn v. Bank, 8 Ohio, 72, 79.
2. Rannels v. Gelmor, 9 Mo. App. 506; s. c., 18 Cent. L. J. 182.
3. Frost v. Deering, 21 Me. 156; Eslava v. Lepretre, 20 Ala. 504, 520; s. c.,

56 Am. Dec. 266.

4. Lewis v. Coxe, 5 Harr. (Del.) 401; Dawson v. Shirley, 6 Blackf. (Ind.) 531; Steele v. Lewis, I Mon. 48; Shanks v. Lancaster, 5 Gratt. (Va.) 110, 118; s. c., 50 Am. Dec. 108; Sumner v. Conant, 10 Vt. 920.1

5. Drury v. Foster, 2 Wall, (U. S.) 24, 34: Conover v. Porter, 14 Ohio St. 450.

6. McElwain v. McElwain, 29 Ill.

7. Webb v. Hall, 35 Me. 336. Infancy—Effect upon Release.—This disability is totally distinct from that of coverture. Bool v. Mix, 17 Wend. (N. Y.) 119, 129; s. c., 31 Am. Dec. 285. See also Watson v. Billings, 38 Ark. 278; See also Watson v. Billings. 38 Ark. 278; s. c., 42 Am. Rep. 1; Phillips v. Green, 3 A. K. Marsh. (Ky.) 7: s. c., 23 Am. Dec. 124; Prewitt v. Graves, 5 J. J. Marsh. (Ky.) 115; Webb v. Hall, 35 Me. 336; Hughes v. Watson, 10 Ohio, 127; Thomas v. Gammel, 6 Leigh (Va.), 9. It renders the deed, under the better view, renders the deed, under the better view, voidable. Cresinger v. Welch, 15 Ohio, 150; s. c., 45 Am. Dec. 565; Watson v. Billings, 38 Ark. 278; s. c., 42 Am. Rep. 1; Phillips v. Green, 3 A. K. Marsh. (Ky.) 7; s. c., 23 Am. Dec. 127; Adams v. Palmer, 51 Me. 480, 488; Youse v. v. Palmer, 51 Me. 480, 486; Youse v. Norcours, 12 Mo. 549, 563; s. c., 51 Am. Dec. 545; Bool v. Mix, 17 Wend. (N. Y.) 119; Hughes v. Watson, 10 Ohio, 127; Thomas v. Gemmel, 6 Leigh (Va.), 9. Some cases say void. Glenn v. Clarke, 53 Md. 580, 603; Chandler v. McKin-

nery, 6 Mich. 217; Sandford v. McLean, 3 Paige (N. Y.), 117; s. c., 23 Am. Dec. 773; Schrader v. Decker, 9 Pa. St. 14; s. c., 49 Am. Dec. 538. If voidable, it is avoided by her subsequent deed of the same property. Youse v. Norcours, supra; Cresinger v. Welch, 15 Ohio, 159. If she avoids it, she need not pay back any of the purchase-money. Mark-ham v. Merrett. 8 Miss 437, 444. Age is presumed. Battin v. Bigelow, I Pet. (C. C.) 452.

8. Eslava v. Lepretre, 21 Ala. 504,

520; s. c., 56 Am. Dec. 266.

520; s. c., 56 Am. Dec. 20b.

9. Martin v. Martin, 22 Ala. 86, 104;
Markling v. Markling, 30 Ark. 17, 24;
Pillow v. Wade, 31 Ark. 678; Rowe v.
Hamilton. 3 Me. 63; Mallory v. Horan,
12 Abb. Pr. N. S. (N. Y.) 289; Crain v.
Cavana, 36 Barb. (N. Y.) 410; Graham
v. Van Wyck. 14 Barb. (N. Y.) 531;
Townsend v. Townsend, 2 Sandf. (N. Y.)
111. Walsh v. Kelly, 21, 22, St. 84; Bur-711; Walsh v. Kelly, 34 Pa. St. 84; Burdick v. Briggs, 11 Wis. 126. But see Blake v. Blake, 7 Iowa, 46, 54.

10. Stidham v. Matthews, 29 Ark. 650, 659; Chicago v. Kinzie, 49 Ill. 289; Rob-

bins v. Kinzie, 45 Ill. 354; La Framboise v. Crow, 56 Ill. 197; Summers v. Babb, v. Crow, 56 Ill. 197; Summers v. Badd, 13 Ill. 483; Harriman v. Gray, 49 Me. 537; French v. Lord, 60 Me. 537; Reiff v. Horst, 55 Md. 42; Marvin v. Smith, 46 N. Y. 571; Mallory v. Horan, 12 Abb. Pr. N. S. (N. Y.) 289, 11. Reiff v. Horst, 55 Md. 42; Marvin v. Smith, 46 N. Y. 571; Harriman v. Gray, 49 Me. 537; Summers v. Babb, 13 Ill. 482; Chicago v. Kinzie. 40 Ill. 280;

Ill. 483; Chicago v. Kinzie, 49 Ill. 289;

Robbins v. Kinzie, 45 Ill. 354.

12. French v. Lord, 69 Me. 537; Kitzmiller v. Van Rensselaer, 10 Ohio St. 63.

13. Reiff v. Horst, 55 Md. 42.

serve a consideration to herself, but none is implied, and a con-

sideration moving to her husband suffices.3

The effect of a release of dower is in the nature of an estoppel.4 and not of a grant; 5 and as an estoppel must be mutual, a stranger cannot avail himself of a release of dower; 6 but it can be set up only by the husband's grantee, or some one entitled to stand in his shoes.8 The wife is not estopped by her release from setting up a subsequent title in herself,9 or from alleging that it was obtained by fraud. 10 The effect of the release is confined to the property actually referred to,11 and if a mistake is made in the description she cannot be made to rectify it. 12 Nor does her joining in a release of her dower have any effect upon her own property; 13 nor does her conveyance of property in a representative capacity affect her dower interest in the property conveyed. 14 If the release of dower, or the deed in which a wife joins to release dower, becomes inoperative, it does not affect her rights, and she has dower as if it had never been executed.15

(7) Jointure, Legal and Equitable.-Jointure, a settlement so called because usually made upon a husband and wife jointly dur-

Bailey v. Litten, 52 Ala. 282; Reiff v. Horst, 55 Md. 42; Miller v. Crawford, 32 Gratt. (Va.) 277, 286.
 Hiscock v. Jaycox, 12 Bank Reg.

3. Bailey v. Litten, 52 Ala. 282.
 4. French v. Lord, 69 Me. 537; Reiff v. Horst, 55 Md. 42; Mallory v. Horan, 12 Abb. Pr. N. S. (N. Y.) 289.
 5. Reiff v. Horst, 55 Md. 42.
 6. Kitzmiller v. Van Rensselaer, 10

Ohio St. 63; Robinson v. Bates, 3 Metc.

7. Dearborn v. Taylor, 18 N. H. 153,

8. Blair v. Harrison, 11 Ill. 384; Robbins v. Kinzie, 45 Ill. 354; Gove v. Cather, 23 Ill. 634; French v. Crosby, 61 Me. 502; French v. Lord, 69 Me. 537; Harriman v. Gray, 49 Me. 537; Littlefield v. Crocker, 30 Me. 192; Young v. Tarbell, 37 Me. 509; Robinson v. Bates, 3 Met. (Mass.) 40; Pixley v. Bennett, 11 Mass. 298; Pearson v. Williams, 23 Miss. 64; Harrison v. Eldridge, 7 N. J. L. 392, 411; Dearborn v. Taylor, 18 N. H. 392, 411, Beatroin v. Taylot, 18 N. H. 153; Mallory v. Horan, 12 Abb. Pr. N. S. (N. Y.) 289; Gray v. McCune, 23 Pa. St. 447. Contra: Elmdorf v. Lockwood, 57 N. Y. 322; Johnson v. Hines, 61 Md. 123; Chew v. Farmers', 9 Gill (Md.), 361, 374; Chase v. Chase, 1 Bland (Md.), 206, 207, 4 M. Dec 277; Herbert v. 231; s. c., 17 Am. Dec. 277; Herbert v. Wren, 7 Cranch (U. S.), 370; Bartenbach v. Bartenbach, 11 Bank Reg. 61.

9. Blair v. Harrison, II Ill. 384. 10. Woodworth v. Paige, 5 Ohio St.

11. French v. Lord, 69 Me. 537.

12. Sieben v. Franks, 52 Iowa, 642; Davenport v. Sovil, 6 Ohio St. 459.

13. Hughes v. Wilkinson, 21 Ala. 296; Raymond v. Holden, 2 Cush. (Mass.) 264; McDaniel v. Priest, 12 Mo. 544; Flagg v. Bean, 25 N. H. 49, 63; Foster v. Dennison, 9 Ohio, 121; Mayo v. Fos-ter, 2 McCord Ch. (S. Car.) 37.

Of course the deed may be so drawn as to release her dower and convey her own property also. Gregory v. Gregory,

16 Ohio St. 560.

14. Jones v. Hollopeter, 10 S. & R. (Pa.) 326; Shurtz v. Thomas, 8 Pa. St. 359. See Ritchie v. Putnam, 13 Wend. (N. Y.) 524. But if she convey in a representative capacity and her individual capacity also, her dower is gone. Churchill v. Bee, 66 Ga. 621, 632.

15. Hoppin v. Hoppin, 96 Ill. 265; Morton v. Noble, 56 Ill. 176; McKee v. Brown, 43 Ill. 130; Gove v. Cather, 23 Brown, 43 Ill. 130; Gove v. Cather, 23 Ill. 634; Summers v. Babb, 13 Ill. 483; Lockett v. James, 8 Bush (Ky.), 28; Richardson v. Wyman, 62 Me. 280; Robinson v. Bates, 3 Met. (Mass.) 40; Stinson v. Sumner, 9 Mass. 143; s. c., 6 Am. Dec. 49; Pinson v. Williams, 23 Miss. 64; Frey v. Boylan, 23 N. J. Eq. 90; Elmdorf v. Lockwood, 57 N. Y. 322; Mallory v. Horan, 12 Abb. Pr. N. S. (N. Y.) 289 296; Clowes v. Dickenson, 5 Johns. Ch. (N. Y.) 235, 246; Ridway v. Masting, 23 Ohio St. 294; Richard v. Talbird, Rice Eq. (S. Car.) 158. But the deed must really become inoperative; it is not sufficient if the grantee. ative; it is not sufficient if the grantee. through laches, never had any benefit thereunder. Morton v. Noble, 56 Ill. 176.

ing their joint lives, and after the husband's death on the wife.1 bars dower at common law under the Statute of Uses.² and in equity under the doctrine of election.³ A legal jointure is such a provision as under the Statute of Uses or other statute bars dower: an equitable jointure is such a provision as requires a widow to choose between it and dower.

To a strict legal jointure under the Statute of Uses, which is in force in the *United States* as a part of the common law. 4 so far as consistent with modern statutes, 5 the following are the requisites: (I) The provision must consist of an estate or interest in land: 6 (2) it must take effect, in possession or profit, immediately from the death of the husband; (3) it must be for the wife's life, at least; 8 (4) it must be limited to the wife herself, and not in trust for her; 9 (5) it must be made in satisfaction of her whole dower, and must be so expressed in the deed; 10 (6) it must be a reasonable and competent provision for the wife's livelihood; 11 (7) it must be made before marriage. 12

An equitable jointure is any other provision made for a wife, which puts her to an election, and will, if she accepts it, bar her of her dower in equity, independently of statute.¹³ The provision

1. Drury v. Drury, Wilm. 185; s. c., 3 Bro. P. C. 492; Vernon v. Vernon, 4

2. 2 Scribner Dow. 402; 27 Hen. VIII. ch. 10. §§ 6-9; Alex. Br. Stat. 300, 301; Vernon v. Vernon, 4 Co. 1, b; Vincent v. Spooner, 2 Cush. (Mass.) 467; Hastings v. Dickinson, 7 Mass. 153.

3. Hastings v. Dickinson, 7 Mass. 153.

Alex. Br. Stat. 300, 301.
 Vance υ. Vance, 21 Me. 364.

5. Vance v. Vance, 21 Me. 364.
6. Gibson v. Gibson, 15 Mass. 106; s. c., 8 Am. Dec. 94; Hastings v. Dickinson, 7 Mass. 153; s. c., 5 Am. Dec. 34; Vance v. Vance, 21 Me. 364; Gelzer v. Gelzer, 1 Bail. Eq. (S. Car.) 387; Ball v. Ball, 3 Munf. (Va.) 279.
7. Vernon v. Vernon, 4 Co. 2, α; Carruthers v. Carruthers, 4 Bro. C. C.

Carrutners v. Carrutners, 4 Bro. C. C. 500, 513; Vance v. Vance, 21 Me. 364; Gibson v. Gibson, 15 Mass. 106; Crain v. Cavana, 63 Barb. (N. Y.) 410.

8. Vernon v. Vernon, 4 Co. 2, a; McCartee v. Teller, 2 Paige (N. Y.), 511, 560; Gelzer v. Gelzer, I Bail. Eq. (S.

9. Co. Litt. 36, b; Hervey v. Hervey,

1 Atk. 561.

10. Vernon v. Vernon, 4 Co. 2, a; Tinney v. Tinney, 3 Atk. 8; Charles v. Andrews, 6 Mod. 152; Caruthers v. Caruthers, 4 Bro. C. C. 500; Garthshore v. Chalie, 10 Ves. Jr. 1, 20; Green v. Porter, 7 Port. (Ala.) 19; Tevis v. McCreary, 3 Metc. (Ky.) 151; Worsley v. Worsley, 16 B. Mon. (Ky.) 455; Bubier v. Roberts,

49 Me. 460; Perryman v. Perryman, 19 Mo. 469; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482; s. c., 9 Am. Dec. 318; Liles v. Fleming, 1 Dev. Eq. (N. Car.) 185. But see Ambler v. Norton, 4 Hen. & M.

(Va.) 23.
11. 2 Scribner Dow. 404, 428.
12. Martin v. Martin, 26 Ala. 86; Rowe

12. Martin v. Martin, 26 Ala. 86; Rowe v. Hamilton, 3 Me. 63; Crain v. Cavana, 36 Barb. (N. Y.) 410; Townsend v. Townsend, 2 Sandf. (N. Y.) 711; Walsh v. Kelly, 34 Pa. St. 84.

13. Co. Litt. 32, b; Dyke v. Rendall, 13 Eng. L. & Eq. 404; s. c., 2 De G., M. & G. 200; Blackmore v. Blackmore, 16 Ala. 633; Farrow v. Farrow, 1 Del. Ch. 457; Raines v. Corbin, 24 Ga. 185; Garrard v. Garrard, 7 Bush (Ky.), 436; Tevis v. McCreary, 3 Metc. (Ky.) 151; Wentworth v. Wentworth, 69 Me. 247; Levering v. Hughes, 2 Md. Ch. 81; Hastings v. Dickinson, 7 Mass. 153; s. c., 5 Am. Dec. 34; Gibson v. Gibson, 15 Mass. 156; s. c., 8 Am. Dec. 94; Logan v. Phillips, 18 Mo. 22; Johnson v. Johnson, 23 Mo. 561; s. c., 30 Mo. 72; Mcv. Fallips, 18 Mo. 22; Johnson v. Johnson, 23 Mo. 561; s. c., 30 Mo. 72; McCartee v. Teller, 2 Paige (N. Y.), 511; s. c., 8 Wend. (N. Y.) 267; Tisdale v. Jones, 38 Barb. (N. Y.) 523; Grogan v. Garrison, 27 Ohio St. 50; Jones v. Jones, 62 Pa. St. 324; Gangwere v. Gangwere, 14 Pa. St. 417; Rudolph v. Rudolph, 10 Pa. St. 34; Rose v. Reynolds, I Swan (Tenn.), 446; Lacy v. Anderson, I Swan (Tenn.), 445; Parham v. Parham, 6 Humph. (Tenn.) 287.

must be expressly in lieu of dower, 1 or the same instrument must make a disposition of some part of the settlor's estate which is clearly inconsistent with the existence of dower therein, so that in claiming dower the widow would defeat, interrupt, or disappoint some provision in the instrument.² The provision may be made by deed or will.³ No technical language is necessary,⁴ but it is sometimes very difficult to determine whether the provision is in lieu of dower or not. Evidence outside the instrument is not admissible as to this point.⁶ In many States, however, the statutes require the widow to elect between any provision made for her by will, unless it is expressly stated not to be in lieu of dower.

If, when a wife is barred by *legal* jointure she conveys away jointly with her husband her jointure lands, she is nevertheless barred of her dower; but if the jointure be equitable only, such a conveyance is no election, and dower may be claimed. If she is evicted from either kind of jointure, she may be endowed of so much of the remainder of her husband's lands as may be necessary to make up her loss, 10 provided that she does not get more altogether than she would have had had she taken dower at first; 11

1. U. S. v. Duncan, 4 McLean (U. S.),

90, 101. 2. Corriell v. Ham, 2 Clarke, 552; Birmingham v. Kirwan, 2 Sch. & L. 441, Birmingham v. Kirwan, 2 Sch. & L. 441, 452; U. S. v. Duncan, 4 McLean (U. S.), 90; Green v. Green, 7 Port. (Ala.) 19; Apperson v. Bolton, 29 Ark. 418, 428; Lord v. Lord, 23 Conn. 327; Alling v. Chatfield, 42 Conn. 276; Worthen v. Pearson, 33 Ga. 385; Potter v. Worley, 57 Ga. 66; Tooke v. Hardeman, 7 Ga. 20; Ostrander v. Spickard, 8 Blackf. (Ind.) 227; Kelly v. Stinson, 8 Blackf. (Ind.) 387; Clarke v. Griffith, 4 Iowa, 405; Van Guilder v. Justice, 56 Iowa, 669; Kyne v. Kyne, 48 Iowa, 21; Wilson v. Cox, 49 Miss. 538; Copp v. Hensey, 31 N. H. 317; Colgate v. Colgate, 23 N. J. Eq. 372; Freedland v. Manderville, 28 N. J. Eq. 530; Van Arsdale v. Van Arsdale, 26 N. J. Eq. 407; Stewart v. Stewart, 31 N. J. Eq. 407; Stewart v. Stewart, 31 N. J. Eq. 407; Stewart v. Adsit, 2 Johns. Ch. (N. Y.) 448, 459; s. c., 7 Am. Dec. 539; Jackson v. Churchill, 7 Cow. (N. Y.) 287; s. c., 17 Am. Dec. 514; Bets v. Bets, 4 Abb. N. Cas. (N. Y.) 317; Smith v. Kniskern, 4 Johns. Ch. (N. Y.) 9; Wood v. Wood, 5 Paige (N. Y.), 596; s. c., 28 Am. Dec. 451; Sandford v. Jackson 10 Paige (N. Y.) 266; Havens v. 452; U. S. v. Duncan, 4 McLean (U. S.), 9, wood v. wood, 5 raige (N. Y.), 596; s. c., 28 Am. Dec. 451; Sandford v. Jackson, 10 Paige (N. Y.), 266; Havens v. Havens, I Sandf. Ch. (N. Y.) 324; Tobias v. Ketchum, 36 Barb. (N. Y.) 479; s. c., 32 N. Y. 319; Lingart v. Ripley, 19 Ohio St. 24; Sample v. Sample, 2 Yeates (Pa.), 421; Allen v. Allen v. Pa. 211; Wahb. 31. 24, Sample v. Sample, 2. 21, 443; Allen v. Allen, 2 Pa. 311; Webb v. Evans, 1 Binn. (Pa.) 565; Chapin v. Hill, 1 R. I. 446; Gordon v. Stevens, 2 Hill (N. Y.), 46; s. c., 27 Am. Dec. 445;

Brown v. Caldwell, I Spear Eq. (S. Car.) 322; Cunningham v. Shannon, 4 Rich. Eq. (S. Car.) 135; Dixon v. McCue, 14 Gratt. (Va.) 540, 549; Higginbotham v. Cornwell, 8 Gratt. (Va.) 83; s. c., 56 Am. Dec. 130.

3. 1 Bishop Mar. Wom. § 383; Birmingham v. Kirwan, 2 Sch. & L. 444; Parham v. Parham, 6 Humph. (Tenn.) 287, 297; Adsit v. Adsit, 2 Johns. Ch. (N. Y.) 448, 459; s. c., 7 Am. Dec. 539.

4. Lord v. Lord, 23 Conn. 321.

5. See collected cases in I Lea. Cas.

Eq. 310 et seq.
6. Stratton v. Best, 1 Ves. Sr. 285; Timber v. Lake, 5 Dana (Ky.), 345: Hall v. Hall, 8 Rich. (S. Car.) 407; Chapin v. Hill, 1 R. I. 446; Dixon v. McCue, 14 Gratt. (Va.) 540.

In Virginia, such evidence is admissible by statute. Dixon v. McCue, 14

Gratt. (Va.) 540.

Stimson Am. Stat. L. § 3244.
 Co. Litt. 36, b; Dyer, 358, b.
 Co. Litt. 36, b; I Greenl. Cruise,

10. Gervoye v. Gervoye, Moore C. P. 717; Beard v. Nutthall, 1 Vern. 427; Garrard v. Garrard, 7 Bush (Ky.), 436; Hastings v. Dickinson, 7 Mass. 153; s. c., 5 Am. Dec. 34; Gibson v. Gibson, 15 Mass. 106; s. c., 8 Am. Dec. 94; Camden v. Jones, 23 N. J. Eq. 171; Pierce v. Pierce, 9 Hun, 50; St. Clair v. Williams, 7 Ohio, 110; s. c., 30 Am. Dec. 194; Ambler v. Norton, 4 Hen. & M. (Va.) 23.

11. Beard v. Nutthall, supra; Tew v.

Winterton, 3 Bro. C. C. 489.

and she may be so endowed even against the husband's alienee.1

The wife's estate in her jointure lands is not, like dower after assignment, a continuance of the husband's estate: 2 the wife takes as purchaser.³ and, for example, is not entitled to the crops sown at the time of the husband's death.4

(8) Defeating Dower by Election to Take Something in its Place. —În certain cases a widow (a wife being under contractual disability cannot elect 5) may be required to elect or choose between her dower and some other provision. If a husband has exchanged some lands for others, his widow must elect to take her dower either in the new or the original lands, and cannot have dower in both. By the Statute of Uses, a jointure made during coverture put the widow to an election; and all equitable jointures do this: 9 as do devises in lieu of dower. 10 And statutes in most States require the widow to elect between her husband's will and her legal rights, including dower.11

As to the manner and time of election, it is difficult, in the absence of statute, to lay down any definite rules. 12 But if a particular mode of election is named no other will suffice.13 If the limited time for election has expired it is usually fatal, though in certain cases equity may extend the time. 14 The election may be conditional, to take effect if a certain event happens before the expiration of the limited time. 15 The election must be made by the widow in person;16 she cannot elect by attorney;17 nor if she is in-

1. Co. Litt. 33, u, n. 8; I Greenl. Cruise, 200.

2. Fisher v. Forbes, o Vin. Abr. 373. 3. Campton v. Cotton, 17 Ves. 267; Sterry v. Arden, t Johns. Ch. (N. V.) 271; s. c., 12 Johns. (N. V.) 536; 7 Am. Dec. 348; Herring v. Wickham, 29 Gratt. (Va.) 628; Jones v. Jones, 62 Pa. St. 324. 4. Fisher v. Forbes, 9 Vin. Abr. 373.

4. Fisher v. Forbes, 9 Vin. Abr. 373.
5. Bishop Mar. Wom. § 430.
6. Stewart Husb. and Wife, § 235.
7. Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64; s. c., 20 Am. Dec. 205; Mosher v. Mosher, 32 Me. 412; Cass v. Thompson, I. N. H. 65; s. c., 8 Am. Dec. 36; Wilcox v. Randall, 7 Barb. (N. Y.) 633.
8. 27 Hen. VIII. ch. 10, § 9; Co. Litt.

36, b.

9. Parham v. Parham, 6 Humph. (Tenn.) 287, 297.

(Tenn.) 287, 297.

10. Worthen v. Pearson, 33 Ga. 385.

11. Stimson Am. Stat. L. § 3244.

12. Stewart Husb. and Wife, § 275.

13. Shaw v. Shaw. 2 Dana (Ky.), 341.

But see Rayner v. Capehart, 2 Hawks (N. Car.), 375; Cauffman v. Cauffman, 17 S. & R. (Pa.) 16; Cox v. Rogers, 77 Pa. St. 160.

14. U. S. v. Duncan, 4 McLean (U. S.), 99; Collins v. Carman, 5 Md. 504, 532; Smith v. Smith, 20 Vt. 270; Adams v.

Adams, 39 Ala. 274; Apperson v. Bolton, 29 Ark. 418, 429; Stephens v. Gibbes, 14 Fla. 331; Nosworthy v. Blizzard, 53 Ga. 668; Grider v. Eubanks, 12 Bush (Ky.), 510; Smither v. Smither, 9 Bush (Ky.), 231; Shaw v. Shaw, 2 Dana (Ky.), 341; Moore v. Moore, 8 Miss. 665; Dougherty Moore v. Moore, 8 Miss. 665; Dougherty v. Barnes, 64 Mo. 159; Palmer v. Voorhis, 35 Barb. (N. Y.) 479; Howland v. Heckscher, 3 Sandf. Ch. (N. Y.) 519; Dutch v. Ackerman, 1 N. J. Eq. 40; Macknet v. Macknet. 29 N. J. Eq. 54; Bierer v. Bierer, 92 Pa. St. 265; Light v. Light, 21 Pa. St. 407; Morrow v. Morrow, 3 Tenn. Ch. 532; Waterbury v. Netherland, 6 Heisk. (Tenn.) 512; McDaniel v. Douglas, 6 Humph. (Tenn.) 220; Hathaway v. Hathaway 46 Vt. 224: 220; Hathaway v. Hathaway, 46 Vt. 234; Zoggel v. Kuster, 51 Wis. 31; Wilber v. Wilber, 52 Wis. 298.

15. McCallister v. Brand, II B. Mon.

(Ky.) 370. 16. Collins v. Carman, 5 Md. 503, 532; Boone v. Boone, 3 Harr. & McH. (Md.) 95; Sherman v. Newton, 6 Gray (Mass.), 307; Welch v. Anderson, 28 Mo. 293; Lewis v. Lewis, 7 Ired. (N. Car.) 72; Hinton v. Hinton, 6 Ired. (N. Car.)

17. Hinton v. Hinton, 6 Ired. (N. Car.)

274.

sane, 1 or an infant, 2 unless the statute provides for such cases, can any one elect for her. If she die before electing, her representatives cannot elect for her. If she marries before electing, it is

doubtful whether her husband must join with her.4

The effect of election is to make the widow a purchaser for valuable consideration of the provision taken in place of dower; and though in case, for example, of a devise, her rights are inferior to those of the husband's creditors, 6 they are superior to those of his other devisees.7—though there is some difference of opinion on this point.⁸ And if she is evicted she may, generally, have her dower proportionately.9 If her election be to take dower, the provision made in lieu thereof is deemed a trust fund for those who are disappointed by her taking dower. 10

A widow's right to dower depends upon the law of the place where the land lies, 11 and her election under a statute affects, in general, only the lands to which such statute applies—the lands

within the State. 12

1. Collins v. Carman, 5 Md. 503; Heavenridge v. Nelson, 56 Ind. 90; Newcomb v. Newcomb, 13 Bush (Ky.), 544; s. c., 26 Am. Rep. 222; Pinkerton v. Sargent, 102 Mass. 568; Lewis v. Lewis, 7 Ired. (N. Car.) 72; Kennedy v. Johnston, 65 Pa. St. 451; s. c., 3 Am. Rep. 650; Wright v. West, 2 Lea (Tenn.), 78. But, if she elects while insane, she

may ratify her act in a lucid interval. Brown v. Hodgson, 31 Me. 65. 2. If she be an infant, equity will elect

for her. Addison v. Bowie, 2 Bland (Md.), 606, 623. Or the time for election will be extended till her majority. Boughton v. Boughton, 2 Ves. Sr. 12; Bor v. Bor, 3 Bro. P. C. 173. But where, by statute, her guardian is authorized to elect, her election in person is void. Cheshire v. McCoy, 8 Jones (N. Car.), 376.

3. Collins v. Carman, 5 Md. 503, 527; Donald v. Porter, 42 Ala. 99; Eltzroth v. Binford, 71 Ind. 455; Boone v. Boone, 3 Harr. & McH. (Md.) 95; Sherman v. Newton, 6 Gray (Mass.), 307; Milliken v. Welliver, 37 Ohio St. 460; Crozier v. Crozier, 90 Pa. St. 384; s. c., 35 Am. Rep. 666. Contra: Howland v. Heck-

scher, 3 Sandf. Ch. (N. Y.) 519.

4. Gretton v. Howard, 1 Swanst. 413; Putteney v. Darlington, 7 Bro. P. C. 516; Davis v. Page, 9 Ves. Jr. 350; Barrow v. Barrow, 4 Kay & J. 409.

5. Steele v. Steele, 64 Ala. 438, 462; Lord v. Lord, 23 Conn. 327; Hubbard v. Hubbard, 6 Met. (Mass.) 50, 62; Tracy
v. Murray, 44 Mich. 109; Isenhart v.
Brown, 1 Edw. Ch. (N. Y.) 411.
6. Steele v. Steele, 64 Ala. 438. Cf.
Norcott v. Gordon, 14 Sim. 258; Tevis
v. McCreary, 3 Met. (Mass.) 151; Dun-

ham v. Rhodes, 23 Md. 233; Bowie v. Berry, 3 Md. Ch. 359; Hall v. Hall, I Bland (Md.), 203; Thomas v. Wood, I Md. Ch. 296; Pollard v. Pollard, I Allen Md. Ch. 296; Pollard v. Pollard, I Allen (Mass.), 490; Leavenworth v. Cooney, 48 Barb. (N. Y.) 570; Williamson v. Williamson, 6 Paige (N. Y.), 298; Jennings v. Jennings, 21 Ohio St. 56; Bard v. Bard, 58 Pa. St. 393; Loocock v. Clarkson, I Desaus. (S. Car.) 471; Stuart v. Carson, I Desaus. (S. Car.) 500.

7. Steele v. Steele, 64 Ala. 438; Isenhart v. Brown, I Edw. Ch. (N. Y.) 411;

Lord v. Lord, 23 Conn. 327.

8. Tracy v. Murray, 44 Mich. 109;
Gibson v. McCormick, 10 Gill & J. (Md.)
65, 113; Thomas v. Wood, 1 Md. Ch.
296; Hall v. Hall, 1 Bland (Md.), 203; 296; Hall v. Hall, I Bland (Md.), 203; Gaw v. Huffman, 12 Gratt. (Va.) 628, 637; Chambers v. Davis, 15 B. Mon. (Ky.) 722; Brant v. Brant, 40 Mo. 266; Paxson v. Potts, 3 N. J. Eq. 313; Howard v. Francis, 30 N. J. Eq. 444; Bray v. Neill, 21 N. J. Eq. 343; Jennings v. Jennings, 21 Ohio St. 56.

9. Hastings v. Clifford, 32 Me. 132; Thompson v. McGaw, I Met. (Mass.) 66; Collins v. Carman, 5 Md. 503, 540.

10. Iennings v. Jennings, 21 Ohio St.

10. Jennings v. Jennings, 21 Ohio St. 56, 80; Sandre v. Sandre, 65 Pa. St. 314. See also Hanson v. Worthington, 12 Md. 418, 438; Hinkley v. House, 40 Md. 461; s. c., 18 Am. Rep. 617.

11. Jennings v. Jennings, 21 Ohio St.

12. Wilson v. Cox, 49 Miss. 537, 542; Jennings v. Jennings, 21 Ohio St. 56; Staigg v. Atkinson, 144 Mass. 564. Con-tra: Apperson v. Bolton, 29 Ark. 418, 428; Van Arsdale v. Van Arsdale. 26 N. J. L. 404, 412.

(9) Defeating Dower by Estoppel, Laches, or Limitations.—During coverture a wife cannot estop herself from claiming dower except by a release duly executed. But after her husband's death she is sui juris, and may lose her estate by estoppel just as any other

person mav.2

Adverse possession against the husband of his lands during coverture cannot bar the wife's dower. 3 as her interest becomes vested only on his death.4 And for various reasons Statutes of Limitations have been held not to apply as against a widow's claim for dower,5 though in some States the statutes do so apply.6 tations must be pleaded to be a bar.7

Laches may be a bar to a claim for dower in equity, even where

Statutes of Limitation do not apply.8

(10) Defeating of Dower by Application of Dower Lands to Public Uses.—If a husband's lands are taken by right of eminent domain, dower is defeated,9 and a husband's voluntary dedication

1. Worthington v. Middleton, 6 Dana (Kv.), 300; Martin v. Martin, 22 Ala. 86; McFarland v. Febiger, 7 Ohio, 194; s. c., 28 Am. Dec. 632; Reiff v. Horst, 25 Md. 42; Chicago v. Kenzie, 49 Ill. 289. Contra: Connolly v. Branstler, 3 Bush (Ky.), 702. 2. Jones v. Powell, 6 Johns. Ch. (N.

Y.) 194; Stewart Husb. and Wife, § 276.

3. Hart v. McCollum, 28 Ga. 478; Durham v. Angier, 20 Me. 242; Moore v. Frost, 3 N. H. 126.

4. Moore v. Mayor, 8 N. Y. 110; s. c.,

59 Am. Dec. 473.

5. Park Dow. 311; 2 Scribner Dow. 559; Wakeman v. Roache, Dudley (S. Car.), 423; Tooke v. Hardeman, 7 Ga. 20; Chapman v. Shroeder, 10 Ga. 321; 20; Chapman v. Shroeder, 10 Ga. 321; Phares v. Walters, 6 Iowa, 106; Rolls v. Hughes, I Dana (Ky.), 407; Wells v. Beall, 2 Gill & J. (Md.) 468; Riddall v. Trimble, I Md. Ch. 143; May v. Rumney, I Mich. I; Littleton v. Patterson, 32 Mo. 357; Brown v. Moore, 74 Mo. 633; Conver v. Wright, 6 N. J. Eq. 412; Campbell v. Murphy, 2 Jones Eq. (N. Car.) 357; Spencer v. Weston, I Dev. & B. (N. Car.) 213; McMullin v. Turner, 7 Jones (N. Car.), 435; Simonton v. Houston, 78 N. Car. 408.

6. Rice v. Nelson, 27 Iowa, 148; King-

6. Rice v. Nelson, 27 Iowa, 148; Kingsolving v. Pierce, 18 B. Mon. (Ky.) 782; solving v. Pierce, 18 B. Mon. (Ky.) 782; Dunham v. Angier, 20 Me. 242; Torrey v. Minor, I Sm. & M. Ch. (Miss.) 489; Conover v. Wright, 6 N. J. Eq. 613; Berrien v. Conover, 16 N. J. L. 107; Jones v. Powell, 6 Johns. Ch. (N. Y.) 194; Tuttle v. Wilson, 10 Ohio, 24; Care v. Keller, 77 Pa. St. 487; Allen v. Allen, 2 Pa. 311; Caston v. Caston, 2 Rich. Eq. (S. Car.) 1; Stoney v. Bank, I Rich. Fg. (S. Car.) 27

Eq. (S. Car.) 275.

These statutes are prospectively construed, and are either applied to no right where the husband has died before their passage, or the limited period is made to passage, of the limited period is made to begin only from the time of their passage. Martin v. Martin, 35 Ala. 560; Tooke v. Hardeman, 7 Ga. 20; Sayre v. Wisner, 8 Wend. (N. Y.) 661; Ward v. Kilts, 12 Wend. (N. Y.) 137. They do not apply generally when the wife is beyond the seas. Larrowe v. Beam, 10 Ohio, 498.

It is said, too, that limitations do not run while the heir is in possession and not claiming adversely. Livingston v. Cochran, 33 Ark. 294; Sully v. Nebergill, 30 Iowa, 339; Fetch v. Finch, 52 Iowa, 563; Rickard v. Talbird, Rice Eq. (S. Car.) 158. It has also been held that the widow is barred in any case by adverse possession against the heirs. Carmichael Carmichael, 5 Humph.

7. Hitchcock v. Harrington, 6 Johns. (N. Y.) 290; s. c., 5 Am. Dec. 229.

8. Banksdale v. Garrett, 64 Ala. 277; McLaren v. Clark, 62 Ga. 106; Robinson v. Miller, 2 B. Mon. (Ky.) 284; Rolls v. Hughes, 1 Dana (Ky.), 407; Riddall v. Trimble, 1 Md. Ch. 143; Steiger v. Hillen, 5 Gill & J. (Md.) 121; Chew v. Farmers, 9 Gill (Md.), 361; Tuttle v.

Farmers, 9 Gill (Md.), 361; Tuttle v. Wilson, 10 Ohio, 24.

9. Bonner v. Peterson, 44 Ill. 253; Duncan v. Terre Haute, 85 Ind. 104; French v. Lord, 69 Me. 537; Nye v. Taunton, 113 Mass. 277; Wheeler v. Kirtland, 27 N. J. Eq. 534; Moore v. Mayor, 8 N. Y. 110; s. c., 4 Sandf. (N. Y.) 456; s. c., 17 Am. Dec. 516; Weaver v. Gregor 6 Ohio St. 547; Little v. Jones. v. Gregg, 6 Ohio St. 547; Little v. Jones, 8 Week. L. Gaz. 5.

thereof to public uses has the same effect. If the right of eminent domain is enforced during coverture, no allowance will, in general, be made for inchoate dower. but if the property is taken after the husband's death, dower will be allowed out of the dam-

ages.3

- (II) Defeating of Dower by Termination of Husband's Estate.— Where a husband holds or has held a defeasible title, and it is defeated, as where he or his heirs are evicted by title paramount.4 or a determinable estate, and it is terminated as a base fee. 5 the wife's dower also terminates, as her estate is but a continuation of her husband's: 6 the possible exception to this rule being the case of an estate determinable on a conditional limitation or executory devise 7
- (12) Defeating of Dower by Legal Proceedings.—Under various circumstances, suits may be instituted for the sale of lands in which a wife has dower. If the sale takes place under a right subsequent to dower, dower is not affected thereby; 8 but if the sale takes place under a lien prior to dower, dower in the land is defeated, though the wife may have dower out of the net proceeds 9 if the sale takes place after the husband's death. 10

Whether in such suits the effect upon dower depends upon whether the wife or widow be a party to the suit, seems to depend rather upon local practice and local statutes than upon any settled principle. 11 But it is permissible to make all persons interested in a piece of land parties to suits relating thereto; and as in some States dower would not be affected at all if the wife were not made a party, 12 it is better always, when dower might attach, to make the wife a party.13

(13) Defeating of Dower by Divorce.—A divorce a mensa et thoro

1. Gwynne v. Cincinnati, supra; Duncan v. Terre Haute, 85 Ind. 105.

2. French v. Lord, 69 Me. 537; Moore

v. Mayor, 8 N. Y. 110.
3. Bonner v. Peterson, 44 Ill. 253;
French v. Lord, 69 Me. 537.
4. Toomey v. McLean, 105 Mass, 122.

5. Jackson v. Kip, 8 N. J. 241.
6. Norwood v. Morrow, 4 Dev. & B. (N. Car.) 442.

7. Milledge v. Lamar, 4 Desaus. (S. Car.) 617.

8. Combs v. Young, 4 Yerg. (Tenn.) 218, 226; s. c., 26 Am. Dec. 225; Lewis v. Smith, 11 Barb. (N. Y.) 152; s. c., 9 N. Y. 502; Gardiner v. Miles, 5 Gill (Md.), 94.

9. Mantz v. Buchanan, I Md. Ch.

10. Holden v. Baggess, 20 W. Va. 62, 74; Helms v. Love, 41 Ind. 210; Kent v. Taggart, 68 Ind. 163; Blair v. Blair, 45 Iowa, 42.

11. Jackson v. Edwards, 7 Paige (N. Y.),

386; s. c., 22 Wend. (N. Y.) 498; Goodwin v. Keney, 49 Conn. 563; Anthony v. Nye, 30 Cal. 401; Stephens v. Richnell. 27 Ill. 444; Bissell v. Eaton, 64 Ind. 248; Tisdale v. Risk, 7 Bush (Ky.), 139; Chambers v. Nicholson, 30 Md. 349; Lamb v. Montague, 112 Mass. 352; Greiner v. Klein, 28 Mich. 12; Byrne v. Greiner v. Klein, 28 Mich. 12; Byrne v. Taylor, 46 Miss. 95; Worsham v. Collison, 40 Mo. 206; Merchants v. Thompson, 55 N. Y. 7; Jordan v. Van Epps, 19 Hun (N. Y.), 526; s. c., 58 How. Pr. (N. Y.) 338; Boardman v. Boardman, 22 Hun (N. Y.), 527; Ketchum v. Shaw, 28 Ohio St. 503; Parmenter v. Binkley, 28 Ohio St. 32; Robinson v. Shacklett, 29 Great (Valley), 28 Gratt. (Va.) 99, 107.
12. Rank v. Hanna, 6 Ind. 20; Greiner

v. Klein, 28 Mich. 12; Jackson v. Edwards, 7 Paige (N. Y.), 386; s. c., 25 Wend. (N. Y.) 498; Van Gelder v. Post, 2 Edw. Ch. (N. Y.) 577.

13. Stewart Husb. and W. § 261; Boone Morigages, § 179.

does not bar dower, 1 but a divorce a vinculo matrimonii, 2 in the absence of statute, 3 does, even though granted by a foreign court, if it be extra-territorially valid. 4

1. Divorce.—Seagrave v. Seagrave, 13 Ves. 443; Gee v. Thompson, 11 La. Ann. 657, 659; Clark v. Clark, 8 Watts & S. (Pa.) 85, 88; Walsh v. Kelly, 34 Pa. St. 84; Crain v. Cavana, 36 Barb. (N. Y.) 410; Wait v. Wait, 4 Comst. (N. Car.) 95, 100; Rich v. Rich, 7 Bush (Ky.), 53; Bryan v. Bachelor, 6 R. I. 546; Thayer v. Thayer, 14 Vt. 107; Watkins v. Watkins, 7 Yerg. (Tenn.) 283. See DIVORCE.

"This decree [of divorce a mensa et thoro] did not dissolve the relation of husband and wife, nor could it deprive the widow of her dower, or reasonable part

Hokamp v. Hagaman, 36 Md. 511, 517. Nor does award of alimony therewith. Taylor v. Taylor, 93 N. Car. 418; s. c.,

53 Am. Rep. 460.

2. Coke Lit. 32, \(\alpha\); Jordan \(\nu\). Clark, 81 Ill. 465, 467; Billau \(\nu\). Hercklebrath, 23 Ind. 71, 72; Whitsell \(\nu\). Mills, 6 Ind. 229, 230; McCafferty \(\nu\). McCafferty, 8 Blackf. (Ind.) 218, 220; McCrarey \(\nu\). McCafferty, 5 Iowa, 232. 238, 251; Levins \(\nu\). Sleator, 2 Greene (Iowa), 609; Harding \(\nu\). Alden, 9 Me. 140, 145; Given \(\nu\). Marr, 27 Me. 212, 223; Dowl \(\nu\). Howland, 14 Mass. 219; Gould \(\nu\). Crow, 57 Mo. 200, 204; Hunt \(\nu\). Thompson, 61 Mo. 148, 152; Gleason \(\nu\). Emerson, 51 M. H. 405, 406; Calame \(\nu\). Calame \(\nu\). Calame \(\nu\). Schippen \(\nu\). Pruden, 39 N. Y. Super. Ct. 167; s. c., 64 N. Y. 47; Reynolds \(\nu\). Reynolds, 24 Wend. (N. Y.) 193, 196, 197; Rice \(\nu\). Lumby, 10 Ohio St. 596, 598; Burdick \(\nu\). Briggs, 11 Wis. 126, 132.

3. There are or have been statutes

3. There are or have been statutes affecting this point in several States. See Stilson v. Stilson, 46 Conn. 15; Marvin v. Marvin. 59 Iowa. 699; Crane v. Fipps, 29 Kan. 585; Wood v. Simmons, 20 Mo. 363, 366; Forrest v. Forrest, 6 Duer (N. Y.), 102, 153; Allen v. McCullough, 2

Heisk. (Tenn.) 174, 188.

In many States, when the wife is the innocent party, the statute gives her dower in spite of an absolute divorce, and she is entitled to such dower under some statutes immediately on the divorce, and she has dower at once as though he were dead in all lands he has owned since the passage of the statute, although he has aliened them. Merrill v. Shattuck, 55 Me. 370; Stilphen v. Hondlette, 60 Me. 447, 452; Given v. Marr, 27 Me. 212, 223, 224; Hunt v. Thompson, 61 Mo. 148, 153; Percival v. Percival, 56 Mich. 297; Gleason v. Emerson, 51 N. H. 405.

An award of alimony may in such case be in lieu of dower. Tatro v. Tatro, 18 Neb. 395; s. c., 53 Am. Rep. 820.

Under other statutes she gets her dower only upon the husband's death. Stilson v. Stilson, 46 Conn. 15, 19; Hunt v. Thompson, 61 Mo. 148, 154; Lamkin v. Knapp, 20 Ohio St. 454, 460. And if the statute does not expressly state when she shall have dower, she has it only on her husband's death. Hunt v. Thompson, 61 Mo. 148, 154.

In case she is entitled to dower at once, it is assigned just as if the husband were dead. Harding v. Alden, 9 Me. 140, 151. The proceedings are as in other cases (discussed hereafter), and the assignment

cannot be made by the divorce court. Smith v. Smith, 13 Mass. 231, 232. And the usual demand must be made. Merrill

v. Shattuck, 55 Me. 370, 373.

In case she is entitled only on his death, she then takes her dower, although they have both meanwhile married again. Lamkin v. Knapp, 20 Ohio St. 454, 456, 459. And although he has aliened the lands. Davol v. Howland, 14 Mass. 219, 221, 222; Harding v. Alden, 9 Me. 140, 151.

If the wife is entitled to dower after divorce, only if innocent, she will get no dower if the fault has been on both sides. Cunningham v. Cunningham, 2 Ind. 233,

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4. In Barrett v. Failing, 111 U.S. 523, it was held that a California divorce barred a wife of her dower in Oregon, although an Oregon statute gave an innocent wife on divorce a one-third interest in her husband's lands, the latter statute being construed to apply to divorces granted in Oregon only. In discussing the subject, Mr. Justice Gray said: "Accordingly, it has been generally held that a valid divorce from the bond of matrimony, for the fault of either party, cuts off the wife's right of dower, and the husband's tenancy by the courtesy, unless expressly or impliedly preserved by statute. Barber v. Root, 10 Mass. 260; Hood v. Hood, 110 Mass. 463; Rice v. Lumley, 10 Ohio St. 596; Lamkin υ. Knapp, 20 Ohio St. 454; Gould υ. Crow, 57 Mo. 200; 4 Kent Com. 54; 2 Bishop's Mar. & Div. (6th Ed.) §§ 706, 712, and cases cited. In each of the Massachusetts cases just referred to, the divorce was obtained in another State. The ground of the decision of the court of appeals of New York

(14) Defeating of Dower by Husband's Bankruptcy.—The husband's bankruptcy defeats dower only in cases where his voluntary assignment would have this effect, and usually the assignee in bankruptcy holds the bankrupt's lands subject to the wife's dower.2

VI. Assignment of Dower.—(I) The Widow's Right to an Assignment.—Upon the husband's death, as has been seen, dower becomes consummate, and is a vested right; but the widow has no right to enter upon her dower lands, and no estate of dower until her dower has been assigned to her.³ She may remain in the family dwelling until dower is assigned—this is her quarantine; 4 and she has

in Wait v. Wait, 4 N. Y. 95, by which a wife was held not to be deprived of her right of dower in her husband's real estate by a divorce from the bond of matrimony for his fault, was that the legislature of New York, by expressly enacting that 'in case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed,' had manifested an intention that she should retain her right of dower in case of a divorce for the misconduct of the husband. See also Reynolds v Reynolds, 24 Wend. (N. Y.) 193. The decisio's of the Supreme Court of Pennsylvania in Colvin v. Reed, 55 Pa. St. 375, and in Reed v. Elder, 62 Pa. St. 308, holding that a wife was not barred of her dower in land in Pennsylvania by a divorce obtained by her husband in another State, proceeded upon the ground that, in the view of that court, the court which granted the divorce had no jurisdiction over the wife. And see Cheely v. Clayton, 110 U. S. 701. Whether a statute of one State, securing or denying the right of dower in case of divorce, extends to a divorce in a court of another State having jurisdiction of the cause and of the parties, depends very much upon the terms of the statute, and upon its interpretation by the courts of the State, by the legislature of which it is passed, and in which the land is situated. In Mansfield v. McIntyre, 10 Ohio, 27, it was held that a statute of *Ohio*, which provided that in case of divorce for the fault of the wife she should be barred of her dower, was inapplicable to a divorce obtained by the husband in another State: and the wife was allowed to recover dower upon grounds hardly to be reconciled with the latter cases in Ohio and elsewhere, as shown by the authorities before referred to. In Harding v. Alden, 3 Greenl. (Me.) 140, a wife who had obtained a divorce in another State recovered dower in Maine under a statute which, upon divorce for adultery of the husband, directed her dower to be assigned to her in the lands of her husband. in the same manner as if such husband was actually dead; but the point was not argued, and in the case stated by the parties it was conceded that the demandant was entitled to judgment if she had been legally divorced. The statute of Missouri, which was said in Gould v. Crow, 57 Mo. 205, to extend to divorces obtained in another State, was expressed in very general terms: 'If any woman be divorced from her husband for the fault or misconduct of such husband, she shall not thereby lose her dower; but if the husband be divorced from the wife for her fault or misconduct, she shall not be endowed."

1. See Perkins v. McDonald, 10 Lea (Tenn.), 732, 734; Rhea v. Meredith, 6 Lea (Tenn.), 605, 608.

2. Porter v. Layear, 109 U. S. 84, 88; s. c., 87 Pa. St. 513; 30 Am. Rep. 380; Dudley v. Easton, 104 U. S. 99, 105; In re Bartenbach, 11 Bank. Reg. 61; In re Angier, 4 Bank. Reg. 619. In re Lawrence, 44 Conn. 411, 424; Dwizer v. Garlough, 31 Ohio St. 158; In re Kelso, Week. Notes, 475; Speake v. Kinard, 4 S. Car. 54.

It is not part of the assignee's duty to try to save the wife's dower rights; he takes subject to such rights. Dudley v.

Easton, 104 U. S. 99, 105.

In some States, on a husband's bankruptcy, the wife is allowed dower at once as if he were dead. Warford v. Noble, 9 Biss. (C. C.) 320, 323; Lawrence v. Lawrence, 49 Conn. 411, 424.

3. Blodget v. Brent, 3 Cranch (C. C.), 394; Moore v. Mayor, 8 N. Y. 110; s. c.,

59 Am. Dec. 473.

4. At common law the widow may remain in the family home or mansion of her husband for forty days after his death, and similar provisions exist in the statutes of many of the States. Stewart Mar. and Div. § 459; I Washb. Real Prop. 223. But there was no right to dower in this property at common law. Denaugh v. Denaugh, 10 Gratt. (Va.) 536; the right to have dower assigned as soon as practicable, the period

being usually fixed by statute.

(2) The Tenant's Duty as to Assignment.—The tenant of the freehold must assign dower, though by statute this duty has been placed upon others, such as the husband's executor,2 or a tenant for years.³ And whoever is compellable by writ to assign dower, may assign it without writ, and vice versa.4

The tenant assigning need not have a good title, his act being ministerial only; and the party with the true title will be bound if the assignment were of common right,6 and be bound until he

avoids it if the assignment were against common right.7

Even though an infant, the tenant must assign,8 and a guardian may make the assignment. But in case of an assignment compelled by writ, it is made by the sheriff or other officer of court. 10

(3) Assignment without Legal Proceedings—Of and Against Common Right.—The person who is bound to make the assignment of her dower to the widow, may do so without legal proceedings, under the common law; and an assignment so made, if fair and just, will be as valid as one made under a decree of court. 11 He may either set off to her by metes and bounds one third of the husband's lands and tenements, 12 or one third interest in his incorporeal hereditaments, 13 thus giving her exactly what she is entitled to; and this is called an "assignment of common right." 14 Or he may, by an agreement with her, set off to her some portion of the husband's lands and hereditaments in lieu of what she is strictly entitled to: 15

Perk. § 456. Such right has been very generally given in the United States, and is especially regarded in the homestead laws. Stewart Husb. and W. §§ 321-330; Stimson Am. Stat. L. § 3270; I Washb. Real Prop. 222, n.
1. Park Dow. 265, 266; 2 Scribner

Dow. 75.

- 2. Harrow v. Johnson, 3 Metc. (Ky.) 578.
 - 3. I Washb. Real Prop. 225-6.

4. 2 Scribner Dow. 75.

5. Park Dow. 266.

6. Park Dow. 266; 2 Scribner Dow. 77. Unica Litt. 35, a. Unless obtained by collusion. Co.

7. 2 Scribner Dow. 78; Rowe v. Power,

2 Bos. & P. N. S. 1, 33.

8. 1 Roll. Abr. 137, 681; Jones v. Brewer, 1 Pick. (Mass.) 314.
9. Boyers v. Newbanks, 2 Ind. 388;

Robinson v. Miller, I B. Mon. (Ky.) 88; s. c., 2 B. Mon. (Ky.) 284; Young v. Tarbell, 32 Me. 509; Curtis v. Hobart, 41 Me. 230; Jones v. Brewer, I Pick. (Mass.) 314. Contra: Bonner v. Peterson, 44 Ill. 253; Guernsey v. Guernsey, 21 Ill. 443. 10. Barton v. Hinds, 46 Me. 121; Miller

v. Miller, 12 Mass. 454.
11. Hill v. Mitchell, 5 Ark. 608, 629; Menifee v. Menifee, 3 Eng. 9; Shelton

v. Carroll, 16 Ala. 148; Johnson v. Neil, (Conn.), 227; Lenfers v. Henke, 73 III. 405; s c., 24 Am. Rep. 263; McCormick v. Taylor, 2 Ind. 336. 338; Robinson v. v. Miller, I B. Mon. (Ky.) 88; s. c., 2 B. v. Miller, I B. Mon. (Ky.) 88; s. c., 2 B. Mon. (Ky.) 284; Mitchell v. Miller, 6 Dana (Ky.), 79; Baker v. Baker, 4 Me. 67; Young v. Tarbell, 37 Me. 509; Austin v. Austin, 50 Me. 74; Shattuck v. Gregg, 23 Pick. (Mass.) 88; Meserve v. Meserve, 19 N. H. 240; Clark v. Mussey, 43 N. H. 59; Rutherford v. Graham, 4 Hun (N. Y.), 796; McLaughlin v. Mc-Laughlin, 20 N. J. Eq. 190; Sutton v. Burrows, 2 Murph. (Tenn.) 79.

12. Park Dow. 251; 2 Scribner Dow. 80; 1 Washb. Real Prop. 223.
13. 2 Scribner Dow. 80; Stevens v. Stevens, 3 Dana (Ky.), 371.
14. Schnebly v. Schnebly, 26 Ill. 116;

Pierce v. Williams, 7 N. J. L. 109.

15. Johnson v. Neil, 4 Ala. 166; Beers v. Strong, Kirby (Conn.), 19; s. c., 1 Am. Dec. 10; Robinson v. Miller, 1 B. Mon. (Ky.) 88; s. c., 2 B. Mon. (Ky.) 284; French v. Peters, 33 Me. 396; French v. Pratt, 27 Me. 381; Jones v. Brewer, 1 Pick. (Mass.) 314; Draper v. Baker, 12 Cush. (Mass.) 288; Marshall v. McPherson. 8 Gill & J. (Md.) 232; Welch v. son, 8 Gill & J. (Md.) 333; Welch v.

and this is denominated an "assignment against common right." 1

The effect of the two kinds of assignment, of and against common right, is not the same. If it be an assignment of common right, it is binding though made by a wrongful tenant: 2 the widow holds the property clear of all incumbrances inferior to dower,3 and if it be taken from her under prior incumbrances, she may be endowed anew out of the balance of the estate.4 Whereas an assignment against common right is not binding unless made by the rightful tenant, the lands are liable for the husband's debts, and if she loses any part of them she cannot be endowed anew.

The assignment may be made without writing, s for the widow's

right is not thereby created, but only ascertained.9

(4) Assignment by Legal Proceedings.—At common law the legal remedy to enforce the right to dower was by a writ of dower unde nihil habet, or by writ of right of dower, under which, judgment being obtained, dower is assigned by the sheriff, and then the widow may obtain possession by ejectment proceedings. 10 common-law remedy is practically obsolete.

Under modern statutes the methods of assigning dower at law vary so much that their discussion would be very unsatisfactory: the statutes themselves should be consulted, and in most cases

will be found very plain and simple.11

In equity, jurisdiction was first taken to assign dower in cases in which discovery was prayed; 12 and then this jurisdiction was extended, principally because dower can be assigned by the same machinery which is used in partition suits and in settling accounts, until it became commonly concurrent with the jurisdiction of law.13

Anderson, 28 Mo. 293; Pinkham v. Gear, 3 N. H. 163; Hale v. James, 6 Johns. Ch. (N. Y.) 258; s. c., 10 Am. Dec. 328; Fowler v. Griffin, 3 Sandf. (N. Y.) 385; Gown v. Gown, 17 S. Car. 532; Fitzhugh

v. Fitzhugh, 3 Call (Va.), 13.
1. Jones v. Brewer, 1 Pick. (Mass.) 314.

2. 2 Scribner Dow. 77.

3. Scott v. Hancock, 13 Mass. 162.

Scott v. Beatty, 12 B. Mon. (Ky.)
 Scott v. Hancock, 13 Mass. 162;
 Pierson v. Williams, 23 Miss. 64.
 Rowe v. Rowe, 2 Bos. & P. N. S.

1, 33. 6. French v. Pratt, 27 Me. 381; Mantz

v. Buchanan, 1 Md. Ch. 202.

7. Scott v. Hancock, 13 Mass. 162; Jones v. Brewer, 1 Pick. (Mass.) 314; Hollowman v. Hollowman, 5 Sm. & M. (Miss.) 559. 8. Rowe v. Power, 2 Bos. & P. N. S.

1, 33; Johnson v. Neil, 4 Ala. 166; Curtis v. Hobart, 41 Me. 230; Jones v. Brewer, I Pick. (Mass.) 314; Meserve v. Meserve, 19 N. H. 240.

9. Co. Litt. 35, a; Conants v. Little, 1

Pick. (Mass.) 191; Shattuck v. Gregg, 23 Pick. (Mass.) 180; Williams v. Bennet, 4 Ired. (N. Car.) 122.

Assignment Without Suit-Statute of Frauds.-Where the widow and the heir made an agreement as to the division between them of the rents and profits of a mine, such an agreement was deemed an assignment of dowerj and valid under the Statute of Frauds. Lenfers v. Henkle. 73 Ill. 405; s. c., 24 Am. Rep. 263.
In a case where the assignment is

against common right, and the widow accepts a provision in lands instead of her legal dower, the transaction is taken out of the Statute of Frauds by part performance. Squire v. Harder, 1 Paige (N. Y.), 494; s. c., 19 Am. Dec. 446. 10. 2 Scribner Dow. ch. 5.

11. 2 Scribner Dow. ch. 6; 1 Washb. Real Prop. 228-236; Stewart Husb. and W. § 287; Stimson Am. Stat. L. §§ 3271–3282.

12. Park Dow. 317, 318; 2 Scribner Dow. 145; Wild v. Wells, I Dick. 3; Cur-

tis v. Curtis, 2 Bro. C. C. 620.

13. Mundy v. Mundy, 4 Bro. C.C. 294;

When dower in equitable estates is to be awarded, equity has exclusive jurisdiction. And courts of law are bound to respect

an assignment of dower made by a court of equity.2

When the widow sues for dower, all interested persons are proper parties, though the only necessary party is the tenant of the freehold. The bill should allege substantially the grounds of her right,5 and if there is no contest the court may proceed at once to make the assignment.⁶ If the widow's right is contested in equity, it is the practice of the court of equity to delay the case until the right is established at law. All legal defences are good, but no equitable defence is good against a legal title except that of laches.8

The widow must prove her marriage, and the seizin and death of her husband.9.

Costs are in the discretion of the court. 10

s. c., 2 Ves. Jr. 122; Strickland v. Strickland, 6 Beav. 77; Powell v. Monson, 3 Mason (U. S.), 347, 359; Herbert v. Wren, 7 Cranch (U. S.), 370; Beavers v. Smith, 11 Ala. 20; Slatler v. Meek, 35 Ala. 528; Boyd v. Hunter, 44 Ala. 705; Menifee v. Menifee, 8 Ark. 9; Crittenden. v. Crittenden, 10 Ark. 333; s. c., 11 Ark. 82; Layton v. Butler, 4 Harr. (Del.) 507; Farrow v. Farrow. 1 Del. Ch. 457; Milton v. Milton, 14 Fla. 369; Blair v. Harrison, 11 Ill. 384; Osborne v. Harine, 17 Ill. 535; Welles v. Sprague, 10 Ill. 305; Martin v. Coult, 4 Ill. 535; Wall v. Hill, 7 Dana (Ky.), 173; Lawson v. Morton, 6 Dana (Ky.), 471; Garton v. Bates, 4 B. Mon. (Ky.) 366; Wells v. Beall, 2 Gill & J. (Md.) 468; Sellman v. Bowen, 8 Gill J. (Md.) 406; Seliman v. Bowell, 6 Sh. & J. (Md.) 50; s. c., 29 Am. Dec. 524; Scott v. Crawford, 11 Gill & J. (Md.) 365; Darnall v. Hill, 12 Gill & J. (Md.) 388; Grove v. Todd, 45 Md. 252; s. c., 20 Am. Rep. 76; Mildred v. Nell, 2 Bland (Md.), 354; Summons v. Tongue, 3 Bland (Md.), 341; Brown v. Bronson, 35; Mich 1841, 341; Brown v. Bronson, 35; Mrch 415; Davis v. Davis, 5 Mo. 183; Hartshorne v. Hartshorne, 2 N. J. Eq. 349; Hinchman v. Stiles, 9 N. J. Eq. 361, 454; Rockwell v. Morgan, 13 N. J. Eq. 384; Ocean v. Brinley, 34 N. J. Eq. 438; Hazen v. Thurber, 4 Johns. Ch. (N. Y.) 604; Swaine v. Perine, 5 Johns. Ch. (N. Y.) zen v. 1 nurber, 4 jonns. Ch. (N. Y.)004; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482; s. c., 9 Am., Dec. 318; Badgley v. Bruce, 4 Paige (N. Y.), 98; Bell v. Mayor, 10 Paige (N. Y.), 49; Campbell v. Mur-phy, 2 Jones Eq. (N. Car.) 357; White-head v. Clinch, 1 Murphy (N. Car.), 128; Woodward v. Woodward, 2 Rich. Eq. (S. Car.) 23; Gibson v. Marshall, 5 Rich. Eq. (S. Car.) 254; Miller v. Cape, I Desaus. (S. Car.) 110; Blair v. Thompson, 11 Gratt. (Va.) 441.

1. 2 Scribner Dow. 161-163.

2. Lawrence v. Miller, 2 Comst. (N. Car.) 245.

Badley v. Bruce, 4 Paige (N. Y.). 98.
 Blair v. Thompson, 11 Gratt. (Va.)

5. 2 Scribner Dow. 156, 157; Wells v. Sprague, 10 Ind. 305; Wing v. Ayer, 53 Me. 465; Darnall v. Hill, 12 Gill & J. (Md.) 388.

6. Mundy v. Mundy, 4 Brown's Chan. Cas. 294; s. c., 2 Ves. Jr. 122; Scott v. Crawford, 12 Gill & J. (Md.) 365; Badgley v. Bruce, 4 Paige (N. Y.), 98.
7. RoperHusb. and W. 450; 2 Dan. Ch.

Pr. 1165; Curtis v. Curtis, 2 Bro. C. C. 631; D'Arcy v. Blake, 2 Sch. & L. 391; Mundy v. Mundy, 4 Brown's Chan. Cas. 294; Scott v. Crawford, 12 Gill & J. (Md.) 365; Sellman v. Bowen, 8 Gill & J. (Md.) 50; s. c., 29 Am. Dec. 524; Hartshorne v. Hartshorne, 2 N. J. Eq. 349; Rockwell v. Morgan, 13 N. J. Eq. 349; Ocean v. Brinley, 34 N. J. Eq. 438; Barnes v. Carson, 59 Ala. 188; Badgley v. Bruce, 4 Paige (N. Y.), 98.

8. 2 Scribner Dow. 164; Shares v. Walters, 6 Iowa, 106; Maybury v. Brien, 15 Pet. (U. S.) 21; O'Brien v. Elliott, 15 Me. 125; s. c., 32 Am. Dec. 137; Campbell v. Murphy, 2 Jones Eq. (N. Car.) 537; Rolls v. Hughes, I Dana (Ky.), 407.

9. 2 Scribner Dow. 205; Stewart Husb. 294; Scott v. Crawford, 12 Gill & J. (Md.)

9. 2 Scribner Dow. 205; Stewart Husb.

and W. § 289. 10. 2 Scribner Dow. 173.

When there has been no denial of the widow's right, she should pay the costs. Lucas v. Calcraft, I Brown's Chan. Cas. Cas. 620; Hazen v. Thurber, 4 Johns. Ch. (N. Y.) 604; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 483; s. c., 9 Am. Dec. 318. But when the defendants have delayed her or disputed her rights, the costs

Dower may be assigned by metes and bounds, out of the rents and profits, or out of money into which land has been changed.1

(5) Assignment by Metes and Bounds.—As a general rule, whenever the property in which the widow is entitled to dower is capable of division, dower must be set off by metes and bounds.2 This was the rule at common law, but its application has proved so troublesome that such assignments are not common, and statutes have provided other means of giving a widow a fair third for her life.3

When an assignment by metes and bounds is about to be made. the tenant need not have notice.4 The officer who makes the assignment is a mere ministerial agent, and has no power except such as is given him by the writ, and he must strictly conform to the law.6 His return should report that he has made the assignment by metes and bounds,7 and should describe with reasonable certainty the property so assigned.8 If he fails or refuses to act, another may be appointed,9 and if he acts vexatiously he may be

In making the division, quantity is not alone to be considered. but the value and productiveness of the land also.11 Whether improvements are to be considered is hereafter discussed. 12 If there are several tracts of land the widow has a right to have her

should be borne by them. Morgan v. Rider, I Ves. & B. 20; Hall v. James, 6 Johns. Ch. (N. Y.) 258; s. c., 10 Am. Dec, 328; Russell v. Austin, I Paige (N. Y.),

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1. Willett v. Beatty, 12 B. Mon. (Ky.)
172; Jennison v. Hapgood, 14 Pick.
(Mass.) 345; s. c., 19 Am. Dec. 258;
Hartshorne v. Hartshorne, 2 N. J. Eq. Hartshorne v. Hartshorne, 2 N. J. Eq. 349; Warner v. Van Alstyne, 3 Paige (N. Y.), 573; Tabele v. Tabele, 1 Johns. Ch. (N. Y.) 45; Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452; Mills v. Van Voorhis, 23 Barb. (N. Y.) 125; Hawley v. James, 6 Paige (N. Y.). 318; Klutts v. Klutts, 5 Jones Eq. (N. Car.) 380; Gibson v. Marshall, 5 Rich. Eq. (S. Car.) 254; Thompson v. Cochran, 7 Humph. (Tenn.) 72; Tod v. Baylor, 4 Leigh (Va.), 498.

2. Perk. § 414; Park. Dow. § 351; 2 Scribner Dow. 581; 4 Kent Comm. 62;

Scribner Dow. 581; 4 Kent Comm. 62; Pierce v. Williams, 3 N. J. L. 700; Ben-

ner v. Evans, 3 Pa. 454.
3. Stewart Husb. and W. § 293; Stim-

son Am. Stat. L. § 3276.
4. Ridway v. Newbold, 1 Harr. (Del.) 385; Watkins v. Watkins. 9 Johns. (N. Y.) 245; Beaty v. Hearst, 1 McMull. (S. Car.)

5. 1 Roll. Abr. 638, pl. 35; Stewart v. Blease, 5 S. Car. 433; Moore v. Waller, 4 Rand. (Va.) 418.
 6. Carriell v. Bronson, 6 Iowa, 471: Jones v. Jones, Busb. (Ky.) 177.

7. 2 Scribner Dow, 582; Pierce v. Wil liams, 3 N. J. L. 709; Jones v. Fields, 5 Heisk. (Tenn.) 394; Spain v. Adams, 3 Tenn. Ch. 319.

8. Howard v. Cavendish, Cro. Jac. 621, pl. 12; s. c., Palmer, 264; I Roper Husb. and W. 394; Dew v Abingdon, Doug. 476; Tenny v. Durrant, I B. & Ald. 40; Adams v. Barron, 13 Ala. 205; Myer v. Pfeffer, 50 Ill. 485; Stevens v. Stevens, 3 Dana (Ky.), 371; Young v. Gregory, 46 Me. 425; Pierce v. Williams, 3 N. J. L. 709; Patch v. Keeler, 27 Vt. 252. 9. McCormick v. Taylor, 5 Ind. 436;

9. McCormick v. Taylor, 5 Ind. 436; Lennox v. Livingston, 47 Mo. 256.

10. Park Dow. 272; 2 Scribner Dow. 582; Abingdon v. Abingdon, Palmer, 265.

11. Coates v. Cheever, I Cow. (N. Y.) 460, 476; Scammon v. Campbell, 75 Ill. 223; Walker v. Walker, 2 Ill. App. 418; Smith v. Smith, 5 Dana (Ky.), 179; Lawson v. Morton, 6 Dana (Ky.), 471; Taylor v. Lusk, 7 J. J. Marsh. (Ky.) 636; Carter v. Parker, 28 Me. 509; Leonard v. Leonard, 4 Mass. 533; Riley v. Bates, 40 Mo. 568; Strickler v. Strickler, 66 Mo. 465; Macknet v. Macknet, 24 N. J. Eq. 449; Watkins v. Watkins, 9 Johns. (N. Y.) 245; McDaniel v. McDaniel, 3 Ired. (N. Car.) 61; Stiner v. Cawthorne, 4 Dev. & B. (N. Car.) 501; Gillgartner v. Geb-A. C. Car.) 501; Gillgartner v. Gebhart, 25 Ohio St. 557; Gibson v. Marshall, 6 Rich. Eq. (S. Car.) 210.

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dower assigned out of each. 1 but in some States if all the tracts are held by the same parties an assignment for all may be made out of any one,2 and there are cases which hold that a husband's alienee may compel an assignment out of the tracts not aliened.3 Assignment may even be made of certain rooms in a house with the use of the halls, etc.4 But some property is not capable of division, and dower must be assigned as a part of the rents and profits, as hereafter shown. Dower may be assigned in estates in common by metes and bounds if such estates have been partitioned or the husband's interest assigned to his cotenant, 6 otherwise the assignment must be made of a part in common.

(6) Assignment in Rents and Profits.—Whenever the property subject to dower is incorporeal, or is in its nature incapable of a fair division by metes and bounds,9 the widow may be allowed one third of the actual or estimated profits or rents during her

life.10

So that, although a rent cannot be given in lieu of dower when the property is divisible, 11 except by consent, 12 when the property is not divisible but its value consists of its rents and profits, as in the case of a tavern, 13 a mill, 14 a ferry, 15 or a mine, 16 a rent may be given as dower, distrainable as of common right. 17 If the property is not actually leased, it is very difficult to determine what its rents and profits are; the yearly interest on its market value is not always commensurate with its actual producing capacity. 18 If the

1. Litt. § 36; Hill v. Mitchell, 5 Ark. 608; Morrill v. Menifee, 5 Ark. 629; Schnebly v. Schnebly, 26 Ill. 116; O'Fer-Schnebly v. Schnebly, 26 Ill. 110; O Ferrall v. Simplot, 4 Iowa, 381; Carriell v. Bronson, 6 Iowa, 471; Wood v. Lee, 5 Mon. 50; French v. Pratt, 27 Me. 381; French v. Peters, 33 Me. 396; Jones v. Brewer, I Pick. (Mass.) 314; Scott v. Scott, I Bay (S. Car.), 504; s. c., I Am.

Dec. 625.

2. 2 Scribner Dow. 603; Doe v. Grinnell, I Q. B. 682; Coulter v. Holland, 2 Harr. (Del.) 330; Milton v. Milton, 14 Fla. 369; Rowland v. Carroll, 81 Ill. 224; Peyton v. Jeffries, 50 Ill. 153; Reeves v. Reeves, 54 Ill. 332; Scammon v. Campbell, 75 Ill. 223; Fosdick v. Gooding, r Me. 30; s. c., 10 Am. Dec. 25; Boyd v. Carlton, 69 Me. 200; Cook v. Fisk, Walker (Miss.), 423; Thomas v. Hesse, 34 Mo. 13; Ellicott v. Mosher, 11 Barb. (N. V.) 534; Anderson v. Henderson, 5 W. Va. 182.

8. Grigly v. Cox, 1 Ves. Sr. 517; Lawson v. Morton, 6 Dana (Ky.), 471; Wood

son v. Morton, o Dana (K.y.), 471; wood v. Keyes, 6 Paige (N. Y.), 478.

4. Palmer, 264; Perk. § 342; Doe v. Grinnell, 1 Q. B. 682; Lymmes v. Drew, 21 Pick. (Mass.) 278; White v. Story, 2 Hill (N. Y.), 543; Watkins v. Watkins, 9 Johns. (N. Y.) 245; Parkes v. Hardey, 4 Bradf. (N. Y.) 15; Stewart v. Smith, 39

Barb. (N. Y.) 167; Patch v. Keeler, 27

5. Park Dow. 253; 2 Scribner Dow. 591.

6. Rank v. Hanna, 6 Ind. 20; Lloyd v. Conover, 25° N. J. L. 47; Blossom v. Blossom, 9 Allen (Mass.). 254.
7. 2 Scribner Dow. 590; Ridgway v. Newbold, 3 Harr. (Del.) 385; Potter v. Wheeler, 13 Mass. 504; Wilkinson v. Parish, 3 Paige (N. Y.), 653.

8. Park Dow. 253; 2 Scribner Dow.

9. 2 Scribner Dow. 639; Chase v. Chase, I Bland (Md.), 206, 233; s. c., 17 Am. Dec. 277.

10. 2 Scribner Dow. 639 et seq.

- 11. White v. Story, 2 Hill (N. Y.), 543,
- 549. 12. White v. Story, 2 Hill (N. Y.), 543,
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 13. Chase v. Chase, r Bland (Md.), 206, 233; s. c., r7 Am. Dec. 277.
 14. Smith v. Smith, 5 Dana (Ky.),
 - 15. Stevens v. Stevens, 3 Dana (Ky.),
- 16. Rockwell v. Morgan, 13 N. J. Eq.
 - 17. Chase v. Chase, I Bland (Md.), 206,

233; s. c., 17 Am. Dec. 277.

18. 2 Scribner Dow, 639 et seq.; Williams v. Williams, 3 Bland (Md.), 186,

lands out of which a widow is dowable are sold under a paramount lien, and she is dowable out of the surplus only. dower is usually allowed either in a gross sum² or in a life-interest in one third of it 3

- (7) Assignment of Gross Sum in Lieu of Dower.—When dower is not assigned out of the lands themselves, or out of the actual rents and profits thereof, interest, as has been seen, is sometimes allowed on the estimated value of the proportion which might have been assigned as dower,4 or the value of the widow's lifeinterest may be calculated and given her at once in a gross sum.5 The power of the court to make an award in a gross sum has been questioned.6 When, however, the court has this power and desires to exercise it, it considers the chances of life in the widow, and the probable value of her interest, after such annuity tables as it chooses to follow.7
- (8) Assignment of Dower out of Improvements.—When before assignment improvements are made, the widow is entitled to the benefit thereof if the husband died seized, but not if he had aliened the lands before his death. There seems to be little reason for the distinction, but it is nearly everywhere recognized.8

As against the heir or devisee, it is well settled that the widow is entitled to dower as it stands when dower is assigned, including all

improvements,9 except where statutes provide otherwise.

As against the husband's alience, the same rule prevails in England: 10 but generally in the United States improvements made after the husband has aliened the property are excluded in assigning dower, and either unimproved parts are assigned, or less is included in the assignment.11 The value of the property is there-

278; Addison v. Bowie, 2 Bland (Md.), 613.

1. Stewart Husb. and W. § 293.

- 2. Robbins v. Robbins, 8 Blackf. (Ind.) 174; Tabele v. Tabele, I Johns. Ch. (N. Y.) 45; Thompson v. Thompson, I Jones (N. Car.), 430; Goodburn v. Stevens, 5 Gill (Md.), I; Weaver v. Gregg, 6 Ohio St. 547; Williams v. Williams, 3 Bland (Md.), 186. Bland (Md.), 186.
- 3. Cases cited in note previous (2). 4. Hale v. James, 6 Johns. Ch. (N. Y.) 258; s. c., 16 Am. Dec. 328; Grove v. Cather, 23 Ill. 634.

5. Williams v. Williams, 3 Bland (Md.),

186, 278.

6. Bonner v. Peterson, 44 Ill. 253.

7. 2 Scribner Dow. ch. 24. For tables, see 2 Scribner Dow. Append.; 70 Ga. Append.; Brown v. Bronson, 35 Mich. 415: Gravigue & McClure's Dower and Curtesy Tables, 8. Powell v. Monson, 3 Mason (U.S.),

347, 365-367. 9. Price v. Hobbs. 47 Md. 359, 386; Powell v. Monson, 3 Mason(U.S), 347,365-367;

Way v. Way, 42 Conn, 82; Husted v. Husted, 34 Conn. 488; Ralston v. Ralston, Husted, 34 Conn. 488; Ralston v. Ralston, 3 Greene (Iowa), 533; Chase v. Chase, 1 Bland (Md.), 206, 232; s. c., 17 Am. Dec. 277; Walsh v. Wilson, 131 Mass. 535; Catlin v. Ware, 9 Mass. 218; s. c., 6 Am. Dec. 56; McGehee v. McGehee, 42 Miss. 747; Humphrey v. Phinney, 2 Johns. (N. Y.) 484; Hale v. James, 6 Johns. Ch. (N. Y.) 258; s. c., 10 Am. Dec. 328; Larrowe v Beam, 10 Ohio, 498; Thompson v. Morrow, 5 S. & R. (Pa.) 289; s. c., 9 Am. Dec. 358; Plummer v. Johnson, 15 S. Car. 158.

10. Park Dow. 255; 2 Scribner Dow. 604; Doe v. Grinnell, 1 Q. B. 682; s. c., 41 Eng. C. L. 728, 735.

Eng. C. L. 728, 735. 11. Summers v. Babb. 13 Ill. 483; Powell v. Monson, 3 Mason (U.S.), 347; Barney v. Frowner, 9 Ala. 901; Beavers v. Smith, 11 Ala. 20; Spring v. Shields, 17 Ala. 205; Francis v. Garrard, 18 Ala. 704; Wood v. Morgan, 56 Ala. 397; Stooky v. Stooky, 89 Ill. 40; Scammon v. Campbell, 75 Ill. 223; Wilson v. Oatman, 2 Blackf. (Ind.) 223; Smith v. Addleman,

fore estimated as of the time of the alienation. The time of the alienation is determined by the date of the deed, if an absolute deed; 2 by the date of the equity of redemption's passing from the husband in case of a mortgage, for the widow has the right to improvements made by the husband after the execution of the mortgage but before foreclosure; 3 and by the date of the bond of conveyance in accordance with which the deed was given, in the case of title following a bond of conveyance.4 The fact of improvements must be pleaded, but not in bar; and the value thereof may be determined in accordance with the practice of the particular court.7

Improvements are not generally held to include enhanced value due to the improvement of adjacent lands,8 or to the general prosperity.9 or to accretions. 10 or to any extrinsic cause; 11 nor do they

5 Blackf. (Ind.) 406; Throp v. Johnson, 5 Blackt. (Ind.) 400; Throp v. Johnson, 3 Ind. 343; Carriell v. Bronson, 6 Iowa, 471; Felch v. Felch, 52 Iowa, 563; Dashiell v. Collier, 4 J. J. Marsh. (Ky.) 601; Waters v. Gooch, 6 J. J. Marsh. (Ky.) 686; s. c., 22 Am. Dec. 108; Taylor v. Brodick, i Dana (Ky.), 345; Mayhoney v. Young, 3 Dana (Ky.), 588; Lawson v. Morton, 6 Dana (Ky.), 471; Wall v. Wall, 7 Dana (Ky.), 172; Mosher v. Mosher, 15 Me. 371; Hobbs v. Harvey, 16 Me. 80; Carter v. Parker, 28 Me. 509; Manning v. Laboree, 33 Me. 343; Boyd v. Carlton, 69 Me. 200; s. c., 31 Am. Rep. 268; Bowie v. Berry, I Md. Ch. 452; Price v. Hobbs, 47 Md. 359, 387; Gore v. Brazier, 3 Mass. 523, 543; s. c., 3 Am. Dec. 182; Ayer v. Spring, 9 Mass. 8; s. c., 10 Mass. 80; Stearns v. Swift, 8 Pick. (Mass.) 532; Johnston v. Van Dyke, 6 McLean (U. S.), 422; Guerin v. Moore, 25 Minn. 462; McGehee v. McGehee, 42 Miss. 747; Wooldridge v. Wilkins, 4 Miss. 360; Markham v. Merritt, 8 Miss. 437; McClanahan v. Porter, 10 Manning v. Laboree, 33 Me. 343; Boyd Wilkins, 4 Miss. 360; Markham v. Merritt, 8 Miss. 437; McClanahan v. Porter, 10 Mo. 746; O'Flaherty v. Sutton, 49 Mo. 583; Cox v. Higbee, 11 N. J. 395; Van Don v. Van Don, 3 N. J. 513; Johnson v. Perley, 2 N.H. 56; s. c., 9 Am. Dec. 35; Hale v. James, 6 Johns. Ch. (N. Y.) 258; s. c., 10 Am. Dec. 328; Walker v. Schuyler, 10 Wend. (N. Y.) 480; Raynor v. Raynor, 21 Hun (N. Y.), 36; Van Gelder v. Post, 2 Edw. Ch. (N. Y.) 577; Coates v. Cheever, 1 Cow. (N. Y.) 40; Dolf v. Basset, 15 Johns. (N. Y.) 21; Campbell v. Murphy, 2 Jones Eq. (N. Car.) 357; Dunseth v. Banks, 6 Ohio 76; Allen v. McCoy, 8 Ohio, 418; Farrowe v. Beam, 10 Ohio, 498; Thompson v. Mor-Allen v. McCoy, 8 Onio, 418; Farrowe v. Beam, 10 Ohio, 498; Thompson v. Morrow, 5 S. & R. (Pa.) 280; s. c., 9 Am. Dec. 358; Shirtz v. Shirtz, 5 Watts (Pa.), 255; Winder v. Little, 1 Yeates (Pa.), 152; Leggett v. Steele, 4 Wash. (C. C.) 305; Westcott v. Campbell, 11 R. I. 378; Russell v. Gee, 2 Mill Const. (S. Car.)

254; Brown v. Duncan, 4 McCord (S. Car.), 346; Phenney v. Johnson, 15 S. Car. 158; Alexander v. Hamilton, 12 S. Car. 30; Lewis v. James, 4 Humph.

(Tenn.) 537.

The proposition stated in the text holds true whether the improvements have been made before or after the husband's death, whether the alience have notice of the claim for dower or not, and even in a case where the husband had deeded the property to a relative as a gift and had thereafter made the improvements thereupon himself. Powell v. Monson, 3 Mason (U. S.), 347; Stooky v. Stooky, 89 Ill. 40.

A purchaser at execution has in this respect the same rights as a voluntary alience of the husband, Price v. Hobbs, anenee of the husband. Price v. Hobbs, 47 Md. 359; Summers v, Babb, 13 Ill. 483; McClanahan v. Porter, 10 Mo. 746.

1. Hale v. James, 6 Johns. Ch. (N. Y.) 258; s. c., 10 Am. Dec. 328.

2. Hale v. James, 6 Johns. Ch. (N. Y.) 258; s. c., 10 Am. Dec. 328.

3. Hale v James, 6 Johns. Ch. (N. Y.) 258; s. c., 10 Am. Dec. 328.

258; s.c., 10 Am. Dec. 328; Purrington v. Pierce, 38 Me. 447. 4. Wilson v. Oatman, 2 Blackf. (Ind.) 223.

5. Taylor v. Brodrick, I Dana (Ky.), 345; Ayer v. Spring, 10 Miss. 80; Allen v. Smith, 1 Cow. (N. Y.) 181; Humphrey v. Phinney, 2 Johns. (N. Y.) 484. But see Yates v. Paddock, 10 Wend. (N. Y.) 528;

Leonard v. Steele, 4 Barb. (N. Y.) 20. 6. Cox v. Higbee, 11 N. J. 395.

7. Dolf v. Basset, 15 Johns. (N. V.) 21; Johnson v. Van Dyke, 3 McLean (U. S.), 422, 430; Cox v. Higbee, 11 N. J. 395; Taylor v. Brodrick, 1 Dana (Ky.), 345.

8. Boyd v. Carlton, 69 Me. 200; s. c.,

31 Am. Rep. 268.

9. Gore v. Brazier, 3 Mass. 523, 544;

5. C., 3 Am. Rep. 162.

10. Lombard v. Kinzie, 73 Ill. 446;
Gale v. Kinzie, 80 Ill. 132.

11. Price v. Hobbs, 47 Md. 359, 387;

include mere repairs.1 But everything added by the money or skill of the alience is an improvement within the meaning of this discussion; 2 not only buildings erected, fences made, etc., but platting the land and preparing it for a depot,³ and crops sown are improvements.⁴ And in some States increase in value from whatever cause is regarded as an improvement to be allowed for in

awarding dower.

Depreciation in value of property subject to dower raises questions, just as improvement therein does. If the property has diminished in value before assignment, as against the heir or devisee, dower is assigned according to the value of the property at the time of assignment, and if the heir or devisee has been guilty of waste he is liable in damages.7 But if the improvements have burnt down and the heir or devisee has received the insurance money, the widow is entitled to dower therein.8 As against the alienee, the value of the land is taken as at the time of the assignment so far as diminution has been due to natural causes,9 or to waste before the husband's death. 10 but the widow must be allowed for waste after the husband's death. 11 In New York, however, dower is assigned according to the value of the property at the time of the alienation.12

(9) The Widow's Right to Damages with Dower.—At common law, no matter how much time elapsed before the assignment of

Powell v. Monson, 3 Mason (U. S.), 347; Green v. Tennant, 2 Harr. (Del.) 336; Summers v. Babb, 13 Ill. (Md.) 483; Smith v. Addleman, 5 Blackf. (Ind.) 406; Throp v. Johnson, 3 Ind. 343; Carriell v. Bronson, 6 Iowa, 471; Dashiell v. Collier, 4 J. J. Marsh. (Ky.) 691; Taylor v. Brodrick, 1 Dana (Ky.), 345; Wall v. Hill, 7 Dana (Ky.), 172; Manning v. Labaree, 33 Me. 343; Boyd v. Carlton 69 Me. 250; s. c., 31 Am. Rep. 268; 69 Me. 250; s. c., 31 Am. Rep. 268; Stearns v. Swift, 8 Pick. (Mass.) 532; Johnston v. Van Dyke, 6 McLean (U. S.), 422; McGehee v. McGehee, 42 Miss. 747; Wooldridge v. Wilkins, 4 Miss. 360; McClanahan v. Porter, 10 Mo. 746; Coxe McClanahan v. Porter, 10 Mo. 746; Coxe v. Higbee, 11 N. J. 395; Campbell v. Murphy, 2 Jones Eq. (N. Car.) 357; Allen v. McCoy, 8 Ohio, 418; Thompson v. Morrow, 5 S. &. R. (Pa.) 289; s. c., 9 Am. Dec. 358; Westcott v. Campbell, 11 R. I. 378; Lewis v. James, 8 Humph. (Tenn.) 537.

1. Walsh v. Wilson, 131 Mass. 535.
2. Price v. Hobbs, 47 Md. 359, 387.
3. Felch v. Felch 52 Iowa, 563.
4. Ralston v. Ralston, 3 Greene (Iowa).

4. Ralston v. Ralston, 3 Greene (Iowa),

5. Beavers v. Smith, 11 Ala. 20; Francis

v. Garrard, 18 Ala. 794; Thrasher v. Pinkard, 23 Ala. 616; Marble v. Lewis, 53 Barb. (N.Y.) 432; Dorchester v. Coventry, 11 Johns. (N. Y.) 570; Shaw v. White, 13

Johns. (N. Y.) 179; Hale v. James, 6 Johns. Ch. (N. Y.) 258; s. c., 10 Am. Dec. 328; Walker v. Schuyler, 10 Wend. (N. Y.) 480; Phinney v. Johnson, 15 S. (S. Car.), 346; Russell v. Gee, 5 Mill Con. (S. Car.) 254; Tod v. Baylor, 4 Leigh (Va.), 498.

6. Powell v. Monson, 3 Mason (U. S.),

347, 368; Hale v. James, 6 Johns. Ch. (N. Y.) 258; s. c., 10 Am. Dec. 328; Campbell v. Murphy, 2 Jones Eq. (N. Car.) 357, 362; Westcott v. Campbell, 11

R. I. 378.
7. Co. Litt. 32, a; 2 Scribner Dow.

8. Campbell v. Murphy, 2 Jones Eq. (N. Car.), 357. 362.

9. Thompson v. Morrow, 5 S. & R. (Pa.) 289; s. c., 9 Am. Dec. 358; infra,

10. Powell v. Monson, 3 Mason (U.S.), 20. Fowen v. Monson, 3 Mason (U. S.), 347, 375; Fritz v. Tudor, I Bush (Ky.), 28; McClanahan v. Foster, 10 Mo. 476; Dunseth v. Bank, 6 Ohio, 76; Thompson v. Morrow, 5 S. & R. (Pa.) 289; Westcott v. Campbell, 11 R. I. 378; Braxton v. Coleman, 5 Call (Va.), 433; s. c., 2 Am. Dec. 502

Am. Dec. 592.
11. 2 Scribner Dow. 635; antes n.

12. Hale v. James, 6 Johns. Ch. (N. Y.) 258; s. c., 10 Am. Dec. 328.

dower, the widow could not recover damages for its detention; 1 but by the Statute of Merton, which has been held in force in the United States,3 she is entitled to the whole value of her dower from the time of the husband's death to the time of the assignment: and similar statutes are in force in several States. the usual procedure for dower is now in equity, the right to claim

- an account has almost taken the place of the right to damages.

 (10) The Widow's Right to a Share of the Mesne Profits with Dower.—Equity, as has been seen, has full jurisdiction over the assignment of dower, and may assign mesne profits,4 i.e. her share of the rents and profits between the time of the husband's death and the time of assignment,—even when dower has been assigned at law,5 and this independently of the Statute of Merton or any other statute,6 and as against the husband's alienee7 as well as against his heir or devisee. But as against the husband's alienee mesne profits are calculated only from the time of demand for an assignment, whereas as against the heir or devisee no demand is necessary. If the tenant die pending the suit, this does not affect the widow's right to mesne profits; 11 nor does her death pending suit prevent her representatives from recovering the same; 12 but whether her representatives can recover if she has died without instituting suit, has been disputed. 13 A release of dower includes mesne profits, 14 and a widow will not be allowed to recover mesne profits if she has meanwhile occupied the land, 15 or has been compensated for the delay in the assignment of dower.16
- 1. Price v. Hobbs, 47 Md. 359, 389. See 2 Scribner Dow. 699; Park Dow. 301; 10 Co. 116; 1 Roper Husb. and W.

301; 10 Co. 110; 1 Koper Husb. and W. 347; Magruder v. Smith, 79 Ky. 512.
2. 20 H. III. ch. 1; Alex. Br. Stats. 20.
3. Alex. Br. Stats. 20; Layton v. Butler, 4 Harr. (Del.) 507; Darnall v. Hill, 12 Gill & J. (Md.) 388. Not in South Carolinal V. Hill, 12 Gill & J. (Md.) 388. Not in South Carolinal V. Hill, 12 Gill & J. (Md.) 388. Not in South Carolinal V. Magratian Carolinal V. Magratian V. Scale V. State V. Magratian V. Scale V. Scale V. State V. St lina. Heyward v. Cuthbert, 1 McCord (S. Car.), 386.

4. Kiddall v. Trimble, I Md. Ch. 143.

5. Price v. Hobbs, 47 Md. 359, 389; Bullock v. Griffin, I Strob. Eq. (S. Car.) 60. But see Whitehead v. Clinch, I Murph. (N. Car.) 128.
6. Keith v. Trapier, I Bail. Eq. (S. Car.) 63, 74. But see Kendall v. Honey, 5 Mon. (Ky.) 282; Tod v. Baylor, 4 Leich (Va.) Leigh (Va.), 498.

7. Price v. Hobbs, 47 Md. 359, 389. But see McElroy v. Wathen, 3 B. Mon.

(Ky.) 135.

8. Harper v. Archer, 28 Miss. 212.

9. Price v. Hobbs, 47 Md. 359, 380; Steiger v. Hillen, 5 Gill. & J. (Md.) 121; Sellman v. Bowen, 8 Gill & J. (Md.) 50; Senman v. Bowen, a Gin & J. (Md.) 50; S. c., 20 Am. Dec. 524; Chiswell v. Mor-ris, 15 N. J. Eq. 101; Tod v. Baylor, 4 Leigh (Va.), 498. 10. Slatter v. Meek, 35 Ala. 528; Chase v. Chase, 1 Bland (Md.), 206; s. c., 17 Am. Dec. 277; Darnall v. Hill, 12 Gill &

J. (Md.) 388; Johnson v. Thomas, 2^r Paige (N. Y.), 377; Russell v. Austin, 1 Paige (N. Y.), 192; Hazen v. Thurber, 4 Johns. Ch. (N. Y.) 604; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482; s. c., 9 Am. Dec. 318. Contra: Tod v. Baylor, 4 Leigh (Va.), 498.

11. Park Dow. 220; 2 Scribner Dow. 742; Curtis v. Curtis, 2 Bro. C. C. 620; Steiger v. Hillen, 5 Gill & J. (Md.) 121. But see Whitehead v. Clinch, 1 Murph. (N. Car.) 128

(N. Car.) 128.

12. Kiddall v. Trimble, I Md. Ch. 143;
Lindsay v. Gibbon, 3 Bro. C. C. 495;
Hamilton v. Mohun, I P. Wms. 118,
Magruder v. Smith, 79 Ky. 512. Contra.:
Turney v. Smith, 14 Ill. 242; Miller v. Woodman, 14 Ohio, 518.

13. Kiddall v. Trimble, 1 Md. Ch. 143;

Harper v. Archer, 28 Miss. 212; Mc-Laughlin v. McLaughlin, 20 N. J. Eq. 190; Sandback v. Quigley, 8 Watts (Pa.), 460; Paul v. Paul, 36 Pa. St. 270; Tibbits v. Langley, 12 S. Car. 465.

14. Morrison v. Morrison, 11 Ill. App.

15. Springle v. Shields, 17 Ala. 205;
Smith v. Addleman, 5 Blackf. (Ind.) 406;
Rackliff v. Look, 69 Me. 516; McLaughlin v. McLaughlin, 20 N. J. Eq. 505; Talbot v. Talbot, 13 R. I. 306.
16. Woodruff v. Brown, 17 N. J. 246.

The mesne profits are the actual profits from the date of the husband's death or the time of demand, as the case may be, to the time of assignment,1—a part of the rent if the property has been leased, a share of the crop, if a crop has been raised, or, if dower has been assigned in money, interest on the amount.4

(11) The Effect of Assignment of Dower.—The assignment of dower gives the widow an estate, the incidents of which have

already been discussed.5

If dower has been assigned without suit, fairly and of common right, it satisfies and bars dower: 6 but if the assignment be against common right, it does not avail as a defence to any party not privy to the agreement.7 When assigned by suit, the lands not assigned are freed; 8 but as the widow has a right to a new assignment if the title to the assigned lands fails, it is necessary that one who takes title in lands out of which dower has been assigned should be sure that the widow's title to the lands assigned to her is good.9 In an assignment, however, the widow may have received either too much or too little.

In the case of an excessive assignment: If the assignment has been made by an adult without suit, he can have no relief; 10 but an infant may have a writ of admeasurement of dower in such a case. 11 If the excessive assignment has been made in a suit by the officer of the court, the tenant may by scire facias have an assignment de novo, 12 or may perhaps 13 have the assignment set aside in equity; 14 or he may recover in ejectment lands out of which the judgment gave no right of dower. 15 But if the widow is deprived of lands once assigned to her as dower, she must be allowed for the improvements meantime made by her. 16

In case of the failure of the assignment in whole or part: If the widow is evicted after assignment and thus loses her dower in whole or part, if the assignment were of common right and she had

1. Keith v. Trapier, I Bail. Eq. (S. Car.) 63, 71. 2. Chase v. Chase, I Bland (Md.), 206;

s. c., 17 Am. Dec. 277.
3. Darnall v. Hill, 12 Gill & J. (Md.)

- 388, 396. 4. Keith v. Trapier, 1 Bail. Eq. (S. Car.) 61, 74.
 - 5. Ante.
 - 6. 2 Scribner Dow. 747.
- 7. 2 Scribner Dow. 747; Co. Litt.
- 8. 2 Scribner Dow. ch. 27.
 9. Park Dow. 280; 2 Scribner Dow.
- 10. Gilb. Dow. 380; 2 Scribner Dow. 751;1 Roper Husb. and W. 407; Stough-
- 751;1 Roper Husb. and W. 407; Stoughton v. Lee, I Taunt. 404, 412.
 11. Park Dow. 270; 2 Scribner Dow. 753; I Roper Husb. and W. 407; McCormick v. Taylor, 2 Ind. 336; Young v. Tarbell, 37 Me. 509.
 12. Park Dow. 271; 2 Scribner Dow.

754; I Roper Husb. and W. 406,

13. Park Dow. 272; I Roper Husb. 13. Fark Dow. 272; I Roper Husb. and W. 406; Sneyd v. Sneyd, I Ark. 442.

14. Chapman v. Shroeder, 10 Ga. 321; Donahue v. Chicago, 57 Ill. 235; Lloyd v. Malone, 23 Ill. 43; Throp v. Johnson, 3 Ind. 343; Singleton v. Singleton, 5 Dana (Ky.), 87; Rawson v. Clark, 38 Me. 223; Wilhelm v. Wilhelm, 4 Md. Ch. 330; Stiner v. Cawthorne, 4 Dev. & B. (N. Car.) 561; Eagles v. Eagles, 2 Hayw. (N. Car.) 181; Shirtz v. Shirtz, 5 Watts (Pa.), 255; Benner v Evans, 3 Pa. 456; Hawkins v. Hall, 2 Bay (S. Car.), 449; Douglass v. McDill, I Spear (S. Car.), 139; Gibson v. Marshall, 5 Rich. Eq. (S. Car.) 254; Beatty v. Hearst, I McMull. (S. Car.) 31; Payne v. Payne, Dud. Eq. (S. Car.) 124.

15. 2 Scribner Dow. 753.
16. 2 Scribner Dow. 758; Pierson v. Hitchner, 25 N. J. Eq. 129. and W. 406; Sneyd v. Sneyd, I Ark. 442.

received only her apparent legal rights, she may proceed for a new assignment out of the remainder of the lands subject to dower. just as if no assignment had been made. 1 But it seems that at common law this rule did not apply as against the husband's alienee.² If the assignment were against common right and she had agreed to take the lands assigned in lieu of the actual lands she was entitled to, she had no remedy if evicted.3

1. Park Dow. 275; 2 Scribner Dow. 761; Sm. & M. (Miss.) 559; St. Clair v. Wil-1. Park Dow. 275; 25 cribber Dow. 701; Sm. & M. (Miss.) 559; 550; Clair v. Wiffrench v. Peters, 33 Me. 396; French v. liams, 7 Ohio, 110; s. c., 30 Am. Dec.194. Pratt, 27 Me. 381; Mantz v. Buchanan, 1 Md. Ch. 202; Scott v. Hancock, 13 Mass. 162; Jones v. Brewer, 1 Pick. (Mass.) 314; Holloman v. Holloman, 5 v. Brewer, 1 Pick. (Mass.) 314.

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